181 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Louisiana Public Service Commission
v.
System Energy Resources, Inc.

Docket No. EL18-152-001

OPINION NO. 581

ORDER ON INITIAL DECISION

(Issued December 23, 2022)

1. This order addresses briefs on exceptions and opposing exceptions to an Initial Decision issued on April 6, 2020 by the presiding Administrative Law Judge (Presiding Judge) in the above-captioned proceeding concerning electric plant capacity rates that are charged by System Energy Resources, Inc. (SERI).[1] The Initial Decision set forth the Presiding Judge's findings. As discussed below, we affirm in part and modify in part the Initial Decision.

I. Background

2. On May 18, 2018, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint (Complaint) against SERI and Entergy Services, Inc. (Entergy Services) pursuant to section 206 of the Federal Power Act (FPA) alleging that SERI and Entergy Services violated the filed rate doctrine and the Commission's ratemaking and accounting requirements in billing the costs of the Grand Gulf Nuclear Power Station's (Grand Gulf) lease renewals (collectively, Lease Renewal) through the formula rate that is part of the Unit Power Sales Agreement (UPSA) between SERI and Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Louisiana L.L.C. (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi), and Entergy New Orleans, Inc. (Entergy New Orleans) (collectively, Entergy Operating Companies).[2] On

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[1] *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 171 FERC ¶ 63,003 (2020) (Initial Decision).

[2] An additional Entergy Operating Company, Entergy Texas, Inc. (Entergy Texas), does not purchase Grand Gulf energy from SERI. For ease of use, in this order,

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September 20, 2018, the Commission issued an order establishing hearing and settlement judge procedures and setting a refund effective date of May 18, 2018.[3]

3. Entergy Services, an Arkansas corporation and wholly-owned subsidiary of Entergy Corporation with its principal office in Jackson, Mississippi, is a centralized service company that provides accounting, legal, regulatory, and other services to Entergy subsidiaries. It also represents the Entergy Operating Companies as their agent in proceedings before the Commission. Entergy Corporation is a utility holding company headquartered in New Orleans, Louisiana.[4]

4. This proceeding pertains to the electric plant capacity rates charged by SERI pursuant to the UPSA, which governs sales to the Entergy Operating Companies of the output of Grand Gulf, a 1,409 megawatt nuclear unit in Port Gibson, Mississippi that began operating in 1985.[5] SERI has a 90% ownership and leasehold interest in Grand Gulf, and the remaining 10% is held by Cooperative Energy, a Mississippi electric power cooperative.[6] Entergy Services administers the UPSA for SERI. The Commission originally approved the UPSA formula rate in Opinion No. 234.[7] The formula rate set forth in Attachment A of the UPSA is calculated as a monthly fuel charge to each Entergy Operating Company, with a monthly bill issued by SERI that is "paid internally within [Entergy Services]."[8] The UPSA allocates the monthly capacity, energy, and

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references to the Entergy Operating Companies do not include Entergy Texas. Also, since the filing of the Complaint several entities changed their names: Entergy Services, Inc. is now Entergy Services, LLC; Entergy Arkansas, Inc. is now Entergy Arkansas, LLC; Entergy Mississippi, Inc. is now Entergy Mississippi, LLC, and Entergy New Orleans, Inc. is now Entergy New Orleans, LLC.

[3] *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 164 FERC ¶ 61,189 (2018) (Hearing Order).

[4] Complaint at 11.

[5] Initial Decision, 171 FERC ¶ 63,003 at PP 13-14.

[6] *Id.* P 13.

[7] *Middle S. Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305 (Opinion No. 234), *order on reh'g and clarification*, 32 FERC ¶ 61,425 (1985); *vacated in part and remanded sub nom. Miss. Indus. v. FERC*, 822 F.2d 1104 (D.C. Cir. 1987), *aff'd after remand sub nom. City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989), *cert. denied sub nom. Miss. v. FERC*, 494 U.S. 1078 (1990).

[8] Initial Decision, 171 FERC ¶ 63,003 at P 16.

related costs associated with SERI's operation of Grand Gulf to Entergy Arkansas, Entergy Louisiana, Entergy Mississippi, and Entergy New Orleans, which are assigned responsibility for 36%, 14%, 33%, and 17%, respectively for the life of Grand Gulf.[9]

5. The Initial Decision explains that Middle South Utilities System, which is now Entergy Corporation, constructed Grand Gulf to meet projected demand, but in the late 1970s, it became clear that such demand would fall short of previous expectations. Entergy Corporation determined, however, that the overall cost per kilowatt hour would be cheaper than alternative energy sources.[10] Because Mississippi Power & Light (now Entergy Mississippi) could not finance Grand Gulf's construction alone, in 1974, Entergy Corporation formed SERI as a vehicle for financing Grand Gulf. In June 1974, each Entergy Operating Company entered into an availability agreement pursuant to which they agreed to be responsible for the identified percentages of Grand Gulf's costs. Grand Gulf's costs eventually exceeded $3 billion.[11]

6. In December 1988, SERI entered two sale and leaseback transactions (collectively, Original-Sale Leaseback) to partially finance its Grand Gulf interest. Pursuant to the Original Sale-Leaseback, SERI conveyed a 15.15% share in Grand Gulf to Public Service Resources Corporation and Management Realty Corporation (collectively, Owner-Lessors), that were owned, in turn, by RCMC I, Inc. (RCMC) and Textron Financial Corporation (Textron), which owned 80% and 20% of the 15.15% share, respectively.[12] The Owner-Lessors leased a portion of their 15.15% interest in Grand Gulf, amounting to 12.8% of SERI's 90% share, back to SERI as an 11.5% undivided interest in the whole plant.[13]

7. According to the Louisiana Commission's witness, Lane Sisung, SERI used proceeds from the Original Sale-Leaseback to lower debt costs by retiring higher rate credit obligations, produce cash flow by permitting the use of tax deductions and credits that were about to expire, and permit the use of low carryforwards to produce tax

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[9] *Id.* P 15.

[10] *Id.* P 17.

[11] *Id.* P 19.

[12] *Id.* P 21. Textron sold its share in 2010 to Cypress GG2, LLC (Cypress).

[13] *Id.* P 22. I.e., 12.8% (Owner-Lessors' share of SERI's share of Grand Gulf) x 90% (SERI's share of Grand Gulf) = 11.5% (lease share of all of Grand Gulf) x 100% (all of Grand Gulf).

savings.[14] Mr. Sisung also states that the difference between the sale proceeds of $500 million and the net book value of $398 million for the leased portion of Grand Gulf created a $102 million book gain, which Entergy Corporation offset with $90 million of net tax effects from the Original Sale-Leaseback to yield approximately $12 million in after-tax gain, which was credited to customers in UPSA rates.[15]

8. According to SERI's witness, Michael M. Schnitzer, however, the primary motivation for the Original Sale-Leaseback was to mitigate Grand Gulf's effect on retail rates, not to generate shareholder gains.[16] He asserted that the Original Sale-Leaseback mitigated rates by allowing SERI to retire $488 million in high interest debt to reduce the cost of service of the non-leased portion of Grand Gulf and generated a tax gain to offset SERI's net operating loss (NOL).[17] He further stated that these effects resulted in a larger effective Accumulated Deferred Income Taxes (ADIT) deduction from rate base than would have resulted otherwise. Finally, Mr. Schnitzer contended that the Original Sale-Leaseback allowed SERI to recover the cost of the covered assets (Leased Assets) through lease payments in UPSA rates rather than through recovery of a return on rate base, an approach that lowered customer costs for the Leased Assets over the term of the Original Sale-Leaseback and phased plant costs into rates better than could otherwise have been achieved.[18]

9. Over the Original Sale-Leaseback term (from January 1, 1989 to July 15, 2015), the Owner-Lessors received semiannual lease payments, including interest at an implicit annual rate of 5.13%, totaling $1,231,695,688 over the term.[19] SERI contends that the Original Sale-Leaseback yielded ratepayer benefits "over and above" what ratepayers would have paid for electricity without the transaction, and that the 2015 net present value of cost savings was over $850 million.[20]

10. According to the Initial Decision, SERI took 100% of the output produced by the Leased Assets, retained the obligation to fund and take responsibility for 100% of Grand

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[14] *Id.* P 23.

[15] *Id.* P 24.

[16] *Id.* P 25 (quoting Ex. SER-0001 at 11:1-3).

[17] *Id.*

[18] *Id.*

[19] *Id.* PP 26-27.

[20] *Id.* P 28.

Gulf's future decommissioning, and retained the obligation to fund and make all requisite capital additions to Grand Gulf.[21] According to the Initial Decision, SERI retains possession and responsibility for all aspects of Grand Gulf, including operations, maintenance, repairs, upgrades, insurance, taxes, and other costs and liabilities. As stated in the Initial Decision, because the Owner-Lessors bear no such responsibilities, the lease-payments pay for none of these costs.[22]

11. In 1989, SERI filed a rate increase, in Docket No. ER89-678-000, in part to permit SERI to bill for Grand Gulf's nuclear plant decommissioning expenses attributable to the Original Sale-Leaseback over the 26.5-year life of the lease rather than the longer expected service life of SERI's remaining ownership interest in Grand Gulf.[23] Shortly thereafter, the Louisiana Commission, the Mississippi Public Service Commission (Mississippi Commission), and the Council for the City of New Orleans (New Orleans Council) (collectively, Retail Regulators) filed a joint complaint, in Docket No. EL90-16-000, against SERI contesting SERI's treatment of its tax gain when it sold the Leased Assets and received the $500 million sale proceeds. These proceedings, Docket Nos. ER89-678-000 and EL90-16-000, were consolidated at the Commission.[24]

12. In 1990, the Commission's Chief Accountant completed an audit of SERI and issued accounting directives for Grand Gulf, including one requiring SERI to treat the Original Sale-Leaseback as a financing (i.e., long-term debt) on its books, rather than as a sale and lease, to comply with the Generally Accepted Accounting Principles set forth in the Statement of Financial Accounting Standards No. 98 (FAS 98).[25] Because the cost of service treatment for the Original Sale-Leaseback was then pending in Docket No. ER89-678-000, the Chief Accountant made no revised accounting recommendations for previous billings but stated that SERI "should make any necessary adjustments to its accounts to reflect the final Commission decision in Docket No. ER89-678-000 on the appropriate cost of service for the sale-leaseback transactions."[26]

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[21] *Id.* P 29.

[22] *Id.*

[23] Ex. LC-0001 at 23:1-3 (Sisung Dir. Test.).

[24] *Id*. at 23:4-8 (Sisung Dir. Test.) (Revised).

[25] Initial Decision, 171 FERC ¶ 63,003 at P 31.

[26] Ex. LC-0009 at 12 (FERC Chief Acc't Report at Schedule No. 3, Sheet 5).

13. In 1991, the consolidated proceedings reached a settlement[27] that included a provision allowing SERI to include the Original Sale-Leaseback lease payments in its UPSA as an operating expense because, according to Mr. Sisung, treating the Original Sale-Leaseback as a financing, as recommended by the Chief Accountant "would have the effect of raising rates."[28] The lease costs were included in the UPSA as rental payments, but the 1991 Settlement also required SERI to continue removing the after-tax gain on the Original Sale-Leaseback investment from rate base for UPSA purposes.[29] While SERI was required to change its accounting to reflect the Original Sale-Leaseback as a financing rather than as a lease, SERI did not reflect this change in ratemaking because, according to Mr. Sisung, "including the lease payments in the cost of service instead was deemed more favorable to ratepayers."[30]

14. The Commission approved the 1991 Settlement, and, over the Original Sale-Leaseback term, SERI recorded the regulatory asset/liability as required by the Chief Accountant.[31] On its FERC Form No. 1, SERI reported this amount to be a net regulatory liability of $62.9 million as of December 31, 2014 and $55.6 million as of December 31, 2015.[32] According to the Initial Decision, as a net liability, this regulatory amount indicates that rates for lease treatment have been lower over the term of the Original Sale-Leaseback than they would have been if it had been treated as a financing.[33] The Initial Decision neither considered nor reached any legal or factual conclusions regarding the justness and reasonableness or prudence of SERI's entry into

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[27] SERI, Settlement, Docket Nos. ER89-678-000 et al. (filed June 14, 1991) (1991 Settlement). The Commission approved the 1991 Settlement on September 16, 1991. *Sys. Energy Res., Inc.*, 56 FERC ¶ 61,465 (1991).

[28] Initial Decision, 171 FERC ¶ 63,003 at P 33.

[29] *Id.*

[30] *Id.* P 34.

[31] As stated in the Initial Decision, the Chief Accountant required SERI to maintain a regulatory asset/liability account to keep track of the difference between the rental payments recovered in rates and the depreciation and interest that were recorded to reflect the treatment of the Original Sale-Leaseback as a financing for accounting purposes, during the Original Sale-Leaseback

[32] Initial Decision, 171 FERC ¶ 63,003 at P 35.

[33] *Id.*

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the Original Sale-Leaseback and its recovery of rental payments under the Original Sale-Leaseback.[34]

15. Before the expiration of the Original Sale-Leaseback, SERI initially exercised a "Fair Market Renewal Term" option for a three-year term but, after some litigation, negotiated different terms and rentals with the Owner-Lessors beginning in December 2013. SERI and the Owner-Lessors reached a new leasing arrangement with a 21-year term beginning July 15, 2015 and ending on July 15, 2036 (Lease Renewal).[35] Pursuant to this arrangement, SERI agreed to pay a semi-annual rental amount of $13.75 million to RCMC and $3.438 million to Cypress and a total rental amount for the entire term of roughly $361 million.[36]

16. Additionally, during the term of the Original Sale-Leaseback, SERI made capital additions to Grand Gulf to which the Owner-Lessors did not contribute (pursuant to the terms of the Original Sale-Leaseback). Nonetheless, the Original Sale-Leaseback allowed the Owner-Lessors to acquire title to the capital additions in proportion to their undivided interests (Net Capital Additions). All of the capital addition costs, however, are in SERI's rate base.[37] These additions include a power uprate to increase Grand Gulf's generating facility capacity by 15%.[38] According to Trial Staff, the net cost of Net Capital Additions, as of 2017 was $153,288,279, but Mr. Sisung contends that the rate base amount is significantly lower than that amount after taking into account accumulated amortization.[39]

A. Complaint and Hearing Order

17. As stated above, on May 18, 2018 the Louisiana Commission filed a complaint under FPA section 206 alleging that SERI and Entergy Services violated the terms of the filed rate and the Commission's ratemaking and accounting requirements in billing the costs of the Grand Gulf Leaseback Renewal through the UPSA formula rate.[40] On

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[34] *Id.* P 36.

[35] *Id.* P 38.

[36] *Id.* P 39.

[37] *Id.* P 41.

[38] *Id.* P 42.

[39] *Id.* P 43.

[40] *Id.* P 75.

September 20, 2018, the Commission issued an order establishing hearing and settlement judge procedures and setting a refund effective date of May 18, 2018.[41] Hearings commenced on November 12, 2019 and ended November 26, 2019.[42] The Presiding Judge issued the Initial Decision on April 6, 2020 and certified it the same day.

18. On June 22, 2020, SERI, Trial Staff, and the Louisiana Commission filed briefs on exception to the Initial Decision. On September 3, 2020, SERI filed an unopposed motion to extend the deadline for filing briefs opposing exceptions from September 8, 2020 to September 22, 2020, which was granted.[43] On September 14, 2020, the Louisiana Commission submitted an unopposed motion to extend the time to file briefs opposing exceptions from September 22, 2020 to October 22, 2020, which was granted. On October 22, 2020, SERI, Trial Staff, the Louisiana Commission, and the New Orleans Council filed briefs opposing exceptions. On that same day, the Mississippi Commission and the Arkansas Commission jointly filed a brief on exceptions and a brief opposing exceptions, and the New Orleans Council filed a brief adopting exceptions.

B. Partial Settlement

19. The Mississippi Commission intervened in this proceeding, participated in the hearing and, as noted above, submitted joint briefs on and opposing exceptions with the Arkansas Commission. We note, however, that in an order issued on November 17, 2022, *Sys. Energy Resources Inc.*,[44] the Commission approved a partial settlement (Settlement) reached by SERI, Entergy Services, Entergy Corporation, Entergy Mississippi, and the Mississippi Commission in multiple proceedings, including the instant proceeding. The Settlement "comprehensively resolves and settles all issues, claims, demands and allegations by the Settling Parties . . . in the [implicated] dockets, and no compensation, refunds, or damages shall be due to any [Settling] Party in connection with any such issues, claims, demands and allegations, except as provided under [the Settlement]."[45] The remaining Retail Regulators are not parties to the Settlement. While the Mississippi Commission has agreed to resolve and settle the issues, claims, demands, and allegations in this proceeding, the issues raised in this order

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[41] *Id.* P 76 (citing Hearing Order, 164 FERC ¶ 61,189).

[42] *Id.* P 82.

[43] *Sys. Energy Res., Inc.*, Notice of Extension of Time, Docket No. EL18-152-001, (Sept. 3, 2020).

[44] 181 FERC ¶ 61,120 (2022).

[45] Settlement at 17.

must still be addressed because they were also raised by one or more of the non-settling parties.

20. The Settlement states that SERI shall provide a black-box refund to Entergy Mississippi in the amount of $235 million, inclusive of Commission interest.[46] Additionally, Section II.1.B of the Settlement provides that this refund payment is subject to a "Most Favored Nation" provision pursuant to which the refund will be adjusted upward if, prior to a Commission decision in one or all of the dockets implicated by the Settlement, SERI settles with another participant and that settlement "either in the aggregate or a docket-by-docket basis, cumulatively, if grossed-up to a total company basis, would require SERI to pay a total historical refund greater than $588.25 million, inclusive of interest, to the [Entergy] Operating Company buyers."[47] We note that, in multiple places in this order, the Commission directs the calculation and payment of refunds to the Entergy Operating Companies. We note, however, that Entergy Mississippi shall only receive refunds pursuant to the Settlement and not pursuant to the directives of this order.

II. Motion to Lodge and Responsive Pleadings

21. On September 22, 2020 in Docket Nos. EL18-152-001 and ER18-1182-001, SERI submitted a motion to lodge and request to take notice of a September 15, 2020 Notice of Proposed Adjustment (NOPA) issued by the U.S. Internal Revenue Service (IRS), which SERI had executed on September 16, 2020.[48] According to SERI, the NOPA memorializes an official IRS action that establishes a fundamental change in the circumstances on which the Initial Decision is based in part by resolving the uncertainty surrounding SERI's formerly uncertain tax position and its ratemaking effects.[49] SERI asserts that granting the motion will assist the Commission's decision-making by providing it with information to act in accordance with the resolution of SERI's tax position.[50]

22. SERI states that, during a taxpayer audit, the IRS may issue a NOPA notifying the taxpayer that the IRS intends to adjust the tax return under the audit. The NOPA memorializes the IRS's position on facts and law with respect to issues under

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[46] *Id.* at 12.

[47] *Id.* at 13.

[48] NOPA Motion to Lodge at 1.

[49] *Id.* at 2. This tax position is discussed in more detail further below.

[50] *Id.*

examination and the IRS's adjustment as to those issues. According to SERI, if the taxpayer accepts the NOPA's statement of facts and adjustments, it can accept the IRS's proposed disposition and adjustment by executing the NOPA. Then, the resolution memorialized in the NOPA will be reflected in the IRS examiner's Revenue Agent Report (RAR) that identifies the bases for the IRS's adjustments to income, credits, and deductions on the taxpayer's return, in addition to any additional taxes, penalties, and interest arising from the adjustments. If the taxpayer does not protest those adjustments to the IRS's Office of Appeals or file suit in the U.S. Tax Court, they are final and binding on the taxpayer, according to SERI.[51]

23. According to SERI, the NOPA provides that the IRS will allow $101,517,825 of future decommissioning expenses with regard to SERI's Costs of Goods Sold tax position, which Entergy Corporation began including on consolidated federal income tax returns beginning in 2015.[52] SERI states that, during the hearing, SERI assessed the likelihood of the IRS agreeing with SERI's tax position at 50% or less based on criteria set forth in FASB Interpretation No. 48, *Accounting for Income Taxes* (FIN 48). SERI states that, consistent with Generally Accepted Accounting Principles and U.S. Securities and Exchange Commission (SEC) reporting requirements, SERI's books include FIN 48 liability in connection with the uncertain tax position.[53]

24. SERI states that the Initial Decision directs SERI to pay over $334 million in refunds, a directive that SERI believes is predicated upon the uncertainty of SERI's tax position at the time of the Initial Decision's issuance.[54] To the extent that this was the case, SERI believes that the Initial Decision was wrongly decided.[55] SERI states that, because the NOPA resolves this uncertainty, it is relevant to core issues in this proceeding and, therefore, SERI asks the Commission to lodge the NOPA in the record in

[51] *Id.* at 3.

[52] *Id.* at 3-4.

[53] *Id.* at 5.

[54] *Id.* at 6-7.

[55] *Id.* at 8.

this proceeding and take official notice of it pursuant to Rule 212[56] and Rule 508[57] of the Commission's rules of practice and procedure.[58]

25. While SERI believes that the NOPA is relevant to an issue central to the disposition of matters decided in the Initial Decision and will assist the Commission's decision making, its motion does not propose how the Commission should treat the information memorialized in the NOPA or advocate a particular path.[59] SERI also argues that the Commission may take official notice of an action at any stage of the proceeding and that the IRS, not the taxpayer, controls the timing of audit determinations.[60] SERI notes, however, that it filed this motion promptly after executing the NOPA to alert the Commission as soon as possible.[61] Finally, SERI argues that portions of the NOPA constitute what it refers to as "Highly Sensitive Protected Materials," which SERI has designated as such, and requests appropriate privileged treatment pursuant to section 388.112 of the Commission's regulations.[62]

26. On October 2, 2020, Trial Staff and the Retail Regulators filed a joint motion to extend the period for answers to SERI's motion to lodge from October 7, 2020 to October 21, 2020, which was granted.

27. On October 21, 2020, Trial Staff filed an answer arguing that the NOPA does not constitute a final IRS action.[63] Trial Staff argues that the details of the IRS's resolution of the 2015 change of method of accounting, which may become relevant to the amounts SERI collects in UPSA rates going forward, are not known and measurable at this time and will not be known until the IRS issues a RAR.[64] Trial Staff further argues that the NOPA standard would not assist the Commission's decision making and is not

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[56] 18 C.F.R. § 385.212 (2021).

[57] *Id.* § 385.508.

[58] NOPA Motion to Lodge at 9.

[59] *Id.* at 9-10.

[60] *Id.* at 11.

[61] *Id.*

[62] *Id.* at 12-13.

[63] Trial Staff NOPA Motion Answer at 6-10.

[64] *Id.* at 7.

dispositive regarding any relevant issues.[65] Trial Staff further argues that the matters that the NOPA raises are best addressed in a separate docket once the IRS resolves the issue.[66] Trial Staff asks the Commission to deny the motion to lodge and direct SERI to abide by the commitment made in the motion to submit appropriate filings to the Commission when the IRS resolves the issue.[67]

28. On October 21, 2020, Retail Regulators made a filing opposing the motion to lodge, arguing that the motion is an attempt to reopen the record in this proceeding, and that the NOPA does not fundamentally change how the Commission should assess the Initial Decision's findings of fact and conclusions about deferred taxes and unprotected excess ADIT.[68] Retail Regulators further argue that SERI did not present a witness with direct knowledge about the uncertainty of the tax position and failed to demonstrate pursuant to section 385.716(c) of the Commission's regulations that there have been changes in conditions of fact or law or the public interest that require reopening the record or that there have been extraordinary circumstances showing a material change that "goes to the very heart of the case."[69] Instead, Retail Regulators argue the uncertainty of a tax position is irrelevant for Commission accounting and ratemaking.[70] Furthermore, the Retail Regulators state that the Commission's tax normalization regulation and 2007 Accounting Guidance with respect to uncertain tax positions make clear that the benefits of tax deductions must be recognized as deferred taxes regardless of uncertainty and included in rate base.[71] Retail Regulators also state that, even if

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[65] *Id.* at 7-8 (citing *NextEra Energy Res. LLC*, 142 FERC ¶ 61,043, at P 20 (2013); *Midwest Indep. Trans. Sys. Operator, Inc.*, 156 FERC ¶ 61,202, at P 129 (2016) (*MISO*)).

[66] Trial Staff NOPA Motion Answer at 10-14; *see also* Retail Regulators Opposition at 14-15.

[67] Trial Staff NOPA Motion Answer at 14.

[68] Retail Regulators Opposition at 8.

[69] *Id.* at 9 (citing *Ass'n of Bus Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator. Inc.*, 171 FERC ¶ 61,154, at P 29 (2020); *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Servs.*, 127 FERC ¶ 61,269, at P 35 (2009)).

[70] *Id.* at 9 (citing, e.g., Initial Decision, 171 FERC ¶ 63,003 at P 509).

[71] *Id.* at 11 (citing 18 C.F.R. § 35.24(b)(2) (2021); *Accot. & Fin. Reporting for Uncertainty in Income Taxes*, 119 FERC ¶ 62,167, at 64,453-54 (2007) (Office of Enforcement Order) (2007 Accounting Guidance)).

uncertainty were relevant, SERI could have established the uncertainty of its decommissioning tax position in this proceeding, which it did not.[72]

29. Retail Regulators also state that the NOPA is a settlement, which, pursuant to Rule 408 of the Federal Rules of Evidence, is not admissible to prove the validity or amount of a disputed claim.[73] Additionally, Retail Regulators state that this settlement can only be considered in a proceeding that allows full discovery, evidentiary submissions, and factual findings.[74] Finally, Retail Regulators ask the Commission to deny SERI's request for privileged treatment because SERI fails to identify any competitive harm that may arise from disclosure of the designated material.[75]

30. In its Brief Opposing Exceptions, filed on October 22, 2020, the Louisiana Commission asserts that the NOPA is irrelevant to the issues determined in the Initial Decision and that it would be unfair to consider it. The Louisiana Commission states that the Initial Decision determines how the decommissioning ADIT should be treated if the funds are in SERI's possession and does not address future dispositions of the tax benefits. The Louisiana Commission states that the going-forward impacts are properly addressed in a new proceeding.[76]

31. On November 5, 2020, SERI filed an answer arguing that the NOPA is authentic and reliable and resolves SERI's formerly uncertain tax position.[77] SERI also argues that, while the NOPA is relevant in other proceedings, it is still relevant here, and that Retail Regulators' argument that the NOPA is irrelevant is based on the NOPA conflicting with their view of the case.[78] Further, SERI argues that it notified counsel in the relevant dockets within three days of the IRS's issuance and that it could not have provided earlier notice.[79] SERI further argues that it did not act imprudently in accepting

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[72] Retail Regulators Opposition at 11-12.

[73] *Id.* at 12 (citing Fed. R. Evid 408).

[74] *Id.* at 13-17.

[75] *Id.* at 17.

[76] Louisiana Commission Brief Opposing Exceptions at 117-118.

[77] SERI NOPA Answer at 6-14.

[78] *Id.* at 16.

[79] *Id.*

the NOPA.[80] Finally, SERI argues that lodging the NOPA does not require reopening the record or taking other evidence and that the Commission should grant highly sensitive protected treatment to the designated material.[81]

32. On November 20, 2020, Retail Regulators filed a reply asking the Commission to deny SERI's motion to answer and arguing SERI fails to explain how the NOPA can make a difference in this proceeding.[82] Retail Regulators also argue that SERI offers no sufficient description of potential harm that could arise from not granting privileged treatment that would outweigh the public interest in full disclosure.[83]

33. On December 4, 2020, SERI submitted a motion to lodge the RAR issued by the IRS on November 30, 2020 and executed by SERI on December 4, 2020. SERI argues that the RAR is an official IRS action that reconfirms and implements the determination made in the NOPA.[84] SERI also argues that the RAR memorializes the final resolution of this issue and asks the Commission to grant this motion to avoid acting on records that do not reflect the resolution of SERI's tax position.[85] SERI reiterates that the IRS Examiner's RAR identifies the bases for the IRS's adjustments to items of income, credits, and deductions on a taxpayer's return, in addition to any additional taxes, penalties, and interest arising from the adjustments, and that, if the taxpayer does not protest those adjustments to the IRS's Office of Appeals or file suit in the U.S. Tax Court, they are binding on the taxpayer.[86] SERI states that the RAR contains the same adjustment reflected in the NOPA and affirms that Entergy Corporation and SERI do not wish to exercise appeal rights.[87]

34. Additionally, while SERI considers the RAR relevant to core issues and central findings in the Initial Decision, SERI states that it does not propose how the Commission

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[80] *Id.* at 18.

[81] *Id.* at 19-23.

[82] Retail Regulators Reply at 4.

[83] *Id.* at 8.

[84] RAR Motion to Lodge at 1.

[85] *Id.* at 2.

[86] *Id.* at 3-4.

[87] *Id.* at 4-5.

should treat the information memorialized in the RAR or advocate a particular path.[88] SERI notes that the motion simply requests that the Commission take official notice of the IRS's partial allowance and partial disallowance of SERI's formerly uncertain tax position.[89] Finally, SERI argues that the motion is timely because it was filed promptly after the execution of the RAR.[90]

35. On January 13, 2021, Trial Staff filed an answer opposing the RAR motion to lodge, which argues that this "fully-litigated proceeding" is not an appropriate venue for addressing any new issues.[91] Trial Staff further argues that the Commission should explore issues related to the RAR in Commission proceedings initiated by SERI's proposed amendments to the UPSA in Docket Nos. ER21-117-000 and ER21-129-000.[92] Trial Staff further argues that resolution of the 2015 change of accounting method will only affect the prospective computation of book-tax timing differences, a result that it argues is consistent with the Commission's tax normalization regulations and required by the rule against retroactive ratemaking.[93] Further, Trial Staff argues that it would be inappropriate to lodge the RAR given the substantial record evidence on which the Initial Decision relied as well as the inability of participants to respond to or challenge the RAR.[94] Trial Staff also argues that the motion omits any of the factual elements necessary to determine the extent to which the IRS's resolution impacts SERI's Uniform System of Accounts (USofA) books and records or UPSA formula rate billings.[95]

36. Retail Regulators also ask the Commission to reject the RAR motion to lodge as procedurally deficient because SERI made no motion to re-open the record to include additional evidence and does not cite the procedural requirements of Rule 716.[96] Additionally, Retail Regulators argue that the RAR does not constitute a change in

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[88] *Id.* at 11.

[89] *Id.*

[90] *Id.* at 12.

[91] Trial Staff RAR Answer at 2.

[92] *Id.*

[93] *Id.* at 4.

[94] *Id.* at 6.

[95] *Id.* at 6-7.

[96] Retail Regulators RAR Answer at 5.

condition of fact or law that is relevant to the issues or that was a basis for the Initial Decision, and thus there is no good cause to reopen the record.[97] Finally, Retail Regulators further argue that SERI failed to establish the uncertainty of its tax position and that the RAR adds nothing to aid the resolution of this proceeding.[98]

37. On January 28, 2021 SERI filed an answer to Retail Regulators and Trial Staff arguing that these parties merely oppose the motion because they believe that SERI's tax position should have been treated in rates as if it would be 100% successful.[99] SERI argues that the Commission may take notice of the RAR because the standard for doing so is whether the "matter may be judicially noticed by the courts of the United States," or whether the matter is one "about which the Commission, by reason of its functions, is expert."[100] SERI argues that the RAR satisfies this standard because the NOPA is an authentic and reliable issuance by a sister federal agency,[101] is undeniably relevant to issues presented in this proceeding, and there are no procedural bars to the Commission taking notice of the RAR.[102]

38. We grant SERI's motions to lodge the NOPA and RAR because the NOPA and RAR provided information that assisted us in our decision-making process.

39. Additionally, as noted above, SERI requests "highly sensitive protected materials" privileged treatment for designated portions of the NOPA. It states that those portions of the NOPA constitute highly sensitive materials pursuant to section 388.112 of the Commission's regulations and SERI has labeled such materials as such and provided a redacted version of the NOPA as part of the public version of its NOPA motion to lodge.[103]

40. Section 388.112(a) of the Commission's regulations defines the scope of, and procedures associated with seeking, privileged treatment for materials filed with the Commission, stating that a person "may request privileged treatment for some or all of

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[97] *Id.* at 6.

[98] *Id.* at 8.

[99] SERI RAR Answer at 3.

[100] *Id.* (citing 18 C.F.R. § 385.508(d)(1); Fed. R. Evid. 20).

[101] *Id.*

[102] *Id.* at 4-6.

[103] SERI Motion to Lodge at 13.

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the information contained in a particular document that it claims is exempt from the mandatory public disclosure requirement of the Freedom of Information Act, 5 U.S.C. § 552, and should be withheld from public disclosure."[104] Here, SERI appears to seek to have the designated material treated as "Highly Sensitive Protected Material," and the entry of a corresponding modified Commission protective agreement. Notably, the Commission's regulations do not provide for a level of confidential treatment beyond simply "privileged."[105]

41. Under section 388.112, materials filed with the Commission as "privileged" are placed in the non-public record "until such time as the Commission may determine that the document is not entitled to the treatment sought and is subject to disclosure consistent with § 388.108."[106] We have considered SERI's arguments and we grant its request for privileged treatment. Section 388.112(a) of the Commission's regulations defines the scope of this privileged treatment, stating that a person "may request privileged treatment for some or all of the information contained in a particular document that it claims is exempt from the mandatory public disclosure requirement of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and should be withheld from public disclosure."

42. Exemption 4 of FOIA covers "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[107] We find that the material at issue meets these requirements. Here, based on relevant precedents, the information sought constitutes "commercial or financial information"[108] and was

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[104] 18 C.F.R. § 388.112(a) (2021).

[105] *Entergy Ark., LLC*, 174 FERC ¶ 61,222, at P 29 (2021).

[106] 18 C.F.R. § 388.112(c)(1)(i) .

[107] 5 U.S.C. § 552(b)(4).

[108] *See, e.g.*, *Baker & Hostetler LLP v. U.S. Dep't of Com.*, 473 F.3d 312, 319-20 (D.C. Cir. 2006) (rejecting argument that Exemption 4 is confined only to records that reveal basic commercial operations or relate to the income-producing aspects of a business; and noting that the exemption "reaches more broadly and applies (among other situations) when the provider of the information has a commercial interest in the information submitted to the agency."); *Pub. Citizen v. U.S. Dep't of Health & Hum. Servs.*, 975 F. Supp. 2d 81, 100 (D.D.C. 2013) ("The scope of 'commercial' information has also been applied more broadly to records containing information in which the provider of the records has a 'commercial interest'").

"obtained from a person."[109] Further, consistent with the U.S. Supreme Court precedent in *Food Marketing Institute v. Argus Leader Media*,[110] information submitted to a government agency such as the Commission will be protected from disclosure under Exemption 4 if: (1) the information is customarily treated as confidential by the submitters; and (2) the government agency provides assurance that the information will be treated as confidential.[111] Thus, we find that the information submitted here satisfies these requirements. With that, we note that the Commission's regulations provide only for privileged or confidential status and not a higher category of sensitive information and direct SERI to the Commission's standard protective order.

43. In reaching this conclusion, it is important to note that "[t]he Commission retains the right to make determinations with regard to any claim of privilege status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities."[112]

III. Discussion

A. Issue 1: Are the Lease Renewal Payments Unjust and Unreasonable if SERI Recovered the Original Cost of the Sale-Leaseback Through Rates and the Original Lease Payments?

1. Initial Decision

44. According to the Initial Decision, the issue of whether the Lease Renewal is just and reasonable is an issue of first impression.[113] The Presiding Judge states that SERI was required to depreciate the Leased Assets over the term of the Original Sale-Leaseback at a rate computed based on the plant's useful life, but that SERI was allowed to pass the rental payments through to ratepayers in the UPSA cost of service as if the transaction were a sale, instead of charging depreciation expense and interest as SERI

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[109] *Elec. Privacy Info. Ctr. v. U.S Dep't Homeland Sec.*, 117 F. Supp. 3d 46 (D.D.C. 2015) ("Information is considered 'obtained from a person' [under Exemption 4] if the information originated from an individual, corporation, or other entity, and so long as the information did not originate with the federal government").

[110] 139 S. Ct. 2356 (2019).

[111] *Id.* at 2363.

[112] 18 C.F.R. § 388.112(c)(1)(i).

[113] Initial Decision, 171 FERC ¶ 63,003 at P 114.

would have if the transaction were a financing.[114] As stated in the Initial Decision, the Chief Accountant "reconciled this anomaly" by requiring SERI to maintain a regulatory asset/liability account to keep track of the difference between the charged rental payments and the uncharged depreciation and interest of a financing, during the Original Sale-Leaseback.[115]

45. According to the Initial Decision, at the Original Sale-Leaseback's expiration, this anomaly became problematic because SERI had only collected from ratepayers the loan payments (which it paid as rent to Owner-Lessors) and not the depreciation expense, interest, or other operating or maintenance costs.[116] The Initial Decision states that SERI "sought no answers" from the Commission to determine the remaining value of the Leased Assets at the Original Sale-Leaseback's expiration to determine how much ratepayers should have to pay.[117] Instead, according to the Initial Decision, SERI opted for "self-help."[118]

46. The Initial Decision determined that the financing aspect of the Original Sale-Leaseback ended at the transaction's expiration as ratepayers effectively paid off the original $500 million loan. The Initial Decision states that, if this were not the case, SERI would not have been able to enter into the Lease Renewal because the original lease specified that a condition of renewal was that the notes shall have been paid "in full."[119]

47. The Initial Decision also found that the Commission's original cost policy, which limits a utility to including no more than facilities' net book value in the rate base,[120] still applied and limited SERI to including in UPSA rates no more than the Leased Assets' depreciated original cost. The Initial Decision notes that Entergy Corporation and the Commission consistently treated the Original Sale-Leaseback as a financing without regard to title transfers, that SERI's books tracked the Leased Assets' depreciation

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[114] *Id.* PP 118-19.

[115] *Id.* P 119.

[116] *Id.* P 120.

[117] *Id.*

[118] *Id.*

[119] *Id.* P 121 (citing Ex. S-00f65 at 28:1-4 (Nicholas Reb. Test.) (citing Ex. S-0015 at 28 (Original Lease, Section 12(a)) and 29 (Original Lease, Section 13(c))).

[120] *Id.* P 122 (citing *RH energytrans, LLC,* 165 FERC ¶ 61,218, at P 37 (2018)).

expense as if they were still owned by SERI, as the FERC Chief Accountant had required, and that SERI was required to compute depreciation of the Leased Assets according to the useful life of those assets, not according to the shorter time period of the Original Sale-Leaseback.[121]

48. According to the Initial Decision, SERI used the $500 million loan proceeds that it received to pay shareholders a $300 million bonus dividend and pay down some high-interest debt, and SERI repaid the loan through the ratepayers' lease payments as part of the UPSA rate.[122] The Initial Decision also states that the money paid by ratepayers was not used to cover the Leased Assets' depreciation or any other plant costs and that SERI thus collected no depreciation for the Leased Assets from ratepayers during the Original Sale-Leaseback term.[123] The Initial Decision determined, however, that ratepayers were not subjected to a double recovery of the Leased Assets, because there has been no recovery of the operating, maintenance, or capital costs from ratepayers during the Original Sale-Leaseback, just the recovery of loan repayments that were paid to the Owner-Lessors directly. Thus, the Initial Decision determined that there has not been an "initial recovery" of the costs of the Leased Assets pursuant to the Original Sale-Leaseback.[124]

49. The Initial Decision states that, if the parties had followed the Chief Accountant's guidance at the outset and structured the UPSA rate recovery of the Original Sale-Leaseback as a financing, then ratepayers would have paid interest and depreciation expense in the cost of service and a return on applicable rate base, consisting of the then-net book value of the Leased Assets. The Initial Decision states that, if SERI had done so, the loan principal repayments would have been made out of depreciation accruals and corporate cash, and the loan principal repayment would have been the shareholders' responsibility, not ratepayers.[125] However, because of the structure of the Original Sale-Leaseback, the Initial Decision concludes that SERI collected nothing from ratepayers for the continued operation, maintenance, and Leased Assets' depreciation.[126]

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[121] *Id.* P 123.

[122] *Id.* P 124.

[123] *Id.*

[124] *Id.* P 125.

[125] *Id.* P 126.

[126] *Id.* P 127.

50. The Initial Decision states that SERI's treatment with regard to the Original Sale-Leaseback differs from how the sale-leaseback of the Waterford 3 nuclear facility in Kilona, Louisiana (Waterford 3 Transaction) was handled, where Waterford 3 was treated as it if were still owned by Entergy Louisiana, and the depreciated original cost was included in the rate base, depreciation was included as an expense, and the amount financed was treated as debt, with interest calculated as if there had been conventional refinancing and subsequent re-financings.[127] For ratemaking purposes, the Waterford 3 Transaction was treated as a financing, and the original cost less accumulated amortization was included in rate base, amortization expenses were passed through to rates.[128]

51. The Initial Decision states that, because SERI forewent ratepayer reimbursement for depreciation and other Grand Gulf costs accrued during the Original Sale-Leaseback and that the leased portion of Grand Gulf depreciated physically nonetheless, the maximum amount that can be charged to ratepayers over the term of the Lease Renewal, consistent with the Commission's original cost principle, is "no more than an UPSA revenue requirement computed according to the UPSA formula, based on the continuing cost of service and rate base of the Leased Assets, with the rate base being no more than that net book value."[129] The Initial Decision states that the cost of service should be paid to SERI to reimburse its costs of operating the Leased Assets pursuant to the Lease Renewal and the return on rate base should be paid to the Owner-Lessors.[130]

52. The Initial Decision states that this approach is consistent with *Carolina Power & Light Co. v. FPC*,[131] which involved a utility's decision to lease a city's distribution system and where the Commission expressed concern that the rental payments significantly exceeded the system's depreciated cost. The Commission set up an accounting system beginning with the depreciated original cost and then determined taxes payable, an allowance for annual depreciation, and a fair return, and the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) affirmed this approach.[132] The Initial Decision states that its determination in this proceeding is similar to the approach taken in

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[127] *Id.* P 131.

[128] *Id.* P 133.

[129] *Id.* P 134.

[130] *Id.*

[131] *Carolina Power & Light Co. v. FPC*, 433 F.2d 158 (4th Cir. 1970) (*Carolina Power & Light II*).

[132] Initial Decision, 171 FERC ¶ 63,003 at P 136.

that decision because the UPSA revenue requirement would be computed according to the UPSA formula based on the cost of service and return on rate base of the Leased Assets with the rate base being no more than the Leased Assets' remaining net book value.[133]

53. The Initial Decision argues that it makes sense to follow this model for the Lease Renewal, because the renewal leases are stand-alone, i.e., not part of a sale-leaseback transaction, and thus, the ownership of the Leased Assets is unchanged. The Initial Decision states that, because the financing is now over, the Initial Decision's approach "comports with" the financing approach that the Commission required for Grand Gulf from the beginning and also for Waterford 3.[134] The Initial Decision also states that the remaining Lease Renewal payments constitute an acquisition premium for which ratepayers are not responsible unless the "substantial benefits" test is met.[135]

54. The Initial Decision also states that the theory that SERI is seeking to double recover the costs of the Leased Assets is flawed because SERI and its Original Sale-Leaseback financiers diverted the cash flow from rate recovery for depreciation, which is supposed to be used for plant reinvestment and maintenance, to a loan transaction that only benefited financiers, SERI's shareholders, and creditors.[136] The Initial Decision states, however, that the Lease Renewal is "designed to perpetuate the diversion by having ratepayers continue paying something for nothing."[137]

55. The Initial Decision states that, as of July 15, 2015, the Leased Assets' net book value, depreciated on a straight-line basis at the Commission-approved rate based on the useful life of the plant, was $69,828,988, and that the negotiated Lease Renewal rental payments equal approximately $361 million.[138] Thus, the Initial Decision states that an acquisition premium of approximately $291 million (the difference between the two

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[133] *Id.* P 137.

[134] *Id.* P 138.

[135] *Id.*

[136] *Id.* P 139.

[137] *Id.*

[138] *Id.* P 140.

amounts without taking operating costs into account) is embedded in the rental payments.[139]

56. According to the Initial Decision, the Commission's order in *UtiliCorp United Inc.*[140] is the controlling authority for the proposition that the original cost principle is applicable to sale-leaseback transactions and that acquisition premiums in lease payments cannot be passed through to rates, absent a demonstration of substantial benefits to customers. The Initial Decision states, however, that the issue with regard to renewal of sale-leaseback is an issue of first impression.[141] Nonetheless, the Initial Decision points out that the Lease Renewal is a stand-alone lease, and that SERI acknowledged that the Commission has applied the acquisition adjustment policy to stand-alone leases.[142] The Initial Decision states that, even if the original cost principle were limited to transfers from one regulated entity to another, the principle would still apply to sale-leaseback transactions, because the asset would first be owned, then leased by a regulated entity, SERI, in this case.[143]

57. The Initial Decision states that, to prevent ratepayers from paying the acquisition premium embedded in the Lease Renewal, Retail Regulators and Trial Staff needed to show that there are no substantial ratepayer benefits resulting from passing the acquisition premium through rates. The Initial Decision states, however, that this burden is satisfied because the facts show substantial disadvantages, namely that it would cost ratepayers a great deal for no benefit, and, structured as a financing, the lease payments would amount to payments of "usurious interest."[144] The Initial Decision also states that SERI provides no credible evidence of specific, measurable benefits.[145]

58. The Initial Decision also states that the public utility principle of including only original costs in cost of service rates assures that costs to construct, operate, and maintain facilities that perform public utility service are the only costs that ratepayers should be

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[139] *Id.*

[140] *UtiliCorp United Inc.*, 56 FERC ¶ 61,031 (*UtiliCorp*), *reh'g denied*, 56 FERC ¶ 61,427, *reh'g denied*, 57 FERC ¶ 61,318 (1991).

[141] Initial Decision, 171 FERC ¶ 63,003 at P 151.

[142] *Id.* P 153.

[143] *Id.* P 159.

[144] *Id.* P 158.

[145] *Id.*

responsible for paying, regardless of which entity has legal title to the facilities and which entity may have a contractual interest in the facilities.[146] It further states that the only exception to this rule is if an acquisition premium in lease rental payments affords ratepayers substantial benefits.[147] The Initial Decision states that renewing the original lease at a negotiated “fair market value” of $17.188 million per year for 21.5 years disadvantages ratepayers because the rental payments will ultimately cost ratepayers $53 million more than they would have paid had the Original Sale-Leaseback never occurred.[148] The Initial Decision also states that, had the lease been surrendered at the Original Sale-Leaseback’s expiration, ratepayers would have saved money thereafter.[149] The Initial Decision also states that Mr. Schnitzer’s present-value analysis is flawed because it inflates the discount factor from 2015 back to 1989 such that a dollar in 1989 is worth $11.80 in 2015.[150] It further states that the identified benefits are front loaded, resulting in SERI’s customers paying a great deal more from 1993 to 2036 under the 1988 Sale-Leaseback transaction than they would have under traditional ratemaking.[151]

59. The Initial Decision goes on to say that the Original Sale-Leaseback “conferred no substantial benefits” on ratepayers because it diverted a large percentage of depreciation cash, normally reinvested in plant infrastructure, to the Owner-Lessors, creditors, and shareholders instead, so that this money was not available to SERI for future maintenance, operations, and structural improvements, or for the capital additions, so SERI had to bill ratepayers “extra” for that.[152] The Initial Decision states that, while a prudence evaluation of the Original Sale-Leaseback may have revealed those issues, no party sought such an evaluation.[153] Based on this analysis, the Initial Decision concludes that ratepayer payment of an acquisition premium for the Lease Renewal is unjust and unreasonable as it confers no benefits and only imposes disadvantages on ratepayers.[154]

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[146] *Id.* P 159.

[147] *Id.* P 169 (citing *UtiliCorp*, 56 FERC at 61,120)).

[148] *Id.*

[149] *Id.*

[150] *Id.* P 170.

[151] *Id.*

[152] *Id.* P 172.

[153] *Id.*

[154] *Id.* P 173.

Thus, the Initial Decision concludes that the best thing SERI could have done would have been to "buy off" the Owner-Lessors and end "the hemorrhage of cash."[155]

60. The Initial Decision states that SERI re-financed what remained of the Original Sale-Leaseback's financing by entering into the Lease Renewal and re-negotiated the original financing terms by stretching out principal payments and changing the interest rates to fit the renewal rental payment boundaries.[156] It states, however, that SERI re-amortized the remaining principal payments over 21 more years and boosted the annual interest rate to 44.46% per year, nearly nine times larger than it was originally paying.[157] The Initial Decision concludes that these terms will cause ratepayers to pay "excessively" for the "re-financing" of the Original Sale-Leaseback through the Lease Renewal.[158]

61. The Initial Decision also found that, just because the Original Sale-Leaseback required that the fair market value lease payment be derived by a negotiating process between SERI and the Owner-Lessors does not mean that that the negotiated payment must be "injected into rates."[159] It also finds that the fact that $17.188 million annual lease payment was negotiated at arm's length does not negate the requirement to determine whether substantial benefits justify having ratepayers shoulder even a portion of the payments above net book value.[160]

62. To this point, the Initial Decision states that none of the Lease Renewal payments will go toward operation, maintenance or administration of the leased portion of the Grand Gulf plant, but instead will be paid entirely to Owner-Lessors since they have no plant management obligation, and that ratepayers, through the UPSA rates, will pay for all of those costs on top of the rent.[161] For these reasons, the Initial Decision states that SERI cannot charge ratepayers more than the revenue requirement based upon the Leased Assets' July 15, 2015 net book value, and SERI's shareholders must bear the rest of any

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[155] *Id.*

[156] *Id.* P 177.

[157] *Id.* P 178.

[158] *Id.* P 182.

[159] *Id.* P 185.

[160] *Id.*

[161] *Id.* P 186.

acquisition premium.[162] The Initial Decision further finds that while no one challenged the prudence of the Original Sale-Leaseback or the Lease Renewal, pursuant to *Mississippi Power & Light*, the Commission has the authority to prevent SERI from recouping 100% of the Lease Renewal rental payments in UPSA rates by reason of the unjust and unreasonable acquisition premium embedded within them.[163] The Initial Decision also states that the Commission can limit SERI's UPSA rate to the useful-life-depreciated net value of the Leased Assets to give effect to original cost principles after a financing ends.[164]

63. The Initial Decision concludes that SERI's re-amortization in the Lease Renewal payments of the principal payments and interest charges in the Original Sale-Leaseback on and after January 1, 2014 is unjust and unreasonable as are the principal and interest charges for the Lease Renewal commencing on July 15, 2015. The Initial Decision thus concludes that these amounts cannot be borne by ratepayers.[165] The Initial Decision further finds that the portion of those Original Sale-Leaseback rental payments that were charged to ratepayers on and after January 1, 2014 that exceed payments set forth in the original amortization schedule for that part of the Original Sale-Leaseback term must be removed from the UPSA rates and refunded to ratepayers.[166] The Initial Decision states that SERI must make a compliance filing to compute the correct net book value of the Leased Assets as of July 15, 2015 based on their net book value at the outset of the Original Sale-Leaseback and depreciated by the 2.85% annual depreciation rate based on the useful life of the plant, and that amount, without an additional acquisition premium, shall be the plant cost in the rate base on which an UPSA revenue requirement shall be calculated for the Leased Assets during the term of the Lease Renewal.[167] Additionally, the Initial Decision states that the cost of service derived from the revenue requirement should be paid to SERI for its operating costs for the Leased Assets, and the return on rate base should be paid to the Owner-Lessors. The Initial Decision states that any rental payments owed the Owner-Lessors beyond that amount shall be borne by SERI's shareholders.[168] Finally, the Initial Decision states that SERI must revise its FERC Form

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[162] *Id.* P 189.

[163] *Id.* P 191 (citing *Miss. Power & Light, Co. v. Miss.*, 487 U.S. 354, 375 (1988)).

[164] *Id.* P 194.

[165] *Id.* P 199.

[166] *Id.* P 200.

[167] *Id.* P 201.

[168] *Id.*

Nos. 3-Q and financial statements to reflect that the Lease Renewal constitutes a new financial liability and an associated right of use asset, with the requisite accounting changes recommended by Trial Staff.[169]

2. Briefs on Exceptions

a. Trial Staff

64. Trial Staff argues that the Initial Decision erred by permitting SERI to include approximately $70 million attributable to the Leased Assets' net book value leased in UPSA rates, rather than offsetting this value by a portion of the unamortized sale-leaseback regulatory liability.[170] Trial Staff explains that, pursuant to the Chief Accountant's 1990 Audit Report, SERI recorded a sale-leaseback regulatory liability to track the amount by which the rental payments in UPSA billings exceeded the sum of the Leased Assets' original cost and straight-line book depreciation and interest during the Original Sale-Leaseback term.[171] Trial Staff represents that the sale-leaseback regulatory liability should have had a July 15, 2015 balance of $160,053,581.[172] However, with

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[169] *Id.* P 202.

[170] Trial Staff Brief on Exceptions at 11 (citing Ex. S-0010 at 75:8-10 (Nicholas Direct and Answering Test)).

[171] *Id.* (citing Ex. S-0016 at 7 (1990 Audit Report)).

[172] *Id.* According to Trial Staff, as discussed in the Initial Decision, SERI's book balance for the sale-leaseback regulatory liability was misstated because of improper book accounting practices, so SERI incorrectly overstated the amount of book depreciation expense and understated the net book value of the Leased Assets at the end of the Original Sale-Leaseback term (i.e., July 15, 2015). *Id.* n.23 (citing Initial Decision, 171 FERC ¶ 63,003 at PP 340-45). Trial Staff further state that the Initial Decision determined the correct net book value of the Leased Assets to be $69,828,988 on July 15, 2015. *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P140). Trial Staff also asserts that the Initial Decision found that SERI incorrectly accounted for the Original Sale-Leaseback rental payments by improperly allocating $34,360,705 of the payments as interest expense when it should have been accounted for as repayments of sale-leaseback debt between January 1, 2014 to July 15, 2015. *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at PP 426-28).

Trial Staff explains that, as of July 15, 2015, the Original Sale-Leaseback Regulatory Liability balance should be $160,053,581. Trial Staff further asserts that net lease payments recovered through UPSA billings were lease payments of $1,231,695,688 less the "after-tax book gain" returned to customers of $11,418,095 equals $1,220,277,593. Trial Staff states that the amounts recorded on the books are the

consideration of recommended accounting corrections, the Leased Assets' net book value would have been $69,828,988 on July 15, 2015 based on their January 1, 1989 net book value of $398,357,312,[173] which represents the amount by which the Original Sale-Leaseback rental payments recovered the financing of the leased asset's cost in excess of straight-line book depreciation. Thus, Trial Staff asserts for UPSA billing purposes, the Leased Assets' $69,828,988 net book value should be fully offset by incorporating the unamortized balance of the $69,828,988 Sale-Leaseback Regulatory Liability in rate base and amortizing the $69,828,988 Sale-Leaseback Regulatory Liability against book depreciation expense of the Leased Assets so that the ratemaking impact of the Leased Assets in the UPSA net to zero, as of July 16, 2015.[174]

65. Trial Staff maintains that SERI's customers have paid the cost of financing the remaining original cost of the Leased Assets and that SERI recovered $500 million of financing/loan principal through the Original Sale-Leaseback, including a net book value of approximately $398 million for the Leased Assets[175] plus $731,695,688 of interest.[176] Trial Staff contends that, irrespective of the recovery method, such recovery remains subject to the Commission's original cost principle both during and after the Original Sale-Leaseback.[177] Trial Staff argues that without incorporating the unamortized Sale-Leaseback Regulatory Liability as an UPSA formula rate component, SERI's customers will pay these original costs a second time.[178] Trial Staff explains that the Commission requires that for a sale-leaseback, any amount that exceeds the net book value of the utility plant property, less income taxes, be credited to customers against lease payments and used as an offset to the utility's rate base and amortized as the gain is credited against

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corrected book depreciation expense of $328,528,324 plus $731,695,688 of corrected interest expense equals $1,060,224,012. The difference, according to Trial Staff, between the UPSA rate recoveries of the Original Lease payments less the gain returned to customers and book expenses is $160,053,581. Trial Staff concludes that the $160,053,581 amount represents the Sale-Leaseback Regulatory Liability. *Id.*

[173] *Id.* at 17 (citing Ex. SER-0135 (Revised Page 2 of Ex. S-0030 for July 2015 Calculation)).

[174] *Id.* at 19.

[175] *Id.* at 14.

[176] *Id.* at 15.

[177] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 157).

[178] *Id.* at 22.

lease payments[179] and that the Commission's original cost principle applies to the recovery of the original cost of utility plant assets subject to a sale-leaseback transaction after the initial lease expires, or is renewed.[180] Trial Staff further explains that, where recovery of original cost has occurred on an accelerated basis (i.e., amounts in excess of straight-line book depreciation expense), the Commission's policy is to reflect a regulatory liability in rates for the difference between such accelerated recovery and straight-line book depreciation of the net book value of capital assets.[181] Trial Staff maintains that SERI's after-tax book gain of $11,418,095 resulting from the Original Sale-Leaseback is an example of a regulatory liability that had to be returned to SERI's customers as a reduction of rate base for the unamortized balance and as an offset to the Original Lease payments.[182]

66. Trial Staff contends that, by paying the Original Sale-Leaseback rental payments in UPSA billings, customers have already fully paid the Leased Assets' $398,357,312 net book value, as evidenced by the benefit customers received of SERI's after-tax book gain computed on the Leased Assets. Trial Staff states that, in the 1991 Settlement, SERI agreed to return to customers and remove from rate base the amount by which the $500 million cash proceeds from the Leased Asset's sale exceeded their $398 million remaining net book value plus SERI's net income taxes of $90,224,593,[183] which resulted in an "after-tax gain" of $11,418,095.[184] Trial Staff adds that SERI calculated the

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[179] *Id.* at 24. Under the 1991 Settlement, the $11.4 million gain was offset from SERI's rate base and amortized as a reduction to Original Lease payments. Under the Original Sale-Leaseback, SERI credited its $11.4 million after-tax gain on the Leased Assets to customers and reduced its rate base for UPSA formula rate purposes by that amount. Initial Decision, 171 FERC ¶ 63,003 at P 33.

[180] Trial Staff Brief on Exceptions at 24 (citing *UtiliCorp*, 56 FERC at 61,120; *Carolina Power & Light Co*., 40 FPC 1122 (1968) (*Carolina Power & Light I*), *aff'd Carolina Power & Light II*, 433 F.2d 158).

[181] *Id.* at 26 (citing *Ohio Edison Co.*, 84 FERC ¶ 61,157, at 61,861 (1998) ("A regulatory liability occurs because the regulator has included an accelerated depreciation amount in rates as an allowable cost in a period other than the period in which enterprises in general would charge the cost to expense under our accounting rules and GAAP.")).

[182] *Id.*

[183] *Id.* at 16 (citing Ex. S-0019 at 24 (Barnes Direct Testimony in Docket No. ER89-678-000)).

[184] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 33). Consistent with prior submissions in this proceeding, Trial Staff uses the term "after-tax book gain" in the

interest rate applicable to the Original Sale-Leaseback rental payments by determining the interest rate necessary to repay the $500 million financing with the sum of the scheduled lease payments on July 15, 2015,[185] and that a condition of the renewal and purchase options under the Original Sale-Leaseback was that the Owner-Lessors pay in full the debt issued to fund the $500 million financing or loan to SERI.[186]

b. Louisiana Commission

67. The Louisiana Commission argues that the Initial Decision should not have allowed SERI to recover a partial acquisition premium through the inclusion of the Leased Assets' net book value. The Louisiana Commission notes that, in the Original Sale-leaseback, SERI obtained $500 million as the purchase price but obligated itself to pay back the $500 million, with implicit interest, over 26.5 years. The Louisiana Commission states that net book value of the 11.5% share at the time was $398 million.[187] The Louisiana Commission states that, from 1989 to 2015, SERI paid back the entire loan implicit plus interest in the lease payments and that the $500 million in principal payments far exceeded the Leased Assets' $398 million net book value. It also states that, considering the $12 million after-tax gain credited to ratepayers under the 1991 settlement, the principal payments exceeded the 1989 net book value by $90 million. The Louisiana Commission further states that the Initial Decision "inexplicably" permitted recovery of the remaining book cost of the Leased Assets, even though this amount was recovered through the principal in the lease payments.[188]

68. The Louisiana Commission also argues that Commission policy prohibits rate inclusion of an acquisition adjustment unless the utility files for approval and shows that the acquisition provides tangible, quantifiable benefits to ratepayers, both of which SERI has failed to do.[189] The Louisiana Commission asserts that Grand Gulf has been uneconomic compared to alternatives and that its cost, even without an acquisition premium, far exceeds typical MISO power prices. The Louisiana Commission also

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place of "after-tax gain."

[185] *Id.* at 17 (citing Hearing Tr. 1487:19-1489:9 (Stack)).

[186] *Id.* (citing Ex. S-0065 at 28:1-4).

[187] Louisiana Commission Brief on Exceptions at 23 (citing EX. LC-0001 REV at 15-18).

[188] *Id.* at 24 (citing Initial Decision, 171 FERC ¶ 63,003 at PP 158, 173, 189).

[189] *Id.* at 25 (citing *Ameren Corp.*, 147 FERC ¶ 61,225, at P 25 (2014) (*Ameren II*)).

asserts that the acquisition adjustment policy applies to leases.[190] The Louisiana Commission argues that SERI chose to enter a sale-leaseback transaction that imposed a $500 million principal cost on consumers, along with $732 million for interest, over 26.5 years. The Louisiana Commission asserts that ratepayers paid all the costs that SERI charged for the Original Sale-leaseback through the UPSA which represent an accelerated payoff for the plant's original cost.[191]

69. The Louisiana Commission states that, in *Carolina Power & Light II*, the Fourth Circuit upheld a Commission decision disallowing rent payments in excess of the amounts necessary to support original cost. The Louisiana Commission argues that although SERI attempted to justify the lease renewals with a "present value" analysis sponsored by SERI witness Mr. Schnitzer, *Carolina Power & Light II* affirmed a disallowance based on a nominal dollar comparison.[192]

70. The Louisiana Commission further argues that FPA section 302(a) prohibits double collection of depreciation cost in rates and pursuant to the Original Sale-Leaseback, ratepayers paid more in nominal dollars than they would have paid under original cost ratemaking. In particular, the Louisiana Commission asserts that ratepayers paid about $224 million more for the Original Sale-Leaseback.[193]

71. The Louisiana Commission notes that the Initial Decision allowed SERI to collect the remaining undepreciated original cost of the Leased Assets in rates. The Louisiana Commission states that the Initial Decision does not explain the net book value recovery and that it conflicts with the findings that SERI already collected the original cost. The Louisiana Commission states that the net book value does not represent unrecovered capital costs because, as the Initial Decision found, those have been recovered through the lease payments.[194]

c. <u>SERI</u>

72. SERI argues that the Initial Decision incorrectly evaluates the Lease Renewal as stand-alone even though, without the Lease Renewal, SERI would have had no right to the Leased Assets after July 15, 2015. SERI further states that the Initial Decision made

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[190] *Id.*

[191] *Id.* at 26-27.

[192] *Id.* at 27.

[193] *Id.* at 28-29.

[194] *Id.* at 30.

this determination without regard to the ratemaking principles that all parties agreed to, and the Commission approved, for the Original Sale-Leaseback. SERI states that, given the lack of precedent to support this decision, the entire Grand Gulf sale-leaseback must be viewed "over the life" of the transaction, and not as a "snapshot in time."[195]

73. In support of its position, SERI argues that the Lease Renewal lease provisions are standard sale-leaseback terms and were understood by all parties as such from the outset. In particular, SERI argues that SERI and the Owner-Lessors reasonably expected that, at the end of the Original Sale-Leaseback, the Leased Assets would still have residual value and included terms that expressly set out how SERI could continue to receive capacity and energy through the Lease Renewal.[196]

74. SERI argues that the Initial Decision's basis for separating the transactions rests on the notion that the financing aspect terminated at the end of the Original Sale-Leaseback even though all parties knew that SERI's ultimate choice to renew the leases was required and indivisible from the Original Sale-Leaseback. SERI states that, while the Original Sale-Leaseback is treated as a financing for accounting, accounting treatment is irrelevant for ratemaking, and there is a dispute as to whether that accounting treatment should end after the Original Sale-Leaseback.[197]

75. SERI argues that the proper approach for assessing the reasonableness of including the Lease Renewal costs in rates is whether the Lease Renewal and related costs were prudent, which Retail Regulators never challenged. SERI argues that the Initial Decision and all parties agree that, during the Original Sale-Leaseback, SERI never recovered, and the UPSA customers never paid, any return on the Leased Assets. SERI states that, when it agreed to the Lease Renewal, it passed through only the renewal lease payments and continued to forego any recovery of depreciation or return on the Leased Assets.[198]

76. According to SERI, the Initial Decision determined that the maximum amount that SERI can charge ratepayers over the Lease Renewal is no more than an UPSA revenue requirement based on the continuing cost of service and rate base of the Leased Assets,

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[195] SERI Brief on Exceptions at 20-21 (citing *Soyland Power Coop v. Central Ill. Pub. Serv. Co.*, 51 FERC ¶ 61,004, at 61,014 (1990) (*Soyland*); *Pontook Operating Ltd. P'ship v. Pub. Serv. Co. of N.H.*, 94 FERC ¶ 61,144, at 61,552 (2001); *San Diego Gas & Elec. Co. v. Pub. Serv. Co. of N.M.*, 95 FERC ¶ 61,073, at 61,202 (2001)).

[196] *Id.* at 21-22.

[197] *Id.* at 22-23.

[198] *Id.* at 23-24.

with the rate base being no more than the new book value.[199] SERI states that the Initial Decision recommends "continuing" a rate methodology that never was in place as the Leased Assets' net book value never had any bearing on UPSA rates and that SERI never recovered costs based on the "rate base of the Leased Assets."[200] SERI states that the Initial Decision found that customers benefitted from the ratemaking treating the lease costs as an expense, in lieu of original cost ratemaking, because the costs of Grand Gulf were levelized and the rates were lower than they would have been had SERI put in place traditional rates under which it recovered the return components.[201]

77. According to SERI, all parties understood that the rates agreed upon in the 1991 Settlement would be lower than traditional rates in the early years and higher in the later years.[202] SERI states, however, that neither the Retail Regulators nor the Initial Decision cite any precedent supporting a change in rate mechanisms in the middle of a transaction.[203] SERI argues that no party challenged the Original Sale-Leaseback's prudence. SERI also argues that the Retail Regulators conceded that customers enjoyed substantial benefits as a result of the 1991 Settlement and thus cannot now argue that the Lease Renewal costs are unjust and unreasonable when compared to an original cost rate structure that would have resulted in higher rates than those that were agreed to under the 1991 Settlement.

78. SERI argues that the Initial Decision erred in applying the acquisition adjustment policy to the Lease Renewal as no direct precedent supports applying acquisition adjustment principles to the Lease Renewal.[204] SERI states that Trial Staff's witness Mr. Poffenberger testified that this policy's purpose is to prevent a utility from using an above-cost purchase to write up rate base to earn an inflated return to prevent facilities from being sold at artificially inflated prices in order to increase rates.[205] SERI argues that SERI did not acquire any assets, did not use the Lease Renewal to write-up rate base, and did not earn any return on the Leased Assets. SERI argues that the Initial Decision

[199] *Id.* at 24.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 25.

[203] *Id.* at 25-26.

[204] *Id.* at 27-28 (citing Initial Decision, 171 FERC ¶ 63,003 at P 114).

[205] *Id.* at 28 (citing Tr. 1825).

avoids the question of how to assess the Lease Renewal by finding that the Lease Renewal should be viewed as stand-alone and applying the acquisition adjustment.

79. SERI notes that the lease at issue in *Carolina Power & Light I* gave the utility the right to retain and retire the leased property, and later replace it with equipment to be owned by the utility. SERI explains that, because the utility planned to replace up to 90% of the leased facilities and the lease extended beyond the useful life of those facilities, the Commission's predecessor agency, the Federal Power Commission, found that, while the agreement may have been a lease, it had the earmarks of an acquisition. SERI explains that because the purchase price exceeded the facilities' original cost, the Federal Power Commission treated that excess as an acquisition premium.[206] SERI argues, however, that SERI did not acquire the Leased Assets. SERI states that, unlike the distribution facilities at issue in *Carolina Power & Light I*, the Leased Assets have never been subject to original cost ratemaking, and the Lease Renewal simply continues the existing ratemaking treatment.[207]

80. SERI argues that the Initial Decision's rate recommendation "dooms" all end-of-lease options from the very outset of a sale-leaseback. SERI argues that, by recommending that the reasonableness of end-of-lease decisions be measured against the depreciated rate base of the Leased Assets, SERI will face a "massive" disallowance if it decides it is prudent to renew the lease and if the asset has residual value at the end of the lease. SERI argues that, conversely, if SERI sought to avoid the disallowance recommended by the Initial Decision by surrendering the Leased Assets, it would face disallowance under prudence grounds for surrendering an asset. SERI states that the Initial Decision creates an acquisition adjustment standard that cannot be met.[208]

81. SERI also argues that the requirement to challenge sale-leaseback related costs in formula rates is a benefits analysis that compares the effects of original cost ratemaking. SERI states that, in *Alamito/Century*,[209] the Commission held that the reasonableness of including sale-leaseback lease costs in the utility's formula rates could be assessed by comparing the total costs that would form the basis for the rates charged for providing

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[206] *Id.* at 29 (citing *Carolina Power & Light I*, 40 FPC at 1130).

[207] *Id.* at 29-30.

[208] *Id.* at 31-32.

[209] *San Diego Gas & Elec. Co. v. Alamito Co.*, 49 FERC ¶ 61,292 (1989), *order on reh'g sub nom. San Diego Gas & Elec. Co. v. Century Power Corp.*, 50 FERC ¶ 61,285 (1990) (*Alamito/Century*)).

service from a facility with and without the sale-leaseback arrangement.[210] SERI also states that, in Opinion No. 446[211] the Commission identified the central issue as whether SERI's formula rates reflecting the sale-leaseback related costs resulted in ratepayer benefits compared to original cost ratemaking. SERI states that the Commission determined there that including the sale-leaseback lease costs in SERI's rates resulted in net present value benefits to customers, as compared to original cost rates and found that the Grand Gulf Original Sale-Leaseback resulted in "substantial savings" to customers.[212] SERI states, however, that despite the precedent in *Alamito/Century* and Opinion No. 446, the Retail Regulators did not submit any analysis comparing the benefits of the sale-leaseback for customers to the original cost ratemaking.[213]

82. SERI argues that the Initial Decision failed to apply *Alamito/Century* and Opinion No. 446 and instead held that the Commission requires that the gain on sale in a sale-leaseback transaction be amortized to reduce recovery of lease payments.[214] SERI states that the Initial Decision fails to recognize that the gain on sale realized in the sale-leaseback was passed to ratepayers as a reduction in lease payments and not retained by SERI's shareholders. SERI maintains that the benefits recognized in Opinion No. 446 were flowed through to ratepayers in addition to the gain on sale. SERI argues that there is no precedent for finding an acquisition adjustment embodied in rates that simply pass through sale leaseback charges when the utility returns its gain on sale to ratepayers. SERI argues that there is no acquisition adjustment in passing through the lease costs as an expense. SERI argues that the Initial Decision makes no finding contradicting that the sale-leaseback arrangement, including the renewal leases, created substantial net benefits for ratepayers compared to original cost ratemaking.[215]

83. SERI also states that the Initial Decision faults SERI witness Mr. Schnitzer for not submitting a prudence analysis even though the Lease Renewal's prudence was unchallenged. SERI argues that the Initial Decision thus recognizes that prudence is the logical method for determining whether the Lease Renewal was reasonable. SERI states that Mr. Schnitzer's net benefits analysis was not an attempt to assess the prudence of the

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[210] SERI Brief on Exceptions at 33 (citing *Alamito/Century*, 50 FERC at 61,916).

[211] *Id.* at 34 (citing *Sys. Energy Res., Inc.*, Opinion No. 446, 92 FERC ¶ 61,119 at 61,455 (2000)).

[212] *Id.* (citing Opinion No. 446, 92 FERC at 61,455).

[213] *Id.* at 35.

[214] *Id.* at 36.

[215] *Id.* at 36-38.

lease renewals but rather was intended to demonstrate that the renewal lease costs were just and reasonable under the net benefits analysis applied in prior Commission orders.[216]

84. SERI disagrees with the Initial Decision's conclusion that the net benefits analysis should be cut off at the Original Sale-Leaseback's end and not applied to the Lease Renewal. SERI argues that the primary impetus of the sale-leaseback was to provide ratepayer benefits in the early years of Grand Gulf's operation and cushion the economic impacts on customers that would have flowed from original cost rates. SERI argues that a party entering a sale-leaseback cannot get the front-end benefits without having to make end-of lease decisions, an essential part of the commercial arrangement.[217]

85. SERI notes that the Initial Decision concludes that, had SERI surrendered its interest in the Leased Assets on July 15, 2015, "ratepayers would have *saved* money thereafter."[218] SERI states that the Initial Decision concludes that the "best thing" SERI could have done was to repurchase its interest.[219] SERI argues that the two quoted statements attempt to answer the same question: what was the most economic choice for SERI at the end of the Original Sale-Leaseback, which SERI argues is the prudence inquiry.[220]

86. SERI also argues that it and its "financiers" never "diverted" funds that should have been used for maintenance and capital additions, as maintenance and capital additions have continued during the Original Sale-Leaseback and that the Initial Decision in consistent with Opinion No. 446, which found that the Original Sale-Leaseback benefitted customers.[221] SERI also disputes the Initial Decision's statement that SERI must show that the Lease Renewal conferred substantial customer benefits. It argues that the complainants have the burden of proof and that SERI demonstrated the substantial

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[216] *Id.* at 39.

[217] *Id.* at 39-41.

[218] *Id.* at 41 (quoting Initial Decision, 171 FERC ¶ 63,003 at P 169 (emphasis in original)).

[219] *Id.* (quoting Initial Decision, 171 FERC ¶ 63,003 at P 173).

[220] *Id.* at 41-42.

[221] *Id.* at 42-43.

customer benefits from SERI entering the sale leaseback, and again, no party challenged the Lease Renewal's prudence.[222]

87. SERI argues that its accounting amortization schedule has no bearing on the Lease Renewal's proper rate treatment and that the Initial Decision's rate determination is influenced, in part, by the belief that the Lease Renewal rental payments include "usurious interest."[223] SERI states that customers pay a negotiated, fair market value rental amount to give SERI the entitlement to the capacity and energy associated with the Leased Assets.[224] SERI argues that SERI (and its customers) is not "paying" for the original financing again but that SERI is paying for a new 21-year entitlement.[225]

88. SERI asserts that the Initial Decision does not justify its finding to order refund of some portion of original lease payments from 2014 through mid-2015.[226] SERI states that, even though its amortization schedule changed in January 2014 to re-allocate lease payments for accounting purposes, the payment amount (and charges to customers) is unaffected by this accounting. SERI argues that the refund order with respect to the Lease Renewal payments constitutes impermissible retroactive ratemaking. It further argues that, even though SERI's formula rate would normally permit recovery of all lease charges expensed to Account 931, the Initial Decision recommends a new approach that would limit the amount of rental payments that could flow through SERI's formula rate, an approach that SERI argues should not be adopted prospectively and cannot be applied retroactively.[227] In support of this claim, SERI contends that there is no equitable basis to order refunds as SERI earns no profit on the Lease Renewal, incurs those charges for the benefit of customers, and entered the transaction only after determining that it provided the greatest economic customer benefit.[228]

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[222] *Id.* at 43.

[223] *Id.* at 44 (quoting Initial Decision, 171 FERC ¶ 63,003 at P 158).

[224] *Id.*

[225] *Id.* at 45 (citing Ex. S-0010 at 64).

[226] *Id.* at 47.

[227] *Id.*

[228] *Id.* at 47-48.

3. Briefs Opposing Exceptions

a. Trial Staff

89. Trial Staff agrees with the Initial Decision's holding limiting the UPSA recovery of the Lease Renewal payments to the Commission's original cost principle.[229] Trial Staff agrees that in *Carolina Power & Light*, the Fourth Circuit affirmed the Commission's determination that Carolina Power & Light could only recover (1) depreciation expense on the net book value of the utility property subject to lease, (2) a fair return on such utility property, and (3) the taxes payable.[230] Trial Staff states that the Initial Decision determines that, in lieu of the $17.188 million annual Lease Renewal payments, SERI may only recover return of and on the Leased Assets' net book value.[231]

90. Trial Staff states that a transaction's form does not control whether an acquisition adjustment has resulted from a lease following a sale-leaseback's expiration and instead finds that the utility plant's original cost, once established, survives transfers to non-public utilities.[232] Trial Staff argues that the Initial Decision does not preclude beneficial sale-leaseback transactions but ensures that they benefit customers by prohibiting public utility-lessees from recovering amounts that exceed the plant's original cost subject to sale-leaseback transactions.[233] Trial Staff contends that, even if the Commission affirms the Initial Decision,[234] SERI's customers will continue to pay several cost components attributable to the Leased Assets during and following the Lease Renewal.[235]

91. Trial Staff argues that the Initial Decision correctly concludes that the original cost principle governs the Lease Renewal and limits SERI to including no more than the depreciated original cost of the Leased Assets and Net Capital Additions in UPSA

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[229] Trial Staff Brief Opposing Exceptions at 12 (citing Initial Decision, 171 FERC ¶ 63,003 at P 153).

[230] *Id.* at 13 (citing *Carolina Power & Light II*, 433 F.2d at 160).

[231] *Id.*

[232] *Id.* at 15.

[233] *Id.* at 17.

[234] *Id.*

[235] *Id.* at 18.

rates.[236] Trial Staff disagrees that the Leased Assets have some value beyond their net book value, and that if a leased asset has residual value at the end of the lease, the lessee faces a potential disallowance if it elects to renew the lease.[237] Trial Staff contends that this argument conflicts with the original cost principle that the purchaser of a facility simply inherits the previous owner's claims to a return of and on the capital originally devoted to the public service.[238] Trial Staff states that SERI's customers are only required to pay the net book value of the Leased Assets and the Net Capital Additions.

92. Trial Staff further argues that SERI has not supported its claims that the Owner-Lessors' residual value expectation reduced the level of Original Sale-Leaseback payments or that the Owner-Lessors received any guarantee of a residual value for the leased interest after the expiration of the term.[239] Trial Staff also argues that SERI's own methodologies for calculating the after-tax gain based upon the Leased Assets' net book value[240] and SERI's methodology for applying its customers' Original Sale-Leaseback payments to the $500 million debt principal contradict this contention.[241] Trial Staff maintains that, under SERI's logic, its customers should fully pay the original cost of the Leased Assets and continue to pay in UPSA rates any premiums in excess of original cost that SERI agrees to pay the Owner-Lessors.[242]

93. Trial Staff asserts that Mr. Schnitzer's analysis of the Original Sale-Leaseback and Lease Renewal as a single transaction is unreasonable because any costs and benefits from the Original Sale-Leaseback were irrelevant to SERI at the time it entered into the Lease Renewal.[243] Trial Staff further notes that SERI's then-Chief Financial Officer, Glenn E. Harder, stated during litigation of the Original Sale-Leaseback in Docket No. ER89-678-000 that "[SERI's] economic interest in that leased portion only runs to the year 2015" and SERI has "no guarantee that it will be economical and prudent to [renew

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[236] *Id.*

[237] *Id.* at 19.

[238] *Id*.

[239] *Id.* at 21.

[240] *Id.*

[241] *Id.* at 23.

[242] *Id.* at 24.

[243] *Id.* at 33 (citing Tr. 1892:17-1893:1 (Schnitzer)).

the terms of Original Sale-Leaseback] at the end of the lease life."[244] Trial Staff contends that Mr. Schnitzer's claimed $840 million in combined customer benefits from the Original Sale-Leaseback and Lease Renewal is based on the premises that (1) SERI and the Owner-lessors reasonably expected that there would be significant residual value in the Leased Assets at the Original Sale-Leaseback's expiration, which reduced the amount of Original Lease payments the Owner-lessors demanded;[245] (2) Commission precedent, which requires a review of the overall benefits and burdens experienced over the full term of the agreements;[246] and (3) the parties to the 1991 Settlement were aware from the outset that SERI's option to renew the terms of the original lease was a required and indivisible part of the Original Sale-Leaseback itself.[247] Trial Staff claims that the Commission's observations from Opinion No. 446[248] call into question Mr. Schnitzer's conclusion that the Original Sale Leaseback provided customer benefits with a 2015 present value of $840 million.[249]

94. Trial Staff reasons that SERI's single transaction theory disregards the fact that SERI could not have agreed to a lease term that extended 12 years beyond expiration of the leased property's operating license for Grand Gulf issued by the Nuclear Regulatory Commission, which is set to expire in 2024,[250] and that, had the Original Sale-Leaseback extended beyond 2015 to the point that the Leased Assets' remaining economic life for tax purposes went below 20%, given the IRS requirement that no less than 20% of Grand Gulf's economic life remain at expiration of the Original Sale-Leaseback, the IRS would have treated the Original Lease as a financing arrangement and not a sale of utility plant[251] and precluded realization of the tax benefits upon which the Original Sale-Leaseback was predicated.[252] Trial Staff notes that the Initial Decision correctly found that the financing aspect ended at the Original Sale-Leaseback's expiration and that the

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[244] *Id.*

[245] *Id.*

[246] *Id.* at 34.

[247] *Id.*

[248] Opinion No. 446, 92 FERC ¶ 61,119.

[249] Trial Staff Brief Opposing Exceptions at 35.

[250] *Id.* (citing Ex. S-0010 at 18:1-2 (Nicholas Dir./Ans. Test.)).

[251] *Id.* at 37 (citing Ex. LC-0008 at 10-11).

[252] *Id.*

original $500 million loan to SERI from the Owner-Lessors was paid off through Original Sale-Leaseback payments that were recovered from ratepayers,[253] and that the Lease Renewal was not structured as a financing arrangement, did not result in the issuance of any debt by SERI or the Owner-lessors, or the refinancing of the Original Sale-Leaseback debt.[254] Trial Staff argues that, whether the Owner-Lessors believed the Leased Assets would retain any value at expiration of the Original Sale-Leaseback is irrelevant for purposes of determining whether the Lease Renewal provides specific, tangible, and substantial customer benefits. Trial Staff notes that SERI witness Mr. Stack indicated that SERI did not guarantee that the Owner-Lessors would receive a certain level of value for their ownership interest at the Original Sale-Leaseback's expiration.[255] Trial Staff further notes that the only provision in the Original Sale-Leaseback that contemplates the value of the leased interest at expiration is expressly limited to the fixed rate lease renewal option, which SERI did not exercise.[256] Trial Staff maintains that SERI's contention that some residual value in the leased interest remained at expiration of the Original Sale-Leaseback also ignores the ratemaking treatment SERI agreed to in the 1991 Settlement.[257] Trial Staff explains that, pursuant to the 1991 Settlement, for UPSA billing purposes, the amount of Original Sale-Leaseback payments was credited for SERI's after-tax book gain of $11.4 million[258] and that any additional amount paid by SERI to the Owner-Lessors to compensate them for any claimed residual value under the Original Sale-Leaseback would constitute amounts to be returned to ratepayers under the Commission's original cost principle.[259]

95. Trial Staff argues that in *Soyland*, the Commission rejected a complaint filed by a signatory to a power purchase agreement (PPA) that was made three years after Commission approval of the PPA, finding that the complainant's arguments departed dramatically from those it made in support of the PPA during the Commission's FPA section 205 review.[260] Trial Staff considers reliance on *Soyland* unpersuasive because the

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[253] *Id.* at 38.

[254] *Id.*

[255] *Id.* at 40.

[256] *Id.* at 42 (citing Ex. S-0015 at 28).

[257] *Id.* at 43.

[258] *Id.*

[259] *Id.* at 44.

[260] *Id.* at 45 (citing *Soyland* , 51 FERC at 61,014) (*Soyland*)).

1991 Settlement did not propose any rate treatment for whatever transaction followed the Original Sale-Leaseback.[261] Trial Staff argues that, even if the 1991 Settlement is pertinent to the ratemaking treatment of the Lease Renewal, SERI's self-authorized ratemaking for the Lease Renewal did not preserve the ratemaking treatment established in the 1991 Settlement because SERI elected to maintain the Net Capital Additions in SERI's UPSA rate base while also reflecting the value of Net Capital Additions in the Lease Renewal payments, which was not the case during the Original Sale-Leaseback.[262]

96. Trial Staff submits that the Commission's findings in Opinion No. 446 are inapposite to the factual and legal circumstances before the Commission in the instant proceeding. Trial Staff alleges that SERI cites Opinion No. 446 for the proposition that the Commission has "held that the [Original Sale-Leaseback] resulted in substantial benefits for customers.[263] Trial Staff maintains that during cross-examination, SERI witness Mr. Schnitzer asserted that SERI's burden to show specific, measurable, and substantial benefits to customers necessary to support SERI's recovery in excess of the Leased Assets' net book value was at least partially satisfied by virtue of an alleged finding by the Commission in Opinion No. 446 that the Original Sale-Leaseback provided "substantial benefits" of $28 million to customers during the Original Sale-Leaseback[264] and approximately $30 million worth of savings.[265] Trial Staff explains that, in that proceeding, a study performed by Trial Staff concluded that customer cost from the Original Sale-Leaseback, as compared to the amounts they would have paid if the Original Sale-Leaseback had not occurred was $27.9 million,[266] and that this amount outweighed the additional costs of SERI's proposal to recover nuclear decommissioning for the Leased Assets on an accelerated basis by approximately $24.7 million.[267] In the instant proceeding, by contrast, Trial Staff argues that nothing suggests that SERI's customers will pay less under the Lease Renewal compared to the amounts they would have paid under traditional cost of service ratemaking in the absence of the Original Sale-

[261] *Id.* (citing SERI Post-Hearing Reply Brief at 6).

[262] *Id.* at 46.

[263] *Id.* at 48 (citing SERI Brief on Exceptions at 42-43).

[264] *Id.* at 47 (citing Tr. 1899:20-1900:25).

[265] *Id.* (citing Tr. 1957:16-1959:23).

[266] *Id.* at 49 (citing Ex. SER-0005 at 24).

[267] *Id.* (citing Ex. SER-0005 at 25).

Leaseback, but that evidence suggests that SERI's customers would pay more under the Lease Renewal than if SERI never entered into the Original Sale-Leaseback.[268]

97. Trial Staff argues that the Initial Decision correctly found that SERI has the burden of proof to demonstrate that the Lease Renewal provides specific, measurable, and substantial benefits to customers. Trial Staff notes that the Initial Decision determined that the Lease Renewal achieved an acquisition premium of approximately $291 million.[269] Trial Staff notes that a utility proposing to recover in excess of net book value bears a heavy burden of proof to demonstrate the specific, measurable, and substantial benefits to permit such recovery,[270] and that in *Ameren Corporation*, the Commission cited its longstanding policy prohibiting rate recovery of the effects of acquisition adjustments "[a]bsent express authorization" pursuant to FPA section 205 and that acquisition adjustments should not affect rates "without a proper showing to the Commission" satisfying the requisite benefits test.[271]

98. Trial Staff also argues that, when articulating the scope of "specific dollar benefits" to support recovery of an acquisition adjustment, such benefits "may include decreases in rates, improved services or economies in operation which are clearly related and solely the result of acquisitions"[272] and that specific dollar benefits must be tangible and non-speculative and must be quantifiable in monetary terms.[273] Trial Staff contends that the Initial Decision correctly applied the Commission's "practically impossible to meet" standard of proof[274] to the benefits analysis of Mr. Schnitzer. Trial Staff contends that the Commission must reject Mr. Schnitzer's purported customer benefits due to his failure to: (1) identify his alleged $840 million in customer benefits at any level of specificity; (2) demonstrate that any of his alleged benefits are measurable; and (3) demonstrate that any of the alleged $840 million customer benefits are solely the result of

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[268] *Id.* at 49 (citing Initial Decision, 171 FERC ¶ 63,003 at P 169).

[269] *Id.* at 50 (citing Initial Decision, 171 FERC ¶ 63,003 at P 140).

[270] *Id.* at 51 (citing Initial Decision, 171 FERC ¶ 63,003 at P 115).

[271] *Id.* (citing *Ameren Corp.*, 140 FERC ¶ 61,034, at PP 30-31 (2012) (*Ameren I*), *order on compliance*, 143 FERC ¶ 61,240 (2013)).

[272] *Id.* at 53 (citing *Mont.-Dakota Utils. Co.*, 23 FERC ¶ 61,151, at 61,335 (1983); *Duke Energy Moss Landing*, 86 FERC ¶ 61,227, at 61,816 (1999)).

[273] *Id.* (citing *N. Nat. Gas Co.*, 35 FERC ¶ 61,114, at 61,236 (1979)).

[274] *Id.* (citing *United Gas Pipe Line Co.*, 25 FPC 26, at 51 (1961); *Mid-La Gas Co.*, 7 FERC ¶ 61,316, at 61,684 (1979)).

the Original Sale-Leaseback.[275] Trial Staff also argues that SERI has not substantiated its argument that SERI's ability to use NOL carryforwards and Investment Tax Credit Carryforwards to reduce the rate of return in UPSA billing benefited customers.

99. Lastly, Trial Staff argues that the Lease Renewal should not be accounted for as a 21-year extension of the repayment term of the Original Sale-Leaseback debt, but as a right-of-use asset lease. Trial Staff contends that, despite SERI witness Mr. Stack's reliance on its "continuing involvement" in support of treating the Lease Renewal as a financing, the Initial Decision reasoned that Mr. Stack mischaracterized the accounting guidance he purported to follow, finding that the guidance should be read as providing that "a financing transaction *in which there is continuing involvemen*t is not accounted for as a sale-leaseback *until the financing ends*"[276] and concluded that the Original Sale-Leaseback "financing" ended at its expiration.[277] Trial Staff notes that the Initial Decision determined that because the "sale" ended at the Original Sale-Leaseback's expiration, the Lease Renewal is just a lease, and found that Mr. Stack's position that SERI's re-amortization of the Original Sale-Leaseback Debt at an imputed 44.46% interest rate contradicted the accounting guidance upon which he relied.[278]

b. <u>Louisiana Commission</u>

100. The Louisiana Commission argues that SERI does not justify SERI's double collection of the Grand Gulf investment costs through the Lease Renewal. The Louisiana Commission states that ratepayers paid 100% of the Leased Assets' value, plus taxes recognized for the Original Sale-Leaseback, plus interest, with no mark-down, and SERI kept the tax benefits from the transaction. The Louisiana Commission also disagrees with the claim the Original Sale-Leaseback and Lease Renewal constitute a single transaction, given that the Lease Renewal involved new leases, counterparties, terms, rent, and other provisions. The Louisiana Commission asserts that, contrary to SERI's assertion of benefits to customers from the Original Sale-Leaseback, ratepayers paid $248 million more than they would have paid with original cost ratemaking.[279]

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[275] *Id.* at 61.

[276] *Id.* at 62 (quoting Initial Decision, 171 FERC ¶ 63,003 at P 327 (emphasis in original)).

[277] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 327).

[278] *Id.* at 63.

[279] Louisiana Commission Brief Opposing Exceptions at 8-10.

101. The Louisiana Commission also argues that if SERI had owned a generating plant of approximately the Leased Assets' capacity, and recovered through rates the entire original cost of the plant, SERI would not be able to write up the cost of the plant to continue recovering its supposed value. The Louisiana Commission also asserts that SERI would also not be able to sell the plant and buy it back at a price above original cost and include the acquisition premium in rates.[280]

102. The Louisiana Commission asserts that SERI chose to enter into the Original Sale-Leaseback, which imposed a $500 million principal cost on ratepayers, along with $732 million for interest, over 26.5 years and that ratepayers paid all the Original Sale-Leaseback costs through the UPSA. The Louisiana Commission argues that the charges represent an accelerated payoff of the original cost of the plant and that SERI is not permitted to impose the asset cost again through the Lease Renewal without meeting the acquisition adjustment requirements.[281]

103. The Louisiana Commission also argues that SERI chose to renew the leases rather than exercise its repurchase option because it knew it could not collect the repurchase cost in rates. The Louisiana Commission asserts, however, that SERI had no basis to treat the Lease Renewal as an extension since all lease payments required under the Original Sale-Leaseback were made as of July 15, 2015. The Louisiana Commission asserts that SERI's accounting thus reflected that $34.3 million of the debt balance had not been paid off and that the balance then is being slowly amortized until 2036, with the remaining portion of lease payments recorded as interest.[282]

104. The Louisiana Commission also asserts that the Lease Renewal was a separate transaction from the Original Sale-Leaseback.[283] It also asserts that SERI contradicts itself repeatedly in describing the Original Sale-Leaseback and Lease Renewal, claiming they are indivisible while simultaneously asserting that the Lease Renewals result from a "choice" that SERI had to make at the end of the Original Sale-Leaseback.[284] The Louisiana Commission states that SERI argues that the prudence of the Lease Renewal should be the issue rather than original cost, but a prudence analysis would only evaluate

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[280] *Id.* at 22 (citing *Carolina Power & Light I*, 40 FPC at 1124).

[281] *Id.*

[282] *Id.* at 24-26.

[283] *Id.* at 27-28.

[284] *Id.* at 28 (citing SERI Brief on Exceptions at 2-3).

going-forward costs resulting from the Lease Renewal.[285] The Louisiana Commission notes that Entergy Corporation's 10-K report and SERI's FERC Form No.1 referred to the Lease Renewal instruments as "new lease[s]."[286]

105. The Louisiana Commission asserts that SERI did not select one of the options provided in the Original Sale-Leaseback agreement, because the fair market renewal option permitted renewals "for one or more periods of three years or such shorter period as shall extend to the expiration of the License."[287] The Louisiana Commission notes that the FERC Uniform System of Accounts General Instruction 19(B) provides that "any action that extends the lease beyond the expiration of the existing lease term . . . shall be considered as a new agreement and shall be classified according to the above provisions."[288] The Louisiana Commission states that the Lease Renewal's 21-year term extends beyond the three-year renewal permitted under the Original Sale-Leaseback.[289] The Louisiana Commission also states that the rent changed upon a new commencement date after negotiation, litigation, and arbitration among the parties. The Louisiana Commission states that the Original Sale-Leaseback was designed to repay the $500 million, plus an implicit interest rate, while the price under the Lease Renewal is based on the fair market value of the Leased Assets, as determined after arbitration and litigation.[290]

106. The Louisiana Commission states that SERI relies heavily on a "present value" analysis that is irrelevant under the original cost standard because in original cost ratemaking, dollars do not change their value based on the time at which they are collected from consumers. The Louisiana Commission states that a dollar depreciated in 1989 has the exact same ratemaking value as a dollar depreciated decades later and that the original cost standard requires that utilities collect only the nominal dollar original cost of an asset.[291] The Louisiana Commission states that, on a nominal basis, SERI's analysis showed that ratepayers paid more under the Original Sale-Leaseback than they

[285] *Id.* (citing SERI Brief on Exceptions at 41).

[286] *Id.* at 29 (citing Ex. LC-0003 at 3; Ex. LC-0021 at 2-3, 9 (discussing "new lease" renewal terms)).

[287] *Id.* (citing Ex. LC-0012 at 28 (§ 12(b))).

[288] *Id.* at 30 (citing Ex. LC-0023 at 5).

[289] *Id.* (citing Ex. LC-0012 (Original Sale/Leaseback Agreement) at 28, §12(B)).

[290] *Id.* at 32-33 (citing Ex. LC-0001 REV at 38-40 (Sisung)).

[291] *Id.* at 33 (citing 16 U.S.C. § 825a(a); *Carolina Power & Light I*, 40 FPC 1122).

would have paid under original cost ratemaking and under the Lease Renewal, they are paying more both in nominal dollars and in present value.[292] The Louisiana Commission argues that lease payments are recoverable only to the extent that they are less than or equal to what the rates would be under original cost ratemaking. The Louisiana Commission states that the Initial Decision in *Alamito/Century* issued pursuant to the Commission's orders on remand included no present value analysis. The Louisiana Commission notes that SERI relies on a present value analysis performed by Trial Staff witness Kenneth Barnes in a previous SERI proceeding Docket No. ER89-678, but the Louisiana Commission notes that in Docket No. ER89-678, Mr. Barnes did not apply present value analysis in determining the amount of the original cost gain. According to the Louisiana Commission, Mr. Barnes determined the gain in nominal dollars and recommended that it be included as a reduction to rate base and amortized to consumers.[293]

107. The Louisiana Commission asserts that SERI relies on the 1995 analysis by Trial Staff witness Mr. Barnes that projected a $28 million present value benefit of the Original Sale-Leaseback compared to original cost ratemaking. The Louisiana Commission states that the 10.66% discount rate employed by Mr. Barnes, and the rates employed in the SERI analysis by Mr. Schnitzer do not represent the real time value of money as ratepayers do not have the investment alternatives available to large corporations. The Louisiana Commission asserts that, if Mr. Barnes had used the inflation rate at the time in his analysis, the Barnes analysis would have shown large detriments in the Original Sale-Leaseback. The Louisiana Commission states that both the Barnes analysis and the Schnitzer analysis omitted the benefit ratepayers would have received from the amortization of investment tax credits in the original cost ratemaking case. The Louisiana Commission states that the investment tax credits would have served as an offset to the perceived present value benefit.[294]

108. The Louisiana Commission argues that the appropriate remedy is to exclude the Lease Renewal payments from rates without including the net book value in rate base and to provide refunds. The Louisiana Commission argues that inclusion of the Lease Renewal costs in rates without prior approval from the Commission violated the acquisition adjustment policy. The Louisiana Commission states that in *Ameren II*, the Commission required refunds for Ameren's improper inclusion of an acquisition adjustment in rates without prior approval from the Commission. The Louisiana Commission asserts that SERI has neither requested, nor received, approval of including

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[292] *Id.* at 34 (citing Tr. 1923, 1924; Exs. LC-0201, LC-0202).

[293] *Id.* at 35-36 (citing Ex. LC-0008).

[294] *Id.* at 37-40.

the acquisition premium and refunds are appropriate.[295] The Louisiana Commission further asserts that refunds are also required because SERI collected more than original cost for the Leased Assets and imposed a double collection of depreciation costs, in violation of FPA section 302.[296] The Louisiana Commission argues that SERI's contention that Lease Renewal costs can only be disallowed prospectively is erroneous. The Louisiana Commission states that the Lease Renewal rents are inputs to SERI's formula rate and, since they violate Commission and statutory policy, they are subject to refund.[297] The Louisiana Commission states that it agrees with SERI that retroactive relief should not begin in 2014, but instead should commence on July 15, 2015, the beginning of the Lease Renewal.[298]

c. SERI

109. SERI asserts that the Louisiana Commission and Trial Staff seek a $360 million disallowance based on a theory that turns solely on an accounting measure that has nothing to do with SERI's rates. SERI argues that the Original Sale-Leaseback involved a true sale as SERI sold a portion of the Grand Gulf plant, leased it back at a negotiated rental rate, and charged customers only for the lease costs. SERI states that it recorded amounts as principal and interest to comply with the FERC Chief Accountant's 1990 Audit Report and that it had to impute an interest rate to allocate the lease payments, because "the Leases were not actual debt agreements with stated interest rates."[299] SERI argues that there is no legal premise for denying SERI's recovery of the Lease Renewal costs due to accounting entries made to reflect an imputed financing.[300] SERI asserts that the Louisiana Commission's and Trial Staff's argument conflicts with Commission precedent and fundamental original cost ratemaking principles. SERI states that, in *Alamito/Century*, there was a gain on sale inherent in the sale-leaseback, but the Commission did not consider the amount of imputed principal inherent in the lease payments relevant. SERI argues that rates that provide for recovery of prudently incurred

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[295] *Id.* at 46-47 (citing *Ameren II*, 147 FERC ¶ 61,225 at P 25).

[296] *Id.* at 47 (citing 16 U.S.C. § 825a(a)).

[297] *Id.* at 47-48 (citing SERI Brief on Exceptions at 47).

[298] *Id.* at 48.

[299] SERI Brief Opposing Exceptions at 44 (citing Ex. SER-0010 at 8).

[300] *Id.* at 45.

actual lease costs and a net economic benefit over the life of the transaction as compared to original cost ratemaking are presumed to be just and reasonable.[301]

110. SERI states that Trial Staff is wrong to claim that because SERI returned its after-tax gain on sale to customers, it cannot recover its Lease Renewal payments.[302] SERI argues that it credited the gain realized on the sale to customers through the UPSA and that the gain-on-sale treatment has no bearing on whether recovery of lease costs that have been reduced by the gain on sale is just and reasonable. SERI disagrees with Trial Staff's argument that SERI has represented that it calculated the interest rate applicable to the Original Sale-Leaseback payments by determining the interest rate necessary to repay the $500 million financing with the sum of the scheduled lease payments on July 15, 2015.[303] SERI states that its witness Mr. Stack explained that SERI had to "impute an interest rate" that changed over time and that, when SERI renewed the lease, the extended payments were incorporated into the debt amortization schedule, extending the amortization schedule to 2036.[304] SERI states that, in *Alamito/Century*, the Commission rejected the argument made by Trial Staff that a condition of the renewal and purchase options was that the Owner-Lessors pay in full the debt they issued to fund part of the $500 million financing or loan to SERI.[305]

111. SERI also states that the Louisiana Commission offers no support for the argument that the acquisition adjustment policy should apply when the reasonableness of lease renewal payments under a sale-leaseback transaction is being evaluated and when there has been no recovery of the Leased Assets' capital costs from ratepayers during the Original Sale-Leaseback.[306] SERI notes that the Louisiana Commission, citing *Carolina Power & Light II*, argued that "[a]lthough SERI attempted to justify the lease renewals with a 'present value' analysis sponsored by Entergy witness Schnitzer, [*Carolina Power & Light II*] affirmed a disallowance based on a *nominal dollar* comparison."[307] SERI states that the Commission made clear in Opinion No. 446 that it uses a net present value

[301] *Id.* at 46-47.

[302] *Id.* at 48.

[303] *Id.* at 49.

[304] *Id.*

[305] *Id.*

[306] *Id.* at 50 (citing Initial Decision, 171 FERC ¶ 63,003 at P 125).

[307] *Id.* at 53 (citing Louisiana Commission Brief on Exceptions at 27).

approach, not a nominal dollar comparison, when considering the economic effect of sale-leaseback-related rates on ratepayers.[308]

112. SERI argues that, if the Commission adopts the imputed principal theory, a utility considering engaging in a sale-leaseback would face a huge disallowance after the initial lease term. SERI states that, under the Louisiana Commission's and Trial Staff's approach, after the initial lease term of a sale-leaseback, the utility must provide the capacity in question without any charge for the remaining life of the plant. SERI asserts that a ratemaking theory that would deter most sale-leasebacks, including efficient transactions that benefit customers, has no merit.[309] SERI states that, even if the Commission agrees with the Louisiana Commission and Trial Staff, SERI would nevertheless be entitled to recover all of its Lease Renewal payments under that approach because, SERI is required to continue to account for the transaction as a financing throughout the lease renewal period (i.e., through 2036). SERI states that its principal balance will not be fully amortized until 2036 under the accounting required by the 1990 Audit Report, FERC's Uniform System of Accounts, and GAAP.[310]

113. SERI disagrees with the Louisiana Commission and Trial Staff that, if the Commission permits SERI to recover roughly $70 million in rate base starting in July 2015, SERI should offset that amount in its entirety by amounts booked to a regulatory liability account (Account 254). SERI states that it recorded costs in its Regulatory Lability Account 254 only for accounting purposes and *not* for ratemaking.[311] SERI argues that the 1991 Settlement did not require SERI to include the regulatory liability Account 254 in the UPSA formula rate, and that the Commission has never required that Account 254 be included in the UPSA formula rate. SERI states that, for accounting purposes, SERI's lease payments are recorded as principal and interest so that, at the end of the transactions, SERI will have recorded approximately $398 million of depreciation as compared with the $500 million of principal payments.[312] SERI states that the regulatory liability recorded at the end of the transaction would be the difference (approximately $102 million) reduced by about $12 million to reflect the return to customers of the after-tax gain on the sale required by the 1990 Audit Report. SERI states that the $90 million remaining balance will reflect the taxes owed by SERI on the taxable gain recognized on the sale of the Leased Assets in 1989. SERI argues that

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[308] *Id.* at 53-54.

[309] *Id.* at 54-55.

[310] *Id.* at 55-56.

[311] *Id.* at 56.

[312] *Id.* at 57.

requiring the offset of the regulatory liability balance against rate base would reverse the previously approved treatment of the $90 million of taxes paid.[313]

114. SERI states that its witness Mr. Stack explained that there is no "direct connection" between the regulatory liability Account 254 and the undepreciated plant balance of the Leased Assets.[314] SERI states that Mr. Stack agreed that SERI would have a net $90 million regulatory liability at the end of the transactions, but that SERI will offset that balance against a deferred tax asset representing the taxes incurred with the initial sale-leaseback and not yet recovered.[315] SERI states that, despite Trial Staff's claim that the 1991 Settlement supports its arguments, in fact, the 1991 Settlement does not mention the regulatory liability required by the 1990 Audit Report and does not require that the regulatory liability be incorporated into the UPSA formula rate. SERI also asserts that Trial Staff overlooks the absence of Account 254 in the formula rate and the accounting offset for deferred tax assets, and instead suggests that the question of whether there should be a regulatory liability rate reduction turns on whether the Lease Renewals confer substantial benefits on the UPSA customers. SERI asserts that Trial Staff's argument fails because recovery of the remaining net plant value is not an acquisition adjustment but rather is an amount that SERI is entitled to recover without making a showing justifying an acquisition adjustment.[316]

115. SERI argues that prudence is the appropriate standard to use to evaluate the Lease Renewal payments and that no one has proven that the fair market value option was imprudent. SERI asserts that, when it decided to enter into the Original Sale-Leaseback, the underlying agreement necessitated a second decision about renewal. SERI states that, since no party has ever challenged the Original Sale-Leaseback's prudence, they should not be allowed to complain about SERI's exercise of an option to renew under that agreement. SERI disputes the Louisiana Commission's argument that the 21-year renewal was beyond what was permitted, stating that the Original Sale-Leaseback allowed "one or more" three-year renewal periods.[317]

116. SERI argues that the Louisiana Commission fails to provide, as required by *Alamito/Century* and Opinion No. 446, a comparative analysis of the economic benefits of the Original Sale-Leaseback versus original cost ratemaking without the Original Sale-

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[313] *Id.* at 56-59.

[314] *Id.* at 60 (citing Tr. at 1583).

[315] *Id.* (citing Tr. at 1558-59).

[316] *Id.* at 61-62.

[317] *Id.* at 63-64 (citing Ex. SER-0008 at 17-19).

Leaseback. SERI states that according to Mr. Schnitzer, over the Original Sale-Leaseback's term, there were net benefits to customers of $844 million in 2015 dollars and $72 million in 1989 dollars. SERI states that the Initial Decision made no finding that SERI's rates over that Original Sale-Leaseback and Lease Renewal terms will fail to provide net benefits to customers. SERI also states that no party took exception to the Initial Decision's treatment of Mr. Schnitzer's analysis and thus no party can raise those points now.[318]

d. New Orleans Council

117. The New Orleans Council argues that SERI was unable to establish that the Lease Renewal's prudence was not at issue and that it is incorrect to suggest that all parties conceded that SERI's actions were prudent.[319] The New Orleans Council also agrees with the Initial Decision that customers may not pay an acquisition premium on the Lease Renewal because the transaction does not produce substantial customer benefits.[320] The New Orleans Council asserts that Exhibit SER-0039 incorrectly identifies ratepayer benefits, including $150 million in lease payments as compared to customary ratemaking and $693 million due to a reduction in the formula's weighted average cost of capital (WACC) from sale proceeds used to retire debt. The New Orleans Council contends that SERI's analysis supporting a purported net benefit of $844 million was duly rejected.[321] The New Orleans Council rejects SERI's introduction at hearing of Exhibit SER-0118, which represents a post hoc benefits analysis that the Parties were unable to evaluate in written testimony.[322]

118. The New Orleans Council states that the corrected analysis relied on the Original Sale-Leaseback's 16% WACC and showed an increase in the WACC by 45 basis points following SERI's debt retirement with sales proceeds.[323] The New Orleans Council argues that, if SERI had instead paid a dividend with the sale funds, then the WACC

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[318] *Id.* at 69-70.

[319] New Orleans Council Brief Opposing Exceptions at 10-11 (citing SERI's Initial Post-Hearing Brief at 17).

[320] *Id.* at 13 (citing Initial Decision at PP 159-173, 169-173).

[321] *Id.* at 14 (citing SERI's Brief at 35).

[322] *Id.*

[323] *Id.* at 15 (citing Ex. SER-0018).

would have decreased by 93 basis points.[324] The New Orleans Council asserts that the 14% ROE that became effective when the Original Sale-Leaseback began, caused the WACC to increase an additional 25 basis points.[325] The New Orleans Council states that SERI's analysis reveals that SERI presumably knew what the ROE would become when it considered whether to enter the Original Sale-Leaseback.[326] The New Orleans Council agrees with the Presiding Judge's decision to reject this analysis due to the unsupported claims of customer benefit.[327]

119. The New Orleans Council states that SERI's claims of $150 million in benefits are due to lease payments incurred after the Original Sale-Leaseback, not the Lease Renewal.[328] The New Orleans Council also claims that these benefits are calculated through a present value analysis that SERI appears to assume is endorsed by the Parties.[329] The New Orleans Council clarifies that its witness Mr. Watson did not endorse SERI's method but only observed that SERI's claim relied on the assumed average discount rate of 8.98%.[330]

120. The New Orleans Council rejects SERI's argument that utilities will be more likely to refrain from sale-leaseback arrangements due to the Initial Decision's misapprehension of its arrangement or SERI's decommissioning tax deductions.[331] The New Orleans Council states that the Initial Decision will instead disincentivize self-serving accounting and double-recovery of costs from customers.[332] The New Orleans

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[324] *Id.* (citing Ex. SER-0018).

[325] *Id.* (citing Ex. SER-0018).

[326] *Id.* (citing Ex. SER-0018).

[327] *Id.*

[328] *Id.* at 16.

[329] *Id.*

[330] *Id.* at 17.

[331] *Id.* at 10.

[332] *Id.*

Council also disputes SERI's claims that the Initial Decision is a case of first impression and in violation of advanced notice requirement for regulated parties.[333]

e. Mississippi and Arkansas Commissions

121. The Mississippi and Arkansas Commissions assert that the complaint and subsequent Commission hearing order do not raise inquiries of prudence of the Lease Renewal but focus on the acquisition premium and original cost ratemaking principles as applied to the Lease Renewal and how it affects UPSA rates and customers.[334] They explain, however, that the Commission's original cost principle prohibits recovery of amounts in excess of the original cost of the Leased Assets through the Lease Renewal, and, thus, such payments are unjust and unreasonable to the extent that they result in recovery beyond the original cost and renewal payments under the UPSA rate since 2015 and should be refunded to customers.[335]

122. The Mississippi and Arkansas Commissions state that SERI's main argument is that the Lease Renewal is only an "extension" of the Original Sale-Leaseback.[336] They note that SERI witness and Controller of Accounting, Mr. Stack, changed his expert opinion that the "extension" was not a continuation of the financing arrangement in the initial Original Sale-Leaseback arrangement.[337] The Mississippi and Arkansas Commissions also note that Mr. Stack stated that, with either option to renew, the debt balance associated with the Original Sale-Leaseback would be fully amortized and the ongoing lease payments of the Lease Renewal would be recognized as lease expense.[338] The Mississippi and Arkansas Commissions argue that in "final" accounting, SERI walked back and stated that the "renewal of the lease will be recorded as an extension of the original financing arrangement."[339] Additionally, the Mississippi and Arkansas Commissions note that the initial Accounting Memorandum correctly stated that the debt balance at the end of the Original Sale-Leaseback would be zero and the Lease Renewal

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[333] *Id.*

[334] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 24.

[335] *Id.* at 25.

[336] *Id.* at 18.

[337] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 17).

[338] *Id.*

[339] *Id.* at 18-19 (citing Ex. SER-0012 at 2 (2013 Investment Proposal)).

would be treated as leases, not extensions of the financing.[340] The Mississippi and Arkansas Commissions assert that the Lease Renewal was not an extension because no trustee acted for the Owner-Lessors, there were new principal parties, there was a new term with a new annual rent and no new debt, and SERI received no payment for entering into the transactions.[341]

123. Moreover, the Mississippi and Arkansas Commissions also point to Mr. Stack's admission that the Lease Renewal was not structured through financial agreements given that SERI did not receive any proceeds, SERI did not adjust the balance of Original Sale-Leaseback Debt, and SERI did not even include the Owner Trustee as a party, and because the Owner-lessors did not issue any debt as a result of the Lease Renewal.[342] The Mississippi and Arkansas Commissions state that, decades ago, SERI witness Mr. Harder[343] determined that the Owner-Lessors shouldered all the risk included such that there could be *zero* economic value in the Original Sale-Leaseback Assets upon the Original Sale-Leaseback transaction's expiration in 2015.[344] The Mississippi and Arkansas Commissions argue that, for these reasons, SERI is wrong to ascribe additional value in the Original Sale-Leaseback Assets for UPSA rate recovery.[345]

124. The Mississippi and Arkansas Commissions also assert that the Lease Renewal cannot be considered an extension because it was not permitted options for SERI, only an extension of the expiration of SERI's nuclear license was permitted.[346] Thus, the Mississippi and Arkansas Commissions allege that the Lease Renewals did not comply with Section 12(B) of the Original Sale-Leaseback agreements.[347]

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[340] *Id.* at 19.

[341] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 19 (citing Tr. 1507 (Stack)).

[342] *Id.* at 20.

[343] Mr. Harder was SERI's witness in Docket No. ER89-678-000 testimony regarding the Original Sale-Leaseback transaction.

[344] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 20 (citing Staff Initial Br. at 16).

[345] *Id.*

[346] *Id.* at 21.

[347] *Id.*

125. The Mississippi and Arkansas Commissions disagree with SERI's claim of resulting "inequity" should 20% residual value of the originally Leased Assets be lost through a Commission denial of its Lease Renewal rental payments.[348] The Mississippi and Arkansas Commissions state that no residual value remained in the original Leased Assets following the expiration of the Original Sale-Leaseback given that the original cost was recovered through the Original Sale-Leaseback payments as of July 2015.[349] The Mississippi and Arkansas Commissions contend that the risk of loss of alleged residual value in 2015 was harbored by the Owner-Lessors, not SERI.[350]

126. Regarding SERI's claim that the Lease Renewal produces $844 million (in 2015 dollars) in customer benefits,[351] the Mississippi and Arkansas Commissions explain that Judge Glazer rejected this estimate due to disadvantages, including costs to ratepayers with no in-return benefit and, since the Lease Renewals were structured as "refinancing," the Renewal Lease rental payments usurped a 44% interest rate.[352] The Mississippi and Arkansas Commissions contend that SERI's assumptions are initially flawed because SERI's analyst used a 12.2% discount rate to show a present value benefit from the Original Sale-Leaseback and the Lease Renewal.[353] However, the Mississippi and Arkansas Commissions state that rate base and depreciation expense are stated in original cost nominal dollars that do not change in value, so impact does not change.[354] With that in mind, the Mississippi and Arkansas Commissions argue that Mr. Schnitzer's calculation nets a nominal $335 million loss for ratepayers.[355] The Mississippi and Arkansas Commissions also state that SERI's calculation impermissibly includes "sunk" costs.[356] Thus, the Mississippi and Arkansas Commissions find that by removing those sunk costs and benefits, a $61 million loss to ratepayers results from SERI's renewal

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[348] *Id.* at 22.

[349] *Id.*

[350] *Id.*

[351] *Id.* at 25 (SERI Brief on Exceptions at 33-42).

[352] *Id.* at 25-26 (citing Initial Decision, 171 FERC ¶ 63,003 at P 158; Staff Reply Brief at 19-20).

[353] *Id.* at 26.

[354] *Id.*

[355] *Id.* at 27 (citing Louisiana Commission Initial Br. at 14).

[356] *Id.* at 26-27.

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decision.[357] The Mississippi and Arkansas Commissions reason that Mr. Schnitzer omits that SERI's debt redemption increased its equity ratio in its UPSA capital structure to avoid shedding light on adverse effects the debt incurred.[358]

127. Additionally, the Mississippi and Arkansas Commissions note that the analysis failed to recognize the impact that the loss of ownership of the Grand Gulf capital additions in the Original Sale-Leaseback case scenario would have on ratepayer costs.[359] The Mississippi and Arkansas Commissions state that the Original Sale-Leaseback renewals require ratepayers to make payments based on fair market value of the Original Sale-Leaseback assets as well as the capital additions, meaning that over-recovery of costs is possible.[360] The Mississippi and Arkansas Commissions agree with the Initial Decision's determination that payment of an acquisition premium for the Renewal Leases conferred no benefits on ratepayers and imposed only disadvantages.[361]

128. The Mississippi and Arkansas Commissions also reject SERI's argument that utilities in the future will have no incentive to enter into sale-leaseback agreements unless the Initial Decision's findings are reversed.[362] The Mississippi and Arkansas Commissions refute SERI's claim that the Lease Renewals were a financing since the Lease Renewals did not renegotiate the terms of the Original Sale-Leaseback, delay or change the repayment of the amounts owed by SERI, or involve the issuance of any debt by SERI, and SERI realized no cash receipts in consideration of the Lease Renewal.[363] The Mississippi and Arkansas Commissions also refute SERI's claim that residual value remained in the Leased Assets when the Original Sale-Leaseback expired because the original costs were fully recovered by July 2015 and since SERI does not own the Leased Assets, any residual value is the sole risk of the Owner-lessors.[364] The Mississippi and Arkansas Commissions assert that the Initial Decision correctly rejected SERI's claims

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[357] *Id.* at 27.

[358] *Id.*

[359] *Id.* at 28.

[360] *Id.*

[361] *Id.* at 29 (citing Initial Decision, 171 FERC ¶ 63,003 at PP 173, 187).

[362] *Id.* at 31-32 (citing SERI Brief on Exceptions at 31-32).

[363] *Id.* at 32.

[364] *Id.* at 33.

that the recovery of amounts in excess of the original cost of the Original Sale-Leaseback Assets through the UPSA is just and reasonable.[365]

129. The Mississippi and Arkansas Commissions state that the Lease Renewal should be accounted for as a right-of-use asset.[366] The Mississippi and Arkansas Commissions notes that SERI found the Initial Decision inconsistent with the 1990 Audit Report which accounted for the Original Sale-Leaseback as a financing.[367] The Mississippi and Arkansas Commissions also note that SERI argues that Price Waterhouse Cooper's 2012 *Accounting and Reporting Manual* supports the accounting treatment for the Lease Renewal and subsequent adjustment of the interest rate to re-amortize the remaining $34 million of principal.[368]

130. The Mississippi and Arkansas Commissions believe that treating the Lease Renewal as a financing resulted in 44.6% interest rate—nine times the original interest rate.[369] The Mississippi and Arkansas Commissions assert that SERI's accounting methods were not effective, and they agree with the Initial Decision that lease payments and interest on the Original Sale-Leaseback over 26.5 years was sufficient to amortize the Original Sale-Leaseback financing of $500 million with interest under the original amortization schedule.[370] The Mississippi and Arkansas Commissions note that SERI witness Mr. Stack verified this finding when he testified that SERI established a debt amortization schedule would fully amortize the debt balance by July 2015.[371] The Mississippi and Arkansas Commissions state that the Initial Decision found that, when SERI "re-financed" by entering into the Lease Renewal, SERI stretched out the principal payments which increased the interest rate to fit the "boundaries" of the renewal rental

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[365] *Id.* at 33-34.

[366] *Id.* at 34.

[367] *Id.*

[368] *Id.*

[369] *Id.* at 35.

[370] *Id.* at 35-36.

[371] *Id.* at 36 (citing Ex. SER-0010 at 10 (Stack)).

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payments.[372] The Mississippi and Arkansas Commissions explain that Lease Renewal consists, however, of "just leases," not sale-leasebacks.[373]

131. Thus, the Mississippi and Arkansas Commissions support the finding that SERI must remove those Original Sale-Leaseback rental payments charged to ratepayers on and after January 1, 2014 that exceeded the payments set forth in the original amortization schedule for that part of the Original Sale-Leaseback from the UPSA rates and refunded to ratepayers.[374] However, they assert "that any ratemaking correction for the new leases should *not* include a retroactive return to SERI on rate base that had been funded by ratepayers."[375] The Mississippi and Arkansas Commissions maintain that a refund to customers for the amount SERI over-collected with interest is due with an adjustment to the rate base as of the date of the refund and appropriate rate base thereafter.[376] Moreover, the Mississippi and Arkansas Commissions agree that SERI should stop recording any interest expense applicable to the Original Sale-Leaseback debt beginning July 16, 2015, without a financing arrangement in place at that time.[377] Also, the Mississippi and Arkansas Commissions agree that SERI should record a right-of-use asset and associated obligation resulting from the Lease Renewal agreements[378] and record reductions in the right-of-use asset and associated obligation for the effect of the annual lease rental payments.[379]

4. Briefs Adopting Exceptions

a. New Orleans Council

132. According to the New Orleans Council, the Leased Assets' net book value has an offsetting book regulatory liability that should exceed the net book balance by $90

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[372] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 177).

[373] *Id.* at 37 (citing Initial Decision, 171 FERC ¶ 63,003 at P 328).

[374] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 328).

[375] *Id.*

[376] *Id.* at 37-38.

[377] *Id.* at 38 (citing Initial Decision, 171 FERC ¶ 63,003 at P 196).

[378] The Mississippi and Arkansas Commissions agree with $17,188,500 per year for 21 years, discounted using SERI's incremental borrowing rate. *Id.*

[379] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 196).

million, and if the net book value is included in rates, then the liability should also be.[380] The New Orleans Council also adopts Trial Staff's exceptions that the Initial Decision erred by characterizing the Sale-Leaseback regulatory Liability as a "net liability" by finding the Retail Regulators and Trial Staff's so-called "double recovery" theory flawed for "conflating the Original Sale-Leaseback with the plant operation and management that was SERI's responsibility to perform," and by determining that the just and reasonable plant cost attributable to the Leased Assets as of July 15, 2015, $69,828,988.[381] The New Orleans Council also contends that the Initial Decision erred to the extent it suggested that the Retail Regulators and Trial Staff have the burden of demonstrating that any proposal by SERI to recover in excess of original cost provides no substantial benefits to ratepayers.[382]

5. <u>Commission Determination</u>

133. We affirm the Initial Decision's findings that the Lease Renewal should be considered a stand-alone lease rather than a continuation of the financing under the Original Sale-Leaseback, and that the Commission's original cost principle applies to the Leased Assets. However, as discussed further below, we modify the Initial Decision to require SERI to continue to exclude the net book value of the Leased Assets at the end of the Original Sale-Leaseback and during the Lease Renewal from rates and direct a compliance filing and refunds. We find that through the Original Sale-Leaseback arrangement, SERI has fully recovered from ratepayers through rental payments the original cost of the Leased Assets. In addition, we find that the Lease Renewal payments that SERI has also recovered from ratepayers beginning January 1, 2014 without Commission authorization represent, in their entirety, costs that exceed the original cost of the Leased Assets. Thus, the recovery of the Lease Renewal payments reflects, in substance, unauthorized recovery of an acquisition premium. Accordingly, we direct SERI to exclude all rent expenses effectuated by the Lease Renewal from UPSA rates and direct that any such Lease Renewal rental payments collected from ratepayers be refunded, with interest.

134. As explained above, pursuant to the Original Sale-Leaseback, in exchange for the sale of a 12.8% share of SERI's 90% share of Grand Gulf (equivalently, 11.5% of the entire Grand Gulf) to the Owner-Lessors, SERI received cash proceeds of $500 million and simultaneously leased back the 11.5% undivided interest and maintained possession and responsibility for all aspects of the Leased Assets, including operations, maintenance, repairs, upgrades, insurance, taxes, and other costs and liabilities. The Owner-Lessors

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[380] New Orleans Council Brief Adopting Exceptions at 3.

[381] *Id.* at 5.

[382] *Id.*

acquired the 11.5% interest in part, with borrowed funds through the issuance of notes. The lease payments made by SERI were sufficient to service the debt incurred by the Owner-Lessors and to provide a return of and on investment to the Owner-Lessors.[383]

135. Pursuant to the 1990 Audit Report SERI was required to treat the Original Sale-Leaseback on its books as a financing (long-term debt) rather than as an outright sale and subsequent lease.[384] SERI's required book treatment necessitated that the original cost of the property, the accumulated provision for depreciation, and the ADIT related to the 11.5% interest be retained on its books; and that depreciation expense related to the 11.5% interest continue to be charged over the estimated service life of the facilities. Additionally, the $500 million of proceeds and interest was required to be accounted for in Account 224, *Other long-term debt* and Account 427, *Interest on long-term debt*. For SERI's ratemaking treatment, the Commission approved a 1991 Settlement that allowed SERI to include the Original Sale-Leaseback lease payments in its UPSA rate as an operating expense. The Original Sale-Leaseback transaction resulted in an after-tax gain of $12 million, which SERI classified to Account 253, *Other deferred credits*. The 1991 Settlement required SERI to credit the after-tax gain on the Original Sale-Leaseback investment to customers in UPSA rates. Pursuant to the 1990 Audit Report SERI was also required to establish a regulatory asset or liability in Account 186, *Miscellaneous deferred debits* or Account 253, *Other deferred credits*, as appropriate, to recognize any differences that would arise between its book treatment and ratemaking treatment of the Original Sale-Leaseback transaction.

136. Nearing expiration of the Original Sale-Leaseback, SERI exercised an option to renew the leasing of the 11.5% interest in Grand Gulf. In 2013 and 2014, SERI entered into the Lease Renewal for an additional 21 years, commencing on July 15, 2015 and ending on July 15, 2036. SERI agreed to pay a semi-annual amount of $13.750 million and $3.438 million, or approximately $17.188 million in new annual rental payments. The estimated rental amount for the entire lease renewal term is approximately $361 million. The record shows that SERI did not receive cash proceeds to enter into the Renewal Lease, and the Owner-Lessors did not issue new debt to retain the 11.5% interest in Grand Gulf that they already owned. The record also shows that SERI maintained the same book treatment for the Renewal Lease as the Original Sale-Leaseback, by invoking a *re-financing* of what remained of the financing under the

[383] Ex. No. S-0011.

[384] Docket No. FA89-28-000, FERC Audit Report, Division of Audits of the Office of Chief Accountant, at Schedule No. 3 (Dec. 21, 1990).

Original Sale-Leaseback by stretching out the remaining principal payments and changing the interest rates to fit the boundaries of the Lease Renewal rental payments.[385]

137. While there is no dispute that SERI accounted for the Original Sale-Leaseback transaction as a financing, as required, the parties disagree as to whether the Lease Renewal payments are merely a continuation of the original financing arrangement or qualify as a new stand-alone lease. As discussed below, we agree with the Initial Decision that the Lease Renewal should be evaluated on a stand-alone basis and is considered a stand-alone lease rather than a continuation of financing primarily because no cash proceeds were involved, no debt was issued, and the "financing" component of the "original sale-leaseback" ended at its expiration. Regarding the parties' disagreement about the appropriate UPSA rate treatment for the Lease Renewal payments, as discussed further below, we agree with the Initial Decision that the Commission's original cost principle applies to the Leased Assets. The Commission's longstanding accounting regulations require utilities to record the value of their electric plant on an original cost basis. Original cost is defined as "the cost of such property to the person first devoting it to public service."[386] Thus, when a utility constructs a new plant, the cost of construction is recorded at the original cost. Additionally, when a utility acquires property already dedicated to public service, the original cost principle governs the accounting treatment of the transaction.[387] The application of the original cost principle to cost of service accounting and ratemaking is necessary to prevent consumers from paying twice for the same asset. Under Commission policy, rate recovery of an existing facility is generally limited to the original cost of the facility and recovery of acquisition premiums in cost-based rates is allowed only if the acquisition is prudent and provides measurable, demonstrable benefits to ratepayers.[388] Therefore, though the issues raised in the instant proceeding involve a lease and lease renewal, rather than construction or acquisition of an asset, we believe it is appropriate to apply the Commission's original cost principle here in order to evaluate the appropriate cost of service accounting and ratemaking treatment. We also find that costs in excess of the original cost of an asset, whether in the context of

[385] Initial Decision, 171 FERC ¶ 63,003 at P 177.

[386] 18 C.F.R. pt 101, Definitions (2021).

[387] See *id.* at Electric Plant Instruction No. 5 (2021).

[388] *Ameren I*, 140 FERC ¶ 61,034 at P 30 (citing *Minn. Power & Light Co.*, 43 FERC ¶ 61,104, at 61,342, *reh'g denied*, 43 FERC ¶ 61,502 (1988); *Duke Energy Moss Landing, LLC*, 83 FERC ¶ 61,318, at 62,304 (1998); *PSEG Power Conn.*, 110 FERC ¶ 61,020, at P 32 (2005)).

a purchase or a lease, can constitute an acquisition premium in substance.[389] As discussed further below, we find the that Lease Renewal payments represent costs in excess of the original cost of the Leased Assets. Thus, we find that the portion of the lease payments that were attributable to the Lease Renewal charged to ratepayers on and after January 1, 2014 that exceeded the payments set forth in the original amortization schedule under the Original Sale-Leaseback to be unjust and unreasonable because they exceeded the original cost of the Leased Assets. We similarly find SERI's re-amortization within the Lease Renewal of the principal payments and interest charges in the Original Sale-Leaseback, on and after January 1, 2014, in order to sustain a continual accounting treatment pursuant to the 1990 Audit Report and UPSA rate recovery treatment pursuant to the 1991 Settlement, to be unjust and unreasonable. We agree with the Initial Decision that these excess payments must be removed from SERI's UPSA rates and refunded to customers.

138. We agree with the Initial Decision that SERI inappropriately treated the Lease Renewal as an extension of the financing initiated by the Original Sale-Leaseback.[390] We disagree with SERI's contention that its "continuing involvement" in Grand Gulf necessitates that the Lease Renewal be treated as a financing. *Section 12. Lease Renewal* of the [Facility Lease No. 1] underlying the Original Sale-Leaseback states in part that "at the end of the Basic Lease Term, provided that. . . all Notes shall have been paid in full, the Lessee shall have the option to renew the term of this Facility Lease."[391] We also note that, the Lease Renewal instruments indicate that, as of January 15, 2013, all notes have been paid in full and are no longer outstanding.[392] Consequently, we find that the "financing" component of the Original Sale-Leaseback ended at its expiration. Concerning the Original Sale-Leaseback, the Chief Accountant determined that, for accounting purposes, the transaction should be treated as a *financing* arrangement rather than a *sale* of facilities under Commission precedent, as the "leveraged lease arrangement is essentially a financing device which serves to reduce Applicant's cost-of-service."[393] SERI's contention that the Lease Renewal also had to be accounted for as a financing to comply with the 1990 Audit Report ignores the fact that a central exchange in the

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[389] *Carolina Power & Light Co.*, 40 FPC at 1122 ("The Commission has consistently required payments for acquisition of utility property in excess of original cost to be accounted for below the line whether the form of acquisition is by purchase, or by lease." (footnotes omitted).

[390] Ex. S-0017.

[391] Ex. S-0015.

[392] Ex. S-0017.

[393] *Pac. Power & Light Co.*, 3 FERC ¶ 61,119 (1978).

Original Sale-Leaseback, namely, SERI's receipt of cash proceeds in exchange for the transfer of ownership interest, did not again occur under the Lease Renewal. Instead, at the inception of the Lease Renewal, the financing was fully paid, and the Owner-Lessors did not issue any new debt. We agree with the Initial Decision's finding that, under the Lease Renewal, the "sale leaseback" portion of the transaction ended and there is no longer a financial transaction in the form of a sale of plant, there is only a bare lease of plant by the Owner-Lessors to SERI.[394] Further, as the Louisiana Commission observes, in developing the Lease Renewal agreement, the parties to the Lease Renewal determined the new rental payment amount for the Leased Assets after negotiation, litigation, and arbitration among the parties, and the parties selected a 21-year term, rather than the 3-year renewal term set forth in SERI's initial notice of renewal.[395] We therefore conclude that the Lease Renewal should be evaluated as a stand-alone lease.[396]

139. We agree with the Initial Decision's overall finding that SERI's re-amortization of principal payments and interest charges that factored the 21-year Lease Renewal into the Original Sale-Leaseback on, and after January 1, 2014, to be unjust and unreasonable as stated above, namely because "[t]he principal and interest components of the original financing were re-arranged to fit the boundaries of the renewal rental payments that SERI negotiated with the Owner-Lessors by extending a small remainder of the original principal into the term of the Renewal Leases and by inflating the interest payment to fill the remaining void."[397] The record shows that this "re-arranging" amounted to SERI stretching out the few remaining principal payments of the Original Lease over an additional 21 years and boosting the annual interest rate to 44.46% to generate principal and interest equivalent to the present value of lease payments under the Lease Renewal.[398] The 44.46% annual interest rate did not reflect SERI's incremental borrowing rate, but rather an imputed rate used to mathematically derive a debt amortization schedule to fit the terms of the Lease Renewal.[399] We find SERI's accounting treatment on and after January 1, 2014 of the debt generated, rather than

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[394] Initial Decision, 171 FERC ¶ 63,003 at P 53.

[395] *E.g.*, Ex. LC-0017 at 2-3, 10.

[396] While the dissent argues that the Lease Renewal is a mere continuation of the Original Sale-Leaseback, the different structures and purposes of the two transactions and the facts surrounding the eventual agreement on the terms of the Lease Renewal indicate that the Lease Renewal is a new and separate transaction.

[397] Initial Decision, 171 FERC ¶ 63,003 at P 177.

[398] *See* Ex. SER-0010 at 6:2-5, 10:1-17, 15:21-17:3 (Stack Ans. Test.).

[399] *See* Ex. S-0010 at 60:1-7 and 61:1-8 (Nicholas Dir./Ans. Test).

actually incurred, using an imputed interest rate of 44.46% to be an improper representation of an extension of the financing initiated by the Original Sale-Leaseback and the ensuing continual charges of rent expense in the UPSA supported by this action to be unjust and unreasonable.[400] Thus, we agree with Trial Staff that at the conclusion of the Original Sale-Leaseback, Account 224, *Other long-term debt*, should have had a zero balance and beginning July 16, 2015, SERI should have ceased recording associated interest expense in Account 427, *Interest on Long-term Debt* given that the record shows that SERI fully repaid its debt obligation pursuant to the Original Sale-Leaseback before the commencement of the Lease Renewal[401] and amounts reported in Account 224, *Other long-term debt*, on and after January 1, 2014 attributable to the Lease Renewal using the 44.46% imputed interest rate do not reflect a new financing arrangement. Therefore, we conclude that the Lease Renewal is no longer subject to the "continuing involvement" criteria used to determine whether the Original Sale-Leaseback arrangement constituted a financing or sale. We find that the Lease Renewal is subject to USofA General Instruction No. 19, *Criteria for Classifying Leases*, which would require applying specific criteria to determine its classification as either an operating lease or capital lease for accounting and reporting purposes and General Instruction No. 20, *Accounting for Leases*. Despite the fact that SERI already recognizes the original cost of the property, accumulated provision for depreciation, and accumulated deferred income taxes related to the 11.5% interest for accounting and reporting purposes, it is appropriate for SERI to separately record a right of use asset and associated obligation for the Lease Renewal, over the 21-year term, discounted using SERI's incremental borrowing rate, and additionally record reductions in the right of use asset and associated obligation for the effect of the Lease Renewal payments.

140. We disagree with SERI's contention that this recommendation is inconsistent with the recommendation made in the 1990 Audit because the audit did not evaluate the treatment of SERI's Lease Renewal payments and was limited to evaluating the appropriate accounting and reporting treatment of the Original Sale-Leaseback transaction. As discussed above, we find that the Lease Renewal should be evaluated as a stand-alone lease, and we do not dispute here previous findings regarding the treatment of the Original Sale-Leaseback transaction. SERI contends that this treatment is unworkable because it would result in the original cost and net book value of the plant remaining on SERI's books, while SERI would also have another asset (i.e., the right of

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[400] The record shows that on its 2015 FERC Form No. 1 report, SERI reported having an implicit rate of 5.13% associated with the Lease Renewal lease payments, rather than the 44.46% imputed rate. *See* Initial Decision, 171 FERC ¶ 63,003 at P 90.

[401] Ex. S-0017 (Nicholas Dir./Ans. Test.).

use asset) on its books that corresponds to the same portion of the plant.[402] However, such accounting and reporting would reflect the economic reality that SERI has opted to recover its original investment in the now leased asset through customer lease payments under the Original Sale-Leaseback transaction, and has subsequently entered into a lease arrangement under the Lease Renewal to pay for the use of that *same* asset which represent payments that are beyond the cost of its original investment, while continuing to depreciate the original investment over its useful life as required for accounting and reporting purposes.

141. SERI advocates that a single measure of prudency, rather than consideration of the original cost of the 11.5% interest in Grand Gulf, should be applied when assessing the justness and reasonableness of the inclusion of associated Lease Renewal payments in rates. SERI also reasons that because parties were aware that the Original Sale-Leaseback agreement contained an option to renew, and SERI exercised that option, the Original Sale-Leaseback and Lease Renewal are considered one continuous transaction that is permitted to be recovered in rates, pursuant to the terms of the 1991 Settlement. Additionally, SERI argues that the Initial Decision recommends "continuing" a rate methodology that never was in place as the net book value of the Leased Assets never had any bearing on UPSA rates, and that SERI never recovered costs based on the "rate base of the Leased Assets."[403] We acknowledge that the Leased Assets did not receive rate base treatment. Nonetheless, we reject SERI's supposition that the net book value of the Leased Assets did not have any bearing on UPSA rates. Based on the record here, we understand that the difference between SERI's receipt of $500 million in sale proceeds and the Leased Assets' net book value of $398 million, which consists of the original cost, at the time of the Original Sale-Leaseback transaction resulted in an approximate $12 million after-tax gain[404] that was credited to customers in UPSA rates.[405] Pursuant to Commission policy,[406] SERI was required by the 1991 Settlement to pass on the benefit of the gain to customers in the form of reduced lease payments and to continue removing the after-tax gain on the Original Sale-Leaseback from rate base for UPSA

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[402] SERI Brief on Exceptions at 52.

[403] *Id.* at 24.

[404] Ex. LC-0001 at 17:11-14 (Sisung Dir. Test.) (Revised); Ex. SER-0001 at 18:3-9 (Schnitzer Ans. Test.).

[405] Ex. LC-0001 at 20:14-16 (Sisung Dir. Test.) (Revised); Ex. SER-0001 at 18:3-9 (Schnitzer Ans. Test.).

[406] *See Am. Elec. Power Serv. Corp.*, 49 FERC ¶ 61,377 at 62,381 (1989).

purposes.[407] Thus, despite SERI's contentions, this outcome resulted in the rate recovery of lease payments during the Original Sale-Leaseback being limited to the net book value of the Leased Assets or the original cost of the Leased Assets. The Commission applied its original cost principle to the Leased Assets during the Original Sale-Leaseback, but SERI offers no credible argument as to why this same policy would not still apply during the Lease Renewal, which involves the same Leased Assets. Even if the Commission were to accept SERI's contention that the Original Sale-Leaseback and Lease Renewal should be viewed as a single transaction, the Commission would still apply its original cost principle to SERI's recovery of the Lease Renewal payments in UPSA rates. Thus, we find that the original cost principle continues to apply to the Leased Assets during the Lease Renewal term, irrespective of the Lease Renewal's classification as a stand-alone lease or continuation of the original lease.

142. SERI contends that all parties understood that the rates agreed upon in the 1991 Settlement would be lower than traditional rates in the early years and higher in the later years.[408] We disagree, however, with SERI's conclusion that parties should have anticipated that the Original Sale-Leaseback was not intended to end in 2015, despite the explicit July 2015 expiration date memorialized in the 1991 Settlement. The record shows that, after July 2015, SERI was not guaranteed further ownership or leasehold of the Leased Assets.[409] Thus, there was no reason to conclude at that time that the Original Sale-Leaseback would continue indefinitely. SERI further argues that the Commission's threshold requirement for challenging sale-leaseback related costs in formula rates is a benefits analysis that compares the effects of original cost ratemaking. For support, SERI cites the 1990 analysis previously performed by Trial Staff that demonstrated that the Original Sale-Leaseback resulted in "substantial savings" to customers.[410] Nevertheless, SERI fails to acknowledge that this analysis assumed a July 2015 expiration and did not contemplate any costs or benefits beyond this date. At any rate, the arguments surrounding the prudence and benefits resulting from the Original Sale-Leaseback have already been previously litigated and resolved pursuant to the 1991 Settlement. The instant proceeding involves the evaluation of costs under the Lease Renewal; therefore, the prudence and benefits of the Original Sale-Leaseback need not be litigated again here. In other words, any benefits from the Lease Renewal must be separately evaluated from those previously considered under the Original Sale-Leaseback. We find that the record

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[407] Ex. LC-0001 at 20:4-18 (Sisung Dir. Test.) (Revised); Ex. LC-0010 at 96-97. (Explanatory Statement and References in Support of Offer of Settlement, ¶ I.3, pp. 5-6).

[408] SERI Brief on Exceptions at 25-26.

[409] Ex. S-0019 (Barnes Dir. Test. in Docket No. ER89-678-000).

[410] SERI Brief on Exceptions at 34 (citing Opinion No. 446, 92 FERC at 61,455).

shows that the lease payments and interest on the Original Sale-Leaseback recovered through rent expense in UPSA rates totaled $1,231,695,688 by July 15, 2015.[411] This amount represents *in substance* a recovery from customers of the original cost of the Leased Assets, i.e., recovery of the $398 million net book value of the Leased Assets as stated at the time of commencement of the Original Sale-Leaseback transaction plus a return, despite its *form* as a sale-leaseback transaction and treatment as a financing for book purposes.[412]

143. SERI maintains that, because it did not acquire any new assets, did not use the Lease Renewal to write-up rate base, and did not earn a return on the Leased Assets, the Commission's acquisition adjustment policy cannot be applied to the Lease Renewal. Like the original cost concept, SERI argues that the applicability of the acquisition adjustment policy is limited here due to the *form* of the sale-leaseback transaction and by extension, the Lease Renewal. However, we find that the Commission's existing policies are sufficient and appropriate to resolve this issue and agree with the Initial Decision's finding that the acquisition adjustment policy can apply to the Lease Renewal. We disagree with SERI's view that the Initial Decision incorrectly relies on *Carolina Power & Light II* as relevant precedent because SERI did not acquire the Leased Assets under the Lease Renewal, and that the Initial Decision failed to accurately apply *Alamito/Century* and Opinion No. 446 in determining the justness and reasonableness of the renewal lease costs.[413] SERI reasons that because customers received benefits, including the gain off-set, through the Original Sale-Leaseback, these same benefits should be weighed against the costs to extend the arrangement to 2036 under the Lease Renewal. SERI fails to acknowledge, however, that its recovery of the original cost of the Leased Assets through its UPSA rent expense during the 26.5 year Original Sale-Leaseback term represents an accelerated cost recovery, as opposed to recovery over the longer estimated service life of Grand Gulf through depreciation expense.[414]

144. We do not disagree with the Commission's previous determination that the Original Sale-Leaseback, rather than a traditional cost of service recovery of the Leased Assets, would result in benefits to customers. However, SERI's decision to enter into the Original Sale-Leaseback, in addition to the benefits accrued to it and its customers as a

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[411] Ex. LC-0001 at 17:1-2 (Sisung Dir. Test.) (Revised); Ex. LC-0006 at 2-3; Ex. S-0010 at 25:4-7 (Nicholas Dir./Ans. Test.).

[412] Accordingly, we disagree with the dissent's reliance on SERI's explanation that the Lease Renewal does not involve an acquisition premium.

[413] SERI Brief on Exceptions at 36.

[414] Grand Gulf's expected service life ends in 2044. *See* Initial Decision, 171 FERC ¶ 63,003 at P 433.

result of the transaction, are not issues that warrant re-litigation in the instant proceeding because these matters have already been borne out and resolved in the 1991 Settlement. Thus, we limit this proceeding to considering the customer benefits that would accrue under the Lease Renewal, which, as noted above, will run from July 15, 2015 to July 15, 2036. SERI argues that *Alamito/Century* and Opinion No. 446 make clear that a complaint contesting the justness and reasonableness of including sale-leaseback lease costs or other sale-leaseback costs in rates must address whether the rates encompassing the sale-leaseback arrangement result in net benefits to customers.[415] However, based on the record in this proceeding, we find that the Retail Regulators and Trial Staff have shown that SERI has recovered the original cost of the Leased Assets through the Original Sale-Leaseback and subsequently recovered, in substance, an acquisition premium under the Lease Renewal, but SERI has not then adequately demonstrated the measurable benefits to customers from the Lease Renewal. Absent express authorization to recover acquisition premiums or costs in excess of the original cost, the Commission requires removal of the effects of those costs from a utility's cost of service; ratepayers should not be affected by any amounts related to these excess costs without a proper showing to the Commission.[416] The Commission requires that for a utility to receive rate recovery of any amounts related to an acquisition premium, a public utility must request Commission authorization pursuant to section 205 of the FPA,[417] and the same holds true here for amounts related to the Lease Renewal.

145. We agree with the Initial Decision's finding that *Carolina Power & Light II* is applicable to the assessment of whether lease rental payments or lease renewal payments can be considered "far in excess of the depreciated original cost,"[418] of a leased asset. SERI contends that, unlike the distribution facilities at issue in *Carolina Power & Light II*, the Leased Assets have never been subject to original cost ratemaking since SERI entered the Original Sale-Leaseback, and the Lease Renewal simply continued the ratemaking treatment that was in place for the prior 26 years.[419] We reject SERI's inference that, because the Leased Assets did not receive rate base treatment for rate purposes, SERI is no longer subject to the Commission's ratemaking policies. As discussed above, we find that the Commission applied the original cost principle to the Leased Assets during the Original Sale-Leaseback. The application of the original cost

[415] *Id.* at 34.

[416] *See ITC Holdings Corp.*, 139 FERC ¶ 61,112, at PP 50-53 (2012).

[417] *Ameren I*, 140 FERC ¶ 61,034 at P 31 (citing *Duke Energy Moss Landing*, 86 FERC at 61,816).

[418] *Carolina Power & Light II*, 433 F.2d at 160.

[419] SERI Brief on Exceptions at 29-30.

principle is not conditioned upon perceived benefits accrued to ratepayers; it is an accounting and ratemaking measure used to capture "the cost of such property to the person first devoting it to public service."[420] The original cost principle is guided by the Commission's fundamental tenet that consumers should pay only once for property devoted to the public use.[421] The Leased Assets' original cost was known and measured when SERI entered into the Original Sale-Leaseback, and was subsequently applied to UPSA rates to exclude recovery of the after-tax gain or acquisition adjustment. SERI incorrectly reasons that an acquisition adjustment only existed for the gain on the "Sale" aspect of the Original Sale-Leaseback, and cannot also exist for lease payment costs incurred beyond the Original Sale-Leaseback, such as the Lease Renewal payments. We disagree and find that an acquisition adjustment, in substance, does exist for the Lease Renewal payments.

146. We modify the Initial Decision to require SERI to continue to exclude the net book value of the Grand Gulf Leased Assets (based on their net book value at the outset of the Original Lease, and depreciated by the 2.85% annual depreciation rate based on the useful life of the plant) at the end of the Original Sale-Leaseback and during the Lease Renewal from rates. We disagree with the Initial Decision's determination that the maximum amount that can be charged to ratepayers over the term of the Lease Renewal, consistent with the Commission's original cost principle, is "no more than an UPSA revenue requirement computed according to the UPSA formula, based on the continuing cost of service and rate base of the Leased Assets, with the rate base being no more than that net book value."[422] As discussed above, we have determined that SERI has already recovered the original cost of the Leased Assets during the Original Sale-Leaseback through rental payments included in cost of service, and while a net book value of Leased Assets remains as of July 15, 2015 for accounting and reporting purposes, SERI has opted to accelerate the recovery of Leased Assets from ratepayers through the Original Sale-Leaseback arrangement itself. Therefore, the sale-leaseback regulatory liability and net book value of the Leased Assets shall continue to be excluded from UPSA rates. We also disagree with the Initial Decision's characterization that:

> there has been *no* recovery of the operating, maintenance, or capital costs of the Leased Assets from ratepayers at all during the term of the Original Lease; there has *only* been the recovery from ratepayers of loan repayments

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[420] 18 C.F.R. pt. 101, Definition 23, Original Cost (2021).

[421] *Carolina Power & Light II*, 433 F.2d at 160.

[422] Initial Decision, 171 FERC ¶ 63,003 at P 134.

> . . . . there had not even been an “initial” recovery of the costs of the Leased Assets under the Original Lease.[423]

This finding is inconsistent with the Initial Decision’s overall finding and inconsistent with record evidence. The record does not provide that operations, maintenance, repairs, upgrades, insurance, taxes, and other costs and liabilities that SERI remained responsible for pursuant to the terms of the Original Sale-Leaseback were not recovered from ratepayers outside of rent expenses under the UPSA formula rate. In other words, the record does not show that the aforementioned expenses associated with the 11.5% leased portion of Grand Gulf were excluded elsewhere in UPSA rates where they are otherwise generally recoverable through the provisions of the UPSA formula rate, notwithstanding the treatment of the Original Sale-Leaseback transaction as a financing or the Lease Renewal as a capital lease. Additionally, we find that ratepayers were subject to paying for the original cost of SERI’s capital investment in the Leased Assets used to form the basis of the Original Sale-Leaseback transaction, and such payments should not be misconstrued as simply “loan repayments” rather than costs that SERI recovered from ratepayers.

147. We direct SERI to make a compliance filing within 60 days of the issuance of this order to compute and record the correct regulatory liability and net book value of the Leased Assets as of July 15, 2015, based on their net book value at the outset of the Original Lease, and depreciated by the 2.85% annual depreciation rate based on the useful life of the plant. We modify the Initial Decision to exclude all rent expenses effectuated by the Lease Renewal from UPSA rates. We direct SERI make refunds, with interest, for all amounts recovered under the Lease Renewal and the portion of the lease payments that were charged to ratepayers on and after January 1, 2014 that exceeded the payments set forth in the original amortization schedule under the Original Sale-Leaseback, as discussed above.[424] We direct SERI to refile its FERC Form No. 1s beginning December 31, 2014 to properly account for the commencement of a stand-alone lease rather than a continuation of a financing arrangement, as discussed above. SERI must make the appropriate disclosures to the notes and footnotes of all affected account balances for years 2014 through 2021.

148. In making these directives, we note that SERI has been recovering the costs of the Lease Renewal rental expenses as inputs to the formula rate contained in the UPSA. As the Commission has noted on multiple occasions, the formula (which, in this proceeding,

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[423] *Id.* P 125 (emphases in original).

[424] As noted above, to the extent that the Commission directs the provision of refunds, Entergy Mississippi shall only receive refunds pursuant to the Settlement and not pursuant to the directives of this order.

is embodied in the UPSA) is the rate and the inputs that are applied as part of the formula are not part of the rate.[425] Consequently, we are enforcing the filed rate and finding that the inclusion of the rental expenses under the Lease Renewal as inputs into the UPSA formula rate is not just and reasonable. Additionally, we note, as discussed in more detail in the discussion of Issue 3, that SERI should have, but did not, file an FPA section 203 request for prior authorization of the Lease Renewal. Therefore, the Commission has had no opportunity to examine the Lease Renewal's effect on rates even pursuant to FPA section 203.[426]

B. Issue 2: Are the Lease Renewal Payments Just and Reasonable to the Extent that those Payments Reflect the Value of Capital Additions?

1. Initial Decision

149. The Initial Decision finds that the reduction of ratepayers' responsibility for the Lease Renewal down to an UPSA revenue requirement based upon the remaining net book value of the Leased Assets as of July 15, 2015, calculated according to the depreciation rate over the useful life of Grand Gulf ensures that there is no double recovery of capital addition costs from ratepayers.[427] Additionally, the Initial Decision

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[425] *See*, *e.g.*, *Va. Elec. Power Co.,* 123 FERC ¶ 61,098, at P 50 (2008); *see also Sys. Energy Res., Inc.*, 48 FERC ¶ 61,321, at 62,066 (1989) ("SERI's rate schedule is a formula rate. When approving a formula rate, the Commission approves the formula as the rate, but not the actual collections under the formula. . . . when we order corrected accounting entries which may affect billings, we may also order refunds."); *see also, e.g.*, *Ameren II*, 147 FERC ¶ 61,225 at P 25 ("Under Commission policy, rate recovery of an existing facility is generally limited to the original cost of the facility, and recovery of acquisition premiums, including goodwill, in cost-based rates is only allowed if the acquisition is prudent and provides measurable demonstrable benefits to ratepayers. Absent express authorization to recover acquisition premiums and goodwill, the Commission requires removal of the effects of acquisition premiums and goodwill from a utility's cost-of-service.").

[426] We recognize that "[o]ur analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable" under FPA section 205. *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009). It is worth noting, however, that SERI never submitted a filing pursuant to either FPA section 203 or 205 to recover the costs of the Lease Renewal rental expenses.

[427] Initial Decision, 171 FERC ¶ 63,003 at P 259.

states that SERI's accounting for the capital additions is not unjust and unreasonable but should be better specified.[428]

150. The Initial Decision also states that it is not essential that the capital additions attributable to the Leased Assets be included in the fair market valuation of the Lease Renewal because ratepayers will pay during the Lease Renewal term an UPSA revenue requirement based only on the remaining net book value of the original Leased Assets and will not pay the acquisitions premium embedded in the Lease Renewal assets.[429]

151. Regarding the accounting, the Initial Decision notes that accounting practices "are not controlling for ratemaking purposes."[430] The Initial Decision also states that SERI's posting errors in sub-accounts that populate the inputs to the UPSA formula rate do not implicate the filed rate doctrine because the inputs are not part of the filed rate.[431] The Initial Decision states that, as long as SERI keeps a list of accounts by which it can reconcile its own numbers with the USofA, which the Initial Decision finds that the SERI can do, there is no filed rate doctrine violation, and the capital additions should not be excluded from the UPSA rate, and refunds are not warranted.[432]

2. Briefs on Exceptions

a. SERI

152. SERI disputes the Initial Decision's suggestion that, if SERI were permitted to recover all of the Lease Renewal payments, recovery of the capital addition costs would be a "double recovery."[433] SERI states that complainants fail to recognize that SERI's end-of-lease options were the fair market renewal option, which includes the value of the capital additions, and the fixed rate renewal option, which did not include those costs, but

[428] *Id.*

[429] *Id.* P 245.

[430] *Id.* P 248.

[431] *Id.* P 254.

[432] *Id.* P 258.

[433] SERI Brief on Exceptions at 46 (citing Initial Decision, 171 FERC ¶ 63,003 at P 245).

which was more expensive. SERI states that it selected the lower-cost option, and nothing suggests that ratepayers were adversely affected by SERI's decision.[434]

3. Briefs Opposing Exceptions

a. Trial Staff

153. Trial Staff argues that the FPA prohibits SERI from recovering the cost of Net Capital Additions twice through the Lease Renewal. Trial Staff explains that during the Original Sale-Leaseback, SERI made approximately $154 million in Net Capital Additions to the leased interest, which became the property of the Owner-lessors at expiration,[435] and asserts that the Initial Decision correctly determined that the negotiated fair market value of $17.188 million annual Lease Renewal payments must reflect the value of the Net Capital Additions, because no participant contested that fact.[436] Additionally, Trial Staff argues that, because SERI fails to rebut the Initial Decision's findings that (1) SERI may continue to collect recovery of and return on the Net Capital Additions in UPSA rate base,[437] and (2) the double recovery in Lease Renewal payments would impose an acquisition adjustment that confers "no benefits and imposes only disadvantages" on SERI's customers that would not have resulted if SERI reacquired or surrendered the lease,[438] the Commission should reject SERI's analysis.

154. Trial Staff argues that the Initial Decision correctly rejects SERI's prudence standard as being determinative of the reasonableness of the Lease Renewal payments by noting that the Commission's standard for the recovery of acquisition premiums in cost-based rates like the UPSA formula rate includes two prongs: (1) whether the acquisition is prudent; and (2) whether the acquisition provides specific, measurable, substantial benefits to customers.[439] Trial Staff contends that the Commission should reject SERI's prudence standard as an unsubstantiated, unprecedented, and impossible-to-fail test that grants SERI self-imbued ratemaking authority that circumvents the Commission's

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[434] *Id.*

[435] Trial Staff Brief Opposing Exceptions at 26 (citing Ex. S-0030 at 1 (Trial Staff Depreciation Adjustments)).

[436] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 242).

[437] *Id.* at 2 (citing Initial Decision, 171 FERC ¶ 63,003 at P 245).

[438] *Id.* at 27 (citing Initial Decision, 171 FERC ¶ 63,003 at P 173).

[439] *Id.* at 31 (citing Initial Decision, 171 FERC ¶ 63,003 at P 115).

statutory obligation under the FPA to ensure that all jurisdictional rates are just and reasonable.[440]

b. Louisiana Commission

155. The Louisiana Commission argues that the Commission should disallow the Lease Renewal payments because they contain a second payment for the cost of Net Capital Additions, which are already included in SERI's rates for the non-Leased Assets. The Louisiana Commission argues that a significant portion of these costs has already been recovered from ratepayers, and the remaining net book value is still included in rate base and SERI earns a return of and on that investment. The Louisiana Commission states that the Net Capital additions enhanced the value of the Leased Assets and thus are incorporated in the Lease Renewal rental payments, which were based on a negotiation of fair market value.[441]

156. The Louisiana Commission states that SERI expert witness Mr. Shrank confirmed that the payments for the enhanced value of the leased property constitute a double payment. The Louisiana Commission states that allowing a utility to collect twice for the same costs violates original cost ratemaking. More specifically, it states that it violates the prohibition in FPA section 302 on collection more than once "in any form" for depreciation.[442]

c. SERI

157. Reiterating arguments from its brief on exceptions, SERI disagrees with the Louisiana Commission's argument that SERI's inclusion of capital additions in the formula rate results in a double payment by virtue of SERI's payment of fair market value for the Lease Renewals.[443]

d. Mississippi and Arkansas Commissions

158. The Mississippi and Arkansas Commissions state that SERI's double recovery of costs for Capital Additions under the Lease Renewal is not just and reasonable. They

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[440] *Id.* at 32 (citing 16 U.S.C. § 824d(a)).

[441] Louisiana Commission Brief Opposing Exceptions at 43-44 (citing Ex. LC-0001 REV at 78 (Sisung)).

[442] *Id.* at 45-46 (citing 16 U.S.C.§ 825a(a)).

[443] SERI Brief Opposing Exceptions at 66-67 (citing Ex. SER-0008 at 17-18 (Shrank)).

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argue that the Initial Decision found that SERI as well as all parties agreed that ratepayers made a double payment of the cost of the Capital Additions attributable to the Leased Assets.[444] The Mississippi and Arkansas Commissions assert that, beyond SERI's "prudence" defense, SERI offers no reason to justify the double recovery of Grand Gulf asset Capital Additions cost from its ratepayers.[445] The Mississippi and Arkansas Commissions explain that the original cost ratemaking principle[446] precludes the collection of Capital Additions costs from the Original Sale-Leaseback Renewal rental payment expense under the UPSA.[447]

4. Commission Determination

159. We agree with the Initial Decision that SERI's accounting for the Net Capital Additions is not unjust and unreasonable but that the accounting should be better specified, as detailed below.[448] Despite the Louisiana Commission's and Trial Staff's concerns regarding SERI's alleged use of Account 101.1, *Property Under Capital Lease*, to label its capital additions, SERI asserts that the costs of the Net Capital Additions are included in Account 101, and recovered in the UPSA rate base portion of the formula.[449] The parties concede that SERI includes the entire cost of the capital additions in the plant balances used to compute SERI's rate base in the UPSA formula rate, whether they are owned by SERI or by the Owner-Lessors,[450] and that ratepayers have paid, and still are paying, for Net Capital Additions made during 1989 through June of 2015.[451] The Initial Decision finds that SERI's posting errors in sub-accounts that populate the inputs to the UPSA formula rate do not implicate the filed rate doctrine because the inputs are not part

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[444] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 30 (citing Initial Decision, 171 FERC ¶ 63,003 at P 242).

[445] *Id.* at 31.

[446] *Id.* (citing *Carolina Power & Light II*, 433 F.2d at 158 (a "fundamental tenet" of Commission ratemaking is "that consumers should pay only once for property devoted to the public use."))

[447] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at PP 245-247).

[448] Initial Decision, 171 FERC ¶ 63,003 at P 259.

[449] Ex. SER-0017 at 7:8-12 (Fontan Ans. Test.).

[450] Trial Staff Post-Hearing Initial Brief at 22.

[451] Louisiana Commission Pre-Hearing Brief at 13.

of the filed rate,[452] but that SERI can and should keep a list of accounts by which it can reconcile its own numbers with the number system of the USofA. We agree that there is no filed rate doctrine violation if the Net Capital Additions were recorded in Account 101 and that the Net Capital Additions should not be excluded from UPSA rates. It is appropriate to record the cost of capital additions in Account 101; however, SERI's use of Account 404, Amortization of Limited-Term Electric Plant and Account 111, Accumulated Provision for Amortization of Electric Utility Plant for amortization and accumulated depreciation of the capital additions is not appropriate. Since the capital additions or improvements are not terminable by action of the lease and must be depreciated over Grand Gulf's service life, similarly, as directed for the Leased Assets pursuant to the1990 Audit Report, SERI must make correcting entries and prospectively record depreciation expense in Account 403 and accumulated depreciation in Account 108.

160. We agree with the Initial Decision's finding that SERI should continue to collect recovery of, and a return on, Net Capital Additions in UPSA rate base, but that these capital additions should not also be recovered through Lease Renewal payments because doing so would result in a double recovery of the same cost. The Initial Decision states that the Retail Regulators, Trial Staff, and SERI agree that there is a double payment for the cost of the Net Capital Additions, one embedded in the UPSA cost of service rate during the Original Sale-Leaseback, and the other embedded in the negotiated fair market value of the Leased Assets that form the basis for the Lease Renewal payments.[453] SERI contends that complainants overlook the fact that SERI's options upon expiration of the Original Sale-Leaseback were the fair market renewal option, which included the value of the capital additions, and the fixed rate renewal option, which did not include the value of the capital additions, but proved to be more expensive.

161. Although we agree that SERI's accounting for the Net Capital Additions is not unjust and unreasonable, we find a double recovery of costs, capital additions or otherwise, through customer rates to be unjust and unreasonable, and conclude that SERI's customers have been responsible for a *double payment* for the cost of capital additions attributable to the Leased Assets. SERI attests that its capital additions were recorded in Account 101, and associated depreciation expense and accumulated depreciation included in UPSA rates, and acknowledges that they were also considered in the fair market value option Lease Renewal, but does not believe this results in a double recovery. We disagree with SERI's contention that, because it chose the least expensive end-of-lease option, ratepayers were not adversely affected. The Initial Decision concludes that it is not essential that the Net Capital Additions be included in the fair

[452] Initial Decision, 171 FERC ¶ 63,003 at P 254.

[453] *Id.* P 242.

market valuation of the Lease Renewal because during the Lease Renewal, ratepayers will only pay an UPSA revenue requirement based on the remaining net book value of the original Leased Assets and not pay the acquisition premium embedded in the Sale-Leased Assets. We agree with the Initial Decision's overall findings, but clarify that our determination under Issue 1 requiring SERI to refund amounts previously recovered through Lease Renewal payments beginning January 1, 2014, also provides for refunding the costs of Net Capital Additions that were embedded in the Lease Renewal rental payments.[454] We also direct SERI to prospectively record depreciation expense provisions in Account 403 and Account 108 for the Net Capital Additions beginning in the first quarter after the issuance of this order.

C. Issue 3: Was SERI Required to Seek FPA Section 203 Approval to Enter into the Lease Renewal?

1. Initial Decision

162. The Initial Decision states that the Lease Renewal did not result in the disposition of ownership of the Leased Assets and therefore did not require Commission FPA section 203 approval.[455] The Initial Decision states, in any case, the Commission has not authorized this administrative proceeding to recommend civil or criminal penalties that SERI could be subject to in an enforcement case.[456] Nonetheless, the Initial Decision examined the issue of whether the Lease Renewal triggered FPA section 203 requirements, finding that while FPA section 203 requires the Commission to approve a lease of existing generating facilities, it is silent as to whether a renewal or extension of a lease must also be approved.[457] Quoting *Atlantic City Electric Company v. FERC*, the Initial Decision states that "[FPA] section 203 has never been construed to give the Commission control over every . . . agreement," and "its focus is plainly upon the *disposition* of the facilities themselves."[458]

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[454] As noted above, to the extent that the Commission directs the provision of refunds, Entergy Mississippi shall only receive refunds pursuant to the Settlement and not pursuant to the directives of this order.

[455] *Id.* P 308.

[456] *Id.* P 284.

[457] *Id.* P 289.

[458] *Id.* P 292 (quoting *Atl. City Elec. Co. v. FERC*, 295 F.3d 1 at 13 (D.C. Cir. 2002) (*Atlantic City*) (emphasis in original)).

163. The Initial Decision finds "[i]n line with *Atlantic City*," that there has been no change in ownership of Grand Gulf, as the Owner-Lessors and SERI are the same parties as they were during the Original Sale-Leaseback and the ownership percentages to the transaction remain exactly the same.[459] Additionally, the Initial Decision finds no change in the effective control of Grand Gulf and that the parties maintain operational control in the exact same way as before.[460]

2. **Briefs on Exceptions**

a. **Louisiana Commission**

164. The Louisiana Commission argues that SERI violated FPA section 203(a)(1)(D)[461] by failing to seek approval before entering into the Lease Renewal. The Louisiana Commission states that, pursuant to the Lease Renewal, SERI leased the Grand Gulf facility from the Owner-Lessors and made annual payments of $17.2 million for 21 years, a value far in excess of the $10 million threshold specified in section 203.[462] The Louisiana Commission also notes that SERI obtained approval of the Original Sale-Leaseback from the SEC, but not this Commission.[463]

165. The Louisiana Commission argues that the Initial Decision would limit the Commission's jurisdiction to leases that result in a change of ownership but that a lease with a change in ownership is a sale, not a lease. The Louisiana Commission asserts that the Initial Decision's interpretation would relieve lease renewals from regulatory review with no opportunity to review the accounting and rate treatment in an FPA section 203 proceeding. The Louisiana Commission argues that the accounting and ratemaking unilaterally chosen by SERI inappropriately increased customer costs, causing them to pay twice for the Leased Assets. The Louisiana Commission argues that the Commission should disallow rate recovery until SERI obtains approval.[464]

166. The Louisiana Commission further asserts that *Atlantic City* is inapplicable to the Lease Renewal because that decision predates the amendment of FPA section 203 to

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[459] *Id.* PP 299-300.

[460] *Id.* P 300.

[461] 16 U.S.C. § 824b(a)(1)(D).

[462] Louisiana Commission Brief on Exceptions at 44.

[463] *Id.* at 44-45.

[464] *Id.* at 46.

include subsection 203(a)(1)(D). The Louisiana Commission also argues therefore that the facts underlying *Atlantic City* are too dissimilar.[465] The Louisiana Commission asserts that the Lease Renewal involves the transfer of ownership or proprietary interest because, absent the Lease Renewal, SERI would have had no proprietary interest in the Leased Assets after July 2015. The Louisiana Commission asserts that there is no reason that a lease that grants the utility-lessee full control of the leased asset, in exchange for significant lease payments recoverable through jurisdictional rates, should escape Commission jurisdiction.[466]

167. The Louisiana Commission also argues that the Lease Renewal has a term of 21 years, far beyond the Original Sale-Leaseback term, and therefore cannot be considered an extension because the Original Sale-Leaseback only provided for three-year extensions.[467] Further, the Louisiana Commission states that the option to renew under the Original Sale-Leaseback only allowed for renewals until the 2024 expiration of Grand Gulf's nuclear license.[468] The Louisiana Commission also asserts that, unlike the Original Sale-Leaseback, the Lease Renewal has no financing component.[469] The Louisiana Commission further observes that upon the Original Sale-Leaseback's July 15, 2015 termination, the rent changed after negotiation, litigation, and arbitration among the parties. The Louisiana Commission states that the charge under the Lease Renewal is not based on the original loan amount, but on the Leased Assets' fair market value. The Louisiana Commission also notes that the Lease Renewal involves a different number of megawatts as a result of the uprating of Grand Gulf.[470] The Louisiana Commission contends that lease renewals that require new documentation, that require negotiation over term or rent, or that significantly modify terms are new contracts.[471]

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[465] *Id.* at 47-48.

[466] *Id.* at 48-49.

[467] *Id.* at 50-51.

[468] *Id.* at 51-52.

[469] *Id.* at 53 (citing Ex. LC-0001 REV at 37).

[470] *Id.* at 54 (citing Ex. LC-0051 REV at 18-19).

[471] *Id.* at 55-57.

3. **Briefs Opposing Exceptions**

a. **SERI**

168. SERI states that, pursuant to the Lease Renewal, the Leased Assets remained with the Owner-Lessors, and SERI retains operational control. SERI asserts that FPA section 203 does not require utilities to seek authorization of a renewal transaction when there is no change of ownership or control of a jurisdictional facility. SERI argues that *Atlantic City* supports this position because there is no additional sale of facilities that would require such FPA section 203 approval. SERI further asserts that the court's rationale in *Atlantic City* applies to FPA section 203(a)(1)(D) even though the case predates the enactment of this provision. In particular, SERI asserts that there is no basis to distinguish "sell, lease, or otherwise dispose" under FPA section 203(a)(1)(A) from "purchase, lease, or otherwise acquire" under FPA section 203(a)(1)(D).[472]

169. SERI asserts that the Commission does not require parties to a sale-leaseback to seek approval for lease renewals, and the Louisiana Commission cites no decisions involving comparable arrangements.[473] SERI also notes that a recent delegated order did not require FPA section 203 approval for a party to renew a sale-leaseback.[474]

170. SERI states that the Lease Renewal was entered into pursuant to the Original Sale-Leaseback's terms and is not a wholly "new" transaction. SERI states that Section 12(b) of one of the original lease instruments permits multiple renewals of up to three years and that the Lease Renewal's 21-year term is consistent with this provision. In response to the argument that SERI could not renew the leases beyond Grand Gulf's 2024 nuclear license expiration,[475] SERI argues that, at the time of the Lease Renewal, Grand Gulf's pending license renewal was uncontested and the Original Sale-Leaseback instruments expressly provide that any renewal could extend through the term of any extension of the license life.[476] SERI adds that the Lease Renewal is subject to New York state law, which, makes clear that lease renewals that do not substantially change the terms of the

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[472] SERI Brief Opposing Exceptions at 72-74.

[473] *Id.* at 75-76.

[474] *Id.* at 77 (citing *Pub. Serv. Co. of N. M.,* 151 FERC ¶ 62,144 (2015)).

[475] *Id.* at 78-79 (citing Louisiana Commission Brief on Exceptions at 52-53).

[476] *Id.* at 79.

arrangement are extensions, not new leases. SERI argues that the Lease Renewal is a continuation of the Original Sale-Leaseback and thus is not new or stand-alone.[477]

4. Briefs Adopting Exceptions

a. New Orleans Council

171. The New Orleans Council argues that the Initial Decision erroneously ruled that FPA section 203 approval was not required for the Lease Renewal.[478]

5. Commission Determination

172. As discussed below, we find that SERI was required to seek prior authorization from the Commission under FPA section 203 before entering into the Lease Renewal. FPA section 203(a)(1)(D) requires that a public utility shall not "purchase, lease, or otherwise acquire" an existing generation facility that "has a value in excess of $10,000,000" and "that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes" without first securing "an order of the Commission authorizing it to do so."[479]

173. Although SERI is correct that FPA section 203(a)(1)(D) was enacted in 2005 (after it entered into the 1988 Original Sale-Leaseback), this provision was in effect when SERI entered into the Lease Renewal in 2015. As discussed above,[480] we disagree with SERI that the Lease Renewal should be considered part of the Original Sale-Leaseback. The Lease Renewal was not simply an extension of the Original Sale-Leaseback under the terms of that agreement, pursuant to, for example, an evergreen clause; rather, after a dispute arose about the fair market rental value of the Leased Assets for a three-year rental term and Owner-Lessors commenced a September 26, 2013 action in a California court to resolve this issue,[481] SERI and the Owner-Lessors altered the terms of their

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[477] *Id.* at 80-82.

[478] New Orleans Council Brief Adopting Exceptions at 4.

[479] 16 U.S.C. § 824b(a)(1)(D).

[480] *See supra* P 138.

[481] *See* Ex. LC-0017 at § F.

negotiation and executed new lease instruments that memorialized a new lease term as well as the amounts and frequency of the new rental payments.[482]

174. We find that, given these changes, the Lease Renewal did constitute a lease that required authorization under FPA section 203(a)(1)(D).

175. Additionally, we note that the precedent established in *Atlantic City* is not relevant to the issue presented here. In that decision, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) determined that the Commission's FPA section 203 jurisdiction did not give it authority to direct a utility to modify its independent system operator (ISO) agreement to require Commission approval prior to withdrawing from the ISO. The D.C. Circuit determined, among other things, that a utility "does not 'sell, lease, or otherwise dispose' of its facilities when it agrees to the changes in operational control necessary to initially join or to withdraw from an ISO" such that prior authorization under FPA section 203(a)(1)(A) is required.[483] Thus, the facts underlying that decision are distinct from the Lease Renewal, which is covered by FPA section

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[482] Section H of the Lease Renewal reads that:

Notwithstanding the Litigation [surrounding the fair market rental value of the Leased Assets] and the giving of the Initial Renewal Notice, the Lessee and the Owner Participant have continued discussions concerning various options, including the Lessee renewing the Lease for a renewal term for a twenty-one year period (the "Selected Renewal Term") rather than the three year renewal set forth in the Initial Renewal Notice and have mutually agreed (subject to the provisions of this Instrument) that:

The Fair Market Rental Value for the Selected Renewal Term commencing July 15, 2015 and ending July 15, 2036 is $1,718,750.00 for each semi-annual period ending on a Basis Rent Payment date; and;

for purposes of determining the Casualty Values through the Selected Renewal Term, the Fair Market Sales Value is:

(x) $48,750,000.00 as of the commencement of the Selected Renewal Term, and

(y) $9,750,000.00 as of July 15, 2036.

Id. § H.

[483] *Atlantic City Elec. Co. v. FERC*, 295 F.3d at 11 (citing 16 U.S.C. §824(a)(1)(A)).

203(a)(1)(D), because this provision applies to the "lease . . . [of] an existing generation facility."[484]

176. For these reasons, we conclude that SERI was required to seek prior authorization FPA section 203(a)(1)(D) before entering into the Lease Renewal. Consequently, we direct SERI to either file an application pursuant to FPA section 203 within 60 days of the issuance of this order, or state within the compliance filing to be filed within 60 days of the issuance of this order when it plans to submit its FPA section 203 application requesting authorization of the Lease Renewal.[485]

D. Issue 4: Was SERI's Accounting and FERC Form No. 1 Reporting for the Lease Renewal Consistent with Commission Requirements?

1. Initial Decision

177. The Initial Decision states that SERI and Trial Staff mostly agree on the accounting corrections that Trial Staff recommends that SERI make but disagree on the treatment of SERI's re-financing of the Original Sale-Leaseback.[486] The Initial Decision also states that SERI's position is misplaced because the Lease Renewal documents are just leases, not sale-leasebacks since the sale ended upon the termination of the Original Lease.[487] The Initial Decision states that SERI shall make a compliance filing to effectuate the changes to its accounts and UPSA rates recommended by Trial Staff.[488]

2. Briefs on Exceptions

a. SERI

178. SERI states that in 1990, the Commission's Chief Accountant "concluded that [SERI] should have accounted for the sale/leaseback transactions as 'financings' under

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[484] We also note that Congress enacted FPA section 203(a)(1)(D) in the Energy Policy Act of 2005, Public L. No. 109-58, tit. XII, § 1289(a)(1)(D) (corresponding to FPA 203(a)(1)(D)) after the D.C. Circuit issued *Atlantic City*.

[485] Applicants for approval under FPA section 203 are reminded that they must submit required filings on a timely basis or face possible sanctions by the Commission. *See Am. Transmission Co. LLC*, 153 FERC ¶ 61,006, at n.12 (2015).

[486] Initial Decision, 171 FERC ¶ 63,003 at P 325.

[487] *Id.* PP 326 & 328.

[488] *Id.* P 332.

the . . . [USofA]."[489] SERI states that the Initial Decision does not explain why the 1990 Audit Report's conclusions should be modified, or how the Initial Decision's recommended accounting is consistent with the 1990 Audit Report's requirements. SERI argues that its accounting is appropriate under Generally Accepted Accounting Principles (GAAP).[490] SERI states that the Initial Decision suggests the right reading of relevant GAAP standards is that a financing transaction *in which there is continuing involvement* is not, in terms of accounting, a sale-leaseback *until the financing ends*.[491] SERI argues that the Initial Decision's interpretation reverses the cause and effect relationship established by the GAAP guidance, because the treatment of the sale-leaseback transaction as a financing does not end until there is an absence of continuing involvement by the seller-lessee.[492] SERI claims that Trial Staff witness Ms. Nicholas's recommendation that SERI revise its FERC Form Nos. 3-Q and financial statements to reflect that the Lease Renewal constitute a new financial liability and that the use of a right of use asset is unworkable because it would result in the original cost and net book value of the plant remaining on SERI's books, while SERI would also have another asset (*i.e.*, the right of use asset) on its books that corresponds to the same portion of the plant (*i.e.*, the Leased Assets).[493]

b. <u>Louisiana Commission</u>

179. The Louisiana Commission asserts that the Initial Decision erred in failing to recognize that there is no remaining asset value on the books for the Original Sale-Leaseback, as the regulatory liability offsets that cost. The Louisiana Commission asserts that there should be no net value on the books for the Leased Assets; otherwise, there would be duplicative entries for the same asset. The Louisiana Commission states that in the 1990 Audit Report, the FERC Chief Accountant required that SERI record regulatory assets or liabilities for the difference between the lease payments and principal and interest recorded on the books. The Louisiana Commission states that the lease payments

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[489] SERI Brief on Exceptions at 49 (citing *Sys. Energy Res., Inc.*, 54 FERC ¶ 62,149, at 63,256 (1990)).

[490] *Id.* at 49-50.

[491] *Id.* at 50 (citing Initial Decision, 171 FERC ¶ 63,003 at P 327 (emphasis in original)).

[492] *Id.*

[493] *Id.* at 51-52.

exceeded the depreciation and interest by $90 million, plus the amount of the undepreciated original cost.[494]

180. The Louisiana Commission argues that, once SERI's 2014 change in accounting is corrected, along with its depreciation, the regulatory liability should exceed the undepreciated original cost by $90 million and there should be no remaining original cost. The Louisiana Commission asserts that the 1990 Audit Report makes clear that the regulatory liability is inextricably linked with the book balance, and the Chief Accountant's requirement ensures that the accounting balance for the Original Sale-Leaseback at the end of the financing should be negative. The Louisiana Commission states that a regulatory liability is an amount the utility owes ratepayers, and ratepayers are entitled to the benefit of the utility's obligation.[495]

3. Briefs Opposing Exceptions

a. Trial Staff

181. Trial Staff explains that, for the Lease Renewal, the Initial Decision directed SERI to implement correcting entries recommended by Trial Staff witness Ms. Nicholas, who identified three principal accounting errors: (1) changing the debt amortization schedule to factor in the 21-year Lease Renewal; (2) extending the pay-down period of the remaining sale-leaseback debt balance, beginning in 2014; and (3) computing interest expense using a 44.46% imputed interest rate.[496]

182. Trial Staff notes that on exceptions, SERI argues that the 1990 Audit Report directed SERI to account for the Original Sale-Leaseback as financings under the USofA because of its "continued involvement" in Grand Gulf, and that continuing involvement factors still applied through the Lease Renewal term.[497] Trial Staff argues that the continuing involvement factors that SERI identifies are irrelevant to determining whether

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[494] Louisiana Commission Brief on Exceptions at 31 (citing Ex. LC-0019 at 8 (Pat Stack Accounting Memorandum)).

[495] *Id.* at 32.

[496] Trial Staff Brief Opposing Exceptions at 64 (citing Ex. S-0010 at 73:1-5 (Nicholas Dir./Ans. Test.)).

[497] *Id.* at 65 (citing SERI Brief on Exceptions at 49).

the Initial Decision erred in finding that the Lease Renewal should be accounted for as a right of use asset.[498]

183. Trial Staff further notes that, on exceptions, SERI contends that the Initial Decision's adoption of Ms. Nicholas's recommended accounting lacks support, because it is solely supported by the December 2018 guidance from the Commission's Chief Accountant that does not address sale-leasebacks.[499] Trial Staff explains that while the 2018 Lease Guidance Letter and the Commission's USofA General Instruction No. 20 do not specifically address sale-leasebacks, this consideration is irrelevant for determining the appropriate accounting treatment for the Lease Renewal.[500] Trial Staff maintains that Ms. Nicholas's recommendation was fundamentally based upon the Commission's USofA General Instruction No. 20, Accounting for Leases,[501] which the 2018 Lease Guidance Letter itself relied upon for purposes of jurisdictional entities' observance of Financial Accounting Standards Board (FASB) Accounting Standards Update (ASU) No. 2016-02, *Leases (Topic 842)* in their FERC accounting and reporting.[502] Trial Staff argues that SERI is incorrect that Ms. Nicholas "solely" relied on accounting guidance "issued five years after SERI had to determine the appropriate accounting for the Lease Renewal[503] because USofA General Instruction No. 20 pre-dates SERI's 2013 determination that it should account for the Lease Renewal as an extension of the original financing term.[504]

184. Trial Staff contends that the Initial Decision correctly directed SERI to retroactively correct its computation of and accounting for depreciation of Net Capital Additions applicable to the leased interest. Trial Staff notes that the Initial Decision determined that SERI should have depreciated the Net Capital Additions to the leased interest on a straight-line basis over the estimated service life of the additions, irrespective of the Original Sale-Leaseback or Lease Renewal terms. Trial Staff maintains that failing to require SERI to retroactively correct its depreciation of Net

[498] *Id.* (citing Ex. S-0010 at 73:15-74:4 (Nicholas Dir./Ans. Test.)).

[499] *Id.* at 67.

[500] *Id.*

[501] *Id.* at 69 (citing Ex. S-0021 at 6 (Commission USofA Excerpts)).

[502] *Id.* (citing Ex. S-0040 at 1-4 (Lease Guidance Letter); *see also* Ex. S-0010 at 71:1-17).

[503] *Id.* at 70 (citing SERI Brief on Exceptions at 51).

[504] *Id.* (citing Ex. S-0065 at 24:12-25:5).

Capital Additions would achieve an outcome that directly conflicts with the Commission's policy prohibiting retrospective changes in a utility asset's estimated service life, resulting in a depreciation rate other than that tied to Grand Gulf's remaining life. Trial Staff adds, while the Initial Decision does permit SERI some additional rate base recovery as a result of its retroactive reduction of accumulated depreciation applicable to the Net Capital Additions to the leased interest, the Initial Decision ensures the highest possible net gain to SERI's customers by finding that the Commission should exercise its remedial discretion and deny SERI "any interest accrual on any retroactive return on enhanced rate base that SERI may earn."[505]

b. Mississippi and Arkansas Commissions

185. The Mississippi and Arkansas Commissions agree with the Initial Decision's finding that SERI should be required to amend its FERC Form No. 1s beginning with calendar year 2014 and henceforth due to the inappropriately factored 21-year Lease Renewal into the sale-leaseback debt amortization schedule resulting in improper disclosures on the imputed interest rate in FERC Form No. 1's Notes to Financial Statements.[506]

4. Briefs Adopting Exceptions

a. New Orleans Council

186. The New Orleans Council contends that the Initial Decision correctly ordered SERI to correct the depreciated capital additions and that excess recoveries be returned to ratepayers, but erred in requiring a retroactive restatement of rates because it would result in ratepayers providing a return on capital for which SERI had no cost.[507]

5. Commission Determination

187. We affirm the Initial Decision's direction to effectuate the changes to SERI's accounts and UPSA rates recommended by Trial Staff, as discussed below. As discussed under Issue 1, SERI's accounting treatment and reporting for the Lease Renewal as an extension of the financing arrangement that originated under the Original Sale-Leaseback is not consistent with the Commission's requirements. We agree with Trial Staff that it was an accounting error for SERI to: (1) change the Original Sale-Leaseback debt amortization schedule to factor in the 21-year Lease Renewal; (2) beginning in 2014,

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[505] *Id.* at 75 (citing Initial Decision, 171 FERC ¶ 63,003 at P 392).

[506] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 38.

[507] New Orleans Council Brief Adopting Exceptions at 3.

extend the pay-down period of the remaining Original Sale-Leaseback debt balance; and (3) compute interest expense using a 44.46% imputed interest rate.[508] We reiterate that we agree with the Initial Decision's finding that SERI should have fully amortized the $500 million financing recorded in Account 224, *Other Long-term Debt*, resulting from the Original Sale-Leaseback and ceased recording associated interest expense in Account 427, *Other Long-Term Debt* by the end of the Original Sale-Leaseback. As explained under Issue 1, we conclude that the Lease Renewal was a stand-alone transaction because, *inter alia*, there was no longer a financing arrangement in place when SERI entered into it. We adopt Trial Staff's correcting entry No. 4 to reflect the full amortization of debt and correct overstated interest expense as of July 15, 2015, to remove the effects of the Lease Renewal being incorporated into the Original Sale-Leaseback. The associated regulatory liability balance recorded in Account 254, *Other Regulatory Liabilities* must also be adjusted to reflect the impact of this correction to the book treatment of the Leased Assets. Additionally, we adopt Trial Staff's correcting entry No. 5 to reflect the impact of entry No. 4 on SERI's Account 190 Original Sale-Leaseback ADIT accounts.

188. We direct SERI to make the above referenced accounting corrections and refile its FERC Form No. 1s, beginning with its December 31, 2014 annual report, to correct the affected balances of the Original Sale-Leaseback debt, interest expense, regulatory liability, and Account 190 ADIT, as a result of improperly incorporating the Lease Renewal into the Original Sale-Leaseback. SERI must make the appropriate disclosures to the notes and footnotes of the affected account balances for years 2014 through 2021.

E. Issue 5: What Accounting and Ratemaking Treatment Should be Applied to Correct SERI's Depreciation of Sale-Leaseback Property?

1. Initial Decision

189. The Initial Decision recommends that SERI's compliance filing include the accounting corrections recommended there.[509] Namely, the Initial Decision recommends that SERI be required to: (i) depreciate the Leased Assets on a straight-line basis over the estimated life of the related depreciable assets using FERC Accounts 403, *Depreciation Expense*, and 108, *Accumulated Provision for Depreciation of Electric Utility Plant* and (ii) depreciate the cost of the capital additions the same way, as depreciation of utility plant using FERC Accounts 403 and 108, all without regard to the end date of the lease terms of the Original Sale-Leaseback agreements or the Lease Renewal.[510] The Initial

[508] Ex. S-0010 at 73:1-5.

[509] Initial Decision, 171 FERC ¶ 63,003 at P 394.

[510] *Id.* P 373.

Decision also recommends that SERI reflect the accounting corrections for depreciation expense and accumulated depreciation for the capital additions in previous monthly UPSA billings and make refunds, as Trial Staff proposes, but forego any interest accrual on any retroactive return that SERI may earn on the increased rate base due to the decreased accumulated depreciation for the capital additions.[511]

2. Briefs on Exceptions

a. Louisiana Commission

190. The Louisiana Commission asserts that SERI made multiple errors when recording and charging depreciation for the Leased Assets and the Net Capital Additions. It argues that since late 2000, SERI overcharged customers for the depreciation expense for capital additions and over-accrued accumulated depreciation for those improvements. The Louisiana Commission quotes General Instruction 22 of the USofA as requiring that utilities "use a method of depreciation that allocates in a systematic and rational manner the service value of depreciable property over the service life of the property."[512] The Louisiana Commission notes that the 1990 Audit Report required SERI to depreciate the Original Sale-Leaseback consistent with the owned portion of Grand Gulf, stating that SERI was to "[c]ontinue charging depreciation expense related to the 11.5[%] [leasehold] interest over the estimated service life of the facilities."[513] The Louisiana Commission asserts that SERI did not follow the requirements of the USofA or the 1990 Audit Report and instead used varying depreciation rates for the Net Capital Additions over approximately three decades.[514] The Louisiana Commission notes that Commission Staff testified that SERI's depreciation of the Grand Gulf capital additions resulted in an over-accrual of depreciation of $31,811,849.[515] The Louisiana Commission states that it is reasonable to correct SERI's approximately $32 million depreciation over-accrual.[516]

191. The Louisiana Commission asserts that the Initial Decision violates Commission policy requiring over accrued depreciation to be remedied prospectively when the

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[511] *Id.* P 392.

[512] Louisiana Commission Brief on Exceptions at 33 (citing Ex. S-0021 (USofA Excerpts) at 7).

[513] *Id.* at 33-34 (citing Ex. LC-0009 at 12).

[514] *Id.* at 34 (citing Ex. S-0021 (USofA Excerpts) at 7).

[515] *Id.* (citing Ex. S-0010 at 52-53).

[516] *Id.* at 35.

depreciation expense has already been collected in rates, which allows for an over-accrual of depreciation to be corrected retroactively only if the over-accrued depreciation was not recovered in utility rates. In particular, the Louisiana Commission cites a letter order issued by the Commission Chief Accountant to Enbridge, Inc.,[517] that explains that Commission policy is to correct over or under-accrued depreciation prospectively unless three criteria were met, one of which was that the depreciation could not have been already collected in rates. The Louisiana Commission asserts that SERI has previously collected the over-accrual of depreciation expense in its rates and the over-accrual of accumulated depreciation is currently reflected in the UPSA's calculation of rate base.[518] The Louisiana Commission asserts that retroactive UPSA rebilling would result in a windfall to SERI by allowing it to earn a return on the money a second time, but that a prospective refund would eliminate SERI's windfall.[519]

192. The Louisiana Commission argues that, if the Commission affirms the Initial Decision, SERI will retroactively reduce its depreciation expense by approximately $31,811,849.[520] The Louisiana Commission argues that the retroactive UPSA rebillings would reduce accumulated depreciation, which serves as a reduction to rate base. The Louisiana Commission states that, unlike the retroactive depreciation expense reduction, the rate base addition that results from the lowered accumulated depreciation continues to increase as the reduction to accumulated depreciation grows.

193. The Louisiana Commission also asserts that the retroactive increase to accumulated depreciation results in additional taxable income to SERI in the form of an increased return on rate base, and thus the amount of taxes owed by customers increases as well.[521] The Louisiana Commission asserts that SERI violated Commission accounting requirements and overcharged consumers in the past for depreciation. The Louisiana Commission argues that refunds should be required without interest and a one-time prospective correction made for accounting and ratemaking.[522]

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[517] *Enbridge, Inc.*, Docket Nos. AC07-162-000 *et al.* (Dec. 10, 2007) (delegated order).

[518] Louisiana Commission Brief on Exceptions at 35-36.

[519] *Id.* at 37.

[520] *Id.* at 39 (citing Initial Decision, 171 FERC ¶ 63,003 at P 379).

[521] *Id.* at 40-41 (citing Ex. CNO-0009 at 5).

[522] *Id.* at 42-43.

b. SERI

194. SERI argues that, to the extent that the Initial Decision recommends that the Commission order rate relief with respect to SERI's depreciation charges for capital additions, such remedy must include interest. SERI argues that, should the Commission require SERI to re-calculate its monthly bills, there would be no basis to preclude SERI from recovering interest on the rate base amounts, given what SERI describes as the Commission's practice to require the payment of interest on refunds using the interest methodology in section 35.19a of the Commission's regulations.[523]

3. Briefs Opposing Exceptions

a. Louisiana Commission

195. The Louisiana Commission states that the Initial Decision correctly required correction of SERI's improper accounting for the Lease Renewal. The Louisiana Commission states that SERI argues that the Initial Decision should not have required the accounting corrections recommended by Trial Staff witness Ms. Nicholas due to SERI's "continuing involvement" with the Leased Assets, but fails to recognize that the financing transaction ended on July 15, 2015.[524] The Louisiana Commission asserts that, at that point, a reevaluation of the transactions was required under both Commission policy and Generally Accepted Accounting Principles. The Louisiana Commission states that General Instruction 19 of the USofA requires that any action that extends the lease beyond the original lease term should be treated as a new agreement.[525]

196. The Louisiana Commission asserts that the Lease Renewal was not an extension of the Original Sale-Leaseback. The Louisiana Commission argues that SERI erred in maintaining a debt balance of approximately $34 million on the books at July 15, 2015, imputing an interest rate of 44.46% to the Original Sale-Leaseback payments after January 1, 2014 for the Lease Renewal, and in its small annual amortization of the debt balance. The Louisiana Commission asserts that the Original Sale-Leaseback financing is over, and SERI's books and FERC Form No. 1 should not reflect a continuing financing arrangement. The Louisiana Commission states that as Trial Staff witness Ms. Nicholas testified, SERI incorrectly depreciated the Original Sale-Leaseback asset balance on the books over the lease life rather than the plant life. The Louisiana

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[523] SERI Brief on Exceptions at 52-53 (citing *Sw. Pub. Serv. Co*., 165 FERC ¶61,246, at P 16 (2018)).

[524] Louisiana Commission Brief Opposing Exceptions at 49 (citing SERI Brief on Exceptions at 49-51).

[525] *Id.* (citing Ex. LC-0023 (USofA Excerpt) at 5).

Commission states that SERI also used an incorrect depreciation rate for some of the capital additions to the Sale-Leaseback asset.

197. The Louisiana Commission states that SERI also appears to have incorrectly accounted for the ADIT associated with the Original Sale-Leaseback. The Louisiana Commission states that SERI maintains an ADIT Original Sale Leaseback asset balance in Account 190, even though all the Original Sale-Leaseback payments have been made and deducted. The Louisiana Commission asserts that SERI has deducted $500 million constituting principal through its deduction of the lease payments, while it only depreciated $398 million on the books. The Louisiana Commission states that the larger tax deductions should have reduced or eliminated the taxes for the initial gain on the Original Sale-Leaseback.[526]

198. The Louisiana Commission states that SERI's argument that the accounting corrections required under the Staff recommendation are faulty ignores the regulatory liability, which with correct accounting fully offsets the net book value of the asset. The Louisiana Commission asserts that the Lease Renewal is "the only asset that should be remaining on the books."[527]

199. In disagreement with SERI, the Louisiana Commission argues that if the Initial Decision's retroactive correction to capital addition depreciation expense is affirmed, SERI should not collect interest on the retroactive return allowances.[528] The Louisiana Commission states that SERI charged a higher depreciation expense than it should have, thus collecting a return of more investment costs than appropriate. The Louisiana Commission asserts that a refund of the excessive depreciation, with a retroactive increase in rate base, provides SERI a return on investment that it had already recovered in rates. The Louisiana Commission argues that the Initial Decision's finding requires ratepayers to pay a return twice on the same investment costs.[529]

200. The Louisiana Commission states that in calculating refunds for each past year in which the depreciation was erroneous, the retroactive methodology will provide ratepayers the excess depreciation SERI charged but will add that amount to rate base and charge a return, which will net against the refund. The Louisiana Commission states that the depreciation refunds will include a return offset for all the investment restored to the

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[526] *Id.* at 51 (citing Ex. LC-0001 REV at 64 (Sisung)).

[527] *Id.* at 52 (citing SERI Brief on Exceptions at 52).

[528] *Id.* (citing SERI Brief on Exceptions at 52; Initial Decision, 171 FERC ¶63,003 at P 392).

[529] *Id.* at 53.

rate base. The Louisiana Commission asserts that the presiding judge's attempt to ameliorate the harm to consumers by denying interest on retroactive return allowances is insufficient, but if the retroactive adjustment is affirmed, the denial of interest should be upheld as well.[530]

4. Commission Determination

201. We affirm, in part, the Initial Decision's direction regarding SERI's depreciation of sale-leaseback property, but modify the Initial Decision as discussed below. The record shows that, for accounting and reporting purposes, SERI improperly depreciated the Leased Assets over the 26.5-year Original Sale-Leaseback term, despite the Commission requirements and the 1990 Audit Report directive to depreciate the assets using the estimated service life of facilities. Trial Staff clarifies that the original cost of the Leased Assets was actually fully depreciated on November 30, 2015,[531] rather than July 15, 2015. SERI's accounting error resulted in over-accrued depreciation of approximately $31,811,849 as of December 31, 2017.[532] We adopt, but modify, Trial Staff's correcting entry No. 1 to recommend the use of Account 439, *Adjustments to Retained Earnings*,[533] to record a cumulative-effect adjustment to retained earnings required to reflect the over-accrual of depreciation for the original cost of Leased Assets.[534] SERI is further required to reclassify this adjustment to accumulated depreciation for the Leased Assets from Account 111 to Account 108, and shall prospectively record depreciation expense in Account 403 instead of Account 404. SERI shall fully evaluate the impact of this accounting error to consider the need to also adjust additional account balances, including, but not limited to accumulated deferred income tax accounts.[535]

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[530] *Id.* at 53-54.

[531] Ex. S-0010 at 45:1-6 (Nicholas Dir./Ans. Test.).

[532] Trial Staff Post Hearing Brief at 36.

[533] 18 C.F.R. pt. 101 requires the use of Account 439 "to include significant nonrecurring transactions accounted for as prior period adjustments [including] [c]orrection of an error in the financial statements of a prior year."

[534] Ex. S-0010 at 48:3-8.

[535] This directive is for accounting purposes only and should not have an impact on UPSA rates because as explained above, for SERI's ratemaking treatment, the Commission accepted a 1991 Settlement that allowed SERI to only include the Original Sale-Leaseback lease payments in its UPSA rate as an operating expense.

202. The record also shows that SERI's depreciation practices have not been in compliance with USofA General Instruction No. 22, *Depreciation Accounting*, which requires utilities to use a method of depreciation that allocates in a systematic and rational manner the service value of depreciable property over the service life of the property.[536] We agree with the Initial Decision's finding that SERI should have depreciated the original cost of the Leased Assets using rates and methods consistent with depreciation of its 78.5% ownership interest in Grand Gulf. As discussed under Issues 1 and 2, SERI was required to, and confirms that it has, accounted for the Leased Assets as utility plant in service in Account 101. Therefore, it should not depreciate the Leased Assets and SERI's ownership interest differently. Additionally, as discussed under Issue 2, depreciation of the Net Capital Additions must also be properly accounted for using Account 403 and Account 108 over the estimated service life of the facilities, rather than the lease term. We find that SERI has overcharged customers through past rates by using an inappropriate service life and inappropriate depreciation rates for the depreciation of the Net Capital Additions. SERI concedes that it should have consistently applied the 2.85% depreciation rate to the Leased Assets and Net Capital Additions that was approved for Grand Gulf. Trial Staff computes an estimated balance of accumulated depreciation using Commission-approved depreciation rates applied to Net Capital Additions over the period December 2000 through December 31, 2017. We adopt, but modify, Trial Staff's correcting entry No. 2 to recommend the use of Account 439, Adjustments to Retained Earnings, to record a cumulative-effect adjustment to retained earnings required to reflect the cumulative impact of SERI's accounting error.[537] SERI is further required to reclassify this adjustment to accumulated depreciation for Net Capital Additions from Account 111 to Account 108, and shall prospectively record depreciation expense in Account 403 instead of Account 404. SERI shall fully evaluate the impact of this accounting error to consider the need to also adjust additional account balances, including, but not limited to accumulated deferred income tax accounts. We also require SERI to correct its method of computing depreciation expense for the Net Capital Additions by applying its Commission approved depreciation rate to the prior month's ending plant balance.[538]

203. Additionally, Trial Staff identified that in December 2000, SERI changed its accounting for depreciating the Net Capital Additions from that of its ownership interest, but failed to record a reclassification entry for the accumulated depreciation for the Net Capital Additions, which has resulted in an overstated accumulated depreciation balance

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[536] 18 C.F.R. pt. 101 .

[537] Ex. S-0010 at 53:3-8.

[538] *Id.* at 53:15-18.

for owned interest of approximately $3,554,203.[539] We adopt Trial Staff's correcting entry No. 3 to properly reclassify overstated accumulated depreciation for SERI's ownership interest, as a result of the transfer of plant property, consistent with USofA Electric Plant Instruction No. 12, *Transfers of Property*, which requires upon the transfer of property that any related amounts carried in the accounts for accumulated provision for depreciation or amortization shall be transferred in accordance with the segregation of such accounts.[540]

204. We adopt the Initial Decision's findings, but clarify that, under Issue 1, we conclude that SERI is required to refund amounts previously recovered through Lease Renewal payments beginning January 1, 2014.[541] Therefore, ratepayers are *not* responsible for the part of Lease Renewals that equals an UPSA revenue requirement for the Leased Assets based on their net book value depreciated down to July 15, 2015[542] because SERI has already recovered the original cost of the Leased Assets.

205. We direct SERI to make the above referenced accounting corrections and refile its FERC Form No. 1 annual report for the year ended December 31, 2021 to properly reflect all adjustments as a result of this determination. SERI must make the appropriate disclosures to the notes and footnotes of the affected account balances for the year ended December 31, 2021. Additionally, as similarly directed under Issue 2, we direct SERI to prospectively record depreciation expense provisions in Account 403 and Account 108 beginning in the first quarter after the issuance of this Commission order.

206. We agree with and affirm the Initial Decision's ordering of prospective and retroactive relief, with interest computed for overcollection of depreciation expense for the capital additions, and SERI's foregoing of any interest on the increased pre-tax return that SERI may earn on the increased rate base due to the decreased accumulated depreciation for the capital additions. We disagree with the Louisiana Commission that the Initial Decision violates Commission policy requiring over-accrued depreciation to be remedied prospectively when the depreciation expense has already been collected in rates. In the context of formula rates, the Commission has found that when errors are discovered in depreciation accounting and FERC Form No. 1 data that is the source of formula rate inputs, formula rate billings for the affected period must be recomputed with

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[539] *Id.* at 55:3-5; Ex. S-0030 at 1.

[540] 18 C.F.R. pt. 101.

[541] As noted above, to the extent that the Commission directs the provision of refunds, Entergy Mississippi shall only receive refunds pursuant to the Settlement and not pursuant to the directives of this order.

[542] Initial Decision, 171 FERC ¶ 63,003 at P 372.

the corrected depreciation inputs.[543] The Louisiana Commission avers that requiring SERI to reduce accumulated depreciation for the Capital Additions has the effect of retroactively increasing the capital investment, thereby increasing rate base and increasing rates.544 We note the Initial Decision found that prospectively, the accounting change suggested by Trial Staff lowers future depreciation expense on the Capital Additions that ratepayers must pay, but also has the effect of raising the return on that rate base that ratepayers will face in the future. However, the Initial Decision also found that "prospective and retroactive reductions in depreciation expense in the cost of service result in a dollar-for-dollar reduction in the rate, and simultaneously result in less than a dollar-for-dollar increase in return on equity resulting from the enhanced rate base." Thus, the overall outcome on the rate should be a net gain for ratepayers, both prospectively and retroactively.

F. Issue 6: Was SERI's Exclusion of Amounts Attributable to Decommissioning Tax Deductions from ADIT Used to Determine Rate Base under the UPSA Inconsistent with the Filed Rate Doctrine or Commission Accounting and Reporting Regulations?

1. Initial Decision

207. The Initial Decision states that Entergy Corporation pays no federal and state income taxes on its net book income because tax allowances such as accelerated depreciation, casualty losses, and other deductions and credits have created net operating loss carryforwards that reduce, or even eliminate, tax obligations.[545] According to the Initial Decision, however, Entergy Corporation, like all utilities, recovers income taxes on net book income from ratepayers at the full statutory rate, so it collects more from customers than it has to pay.[546] According to the Initial Decision, pursuant to the USofA, jurisdictional utilities like SERI record asset ADIT (amounts representing future tax savings, which raise rate base and increase current utility rates) in Account 190 and liability ADIT (amounts representing future taxes due, which lower rate base and thereby reduce current utility rates) in Accounts 281, 282, and 283.[547] The Initial Decision states that SERI's FERC Form No. 1s for 2007 to 2017 indicate that SERI reported ADIT

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[543] Entergy Services, Inc., Opinion No. 545, 153 FERC ¶ 61,063, at P 159 (2015).

[544] Louisiana Commission Post-Hearing Initial Brief at 38-40; Louisiana Commission Post-Hearing Reply Brief at 20-23; Ex. S-0010 at 52:17-53:8.

[545] *Id.* P 45.

[546] *Id.*

[547] *Id.* P 48.

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balances in FERC Accounts 282 and 283 ranging from $0.81 billion in 2008 to $1.34 billion in 2012 and that, while these balances have varied, ADIT represents a cost-free long term source of capital for SERI that most often, constitutes a reduction of rate base, resulting in a reduction of amounts paid by customers under the UPSA.[548]

208. The Initial Decision states that in *System Energy Resources, Inc.*,[549] the Commission applied a benefits/burdens test to determine whether a tax reduction inures to the benefit of a utility or its ratepayers. The Initial Decision states that, pursuant to this test, if ratepayers have the burden of the book expense, then they get the rate benefit of the tax savings caused by that expense.[550]

209. The Initial Decision states that FIN 48 is a shorthand for Financial Accounting Series Interpretation No. 48 issued in June 2006 by the Financial Accounting Standards Board (FASB), titled *Accounting for Uncertainty in Income* Taxes, is considered to be part of GAAP in the United States, and has been codified in the Accounting Standards Codification (ASC) as ASC-740-10-25.[551] According to FASB, the purpose of FIN 48 is to prescribe "a recognition threshold and measurement attribute for the financial statement recognition and measurement of a tax position taken or expected to be taken in a tax return."[552] That is, FIN 48 assesses the likelihood that a tax deduction or credit taken on a tax return will be upheld by the taxing authority and eliminates or reduces the deduction or credit accordingly. FIN 48 also directs the entity to account in its financial statements for the additional tax liability if the credit or deduction is reduced or denied.[553]

210. The Initial Decision concludes that SERI's removal of nuclear decommissioning ADIT from the ADIT offset to rate base in the UPSA formula rate is unjust and unreasonable and that SERI must include in the ADIT offset from rate base in the UPSA formula rate, ADIT assets and liabilities that are attributable to its deduction of Grand Gulf nuclear decommissioning expenses.[554] The Initial Decision calculates the refund

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[548] *Id.* P 49.

[549] Opinion No. 375, 60 FERC ¶ 61,131 (1992).

[550] Initial Decision, 171 FERC ¶ 63,003 at P 50 (citing Opinion No. 375, 60 FERC ¶ 61,131).

[551] *Id.* P 52.

[552] *Id.* P 55 (citing Ex. SER-0022 at 3-4 (FIN 48, Summary).

[553] *Id.* P 56.

[554] *Id.* P 547.

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that SERI must pay for improperly excluding ADIT liabilities that relate to nuclear decommissioning expenses during the period 2007 to 2018 as $334,475,214.[555]

211. In support of these conclusions, the Initial Decision states that SERI seeks to take tax deductions for not yet incurred expenses, and that, as SERI sees it, the "purpose of attempted decommissioning tax deductions is to reduce SERI's overall tax burden (and costs to customers) by seeking approval to deduct the costs to decommission Grand Gulf immediately, as opposed to waiting until SERI performs the decommissioning after the end of Grand Gulf's operating life."[556] The Initial Decision states that, according to Trial Staff witness Mr. Healy, SERI's deductions create a timing difference, which requires, according to the Retail Regulators and Trial Staff that ADIT be included in the ADIT offset to rate base in the UPSA formula rate.[557] The Initial Decision finds that including nuclear decommissioning ADIT in the ADIT offset to UPSA rate base satisfies the benefits/burdens test and that because ratepayers had the burden of funding the trust account that will be used ultimately to pay decommissioning expenses, they should also receive the benefit of the related ADIT balance as an ADIT rate base reduction.[558]

212. The Initial Decision also states that asset retirement obligation (ARO) accounting is separate from and not related to the decommissioning FIN 48 ADIT at issue here.[559] Further, it finds that AROs have nothing to do with SERI's uncertain deduction of nuclear decommissioning expenses decades prior to their being incurred under the rubric of "costs of goods sold."[560] While the Initial Decision finds no basis for the argument that decommissioning deductions are "asset-retirement-obligations-related" cost components that must be removed from rate basis, SERI determined in 2017 that the existing trust fund was already adequately funded to fully decommission Grand Gulf in 2044 and SERI no longer collects contributions from ratepayers.[561] For this reason, the Initial Decision states that removing nuclear decommissioning ADIT from the ADIT

[555] *Id.*

[556] *Id.* P 475 (citing SERI Pre-Hearing Brief at 4).

[557] *Id.* P 477.

[558] *Id.* P 481.

[559] *Id.* P 487.

[560] *Id.* P 488.

[561] *Id.* P 490.

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offset to rate base in the UPSA formula rate saddles customers with a double burden that confers no benefit and is thus unjust and unreasonable.[562]

213. Additionally, the Initial Decision states that the Commission questioned FIN 48's compatibility with FERC accounting and in a 2007 FIN 48 Guidance Letter, the Commission's Chief Accountant issued guidance stating that "[w]here certainties exist with respect to tax positions involving temporary differences, the amounts recorded in the account established for accumulated deferred income taxes are based on the positions taken in the tax returns filed or expected to be filed."[563] The Initial Decision further states that this practice "results in the accumulated deferred income tax accounts reflecting an accurate measurement of the cash available to the entity as a result of temporary differences," and FIN 48 frustrates this important measurement objective.[564] Thus, according to the Initial Decision, the Commission has determined that FIN 48 has no impact on FERC accounting.[565]

2. Briefs on Exceptions

a. Trial Staff

214. Trial Staff asserts that the Initial Decision correctly found that SERI improperly excluded decommissioning ADIT from rate base, and that SERI is required to correct the error and issue refunds to ratepayers,[566] but that the Initial Decision incorrectly relied upon amounts used to compute the required refund.[567] Trial Staff argues that the refund calculation does not include all amounts of SERI's decommissioning ADIT, incorrectly adds Account 190 ADIT amounts to rate base, and incorrectly uses an estimated value for the 2018 Account 283 balance.[568] Trial Staff proffers that these errors largely derive from the use of the *initial* refund calculation of Louisiana Commission witness Mr. Sisung, rather than the *revised* and corrected calculation submitted in Mr. Sisung's

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[562] *Id.*

[563] *Id.* P 507 (citing 2007 Accounting Guidance, 119 FERC at 64,454).

[564] *Id.* P 508.

[565] *Id.* P 509.

[566] Trial Staff Brief on Exceptions at 28 (citing Initial Decision, 171 FERC ¶63,003 at PP 474-549).

[567] *Id.* at 8.

[568] *Id.*

rebuttal testimony. Trial Staff explains that SERI divided the ADIT resulting from the decommissioning tax deduction between a FIN 48 component, which represents the portion of the tax deduction that SERI determined did not meet the "more likely than not" threshold, and an Internal Revenue Code (IRC) section 263A component, which represents the portion of the tax deduction that SERI determined did meet the FIN 48 "more likely than not" threshold.[569] Trial Staff explains that Mr. Sisung's rebuttal testimony corrected this error, and included both the FIN 48 component and the IRC section 263A component in the revised refund calculation.[570]

215. Trial Staff further argues that the Initial Decision erred by not including the ADIT resulting from the decommissioning deductions taken by SERI prior to 2007.[571] Trial Staff notes that its witness Ms. Miller explained that prior to the issuance of FIN 48 in 2007, SERI recorded over $160 million in income tax liabilities related to uncertain tax positions in Account 236,[572] and that the proper account for recorded uncertain tax positions would have been an ADIT account, not Account 236.[573] Trial Staff adds that its witness Ms. Miller further explained that according to the Chief Accountant's 1993 Guidance Letter, jurisdictional entities were required to adopt FAS 109 which stated that "current or deferred income tax liability or asset is recognized for the current or deferred tax consequences of all events that have been recognized in the financial statements or tax returns,"[574] so pre-2007 deductions would have fallen under this pronouncement. Based on this logic, Trial Staff argues that SERI's recording of ADIT in a non-ADIT account is improper, and that amounts recorded in Account 236 prior to 2007 should be recorded in an ADIT account beginning when SERI first took the decommissioning tax deduction.[575] Trial Staff maintains that together, these errors impact the refund calculation by understating the refund by approximately $176.6 million.[576]

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[569] *Id.* at 32.

[570] *Id.* at 33 (citing Ex. LC-0051 (REV) at 153:8-14).

[571] *Id.* at 8.

[572] *Id.* at 35 (citing Ex. S-0005 at 36:3-7).

[573] *Id.* at 36 (citing Ex. S-0005 at 37:1-23, 38:7-9).

[574] *Id.* (citing Ex. S-0005 at 40:3-6).

[575] *Id.* at 38.

[576] *Id.* at 8.

b. SERI

216. SERI argues that the Initial Decision's proposed refunds for the uncertain tax are unsupported by Commission regulations and contrary to Commission policy objectives. SERI states that the Initial Decision overlooked the potential benefits of uncertain tax positions and that uncertain tax positions and their resulting FIN 48 liabilities exist due to complexity and ambiguity in the tax code. SERI states that, before designating a tax position as uncertain, SERI performs a rigorous internal analysis that is reviewed by external auditors. SERI maintains that it takes uncertain tax positions because, if accepted by the IRS, they "benefit both customers and the Company by reducing total income tax liability."[577] SERI states that failure to advance an uncertain tax position means the taxpayer has zero chance to realize potential benefits when there is uncertainty. SERI states that its affiliates have achieved more than $800 million in customer benefits through the assertion of uncertain tax positions. SERI states that its objective in pursuing the uncertain tax position at issue here is to accelerate the tax deduction for future decommissioning expenses to create long-term tax savings, which is consistent with ensuring "just and reasonable" rates.[578] SERI states that it has taken on the risk and absorbed the cost associated with the deductions and that the Initial Decision did not address the potential benefits of uncertain tax positions broadly or the particular tax position at issue here; instead, it concluded, without citing any evidence, that there is no ratepayer benefit to claiming tax deductions that have little likelihood of success.[579]

217. SERI states that the prior disallowance of SERI's position does not mean that it is destined to fail and that there are numerous instances in which initial unfavorable decisions by the IRS have been ultimately reversed. SERI argues that the Initial Decision erred by failing to acknowledge that Entergy has successfully defended other uncertain tax positions that provided over $800 million in customer benefits and that for the position at issue, the IRS never assessed penalties.[580]

218. SERI argues that the Initial Decision erred in concluding that FIN 48 liabilities arising from uncertain tax positions are identical to ADIT that arises from certain tax positions. SERI states that the Initial Decision did not consider SERI's arguments distinguishing FIN 48 liabilities from traditional ADIT. SERI argues that it is undisputed that FIN 48 liabilities carry an associated interest cost and that asserting an uncertain

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[577] SERI Brief on Exceptions at 53-54 (quoting Ex. SER-0025 at 9).

[578] *Id.* at 54 (citing *ITC Midwest LLC*, 154 FERC ¶ 61,188, at P 50 (2016) (*ITC Midwest*)).

[579] *Id.* at 55 (citing Initial Decision, 171 FERC ¶ 63,003 at P 540).

[580] *Id.* at 55-57.

position and losing has the same economic effect as a late tax payment. SERI states that traditional ADIT produces cost-free capital as taxpayers pay lower tax expenses in the near term and pay higher tax expenses in later tax years.[581] SERI states that FIN 48 liabilities are uncertain in both timing and amount and, consequently, a taxpayer may ultimately realize some, all, or none of the associated deferred taxes. SERI states that in contrast, traditional ADIT produces cost-free cash flow that is predictable in both timing and amount and can therefore be used to invest in rate base assets. SERI argues that there is no rational connection between the fundamental properties of FIN 48 liabilities and the Initial Decision's recommendation to treat them as traditional ADIT.[582]

219. In response to the Initial Decision, SERI states that the "benefits/burdens" test examines whether a tax benefit to the utility arises from a customer burden, and if there is such a benefit, then it is flowed through to customers.[583] SERI states that the Initial Decision failed to consider evidence that for FIN 48 liabilities, there is not yet any tax benefit to pass along to customers unless the corresponding tax position is approved by the IRS. SERI states that the only ratemaking dispute implicating Order No. 144 is whether SERI should have adjusted its rate base for the tax effect of SERI's tax position. SERI states that the general rule under the "benefits/burdens" test is that if tax benefits arise from a customer burden, they must be shared with the customers that bear such burden. SERI maintains that the rate base rule is a shorthand application of this general rule: if the utility receives a tax benefit in the form of deferred taxes and customers pay through rates for the underlying expenses that create the deferred tax benefit, then customers are entitled to a rate base offset.[584] SERI argues that underpinning the Order No. 144 rate base rule is the presumption that ADIT produces a benefit in the form of cost-free capital that is then to be shared with customers if the related expense is included in rates. SERI states that, if there is no tax benefit, or if the deferred tax balance does not arise from an expense recovered in rates, then the rate base rule should not apply.[585]

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[581] *Id.* at 58-59.

[582] *Id.* at 59-60.

[583] *Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking & Income Tax Purposes*, Order No. 144, FERC Stats. & Regs. ¶ 30,254 (1981) (cross-referenced at 15 FERC ¶ 61,133), *order on reh'g*, Order No. 144-A, FERC Stats. & Regs. ¶ 30,340 (1982) (cross-referenced at 18 FERC ¶ 61,163).

[584] *Id.* at 60-61.

[585] *Id.* at 62.

220. SERI states that the Initial Decision wrongly asserts that FIN 48 liabilities are no different than ADIT that arises from certain tax positions. SERI argues that the Notice of Proposed Rulemaking (NOPR) leading to Order No 144 and Order Nos. 144 and 144-A make clear that the rate base rule presumes ADIT is a source of cost-free financing that a utility can use to invest in rate base assets.[586] SERI states that these orders did not contemplate a situation where a type of ADIT balance might have an associated cost, and no party identified any other type of ADIT balance that has an interest cost. SERI argues that the Initial Decision concludes that there is no need to determine whether the ADIT is "cost free," and that as long there is an ADIT balance, that is enough to require a rate base reduction. SERI argues that the rate base policy that the Commission articulated in Order No. 144 was based on its finding that ADIT provides cost-free capital that can be used for rate base investment.[587]

221. SERI argues that the UPSA does not require inclusion of all ADIT balances in rate base, and never has been interpreted in that manner. SERI states that, under the Initial Decision's logic, every single ADIT balance recorded by SERI should be included in the calculation of rate base. SERI argues that this is a question of first impression where the treatment of FIN 48 liabilities for ratemaking, not accounting, is the issue. SERI argues that the Initial Decision incorrectly presumed that there are no ratemaking distinctions between ADIT balances recorded for accounting purposes. SERI argues that were there no distinctions between different types of ADIT balances for accounting versus ratemaking, there would be no basis for Order No. 144's limitation on the ADIT balances included in rate base.[588] SERI states that the UPSA does not say SERI must include "ADIT as a rate base offset without any exception or qualification"[589] SERI argues that SERI's historical practice in implementing the UPSA requires a deeper analysis than inserting total ADIT balances in the calculation of rate base. SERI states that its witness Mr. Hunt explained that SERI's practice in implementing the UPSA distinguishes between ADIT balances that are appropriate for inclusion in ratemaking as part of the overall method for determining rates. SERI argues that, as the UPSA does not identify specific subaccounts to be included in the rate base determination, and the parties in the case agree that not all subaccounts are to be included, the exclusion of any subaccount is not a tariff violation. SERI maintains that, based on the distinctions between FIN 48

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[586] *Id.* at 63.

[587] *Id.* at 63-64.

[588] *Id.* at 65-66.

[589] *Id.* at 67 (quoting Initial Decision, 171 FERC ¶ 63,003 at P 533).

liabilities and traditional ADIT and the characteristics of its tax position, SERI concluded that ADIT balances related to its position should not be used to reduce rate base.[590]

222. SERI argues that the Initial Decision incorrectly interprets the 2007 Accounting Guidance, which SERI argues explicitly limited its effect on rates without prior Commission approval but the Initial Decision excluded the background paragraph which explains that "amounts billed each month" under formula rates "will change based on amounts recorded pursuant to a Commission prescribed" USofA.[591] SERI states that its implementation of FIN 48 for FERC reporting purposes caused additional amounts to be recorded as ADIT. SERI argues that it would have been inappropriate for SERI to include the uncertain tax position-related FIN 48 liability in its rate base ADIT calculation upon implementation of the Commission's 2007 Accounting Guidance without prior regulatory approval. SERI states that the Initial Decision's conclusion that once SERI reclassified its 2004 Change of Accounting Method (CAM) UTP from Account 236 to ADIT Account 283, it could not remove that ADIT from the UPSA ADIT offset to rate base without obtaining Commission approval directly conflicts with the 2007 Accounting Guidance.[592] SERI states that nothing suggests that SERI's exclusion of ADIT balances in connection with FAS 109 implementation and SFAS 158 implementation is inconsistent with the UPSA. SERI states that, for these other accounting guidance letters, parties agree that the resulting ADIT balances do not belong in rate base without Commission approval.[593]

223. SERI also argues that the Initial Decision ignored the fact that customers already have received the benefits of the certain tax deduction that arose from their contributions to the qualified nuclear decommissioning trust fund. SERI states that its collection of Qualified Fund contributions is the source of an entirely separate set of tax transactions that are not at issue in this proceeding. SERI states that it established a Qualified Fund pursuant to IRC section 468A. SERI asserts that under IRC section 468A(a), SERI was entitled to, and did, deduct 100% of the Qualified Fund contributions. SERI states that this was a highly certain tax position, from which, under IRC section 468A(a), customers already have benefitted and is unrelated to the computation of SERI's cost of goods sold. SERI asserts that its uncertain tax position does not eliminate the tax obligation associated with the withdrawal of funds from the Qualified Fund, as the inclusion in

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[590] *Id.* at 67-68.

[591] *Id.* at 70 (citing 2007 Accounting Guidance, 119 FERC ¶ 62,167).

[592] *Id.* at 71 (citing Initial Decision, 171 FERC ¶ 63,003 at P 544).

[593] *Id.* at 71-72.

taxable income of all withdrawals from the Qualified Fund occurs under IRC section 468A(c)(1).[594]

224. SERI states that the Initial Decision reasons that customers should receive the benefit of SERI's uncertain tax position because contributions to its Qualified Fund were funded by customers.[595] SERI asserts that the Initial Decision concluded that the "benefits/burdens" test requires SERI to reduce rate base because of Qualified Fund contributions paid by customers. SERI argues that the Initial Decision confuses the ADIT arising from the creation and maintenance of SERI's Qualified Fund with the FIN 48 liability arising from the uncertain position. SERI states that having a Qualified Fund allowed SERI to minimize the tax burden on its decommissioning trust, allowing the funds to grow at a substantially higher after-tax rate of return. According to SERI, the Qualified Fund also has allowed SERI's customers to pay through rates a much lower amount (approximately $440 million total) than the total expected cost of decommissioning.[596] SERI asserts that the benefits of a Qualified Fund in no way inform the proper regulatory treatment for SERI's uncertain tax position. SERI asserts that the uncertain tax position did not arise from any customer burden and that customers already have benefitted from the certain tax deduction directly arising from their Qualified Fund contributions. SERI argues that its exclusion of the uncertain decommissioning FIN 48 liability from rate base is thus consistent with Order No. 144's benefits/burdens test.[597]

225. SERI asserts that, for many of the years covered by this proceeding, SERI's uncertain tax positions produced no tax benefit, and the Initial Decision erred in failing to recognize this fact and recommending rate base refunds in years when there were no tax benefits. SERI states that, when a tax position is asserted via a refund claim filed on an amended tax return, there is no cash tax benefit to the taxpayer unless and until the IRS affirmatively approves the claim; and that federal law prohibits the IRS from issuing refunds for amended return claims in excess of certain thresholds ($2 million for the tax years in which the 2004 CAM and 2009 CAM would have applied) unless audit and review procedures are performed and the refund claim is approved by the IRS and the Joint Committee on Taxation. SERI asserts that such approval did not occur, and that the Initial Decision ignored this fact.[598]

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[594] *Id.* at 72-74.

[595] *Id.* at 75 (citing Initial Decision, 171 FERC ¶ 63,003 at PP 480-90).

[596] *Id.* at 75-76.

[597] *Id.* at 76-77.

[598] *Id.* at 77-78.

226. SERI states that its refund claims did not produce cost-free capital and there was no benefit to be shared with customers. SERI argues that the Initial Decision then found that Entergy Tax Allocation Agreement (ETAA) settlements control whether SERI obtained the "cost-free cash" contemplated by Order No. 144. SERI asserts that the Commission already has rejected the notion that the ETAA is determinative of tax benefits.[599] SERI also asserts that the Initial Decision is incorrect to presume that the ETAA allocations are "cost-free." SERI states that its receipt of allocations from other members of the ETAA occurred without a corresponding cash tax benefit on Entergy's consolidated tax return. SERI asserts that there was no externally generated source of cost- free funds; instead, Entergy Corporation provided those funds. SERI states also that treating SERI's ETAA allocations as if they are identical to cash flow from traditional ADIT violates the Commission's matching principle because those allocations do not come from any burden borne by SERI's customers. SERI asserts that the ETAA allocations diverted intercompany funds away from other potential uses and that the ETAA allocations for the amended returns and protective claim are wholly unrelated to any customer burden, and therefore do not support refunds.[600]

227. SERI notes that the Initial Decision says that SERI's explanation of the refund claims contradicts earlier testimony that the uncertain decommissioning deductions taken on original returns are not cost-free capital because the IRS charges interest on late payments of tax. SERI states that its refund claims did not produce a tax benefit because they were never approved, and they did not produce cost-free capital because they did not generate any capital.[601]

228. SERI states that the Initial Decision wrongly concluded that SERI's receipt of ETAA allocations, rather than the economic reality of the consolidated return, control "SERI's tax cash benefit position."[602] SERI states that the resolution of uncertain tax positions is uncertain in terms of timing and amount, which also means the repayment of any cash from a FIN 48 liability is uncertain. SERI states that any cash resulting from a FIN 48 liability cannot be considered a financing replacement for rate base investments because some or all of it may come due at an unexpected time. SERI asserts that it is not reasonable to presume that FIN 48 liabilities can be invested in rate base assets or to presume that SERI could have earned the equivalent of a WACC return on ETAA cash

[599] *Id.* at 78-79 (citing Opinion No. 375, 60 FERC at 61,475).

[600] *Id.* at 79-80.

[601] *Id.* at 80-81 (citing Initial Decision, 171 FERC ¶ 63,003 at P 497).

[602] *Id.* at 81 (citing Initial Decision, 171 FERC ¶ 63,003 at P 494).

flows. SERI also asserts that it is not reasonable to presume that SERI's "time value" benefit from the FIN 48 liabilities was equivalent to that of rate base investment.[603]

229. SERI notes that its witness Mr. Hunt quantified the effect of SERI's assertion of the uncertain tax position to determine if the FIN 48 liabilities have produced benefits. SERI notes that Mr. Hunt found that the FIN 48 liabilities have not yet produced benefits to SERI when considered as a whole (taking into account all related costs).[604] SERI states that the Initial Decision fails to identify Mr. Hunt's point: for SERI, the FIN 48 liabilities have not yet produced the type of "benefit" that justifies a rate base offset.[605]

230. SERI asserts that its uncertain tax position is for the same liability as its ARO. SERI states that both the asset retirement obligation and the uncertain tax have been determined based on the same projection of the cost of decommissioning Grand Gulf.[606] SERI states that the Costs of Goods Sold (COGS) position and the asset retirement obligation use the same underlying study to determine the cost of decommissioning,[607] and that the study estimated the total cost of decommissioning the plant in today's dollars, which forms the basis for the tax deduction.

231. SERI asserts that the Initial Decision erred in finding that "ARO accounting is separate from and not related to the decommissioning FIN 48 ADIT at issue here."[608] SERI states that the amount of the tax deduction and the amount of the asset retirement obligation liability recognized for financial reporting purposes are different because the valuation method for tax deduction purposes is dictated by the IRC, whereas the valuation method for financial reporting is dictated by GAAP. SERI asserts that the Initial Decision's statement that "the deduction did not reflect offsetting revenue accruals, which reduce the annual book impact of the asset retirement obligation to near zero" is irrelevant.[609] SERI argues that the Initial Decision confuses asset retirement obligation liability and asset retirement obligation accounting. SERI asserts that asset retirement obligation liability is recorded in Account 230, and that amount is not zero. SERI states

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[603] *Id.* at 81-82.

[604] *Id.* at 83-84 (citing Ex. SER-0034 at 14-19).

[605] *Id.* at 84-85.

[606] *Id.* at 85-86 (citing Ex. SER-0044 at 30).

[607] *Id.* at 86 (citing Ex. MC-0033).

[608] *Id.* at 87 (quoting Initial Decision, 171 FERC ¶ 63,003 at P 487).

[609] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 487).

that both the amount of the asset retirement obligation liability and the amount of the tax deduction are subject to annual adjustments. SERI asserts that the regulation's main concern is whether the deduction underlying the ADIT balance is related to the asset retirement obligation liability itself.

232. SERI states also that the Initial Decision is incorrect in stating that "[t]here would be no asset retirement obligation to count if there were no [Qualified Fund]."[610] SERI states that the asset retirement obligation liability exists because SERI has a legal obligation to decommission Grand Gulf after its useful life has ended. SERI states that establishing the asset retirement obligation liability in Account 230, pursuant to Order No. 631, was not optional but the Qualified Fund is optional. SERI also states that the Initial Decision misapplies the Commission's regulations in asserting that SERI's collection of Qualified Fund contributions negates the premise of SERI's reliance on Order No. 631.[611] SERI asserts that in Order No. 631 the Commission specifically called for the exclusion of all "rate base amounts related to asset retirement obligations."[612] SERI states that it has complied with the Commission's regulations as the Qualified Fund contributions, which were all authorized by the Commission, did not affect the calculation of rate base. SERI also asserts that the Initial Decision is incorrect in its assertion that SERI has "entered asset retirement obligation items in Accounts 101, 108, and 190, all of which are in UPSA rates despite SERI's never having requested Commission approval to do so."[613] SERI states that it has excluded the asset retirement obligation related cost components in Accounts 101 and 108 from rates.

233. SERI argues that ordering refunds going back almost 15 years in this case of first impression would also be arbitrary and unfair because it would deprive SERI of fair notice. SERI argues that if the Commission agrees with complainants and chooses to establish a policy on the appropriate rate treatment of FIN 48 liabilities, it would be inequitable to apply such policy retroactively when SERI would have had no notice of the policy or opportunity to alter its decisions based on such policy. SERI argues that ordering refunds would unfairly punish SERI's good-faith reliance on the plain text of the 2007 Accounting Guidance, which required formal Commission approval before any effect on rates as a result of the accounting guidance could be permitted. SERI argues that if the Initial Decision's position is adopted, it would represent a substantive change in how utilities would be required to treat uncertain tax positions for ratemaking

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[610] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 487).

[611] *Id.* at 88.

[612] *Id.* (citing Ex. SER-0067 at 33 (P 62), *Acct., Fin. Reporting, & Rate Filing Requirements for Asset Ret. Obligations*, Order No. 631, 103 FERC ¶ 61,021 (2003)).

[613] *Id.* at 88-89 (citing Initial Decision, 171 FERC ¶ 63,003 at P 526).

purposes. SERI states that imposing this change without advance notice would adversely affect the substantive rights of a segment of the public that could have conformed their conduct to the new policy, if proper advance notice had been given.[614]

234. SERI argues that the principle of fair notice is embedded in the Administrative Procedure Act (APA), which requires publication of "substantive rules of general applicability . . . and statements of general policy or interpretations of general applicability formulated and adopted by the agency."[615] SERI states that because it did not have notice that it could be liable to pay refunds for its unsuccessful uncertain decommissioning tax positions, the Initial Decision fails the reasonableness standard in the APA.[616] SERI argues that the hundreds of millions of dollars in refunds proposed by the Initial Decision would make SERI worse off than had it not taken the deductions in the first place, and that such a result would be unjust and unreasonable, and serve as a punishment to utilities attempting to engage in novel and unique tax planning strategies. SERI states that, if the Commission announces new policy and orders retroactive refunds, refunds should be limited to the tax effects associated with the uncertain deduction that is still pending—the 2015 CAM.[617]

235. SERI argues that, even if the Commission were to identify a tariff or policy violation in this case, ordering refunds is inappropriate here because "the end result of [the] tariff violation" or policy violation "is not 'unjust, unreasonable, or unduly discriminatory."[618] SERI states that the D.C. Circuit has reversed the ordering of refunds when a company was found to "technically" violate its tariff but "received no windfall as a result of its actions."[619] SERI states that there is no contention in this proceeding that SERI has over-collected its income tax expense; SERI claims it has sought to benefit customers by pursuing a tax deduction that is not only uncertain but has been repeatedly denied by the IRS. SERI states that it has received no windfall, and that for the CAMs that have already been adjudicated, the IRS rejected each tax position in its entirety and SERI already paid back the cash it received via the ETAA. SERI states that, for the 2015 CAM, which is still pending before the IRS, any cash SERI has received through the

[614] *Id.* at 96-97.

[615] *Id.* at 97 (citing 5 U.S.C. § 552(a)(1)(D)).

[616] *Id.* at 98.

[617] *Id.* at 98-99.

[618] *Id.* at 91-92.

[619] *Id.* at 92 (citing *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 817-18 (D.C. Cir. 1998) (*Koch Gateway*)).

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ETAA is contingent and must be paid back through the ETAA if the deduction is disallowed by the IRS.[620]

c. **Louisiana Commission**

236. The Louisiana Commission states that the Initial Decision overlooked evidence showing that the decommissioning tax benefits received by SERI prior to 2007, and recorded in Account 236, should have been booked as ADIT and included in rate base. The Louisiana Commission states that SERI established a trust fund to pay for the future decommissioning cost of Grand Gulf, and ratepayers funded that trust through the rates they paid to SERI. The Louisiana Commission notes that, since 2003 SERI has taken current deductions for the future decommissioning cost as "cost of goods sold," producing decommissioning tax benefits, and that SERI's decommissioning tax benefits should have been included in rate base pursuant to the Commission's benefits/burdens test.[621] The Louisiana Commission asserts that ratepayers paid revenues to SERI for taxes that SERI did not have to pay because of the decommissioning deductions and that SERI was allowed to hold the tax benefits, rather than lowering rates to reflect actual taxes, under the Commission's tax normalization regulation requiring that the ADIT be included in SERI's rate base. The Louisiana Commission asserts that SERI, without Commission approval, failed to follow the regulation and the Initial Decision correctly required refunds and correctly found that SERI was required to record the decommissioning tax benefits as deferred taxes.[622]

237. The Louisiana Commission asserts that this Initial Decision incorrectly held that "[i]t has not been established in this case whether SERI's [uncertain tax positions] that were entered in Account 236, before FIN 48 became effective, should have counted as ADIT"[623] and likely resulted from SERI's recalcitrance in producing information during the proceeding, including non-disclosure of 2004-2006 decommissioning tax benefits. The Louisiana Commission notes that the Initial Decision stated that "SERI seeks to take tax deductions for expenses that it has not yet incurred,"[624] but SERI's ratepayers fully

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[620] *Id.* at 92-93.

[621] Louisiana Commission Brief on Exceptions at 61 (citing Initial Decision, 171 FERC ¶ 63,003 at PP 474, 475, 480).

[622] *Id.* at 61-62.

[623] *Id.* at 63 (quoting Initial Decision, 171 FERC ¶ 63,003 at P 518).

[624] *Id.* at 65 (quoting Initial Decision, 171 FERC ¶ 63,003 at P 475).

funded the trust that will pay for decommissioning and they are entitled to the tax benefits associated with those costs.[625]

238. The Louisiana Commission asserts that SERI's decommissioning tax benefits from 2004-2006 are deferred taxes because they result from timing differences. The Louisiana Commission states that, each time the deduction was taken, SERI claimed a tax deduction for the estimated future decommissioning cost as a cost of producing electricity.[626] The Louisiana Commission asserts that the Commission's tax normalization rule permits utilities to hold the benefits of higher tax deductions rather than flowing them through immediately to consumers, but requires that the benefit be reflected in rate base.[627] The Louisiana Commission asserts that the 1993 Guidance Letter determined that the tax effects of deferred taxes must be recorded in deferred tax accounts. The Louisiana Commission states that Account 236 is an account used to record taxes accrued or payable for the current accounting period and cannot be used in lieu of a deferred tax account.[628]

239. The Louisiana Commission asserts that the Initial Decision inadvertently omitted decommissioning ADIT SERI recorded in Account 283 as "263A Method Change." According to the Louisiana Commission, SERI deemed the decommissioning deductions that produced the ADIT as more likely than not to succeed and thus did not title the deductions as FIN 48. The Louisiana Commission argues that the nature of the 263A Method Change ADIT, and its exclusion from rate base, was not revealed until the depositions and production of the previously undisclosed trial balance and other material in Trial Staff's direct testimony table and the Louisiana Commission's rebuttal table.[629] The Louisiana Commission states that SERI offered no reason to exclude the 263A Method Change ADIT from rate base and the Initial Decision overlooked the existence of this ADIT.[630]

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[625] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 480).

[626] *Id.* at 66 (citing Tr. 1333-34 (Roberts)).

[627] *Id.* (citing 18 C.F.R. § 35.24(b)(2)).

[628] *Id.* at 66-67 (citing Ex. LC-0084 at 12; Ex. S-0005 at 42).

[629] *Id.* at 67-69 (citing Ex. S-0004; Ex. LC-0051 REV at 155).

[630] *Id.* at 69.

3. Briefs Opposing Exceptions

a. Trial Staff

240. Trial Staff argues that the Initial Decision appropriately determined that SERI's uncertain tax positions were ill-conceived and provided no ratepayer benefits. Trial Staff maintains that the core question is whether long-standing Commission policies and precedent prohibit SERI from excluding the decommissioning ADIT from rate base, and that the Initial Decision found that SERI is prohibited from excluding the decommissioning ADIT from rate base in the UPSA.[631] Trial Staff notes that SERI focuses on the *potential* benefits to ratepayers from the uncertain tax positions, but concedes the critical fact that SERI has not *actually* prevailed on its decommissioning deductions before the IRS,[632] and that the Initial Decision has concluded that there is no benefit to ratepayers for utilities to claim tax deductions that have little or no likelihood of being sustained by the taxing authorities upon review.[633]

241. Trial Staff argues that the Commission's longstanding tax normalization policy, embodied in Order No. 144, applies the benefits/burdens test to determine whether utilities must include ADIT in rate base, and that SERI attempts to avoid these requirements by asserting that there are differences between what it calls "traditional ADIT" and FIN 48 ADIT.[634] Trial Staff posits that the Initial Decision correctly held that the Commission does not distinguish between ADIT and FIN 48 ADIT,[635] and that the Commission's accounting regulations do not distinguish between certain and uncertain tax positions.[636] Trial Staff also argues that the Commission has instead held that the benefits/ burdens test requires that ratepayers "be given the benefit of tax reductions

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[631] Trial Staff Brief Opposing Exceptions at 77.

[632] *Id.* Trial Staff points to SERI's September 22, 2020 Motion to Lodge the NOPA regarding SERI's decommissioning deductions for the 2015, 2016, and 2017 tax years, which were based upon a Change in Accounting Method SERI submitted to the IRS in 2015, and Trial Staff notes that Trial Staff and the Retail Regulators submitted answers in opposition.

[633] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 540).

[634] *Id.* at 78 (citing SERI Brief on Exceptions at 58).

[635] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at PP 480-84).

[636] *Id.* at 79 (citing Initial Decision, 171 FERC ¶ 63,003 at PP 507-09 (citing 2007 Accounting Guidance, 119 FERC ¶ 62,167)).

resulting from deductible expenses which they bear in rates."[637] Trial Staff explains that SERI's own filings with the SEC confirm that its 2004 decommissioning tax deduction produced a $144 million cash tax benefit,[638] in addition to SERI's spreadsheet showing its tax benefits from 2002 to 2018,[639] and disagrees with SERI's contention that the cash tax benefits are not "real" benefits.[640]

242. Trial Staff argues that the Initial Decision correctly held that SERI must include decommissioning ADIT balances in rate base, despite SERI's contention that the UPSA does not have such a requirement. Trial Staff argues that the Initial Decision correctly found that the Commission's Office of Enforcement Chief Accountant's 2007 Accounting Guidance requires utilities to disregard FASB's FIN 48 guidance for FERC accounting and reporting purposes, and to obtain prior Commission approval before excluding ADIT amounts from rates due to the implementation of FIN 48.[641] Trial Staff notes that the Initial Decision rejects SERI's interpretation of the 2007 Guidance, which construes an opposite meaning that would require SERI to seek prior approval from the Commission before including any ADIT resulting from an uncertain tax position in rate base and found this argument to be "perverse."[642]

243. Trial Staff argues that SERI erroneously asserts that the Initial Decision "matched the burden of customer contributions to the [decommissioning trust fund] to the wrong tax deduction," and that the collection of those contributions "are not at issue in this proceeding."[643] Trial Staff contends that the Initial Decision correctly found that ratepayers bore the burden of book expenses that gave rise to the decommissioning ADIT, as the decommissioning expenses were fully funded by ratepayer contributions to the trust fund and earnings on those ratepayer contributions.[644] Trial Staff explains that

[637] *Id.* at 80 (citing Opinion No. 375, 60 FERC at 61,476; Initial Decision, 171 FERC ¶ 63,003 at P 481).

[638] *Id.*

[639] *Id.* (citing Ex. SER-0028).

[640] *Id.* at 81 (citing Ex. S-0055 at 5:7-6:3).

[641] *Id.* at 83 (citing Initial Decision, 171 FERC ¶ 63,003 at P 534; 2007 Accounting Guidance, 119 FERC ¶ 62,167).

[642] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 532).

[643] *Id.* at 85 (citing SERI Brief on Exceptions at 2-73).

[644] *Id.* (citing Ex. S-0001 at 10:3-17).

SERI has taken two separate decommissioning tax deductions, one for the future decommissioning expenses that will occur upon plant shutdown, and another for amounts contributed to the trust fund for future decommissioning costs,[645] and through the deductions at issue here, has attempted to accelerate those deductions and take them beginning in 2004.[646] Trial Staff contends that SERI has failed to share the benefits accruing from the deductions with ratepayers, as required by Order No. 144, and alternatively offers that the benefit should only be shared with ratepayers if SERI prevails with the IRS on its uncertain tax deduction.[647] Trial Staff notes that in *Alaskan Northwest Natural Gas Transportation Company*, the company attempted to exclude ADIT from rate base because the IRS had "challenged the deductibility" of the expenditures that gave rise to the ADIT,[648] and the Commission declined the company's proposal to wait to include the amounts in rate base following "final resolution [of] the dispute with the IRS," concluding that there was "no need to await final IRS rulings on this matter."[649] Trial Staff contends that SERI has made no attempt to distinguish or provide a rationale for why it would be appropriate to treat decommissioning ADIT differently from the ADIT in *Alaskan Northwest*. Trial Staff adds that the Initial Decision noted Trial Staff witness Healy testified that "he is not aware of any Commission precedent distinguishing between the filing status of an 'original' or 'amended/claim' return, and if filing status were to be considered, it should be considered for all ADIT, not just the inconsistent application to decommissioning FIN 48 ADIT as SERI has done here."[650]

244. Trial Staff rejects SERI's contention that the cash benefits identified on its SEC filings are not "real" benefits because SERI received cash through the ETAA, and ETAA cash flows are not a cash tax benefit.[651] Trial Staff argues that SERI incorrectly contends that ETAA allocations cannot be matched to "any burden borne by SERI's customers" because "[n]ot so much as one dollar of the COGS position was included as an expense in

[645] *Id.* at 86 (citing Ex. No. S-0001 at 10:3-17).

[646] *Id.* at 85-86.

[647] *Id.* at 86 (citing SERI Brief on Exceptions at 18).

[648] *Id.* at 87 (citing *Alaskan Nw. Nat. Gas Transportation Co*., 19 FERC ¶ 61,218, at 61,427 (1982) (*Alaskan Northwest*)).

[649] *Id.* (citing *Alaskan Northwest*, 19 FERC at 61,427).

[650] *Id.* at 89 (citing Initial Decision, 171 FERC ¶ 63,003 at P 497).

[651] *Id.* (citing SERI Brief on Exceptions at 78-79).

the UPSA."[652] Trial Staff asserts that it is immaterial whether those deductions were reported on a consolidated return and matched with tax benefits flowing into and out of a tax allocation agreement[653] because the issue before the Commission is whether ratepayers bore the burden of funding the decommissioning trust that resulted in the cash tax benefits stemming from SERI's attempted decommissioning deductions.[654] Trial Staff argues that, despite SERI's contention that deductions resulted in "limited potential benefits" because it "would not be reasonable to expect that proceeds from the decommissioning FIN 48 liabilities were invested in [long-lived] rate base assets,"[655] SERI witness Mr. Hunt conceded at hearing that the cash tax benefits are not traceable, that the funds were not deposited into a restricted account, and that he was unable to attest that the cash remained in the Entergy money pool from 2003 to 2018.[656]

245. Trial Staff argues that the Initial Decision correctly found that the decommissioning deductions are not ARO-related cost components, despite SERI's contention that it is both *permitted* and *must* exclude decommissioning ADIT from rate base pursuant to Commission regulations governing asset retirement obligation cost components, Order No. 631, and FASB Statement No. 143, Accounting for Asset Retirement Obligations (FAS 143).[657] Trial Staff argues that SERI conflates the asset retirement obligation itself and the future decommissioning costs by asserting that the issue is "whether the deduction underlying the ADIT balance is related to the [asset retirement obligation] *liability* itself."[658] Trial Staff argues that the critical distinction that SERI attempts to sidestep is that the decommissioning deduction at issue was for future costs, not the obligation itself.[659]

246. Trial Staff disagrees with SERI's contention that the Commission should find that the "UPSA is unjust and unreasonable because it does not sufficiently define how the

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[652] *Id.* at 91 (citing SERI Brief on Exceptions at 80).

[653] *Id.* at 89.

[654] *Id.* at 91.

[655] *Id.* at 92 (citing SERI Brief on Exceptions at 81-82).

[656] *Id.* (citing Tr. at 799:25-801:5).

[657] *Id.* at 93.

[658] *Id.* at 94 (quoting SERI Brief on Exceptions at 87 (emphasis in original)).

[659] *Id.*

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ADIT calculation is made."[660] Trial Staff argues that neither the UPSA nor the Commission's requirements are unclear or insufficiently definite, and that SERI's failure to adhere to the Commission's requirements does not render them unclear.[661] Trial Staff contends that SERI incorrectly argues that refunds should not be required because "the end result" of any tariff or policy violation "is not 'unjust, unreasonable, or unduly discriminatory.'"[662] Trial Staff argues that it has been established that SERI has continuously reaped cash tax benefits from the decommissioning deductions since 2004 and that ratepayers bore the burden of book expenses that gave rise to the decommissioning ADIT and suffered a corresponding harm by bearing the burden of income tax expenses that were never paid.[663]

b. Louisiana Commission

247. The Louisiana Commission states that the Initial Decision properly applied the Commission's policy to include decommissioning ADIT in rate base and rejected SERI's collateral attack on that policy. The Louisiana Commission states that SERI collected hundreds of millions of dollars in tax expense from customers that it did not pay to the IRS because of its decommissioning tax deductions. The Louisiana Commission states that SERI has held that money since 2004, failed to reflect it as a deduction to rate base, and used the money to benefit shareholders. The Louisiana Commission asserts that Commission regulations and accounting guidance already have established Commission policy that requires the recognition of the decommissioning tax deductions as ADIT and its inclusion in the SERI rate base.[664] The Louisiana Commission states that the Initial Decision correctly concluded that the uncertainty of a tax position plays no role in determining whether ADIT is included in the UPSA formula rate.[665]

248. The Louisiana Commission also states that the Initial Decision properly rejected SERI's incentive argument and the testimony of SERI witness Ms. Johnston. The Louisiana Commission states that the Commission requires that utilities provide the time-value benefit of tax deductions to customers by providing them a rate base credit for the tax expense that they advance to the utility and the Initial Decision applied this policy.

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[660] *Id.* at 95 (quoting SERI Brief on Exceptions at 91).

[661] *Id.*

[662] *Id.* at 96 (citing SERI Brief on Exceptions at 91-92).

[663] *Id.*

[664] Louisiana Commission Brief Opposing Exceptions at 63-64.

[665] *Id.* at 64.

The Louisiana Commission states that the Commission's normalization policy provides adequate incentive for utilities to pursue tax deductions as utilities can use the cash as they see fit; ratepayers receive a rate base credit, which may or may not equal the utility's time value benefit. The Louisiana Commission argues that SERI's suggestion that a federal agency should incentivize utilities to take a tax deduction that the utility previously conceded in multiple IRS audits, by letting it keep all the benefit of the unjustified deduction, is highly questionable. The Louisiana Commission states that Ms. Johnston's testimony amounted to a collateral attack on the Commission's deferred tax requirements and the Initial Decision dismissed her testimony due to a lack of credibility.[666]

249. The Louisiana Commission further asserts that SERI's attempt to avoid the ADIT requirements of the Commission and of SERI's filed rate should be rejected. The Louisiana Commission states that SERI violated Commission accounting requirements and the filed rate by excluding from rate base ADIT produced by SERI's deduction of the future cost for decommissioning Grand Gulf on its tax returns. The Louisiana Commission states that decommissioning ADIT must be included in rate base and would reduce rate base because it is "liability" ADIT, under the Commission's tax normalization rule.[667] The Louisiana Commission argues that consumers have been required to contribute enough funds to a trust fund to decommission Grand Gulf and are entitled to the benefit of the decommissioning ADIT. The Louisiana Commission states that the UPSA provides for the inclusion of all ADIT accounts and does not delegate discretion to SERI to make exceptions.[668] The Louisiana Commission argues that SERI nonetheless unilaterally and without Commission approval excluded the ADIT, and that SERI should make refunds. The Louisiana Commission states that if SERI thought that the decommissioning ADIT should not be included in rate base, it could have proposed a tariff amendment to the Commission, but it did not.[669]

250. The Louisiana Commission argues that the Commission does not recognize any distinction between "traditional ADIT" and ADIT that arises from uncertain tax positions. The Louisiana Commission notes that SERI states that the decommissioning ADIT is different because it (a) is uncertain; (b) will be paid at an indefinite time; and (c) carries an interest accrual.[670] The Louisiana Commission argues that those characteristics

[666] *Id.* at 64-69.

[667] *Id.* at 69 (citing 18 C.F.R. § 35.24).

[668] *Id.* (citing Ex. SERI-0035 at 9).

[669] *Id.* at 69-70.

[670] *Id.* at 70-71 (citing SERI Brief on Exceptions at 58-60).

are true of any uncertain ADIT and the 2007 Accounting Guidance directs that uncertain ADIT should not be treated differently. The Louisiana Commission notes that SERI relies on the argument that the decommissioning ADIT is not cost-free capital because the deductions were uncertain and if they are disallowed, SERI may have to pay interest. The Louisiana Commission states that the 2007 Accounting Guidance recognized that uncertain tax deductions may carry interest and even penalties, but it still required the inclusion of the deferred taxes in ADIT accounts, so that they would be properly recorded for ratemaking.[671] The Louisiana Commission states that SERI has repeatedly renewed its decommissioning deductions as they have been disallowed by the IRS. The Louisiana Commission states that SERI has had the tax benefit almost continuously since 2004, as it argued tax audits, appealed audit conclusions, and replaced decommissioning tax theories.[672]

251. In response to SERI, the Louisiana Commission asserts that ratepayers have fully funded the Grand Gulf nuclear decommissioning trust fund and that the cost of goods sold deduction takes the decommissioning costs as a current tax deduction on the theory that it is a current cost of producing electricity. The Louisiana Commission states that the Commission's tax normalization regulation allows utilities to collect revenues for taxes before they are paid but requires that the funds be included in rate base, thus reducing the return on rate base recovered by the utility.[673] The Louisiana Commission argues that, since ratepayers funded the decommissioning trust fund, they should receive the benefit of the deduction. The Louisiana Commission asserts that the Initial Decision correctly applied the Commission's tax normalization orders.[674]

252. The Louisiana Commission argues that SERI seeks to deny the enormous time-value benefit of the tax collections it has received from ratepayers since 2003.[675] The Louisiana Commission states that SERI would have the Commission adopt the view that there has been no “"benefit” to SERI from having the unrestricted use of hundreds of millions of dollars for 16 years. The Louisiana Commission argues that the Commission should reject this argument.[676]

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[671] *Id.* at 71 (citing Ex. LC-0047).

[672] *Id.* at 72.

[673] *Id.* at 74 (citing 18 C.F.R. § 35.24).

[674] *Id.* at 75.

[675] *Id.* at 76 (citing SERI Brief on Exceptions at 60).

[676] *Id.*

253. The Louisiana Commission states that the UPSA requires the inclusion of the decommissioning ADIT balances and SERI has never made a filing to change that requirement. The Louisiana Commission states that SERI's entire case for excluding the decommissioning tax benefits from rates rests on its determination that the tax benefits are uncertain. The Louisiana Commission argues that the formula rate in the UPSA provides for the inclusion in rate base of "FERC Accounts 190, 281, 282, 283" and makes no provision for excluding uncertain balances.[677] The Louisiana Commission states that the UPSA does not allow SERI to use different sets of books for accounting and ratemaking for ADIT. The Louisiana Commission states that, despite the requirements of the UPSA and the 1991 Settlement, SERI excluded the benefits of the decommissioning tax deductions from rate base at least since 2004 and that SERI never made a filing with the Commission requesting permission to deviate from the UPSA, the tax normalization requirements, or the 1991 Settlement. The Louisiana Commission asserts that no FPA section 205 filing was made to exclude the decommissioning ADIT; therefore, refunds are due to correct the erroneous exclusion. The Louisiana Commission states that SERI's claim of discretion in implementing the ADIT provisions of the UPSA formula conflicts with the underlying justification for the use of formula rates. The Louisiana Commission states that the Commission permits utilities to use formula rates as an exception to the notice and filing requirements of the FPA but the utilities are required to comply with the formula.[678]

254. The Louisiana Commission argues that the Initial Decision properly applied the 2007 Accounting Guidance. The Louisiana Commission notes that SERI argues that it complied with the 2007 Accounting Guidance for accounting and reporting purposes by moving the decommissioning ADIT that was erroneously recorded in Account 236 to Account 283 and by reporting it in its FERC Form No. 1 in Account 283 after 2007. The Louisiana Commission argues that SERI attempts to use its own improper failure to recognize ADIT prior to 2007 as a basis to legitimize its violation of the tax normalization requirement. The Louisiana Commission states that decommissioning ADIT should not have been excluded from UPSA ratemaking before 2007, and not after 2007. The Louisiana Commission argues that the 2007 Accounting Guidance made it clear that the decommissioning ADIT was always supposed to be recorded as ADIT and that SERI would need to seek Commission permission to exclude the decommissioning ADIT from SERI rate base. The Louisiana Commission argues that SERI treated the decommissioning ADIT incorrectly for accounting and for ratemaking prior to the 2007 Accounting Guidance and continued to do so after the 2007 Accounting Guidance. The Louisiana Commission asserts that SERI misinterprets the 2007 Accounting Guidance as

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[677] *Id.* at 77 (citing Ex. SER-0035 at 9).

[678] *Id.* at 77-81.

preventing it from fixing its erroneous ratemaking.[679] The Louisiana Commission states that SERI's need to correct its accounting resulted from its failure previously to account properly for the decommissioning ADIT. The Louisiana Commission states that SERI corrected the accounting but kept a separate non-compliant set of accounting books for ratemaking and incorrectly continued to exclude the decommissioning ADIT from rate base, violating the 2007 Accounting Guidance.[680]

255. The Louisiana Commission argues that SERI's attack on the Initial Decision's benefits/burdens test is based on an illusory distinction. The Louisiana Commission asserts that SERI attempts to disassociate ratepayers from the burden of decommissioning Grand Gulf, even though ratepayers actually paid those expenses. The Louisiana Commission asserts that SERI had no cost burden associated with decommissioning Grand Gulf.[681] The Louisiana Commission notes that collection of the decommissioning expense from ratepayers increases SERI's taxable income, and that the deposit of those same dollars into the trust fund provides SERI with an offsetting tax deduction. The Louisiana Commission notes that the cash in the ratepayer-funded trust fund remains in the fund earning a return until it is time for SERI to decommission Grand Gulf. The Louisiana Commission states that SERI will withdraw cash from the trust fund to pay for the decommissioning, which will be recognized as income. The Louisiana Commission states that absent SERI's accelerated nuclear decommissioning deduction, the expenses that SERI would then incur for decommissioning Grand Gulf would provide SERI with an offsetting taxable deduction. The Louisiana Commission asserts that SERI's decommissioning deduction accelerated the decommissioning deduction that SERI would normally take when it begins to decommission Grand Gulf and that each deduction provided SERI the cash-tax benefit of that deduction at once, well ahead of when it normally would have been allowed to deduct the expense.[682]

256. The Louisiana Commission asserts that there is no dispute that ratepayers have borne the expenses required to decommission Grand Gulf. The Louisiana Commission states that even though SERI has shared none of the benefit of the decommissioning deductions with ratepayers, it has billed them annually for costs incurred in taking and defending the deductions. The Louisiana Commission states that SERI attempts to isolate the ratepayers' payment of the decommissioning expense from the decommissioning deduction to disassociate the ratepayers' burden from the benefit. The Louisiana Commission states that the deduction SERI took is for amounts it will use to

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[679] *Id.* at 82-83.

[680] *Id.* at 84.

[681] *Id.* at 85-86 (citing SERI Brief on Exceptions at 72).

[682] *Id.* at 86-87.

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decommission the unit, which will come from the trust fund.[683] The Louisiana Commission states that SERI argues that ratepayers have received the "benefit" of the tax deduction for contributions to the trust fund but the Louisiana Commission argues that is not a benefit. The Louisiana Commission argues that while SERI's shareholders will not pay taxes on withdrawals from the decommissioning trust fund, ratepayers have experienced a burden. The Louisiana Commission argues that even though the ratepayers' payments for decommissioning Grand Gulf were deposited in the trust fund, ratepayers paid the decommissioning expense and they should receive the time value of the ADIT that results from the deduction.[684]

257. The Louisiana Commission states that SERI's claim that it did not receive any cash tax benefits from its decommissioning deductions taken on amended tax returns or protective claims is an attempt to distract from realized, actual benefits. The Louisiana Commission argues that the evidence does not support SERI's claims as SERI took its initial decommissioning deduction on its original 2003 tax return, obtained cash tax benefits from that deduction, and has been holding those benefits and more for the years since. The Louisiana Commission asserts that SERI's 2004 CAM produced significant cash tax benefits, and that after the appeal of the initial 2003 CAM was completed, SERI was obligated to make payments to other Entergy companies via the ETAA to reflect its concession of the decommissioning deduction. The Louisiana Commission states that SERI's witness Roberts testified that SERI received a total "payment of $252 million attributable to its decommissioning deductions in 2009" and "the incremental deductions taken on original returns allocable to SERI" in 2009, 2010, 2011, and 2012 totaled $64 million.[685] The Louisiana Commission states that when SERI conceded the 2004 CAM to the IRS on October 18, 2012, the 2009 CAM took its place, preserving SERI's cash tax benefits.[686] The Louisiana Commission states that the 2009 CAM was resolved in 2015, but Entergy Corporation took another decommissioning deduction on a CAM included in its original 2015 tax return. The Louisiana Commission argues that regardless of the ordinary effects of amended returns and protective claims, SERI received cash tax benefits from the 2003 CAM that were protected by Entergy Corporation through the repetitive, slightly altered decommissioning CAM theories that were asserted over many years.[687]

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[683] *Id.* at 87-88.

[684] *Id.* at 89-90 (citing SERI Brief on Exceptions at 73, 75).

[685] *Id.* at 92 (citing Ex. SER-0025 at 24).

[686] *Id.* at 93 (citing Ex. LC-0051 REV at 72).

[687] *Id.*

258. The Louisiana Commission states that SERI's claims that cash received through the ETAA does not constitute a cash tax benefit is erroneous and conflicts with SERI's representations in public disclosures, including Entergy Corporation's 10-K and SERI's Form No. 1s, which represent that SERI received large amounts of cash tax benefits from its decommissioning deductions. The Louisiana Commission states that SERI fails to acknowledge its concession that it received revenues through the ETAA. The Louisiana Commission alleges that this concession refutes SERI's entire argument about claims, IRS refunds, and amended returns.[688] The Louisiana Commission states that SERI alleges that its cash tax benefit from the decommissioning deduction came from the ETAA and that Entergy Corporation and its shareholders provided those funds. The Louisiana Commission argues that that statement cannot be true as SERI ratepayers have paid approximately $1.2 billion in revenues for taxes on a normalized basis to SERI since 2003.[689] The Louisiana Commission argues that any cash that SERI receives through the ETAA from other regulated Entergy companies is funded by customers alone. The Louisiana Commission argues that the fact that SERI received some of its cash benefits from the ETAA would still not be a reason to exclude it from SERI's rate base.[690]

259. The Louisiana Commission asserts that SERI's argument that the cash tax benefit could not be used to invest in rate base assets conflicts with the evidence. The Louisiana Commission states that SERI's contention that a "reasonable inference" can be drawn that SERI did not invest cash from the decommissioning deduction is inconsistent with the evidence. The Louisiana Commission notes that SERI witness Mr. Heytens, testified that he had "no specific knowledge or evidence that SERI kept cash for the purpose of paying back the decommissioning deduction."[691] The Louisiana Commission notes that Mr. Heytens explained that SERI did not need to have enough cash on hand to pay back its decommissioning deduction tax liabilities because it could borrow from the money pool if an immediate need for cash arose. The Louisiana Commission alleges that if SERI could finance its cash needs by borrowing from the money pool, it did not need to reserve cash to pay back the decommissioning deduction liabilities whenever they became due. The Louisiana Commission states that SERI's ability to borrow from the money pool allowed SERI's cash tax benefits to be available for investment in rate base assets.[692] The Louisiana Commission states that in 2012, SERI was performing an uprating on Grand Gulf that resulted in a significant rate base investment. The Louisiana

[688] *Id.* at 94-95.

[689] *Id.* at 96 (citing SERI Brief on Exceptions at 79-80; Tr. 1269).

[690] *Id.* at 97.

[691] *Id.* at 97-98 (citing Tr. 950).

[692] *Id.* at 98 (citing Tr. 953-54).

Commission notes that at the same time, SERI went from lending approximately $244 million to the money pool at the end of 2011 to borrowing $43 million by the end of August 2012, a difference of approximately $274 million. The Louisiana Commission states that SERI invested its ADIT proceeds and then borrowed from the money pool.[693]

260. The Louisiana Commission argues that SERI's decommissioning ADIT is not a cost component related to SERI's asset retirement obligation and should not be excluded from rate base pursuant to SERI's late argument claiming otherwise. The Louisiana Commission notes that SERI on rebuttal raised an argument that the decommissioning deduction tax benefits should not be included in rate base because the deduction is related to SERI's asset retirement obligations.[694] The Louisiana Commission argues that SERI presented no evidence that it ever associated the deduction with the financial reporting requirement prior to that point in this proceeding. The Louisiana Commission argues that SERI's decommissioning ADIT is not a "cost component related to [SERI's] asset retirement obligations" and cannot be excluded from rate base pursuant to that theory.[695] The Louisiana Commission notes that entities are required to report asset retirement obligations under FAS 143 and that section 35.18 of the Commission's Regulations and Order No. 631 set forth how utilities shall record these financial reporting amounts and requires that they not be included in rate base.[696] The Louisiana Commission argues that contrary to SERI's assertion, the critical requirement of section 35.18 is that the cost must be a "cost component" related to the asset retirement obligation to be excluded from rate base. The Louisiana Commission asserts that the decommissioning ADIT cannot be a "constituent part" of the asset retirement obligation because the ADIT is independent of the asset retirement obligation.[697]

261. The Louisiana Commission states that there are numerous differences between the decommissioning deduction and the ARO, noting that the amounts SERI deducted for decommissioning were different by hundreds of millions of dollars from the amounts recorded for the ARO.[698] The Louisiana Commission states that the financial entry for the ARO is an amount discounted from the future decommissioning cost of Grand Gulf

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[693] *Id.* at 99 (citing Tr. 969; Ex. LC-0081 at 4).

[694] *Id.* at 100 (citing 18 C.F.R. § 35.18 (2021); SERI Brief on Exceptions at 85-89).

[695] *Id.* (citing 18 C.F.R. § 35.18).

[696] *Id.* at 100-101 (citing Order No. 631, 103 FERC ¶ 61,021 at P 60).

[697] *Id.* at 101-102 (citing 18 C.F.R. § 35.18; Tr. 1364-65).

[698] *Id.* at 103 (citing Tr. 1365-66).

and is a liability recorded in Account 230. The Louisiana Commission states that as a liability, the ARO could only create asset deferred tax. The Louisiana Commission states that the decommissioning tax deduction creates a liability deferred tax.[699]

262. The Louisiana Commission argues that the Commission's regulations state that cost components related to ARO that should be excluded from rate base include "electric plant and related accumulated depreciation and accumulated deferred income taxes." The Louisiana Commission states that the decommissioning ADIT is not ADIT that "relate[s]" to the ARO "electric plant" asset; but that it is completely expense related. The Louisiana Commission states that the decommissioning ADIT does not fit the regulation's description for an excludable cost.[700]

c. <u>SERI</u>

263. SERI asks the Commission to reject the Louisiana Commission's and Trial Staff's exceptions that seek to increase the Initial Decision's proposed refund related to uncertain tax positions. SERI argues that these requests do not reflect economic reality, are barred by the Commission's asset retirement obligation regulations, and rely on the fundamentally flawed premise: that refunds are owed as if the uncertain tax position was certain each time it was taken and would be 100% accepted by the IRS. SERI asserts instead that each time SERI asserted the uncertain tax position, it could not have predicted when or how much it would need to pay back the tax liability, but SERI states that it understood that the liability would need to be paid back in a relatively short time.[701]

264. SERI argues that the NOPA underscores the incorrectness of the Louisiana Commission's and Trial Staff's exceptions. SERI states that the Initial Decision made no finding, and the record does not support any finding, that SERI obtained more than $500 million in benefits as a result of the uncertain tax position. SERI states that, for many years the uncertain tax position created no tax benefits because it was the basis for requested tax refunds (presented in amended tax returns) that were ultimately denied. SERI states that the Louisiana Commission's and Trial Staff's exceptions presume that the uncertain tax position produced cash that could be invested in long term, 30 to 40-year assets and earn the equivalent of a weighted average cost of capital return. SERI asserts that there is no evidence that was possible. SERI states that it was most likely that any cash balances resulting from the uncertain tax position would have been invested

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[699] *Id.* (citing Ex. LC-0051 REV at 138 (Sisung); Tr. 1366 (Roberts); Ex. LC-0143 at 2).

[700] *Id.* at 104 (citing 18 C.F.R. § 35.18(a)).

[701] SERI Brief Opposing Exceptions at 7-10.

only on a short-term basis because those balances may need to be paid back on an unpredictable basis. SERI states that it obtained a deferred tax benefit of approximately $26.1 million. SERI argues that prior to the NOPA, the uncertain position could not have been considered a stable source of long-term, cost-free financing.[702] SERI states that each of the Louisiana Commission's and Trial Staff's enumerated exceptions are intended to elicit rate base refunds based on a cost element related to SERI's asset retirement obligation and are proposed refund adjustments related to SERI's uncertain position but SERI argues that neither the UPSA nor any Commission order has authorized such rate treatment in the timeframe being considered.[703]

265. SERI argues that, for ratemaking purposes, uncertain tax positions do not have the same characteristics as certain ones, and it is not appropriate to treat tax liabilities associated with uncertain tax positions as equal to traditional ADIT. SERI argues that this this is a case of first impression concerning the appropriate ratemaking treatment of the effects of uncertain tax positions and if the Commission penalizes SERI for taking the uncertain tax position by ordering the refunds urged by the Louisiana Commission and Trial Staff, utilities will be forced to forego taking uncertain tax positions to avoid the penalty. SERI states that the Louisiana Commission and Trial Staff are asking for more than seven times the lifetime deferred tax benefit that was created by the IRS resolution of uncertain tax position taken in 2015.[704]

266. SERI states that this case does not involve the filed rate doctrine as neither the text of the UPSA nor historical practice in its implementation compel the inclusion of all ADIT subaccount balances in the rate base determination. SERI argues that it was a reasonable interpretation of the UPSA and Commission policy for SERI to conclude that the cost of goods sold-related ADIT balances were not appropriate to be used to reduce rate base.[705] SERI argues that in cases where the Commission identifies a "technical" tariff violation, however, it must still evaluate the equities when determining whether to order refunds.[706] SERI cites *Koch Gateway* in which the D.C. Circuit upheld the Commission's finding that the tariff had been violated but concluded that the Commission had "abused its remedial discretion by ordering a refund given that Koch did not ultimately garner a windfall" as a result of the tariff violation and the case did not

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[702] *Id.* at 12-13.

[703] *Id.* at 14.

[704] *Id.* at 15-16.

[705] *Id.* at 17.

[706] *Id.* (citing *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992)).

implicate filed rate doctrine concerns.[707] SERI argues that, in the instant proceeding neither the Louisiana Commission's nor Trial Staff's exceptions demonstrate that SERI received any windfall, much less one that is close to the scope of their requested refunds. SERI asserts that neither the Louisiana Commission nor Trial Staff demonstrated any harm to customers or other concerns that implicate the filed rate doctrine. SERI argues that it has not collected any IRS interest or tax deposit costs in connection with the uncertain tax position from customers and that its rates from January 2004 through October 2020 were essentially the same as they would have been otherwise.[708]

267. SERI states that Trial Staff proposes to impose a $500 million penalty on SERI for taking a tax position that ultimately produced $68.5 million in customer savings, without increasing customer rates at all, and without customers bearing any risk for the potential costs associated with a negative outcome with the IRS. SERI asserts that neither the equities nor the facts justify the Louisiana Commission's and Trial Staff's proposed remedy.[709] SERI states that, at most, a refund equal to inclusion of the successful portion of the uncertain tax position as a rate base reduction (i.e., approximately 10% beginning in January 2016, when it would be reflected in the UPSA calculation of ADIT) is all that could be justified because it would reflect the actual tax benefits achieved by SERI. SERI states that a refund calculation based on actual tax benefits would produce a refund of approximately $22.7 million (prior to application of FERC interest). SERI asserts that the Commission may not lawfully adopt a refund based on factual premises now known to be untrue.[710]

268. SERI notes that the Louisiana Commission and Trial Staff argue that SERI owes refunds in connection with the first iteration of the uncertain tax position, which was included on the consolidated Entergy federal income tax return for the 2003 Tax Year (the 2003 CAM) and disallowed by the IRS in 2007. SERI states that the Louisiana Commission and Trial Staff failed to satisfy their burden of proof, and the Initial Decision rejected the refund claims in connection with the 2003 CAM. SERI states that on exceptions, the Louisiana Commission and Trial Staff attempt to meet the burden of proof by making legal arguments as to why the 2003 CAM should have been recorded as ADIT for FERC purposes but SERI asserts that the arguments ignore the accounting standards that were in effect prior to FIN 48 and selectively quote and misinterpret other accounting standards. SERI states that the Louisiana Commission and Trial Staff ignore the fact that the 2003 CAM was asserted years before FIN 48 was issued, when a

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[707] *Id.* at 18 (citing *Koch Gateway*, 136 F.3d at 817-18).

[708] *Id.* at 18-19.

[709] *Id.* at 20.

[710] *Id.* at 20-21.

different accounting standard—FAS 5—directly addressed uncertainties in income tax accounting for both the Commission *and* Generally Accepted Accounting Principles. SERI states that FAS 5 required that SERI immediately recognize a contingent liability in connection with the 2003 CAM and that SERI determined that it was probable that the 2003 CAM would be disallowed when it initially asserted the position. SERI asserts that the liability was for additional taxes expected to be due for the 2003 tax year, not a deferral of taxes associated with a future tax year.[711] SERI asserts that the Louisiana Commission and Trial Staff chose to ignore the relevance of FAS 5 in their initial testimony and their briefs on exceptions.[712]

269. SERI asserts that the Louisiana Commission and Trial Staff pursue an incorrect interpretation of the 1993 Guidance Letter addressing FAS 109.[713] SERI states that the Louisiana Commission and Trial Staff argue that the 1993 Guidance Letter, which adopted FAS 109, dictates that all book-tax differences were to be recorded as deferred tax liabilities or assets, with no exceptions, an interpretation that conflicts with the FAS 5 requirement that SERI recognize a contingent liability due to the probability that the uncertain tax position would be disallowed. SERI argues that Trial Staff and the Louisiana Commission identified no evidence suggesting that either FASB or the Commission considered FAS 109 to have amended FAS 5, or that the Commission directed utilities to depart from FAS 5. SERI argues that Trial Staff and the Louisiana Commission failed to establish that SERI's treatment of the COGS position under FAS 5 in 2003 was incorrect.[714]

270. SERI asserts that its treatment of the uncertain tax position is not inconsistent with the 1993 Guidance Letter. SERI states that liability for the 2003 CAM was properly considered a current liability, recorded in Account 236, because the income tax contingent liability was accrued in and for the accounting period when the contingent liability was recognized. SERI states that the Louisiana Commission and Trial Staff ignore the "all events" standard noted in FAS 109 that supports SERI's recognition of the 2003 CAM as a *current* liability.[715]

271. SERI asserts that Trial Staff and the Louisiana Commission incorrectly suggest that the 2007 Accounting Guidance and the Initial Decision support their position that

[711] *Id.* at 22-25.

[712] *Id.* at 26.

[713] *Id.* at 26-27 (citing 1993 Guidance Letter, in record as Ex. LC-0084)).

[714] *Id.* at 28-29.

[715] *Id.* at 29-30.

SERI should have accounted for the 2003 CAM differently. SERI asserts that the 2007 Accounting Guidance provided new guidance and established that for FERC accounting and reporting purposes, the entities' assessment of a tax position's probability of success and expectation with regard to IRS audit outcomes would not be part of the "all events" analysis for purposes of determining whether a deferred tax liability should be recognized. SERI states that the 2007 Accounting Guidance was to be applied prospectively beginning with certain FERC disclosures due in 2008.[716]

272. SERI asserts that FASB modified FAS 5 when it issued FIN 48, thereby establishing FIN 48 as the controlling guidance for accounting for uncertainties in income taxes. SERI states that the FASB added to paragraph 2 of FAS 5: "[b]ecause FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes*, provides guidance on accounting for uncertainty in income taxes, this Statement no longer applies to income taxes."[717] SERI argues that this language indicates that FAS 5 was the controlling standard prior to FIN 48 and thus for the 2003 CAM. SERI argues that there is no basis to conclude that SERI incorrectly accounted for the tax effects of the 2003 CAM. SERI states that the 2003 CAM did not create ADIT for ratemaking purposes and it did not produce cost-free capital that could be used to invest into rate base assets. SERI states that it failed on the 2003 CAM, and any amounts it received through the ETAA were paid back following the IRS's disallowance.[718]

273. SERI asserts that the Louisiana Commission and Trial Staff did not satisfy their burden to establish whether any tax benefits resulted from the 2004 CAM or 2009 CAM. SERI states that the IRS did not accept *any* portion of the 2004 CAM or the 2009 CAM for SERI and that SERI already has paid back other members of the ETAA for those disallowances. SERI states that the amounts being contested are tax refunds as the years at issue—2008 through 2014—reflect Account 283 balances arising from the 2004 CAM and the 2009 CAM and that the vast majority of the COGS position's Account 283 liability for the 2004 CAM and 2009 CAM arose from tax refund claims, and not from reductions to taxable income on originally-filed tax returns. SERI argues that, under Order No. 144, it would be unreasonable to require rate refunds for Account 283 balances where no associated tax benefit ever materialized, as was the case for the 2004 CAM and 2009 CAM tax refund claims. SERI states that all but approximately $5.4 million of

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[716] *Id.* at 30-31.

[717] *Id.* at 32 (citing Ex. SER-0022 at 27-28).

[718] *Id.* at 32-33.

Trial Staff's calculated "adjustment" would be eliminated since unsuccessful tax refund claims are not appropriate for inclusion in rates.[719]

274. SERI disputes Trial Staff's proposed adjustments to the Account 190 NOL balances, arguing that they are based on a misunderstanding of the record. SERI notes that Trial Staff argues that the Initial Decision made two errors in calculating the Account 190 NOL balances that are reflected in the refund calculation: (1) it included amounts that "had already been included in rate base for the 2010-2014 period" and (2) it included "the entire Account 190 net operating loss carry-forward ADIT in rate base," when "portions of the account were already included in rate base."[720] SERI asserts that Trial Staff's adjustments are unsupported and based on an error in Louisiana Commission witness Mr. Sisung's analysis that SERI claims its witness Mr. Roberts corrected.[721]

275. SERI asserts that Trial Staff offers no basis to use the December 2018 balance for Account 283 to calculate bills for calendar year 2018. SERI argues that using the 2018 balance is wrong because the Account 283 balance that was reflected in the 2018 FERC Form No. 1 was based on the end-of-year (December 2018) balance and would not be incorporated in rates until the January 2019 bill. SERI states that it would not be consistent with the UPSA to use the December 2018 value for any of 2018.[722]

276. SERI argues that the Commission also should recognize that neither the Initial Decision nor Trial Staff's and the Louisiana Commission's exceptions represent an accurate calculation of the refunds that would be appropriate if the Commission were to accept the findings of the Initial Decision. SERI states that the Initial Decision's calculation adds an additional year of refunds and ignores evidence of offsetting tax deposits. SERI states that the extra year of revenue requirement was created because Louisiana Commission witness Mr. Sisung's calculation, adopted by the Initial Decision, wrongly treats amounts that were not included in Account 283 until the end of 2007 as if they existed in Account 283 throughout 2007. SERI also states that the Initial Decision's $334 million and Trial Staff's proposed adjustments are based on annual balances, and therefore fail to reflect the fact that the UPSA is a monthly calculation. SERI states that annual balances do not capture the timing of when the liabilities associated with the uncertain tax position were booked (and reversed upon IRS denial of the different CAMs), nor do they capture the monthly variation in the rate of return on rate base calculation. SERI states that the Initial Decision's $334 million and Trial Staff's

[719] *Id.* at 33-35.

[720] *Id.* at 36 (citing Trial Staff Brief on Exceptions at 30-31).

[721] *Id.*

[722] *Id.* at 37.

proposed adjustments omit the cost of IRS interest which SERI calculates as $243.9 million.[723]

277. SERI states that, if the Commission orders a retroactive refund, it should order that SERI calculate the refunds based on the rates SERI should have charged customers under the UPSA and that both SERI and customers should have interest added to any incorrect amounts, ultimately deriving a final refund total that SERI would pay to the customers. SERI states that this proposal was made by Trial Staff and is consistent with the Commission's general refund approach. SERI notes that the Louisiana Commission argues that refunds following the Initial Decision's approach will be lower than under the Louisiana Commission's proposed approach but SERI states that the Louisiana Commission's argument is irrelevant. SERI states that under the Initial Decision's proposal, SERI would be re-calculating the bills and determining the amounts that should have been charged to customers under a correct application of the formula.[724] SERI states that the Louisiana Commission argues that "[r]etroactive UPSA rebillings would result in a windfall to SERI by allowing it to earn a return on that money [*i.e.*, any depreciation amounts SERI incorrectly billed] a second time."[725] SERI states that the Louisiana Commission cannot explain how SERI would receive a windfall. SERI states that SERI never earned a return on the money in question because it was improperly billed as depreciation too quickly, and thus came out of SERI's rate base calculations.[726]

d. <u>New Orleans Council</u>

278. The New Orleans Council contends that the Initial Decision correctly determined that SERI's exclusion of certain ADIT balances attributable to decommissioning tax deductions improperly influenced rate base calculations.[727] The New Orleans Council argues that SERI's argument of IRS uncertainty pertaining to the allowance of deductions is unavailing.[728] The New Orleans Council states that the deferred taxes that SERI has

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[723] *Id.* at 37-42.

[724] *Id.* at 84-85.

[725] *Id.* at 85 (citing Louisiana Commission Brief on Exceptions at 37).

[726] *Id.*

[727] New Orleans Council Brief Opposing Exceptions at 3-4.

[728] *Id.* at 4.

accumulated should be treated as a credit to rate base for the sake of customers due to the violation of Commission accounting requirements.[729]

279. The New Orleans Council argues that the Initial Decision correctly concluded that SERI must include ADIT in the rate base[730] and that Commission tax guidance prohibits the exclusion of FIN 48 Liabilities from ADIT.[731] The New Orleans Council rejects SERI's argument that the Initial Decision lacked reason by failing to consider SERI's argument that a distinction exists between "FIN 48 Liabilities" and "traditional ADIT."[732] In that, the New Orleans Council states that SERI's "FIN 48 Liabilities" are ADIT for FERC accounting and ratemaking purposes.[733]

280. The New Orleans Council rejects SERI's stance that "FIN 48 Liabilities" and traditional ADIT produce different benefits and these tax benefits only exist once the IRS resolves the tax uncertainty.[734] The New Orleans Council explains that the IRS may uphold a tax benefit or deny a tax underpayment, which may incur an interest payment if the tax deduction is denied.[735] The New Orleans Council asserts that retail regulators have agreed that such interest payments can be transferred to SERI's customers proving that tax benefits and tax underpayments possess no significant difference.[736] The New Orleans Council notes that the Initial Decision is correct in finding that FIN 48 ADIT is a cash source provided by SERI's customers through UPSA billings for deferred tax and properly reflected as a credit to SERI's rate base.[737]

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[729] *Id.* at 7.

[730] *Id.* at 18.

[731] *Id.* at 18.

[732] *Id.* at 18-19.

[733] *Id.* at 19 (citing Initial Decision, 171 FERC ¶ 63,003 at P 517).

[734] *Id.* at 18-19.

[735] *Id.* at 20.

[736] *Id.* (citing Ex. CNO-0001 at 20).

[737] *Id.* at 20-21.

281. The New Orleans Council expresses concern that the Initial Decision's failure to account for the years in which SERI's deduction "produced absolutely no tax benefit"[738] disputes the credit ordered to the rate base for those years. However, the New Orleans Council asserts that the refund and rate base credit ordered rely on uncertain FIN 48 ADIT balances in the FERC Form No. 1s instead of SERI's tax filings.[739] To this, the New Orleans Council argues that SERI should have filed amended FERC Form No. 1s for those affected years for the ratemaking purposes of this proceeding.[740]

282. The New Orleans Council states that SERI goes against the Initial Decision's rejection of the potential benefits of the decommissioning deductions as low-cost capital for its use.[741] The New Orleans Council argues that, although SERI denies this in its brief,[742] SERI's accounting shows that SERI has invested FIN 48 ADIT capital in its rate base assets.[743] The New Orleans Council states that interest paid to the IRS for SERI's denied deductions is higher than the interest SERI earns in loans to other Entergy Corporation affiliates.[744]

283. The New Orleans Council rejects SERI's citing of Entergy Corporation's 2015 10-K report to the SEC, pages 126-127, to bolster claims of Entergy Corporation's previous success in resolving similar decommissioning tax positions on behalf of affiliates,[745] as those pages are not included in the record.[746] Further, the New Orleans Council asserts that 98.7% of the deductions was denied by the IRS therein providing no material benefit

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[738] *Id.* at 21.

[739] *Id.*

[740] *Id.* at 21-22.

[741] *Id.* at 22.

[742] *Id.*

[743] *Id.* (citing Ex. CNO-0024).

[744] *Id.* at 22-23 (citing Ex. CNO-0013 at 22-23).

[745] *Id.* at 23.

[746] *Id.* (citing Ex. SER-0106).

to SERI's customers and upholding the Initial Decision's directive to provide a credit to rate base for use of the low cost capital at SERI's customers' expense.[747]

e. **Mississippi and Arkansas Commissions**

284. The Mississippi and Arkansas Commissions agree with the Initial Decision's conclusion that FIN 48 ADIT should be applied in the UPSA to reduce rate base and believe SERI created two straw arguments in opposition.[748] The Mississippi and Arkansas Commissions disagree with SERI's claims that (1) the Initial Decision requires that all ADIT be applied to offset rate base; and (2) accounting does not dictate ratemaking.[749] The Mississippi and Arkansas Commissions contend that neither point was argued against by the parties, but that the FIN 48 ADIT, accounted for as ADIT, created a reduced-cost source of funds for SERI that in turn created a benefit, and so, for ratemaking purposes, it is justifiably applied as an offset to rate base.[750]

285. The Mississippi and Arkansas Commissions explain that the Initial Decision states that all parties agree that there are not specific ADIT account or subaccount exclusions in the UPSA formula rate.[751] Moreover, the Mississippi and Arkansas Commissions assert that the Commission should ignore SERI's attempts to justify the exclusion of FIN 48.[752]

286. The Mississippi and Arkansas Commissions contend that the Initial Decision explains that the benefit of SERI's uncertain tax position is due to ratepayers because (1) the ratepayers funded SERI's decommissioning expense and those amounts are the basis for the FIN 48 ADIT;[753] (2) SERI received benefits from uncertain tax positions;[754] (3) Order No. 144 requires that ratepayers be given the benefit of reduced cost-financing not

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[747] *Id.*

[748] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 44.

[749] *Id.*

[750] *Id.*

[751] *Id.* at 45.

[752] *Id.*

[753] *Id.*

[754] *Id.* at 45-46.

supplied by equity or debt investors;[755] and (4) the UPSA requires that Account 283, including FIN 48 ADIT, be applied to offset rate base.[756] The Mississippi and Arkansas Commissions assert that this explanation illustrates that accounting supports, and is consistent with, ratemaking.[757]

287. The Mississippi and Arkansas Commissions assert that SERI misinterprets the 2007 Accounting Guidance that the Commission does not distinguish the certainty of tax deductions, and that a utility's accounting needs to reflect its filed tax deductions.[758] The Mississippi and Arkansas Commissions cite the Chief Accountant's directive which found that ADIT amounts recorded in appropriate accounts are based on positions taken in filed tax returns.[759] The Mississippi and Arkansas Commissions state that the Initial Decision recognized the same language from the 2007 Accounting Guidance.[760] The Mississippi and Arkansas Commissions state that the 2007 Accounting Guidance confirms that the Initial Decision followed the directions therein by requiring SERI to reflect FIN 48 ADIT in Account 283 and apply those amounts in the UPSA.[761]

288. The Mississippi and Arkansas Commissions ask the Commission to uphold the Initial Decision's statements distinguishing SERI's asset retirement obligation from decommissioning and to reject SERI's claim that its uncertain tax positions are tied to its Grand Gulf ARO.[762] The Mississippi and Arkansas Commissions argue that SERI has an asset retirement obligation associated with Grand Gulf but the asset retirement obligation is not linked to its decommissioning expenses paid by ratepayer-supplied funds from the Qualified Fund once the unit is retired.[763] Moreover, the Mississippi and Arkansas Commissions maintain that the record supports the separation of the ARO,

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[755] *Id.* at 46.

[756] *Id.*

[757] *Id.*

[758] *Id.*

[759] *Id.* at 47 (citing 2007 Accounting Guidance, 119 FERC at 64,453).

[760] *Id.*

[761] *Id.*

[762] *Id.* at 55 (citing SERI Brief on Exceptions at 85-89).

[763] *Id*. at 56.

decommissioning tax deduction, and its associated FIN 48 ADIT.[764] The Mississippi and Arkansas Commissions argue that SERI witness Mr. Roberts conceded that "[SERI] could have taken that tax deduction if FAS 143 [accounting treatment of Asset Retirement Obligations] had never existed," thereby marking that the tax deduction is unrelated to the Asset Retirement Obligation.[765]

289. The Mississippi and Arkansas Commissions also contend that SERI witness Mr. Stack debunked SERI's claim by stating that SERI has separate ADIT associated with its ARO.[766] Thus, the Mississippi and Arkansas Commissions support the Initial Decision's finding that the asset retirement obligation and decommissioning deduction are unrelated.[767]

290. The Mississippi and Arkansas Commissions allow that SERI is right to assert that ratepayers receive deduction benefits when SERI transfers ratepayer-supplied dollars into the Qualified Fund. However, the Mississippi and Arkansas Commissions contend that this transfer does not make ratepayer dollars SERI's dollars, and that just as the cost of decommissioning lies with ratepayer billing so do the benefits of the tax deduction for decommissioning costs.[768] The Mississippi and Arkansas Commissions state that SERI's ratepayers, not SERI, must fund the Qualified Fund and ratepayers that funds the decommissioning expense.[769] The Mississippi and Arkansas Commissions maintain that the Commission must ignore SERI's effort to distinguish between two tax deductions when the issue is that ratepayers bear the underlying burden of funding the Qualified Fund and decommissioning expenses and are due the benefit of the tax deductions that are accepted by the IRS.[770]

291. The Mississippi and Arkansas Commissions note that SERI continually alleges in its brief that ratepayers will receive the benefits through the ADIT mechanism if the IRS

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[764] *Id.*

[765] *Id.* (citing Tr. 1365:1-2).

[766] *Id.* (citing Ex. SER-0041 at 21).

[767] *Id.*

[768] *Id.* at 48-49 (citing SERI Brief on Exceptions at 72-73).

[769] *Id.* at 50.

[770] *Id.*

agrees with SERI's uncertain tax deductions.[771] The Mississippi and Arkansas Commissions argue that SERI has accounted for its uncertain tax deductions, but when the filed rate requires sharing with ratepayers, SERI wishes to recover those extra benefits and, if unable, claims that utilities will be discouraged from pursuing uncertain tax strategies.[772]

292. The Mississippi and Arkansas Commissions disagree with SERI's claims and state that the Initial Decision would not take away utilities' benefits if a tax deduction is accepted by the IRS, as the Commission requires utilities to submit available tax benefits.[773] Nonetheless, the Mississippi and Arkansas Commissions state that, while SERI awaits the uncertain tax deduction's acceptance or denial, SERI wants to be allotted all benefits until the IRS accepts the deduction, but if SERI's deductions are granted, the benefits would be reflected in rates, but would not make up for the error.[774] The Mississippi and Arkansas Commissions assert that the Commission should not allow SERI to abuse the ratemaking process in this way.[775]

293. The Mississippi and Arkansas Commissions maintain that SERI attacks the Initial Decision's requirement for SERI to reflect the ADIT recorded in the UPSA calculations with its arguments for its twelfth exception[776] to rehabilitate its decommissioning tax strategy.[777] The Mississippi and Arkansas Commissions note that SERI highlights previous instances when other tax payers have succeeded in IRS disputes over uncertain tax positions, but the Mississippi and Arkansas Commissions have concerns that this distraction on tax positions deflects from the rates of tax positions SERI has taken.[778]

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[771] *Id.* at 39.

[772] *Id.*

[773] *Id.* (citing SERI Brief on Exceptions at 54 (citing *ITC Midwest*, 154 FERC ¶61,188 at P 50)).

[774] *Id.* at 39-40.

[775] *Id.* at 40.

[776] SERI's twelfth exception states, "Failing to consider the potential benefits of uncertain tax positions based on a misunderstanding of the FIN 48 standard and unfounded speculation about the merits of the COGS position."

[777] *Id.* at 40 (citing SERI Brief on Exceptions at 53-57).

[778] *Id.* at 40-41.

294. The Mississippi and Arkansas Commissions agree with the Initial Decision's assertion that FIN 48 ADIT must be treated as ADIT under the UPSA and oppose SERI's contention that ADIT associated with uncertain tax positions warrants special treatment by the Commission.[779] The Mississippi and Arkansas Commissions state that SERI's argument that FIN 48 ADIT possesses a disadvantage that traditional ADIT does not have is wrong.[780] The Mississippi and Arkansas Commissions maintain that SERI will receive benefits of tax savings without any cost if SERI wins its uncertain tax dispute[781] and if SERI loses then there will be a reduced cost.[782] The Mississippi and Arkansas Commissions assert that the Commission has not limited the recording of ADIT and use of ADIT to offset rate base to cases in which the utility has a cost-free source of capital. Moreover, the Mississippi and Arkansas Commissions state that SERI can change the UPSA to provide a mechanism for SERI to collect the costs of the capital obtained using uncertain tax positions.[783]

295. The Mississippi and Arkansas Commissions dispute SERI's claim that Order No. 144's rate base rule presumes that ADIT produces a cost-free capital benefit to utilities that is shared with customers in the rates.[784] The Mississippi and Arkansas Commissions agree with the Initial Decision's rejection of SERI's argument based on Order Nos. 144 and 144-A. The Mississippi and Arkansas Commissions agree with the Initial Decision's statement that both orders explicitly rejected "cost-free loan" considerations in order to reasonably adopt tax normalization.[785]

296. The Mississippi and Arkansas Commissions agree with SERI's point that Order No. 144 refers to "cost-free" capital but they counter that FIN 48 ADIT creates a time-value of money benefit as well as a reduced interest rate benefit.[786] Rather than dictate that SERI accrue benefits from a government loan that is low-cost and not cost-free, the

[779] *Id.* at 41 (citing SERI Brief on Exceptions at 58-72).

[780] *Id.* (citing SERI Brief on Exceptions at 58-59).

[781] *Id.* at 41-42 (citing Ex. MC-0001 at 19:6-9).

[782] *Id.* at 42 (citing Ex. MC-0001 at 19:13-20:10).

[783] *Id.*

[784] *Id.*

[785] *Id.*

[786] *Id.* at 43-44 (citing Ex. MC-0001 at 19:13-17).

Mississippi and Arkansas Commissions agree with Order No. 144 that ratepayers should receive those benefits.[787]

297. The Mississippi and Arkansas Commissions state that the Commission should disregard SERI's claim that its uncertain tax positions produced no tax benefit.[788] The Mississippi and Arkansas Commissions state that SERI finds a difference between tax deductions on original tax returns and tax positions asserted in refund claims on an amended return.[789] However, the Mississippi and Arkansas Commissions assert that the Initial Decision found this distinction did not have any relevance to the issue, which is that SERI must follow the filed rate.[790]

298. The Mississippi and Arkansas Commissions state that SERI's uncertain tax position was born out of a deduction made by Entergy Corporation in 2003 such that Entergy Corporation paid less in taxes due to the SERI deduction.[791] The Mississippi and Arkansas Commissions explain that this deduction was attempted unsuccessfully in Entergy Corporation's CAM 2003.[792] The Mississippi and Arkansas Commissions assert that Louisiana Commission witness Mr. Sisung found that SERI took a tax deduction, received an ensuing tax benefit, then preserved that cash benefit and accounted for its tax deduction by recording deferred taxes.[793]

299. The Mississippi and Arkansas Commissions also refute SERI's criticism of the Initial Decision's conclusion that SERI received a cash tax benefit as a result of the operation of the ETAA.[794] The Mississippi and Arkansas Commissions add that the Initial Decision provides record evidence that the Entergy Corporation family treated SERI's tax positions like cash tax benefits.[795] Moreover, the Mississippi and Arkansas

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[787] *Id.* at 44.

[788] *Id.* at 50.

[789] *Id.* at 51 (citing SERI Brief on Exceptions at 77).

[790] *Id.* (citing Initial Decision, 171 FERC ¶ 63,003 at P 493).

[791] *Id.* at 52.

[792] *Id.*

[793] *Id.* at 52-53.

[794] *Id.* at 53.

[795] *Id.*

Commissions state that Commission precedent from almost 30 years ago aligns with the Initial Decision's conclusion that transactions under the ETAA do not determine tax benefits, and Entergy Corporation's actions under the ETAA support that conclusion.[796]

300. The Mississippi and Arkansas Commissions state that SERI lacks evidence to support its claim that uncertain tax positions' proceeds were separated from SERI's cash amounts and only used to pay tax obligations.[797] Rather, the Mississippi and Arkansas Commissions note that their witness Mr. Smith found that SERI discovered a cash tax benefit from the decommissioning deduction.[798] The Mississippi and Arkansas Commissions contend that Mr. Smith compared SERI's possible benefits to utility debt issuances[799] therein observing that if a utility's long-term debt matures a long time, that debt does not equate to investment. The Mississippi and Arkansas Commissions reason that SERI obtained cash from its tax positions using non-investor supplied capital and must appropriately offset rate base with the associated ADIT.[800] The Mississippi and Arkansas Commissions agree with the Initial Decision's rejection of SERI's protest that the benefits incurred by its tax strategy were insubstantial.[801]

301. The Mississippi and Arkansas Commissions explain that the 2007 Accounting Guidance clearly demonstrates that, whether a tax deduction is certain or not, there are ADIT effects to the deduction.[802] Since SERI recorded ADIT in Account 283 and applied the ADIT without the FIN 48 portion to offset rate base, the Mississippi and Arkansas Commissions maintain that SERI did not produce a technical violation.[803] The Mississippi and Arkansas Commissions explain that the filed rate is the only rate that may be charged, and in the case of the UPSA, that rate is the formula in which ADIT in Account 283 is applied to offset rate base.[804] However, the Mississippi and Arkansas

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[796] *Id.*

[797] *Id.* at 54.

[798] *Id.* at 54-55 (citing Ex. MC-0031 at 17:15-18:6).

[799] *Id.* at 55.

[800] *Id.*

[801] *Id.* at 54.

[802] *Id.* at 60.

[803] *Id.* (citing SERI Brief on Exceptions at 92).

[804] *Id.*

Commissions have concerns with the fact that SERI excluded FIN 48 ADIT because SERI over-collected rates and now must return hundreds of millions of dollars in over-collected rates.[805] The Mississippi and Arkansas Commissions state that ratepayers are owed those overpayments in refunds.[806]

302. Lastly, the Mississippi and Arkansas Commissions disagree with SERI's justification that customers paid income taxes that were not affected by SERI's uncertain decommissioning deductions.[807] The Mississippi and Arkansas Commissions argue that SERI's rationalization does not justify SERI's action. The Mississippi and Arkansas Commissions maintain that the Commission should uphold the Initial Decision to follow ratemaking policy, hold SERI accountable for its failure to follow the UPSA, and ensure that customers rightfully receive refunds for SERI's overcharges.[808]

4. Briefs Adopting Exceptions

a. New Orleans Council

303. The New Orleans Council argues that the Initial Decision erroneously found that the decommissioning tax benefits SERI recorded for 2004-2006 should not be included in the remedy ordered in this proceeding and overlooked decommissioning tax benefits that SERI did not deem uncertain but excluded from rate base.[809] The New Orleans Council also maintains that the Initial Decision erred by including only a portion of the ADIT resulting from the decommissioning tax deductions as a rate base reduction in calculating the amount to be refunded to customers. It argues that the Initial Decision incorrectly used an estimated value for the 2018 Account 283 balance, rather than the actual value, in calculating the amount to be refunded to customers and incorrectly added Account 190 ADIT to rate base in the refund calculation, when those amounts were already included in rate base. The New Orleans Council also argues that the Initial Decision incorrectly excluded ADIT resulting from the decommissioning deductions taken prior to 2007 in rate base in the refund calculations.[810]

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[805] *Id.* (citing SERI Brief on Exceptions at 91-93).

[806] *Id.* at 61.

[807] *Id.* (citing SERI Brief on Exceptions at 92).

[808] *Id.* at 61-62.

[809] New Orleans Council Brief Adopting Exceptions at 4.

[810] *Id.* at 5.

5. Commission Determination

304. The instant proceeding resolves the issue of whether the ADIT that arises from SERI's nuclear decommissioning expense income tax deductions should be included or excluded from rate base. The Initial Decision concludes that SERI's removal of nuclear decommissioning ADIT from the ADIT offset to rate base in the UPSA formula rate is unjust and unreasonable, and directs SERI to include ADIT assets and liabilities that are attributable to its deduction of Grand Gulf nuclear decommissioning expenses in the ADIT offset from rate base in the UPSA formula rate.[811] The Initial Decision orders SERI to refund $334,475,214 for improperly excluding ADIT that arose from its nuclear decommissioning expenses from the UPSA rate base during the period 2007 to 2018. Trial Staff and the Retail Regulators agree with the Initial Decision's overall finding, but except on the grounds that there are errors with regard to the refund calculations relied on by the Presiding Judge. Trial Staff and the Retail Regulators argue that the rate base computation used to derive the required refund amount only includes a portion of the ADIT resulting from SERI's decommissioning tax deductions, incorrectly used an estimated value for 2018, and incorrectly added Account 190 ADIT amounts. Trial Staff and the Retail Regulators explain that these errors in the refund amount stem from the Initial Decision's reliance upon Louisiana Commission witness Mr. Sisung's *initial* refund calculation and recommend that the Commission use Mr. Sisung's *revised* rebuttal calculation to determine the refund amount. We affirm the determination in the Initial Decision that SERI must refund amounts as a result of improperly excluding ADIT liabilities from the UPSA rate base, but modify the Initial Decision to require a refund amount that reflects the correct period of noncompliance, as discussed below.

305. SERI flatly opposes the Initial Decision's finding on several grounds and argues that the proposed refunds are unsupported by Commission regulations and contrary to Commission policy objectives. At the onset, we address several of SERI's arguments, but find them to be unpersuasive.

306. The record establishes that the ADIT liabilities at issue in this proceeding arise from Grand Gulf nuclear decommissioning expenses, claimed by Entergy Corporation on its consolidated federal income tax return, that it estimates will be required to decommission Grand Gulf at the end of its useful life. These income tax expense deductions are designated as "uncertain" tax positions pursuant to *FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes*, an interpretation of FASB Statement No. 109, Accounting for Income Taxes (FIN 48).[812] The term *tax position* in

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[811] Initial Decision, 171 FERC ¶ 63,003 at P 547.

[812] On May 2, 2007, FASB issued FASB Staff Position No. 48-1, Definition of *settlement* in FASB Interpretation No. 48, an amendment to FIN 48. FIN 48-1 clarifies how an entity should determine whether a tax position is effectively settled for the

FIN 48 refers to a position in a previously filed tax return or a position expected to be taken in a future tax return that is reflected in measuring current or deferred income tax assets and liabilities for interim or annual periods. A tax position for which there is uncertainty refers to whether a taxing authority will accept or uphold a tax position under the relevant tax laws. Under FIN 48, an entity must evaluate all tax positions using a two-step process. First, an entity must determine whether it is more likely than not that a tax position will be sustained upon examination by a taxing authority, including resolution of any related appeals or litigation processes. Second, for a tax position that meets this threshold, it is measured to determine the amount of benefit to recognize in the financial statements. Jurisdictional entities are permitted to adopt FIN 48 for Commission accounting and reporting purposes, but in doing so, must continue to comply with section 35.24 of the Commission's regulations, *Tax Normalization for Public Utilities*.[813] SERI's uncertain tax position, pursuant to FIN 48, concerns the uncertainty as to the permissible deductibility of nuclear decommissioning expenses for tax purposes. The decommissioning expenses deducted for tax purposes will not be recognized for regulatory book purposes until Grand Gulf begins the decommissioning process in a future period, giving rise to temporary timing differences that are captured as ADIT (referred to herein as FIN 48 ADIT).

307. SERI has previously proposed, and ultimately received, Commission authorization to recover nuclear decommissioning expenses for Grand Gulf in UPSA wholesale sales rates, as a component of its cost of service.[814] The Commission generally considers decommissioning expenses to be a cost of doing business for which utilities are entitled to reimbursement from their ratepayers.[815] Order Nos. 580 and 658 govern requirements for the establishment, organization, and operation of a nuclear decommissioning trust fund for the funding of Commission-jurisdictional decommissioning expenses.[816] SERI

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purpose of recognizing previously unrecognized tax benefits.

[813] Additionally, jurisdictional interstate pipelines must comply with requirements of Section 154.305, Tax normalization.

[814] Opinion No. 234, 31 FERC ¶ 61,305.

[815] *Nuclear Plant Decommissioning Trust Fund Guidelines*, Order No. 580, 60 Fed. Reg. 34,109, FERC Stats. & Regs., ¶ 31,023, at P 31,360 (1995) (cross-referenced at 71 FERC ¶ 61,350).

[816] *See* 18 C.F.R. pt. 35, subpt, E (2021); *Nuclear Plant Decommissioning Trust Fund Guidelines*, Order No. 580, FERC Stats. & Regs., ¶ 31,023, *order on reh'g*, Order No. 580-A, FERC Stats. & Regs., ¶ 31,055 (1997); *Modification of Nuclear Plant Decommissioning Trust Fund Guidelines*, Order No. 658, 111 FERC ¶ 61,279 (2005).

has established a decommissioning trust fund,[817] which has been adequately funded to fully decommission Grand Gulf following cessation of plant operations in 2044.[818] Thus, this proceeding establishes that, while SERI has recovered its anticipated cost of decommissioning expenses through wholesale rates, it has attempted to accelerate the deduction of decommissioning expenses for tax purposes.

308. SERI first contends that the Initial Decision did not consider the value of its uncertain tax positions and unreasonably dismissed their potential to create benefits to customers. SERI argues that its objective in pursuing an uncertain tax position is to accelerate the tax deduction for future decommissioning expenses to create long-term tax savings for customers and the company.[819] SERI maintains that the potential benefit to customers rests with the possibility that an uncertain tax position may be fully or partially accepted by taxing authorities, and such an outcome would result in a rate base reduction of associated ADIT. SERI offers that although it has not yet succeeded in achieving IRS approval of the deductions, SERI—not customers—has taken on all of the risk and absorbed the cost associated with the deductions.[820] SERI additionally contends that the Initial Decision erred by rejecting uncertain potential benefits and is wrong in its evaluation that SERI's uncertain tax position is "ill conceived."[821] SERI explains that although it has not yet prevailed on its own uncertain tax positions with the IRS, Entergy Corporation has successfully resolved portions of similar decommissioning tax positions taken on behalf of other affiliates.

309. Nonetheless, we find that whether an uncertain tax position prevails or fails is irrelevant to determining whether ADIT is properly recordable for regulatory purposes. It is undisputed that SERI's ADIT resulted from income tax timing differences caused by decommissioning expenses recorded for income tax purposes but not yet recognized in income for regulatory accounting purposes. We disagree with SERI's contention that it is only when SERI prevails on an uncertain tax position that the "potential" benefit of the resulting FIN 48 ADIT should be passed on to customers as a rate base offset. Instead, we find that a customer benefit exists at the onset of recognizing and recording FIN 48 ADIT for regulatory purposes. The reason is that public utilities must follow the

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[817] SERI states that it has established a Qualified Fund pursuant to Internal Revenue Code (IRC) section 468A and made contributions to the Fund with amounts funded by customers through UPSA billings. SERI Brief on Exceptions at 73.

[818] Ex. S-0001 at 9:2-6 (Healy Dir./Ans. Test.).

[819] SERI Brief on Exceptions at 54.

[820] *Id.*

[821] *Id.* at 55.

Commission's ratemaking principle of tax normalization.[822] Thus, FIN 48 ADIT, regardless of its uncertainty, must be included in rate base because the future decommissioning activities that have given rise to the ADIT are directly attributable to the underlying Grand Gulf facilities. Since the decommissioning expenses are included in the cost of service, the associated deductions and their tax reducing benefits should be considered in determining the ADIT offset to rate base in the UPSA formula rate.

310. SERI next argues that contrary to the Initial Decision's finding, neither Order No. 144 nor the UPSA require treating ADIT resulting from an uncertain tax position the same way as traditional ADIT. SERI maintains that the Initial Decision failed to reflect reasoned decision making because it did not consider SERI's arguments distinguishing FIN 48 liabilities from traditional ADIT.[823] Here, SERI mistakenly relies upon its argument that FIN 48 ADIT does not produce the same benefits as traditional ADIT because it is only when SERI prevails on an uncertain tax position that FIN 48 ADIT benefits can exist. In the alternative, SERI contends, if SERI does not prevail on an uncertain tax position then it must pay taxes, with interest, as of the date the taxes were originally due. As such, SERI maintains that FIN 48 ADIT cannot reasonably be considered a prudent source of cash for investment into long-lived rate base assets.[824] SERI argues, by contrast, traditional ADIT produces cost-free capital. SERI asserts that because FIN 48 ADIT is uncertain in both timing and amount, while traditional ADIT is predictable in both timing and amount, it is unjust and unreasonable to require a rate base reduction for FIN 48 ADIT before the associated uncertain tax position is resolved. SERI also asserts that the Initial Decision improperly relied upon Order No. 144 and the Commission's benefits/burdens test because it presumed that the rate base offset *itself* is the benefit that must follow from any ADIT balance. In SERI's view, this is because the benefits/burden test examines whether a *tax benefit* to the utility arises from a customer burden, and for FIN 48 ADIT, there is no tax benefit to pass on to customers while the associated uncertain tax position remains unresolved. SERI rationalizes that under Order No. 144 there is a presumption that ADIT produces a benefit to utilities in the form of cost-free capital that is then to be shared with customers if the related expense is included in rates, and if there is no such tax benefit, or if the deferred tax balance does not arise from an expense recovered in rates, then it follows that the rate base rule should not

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[822] Under the ratemaking principle of tax normalization, the Commission permits the company to defer certain of its tax deductions for ratemaking purposes until the expenses that produced the deductions are recovered in the company's rates.

[823] *Id.* at 58.

[824] *Id.* at 59.

apply.[825] SERI principally argues that the "benefits" to be weighed in the benefits/burdens test are the benefits accrued to it, in the form of cost free capital, rather than the benefits accrued to customers in the form of an ADIT rate base offset.

311. We disagree with SERI's characterization of the benefits/burdens test. The benefits/burdens test requires weighing customer benefits received against the related burden of expenses paid through wholesale rates. The Commission has emphasized that the primary rationale for tax normalization is the matching of the recognition in rates of the tax effects of expenses and revenues of utilities with the recovery in rates of the associated expenses and revenues themselves.[826] In Order No. 144, the Commission states that "[a]ll costs should be allocated among customers and over time in a manner that matches the burdens of costs with the benefits received."[827] Thus, it is the lack of benefits accrued to customers in the form of an ADIT rate base offset that is at issue in the instant proceeding, not whether SERI's seeming tax benefit manifests in some future period. As SERI asserts, "uncertainty does not mean that the tax position has no merit"[828] and the "pursuit of such tax benefits is consistent with the Commission's objective of ensuring 'just and reasonable' rates."[829] Thus, it stands to reason that the "uncertainty" of FIN 48 ADIT should not preclude its proper inclusion in rates while the associated tax position is outstanding. Given that the anticipated timing of the resolution of an uncertain tax position is generally unknown beforehand, it is unreasonable to require customers to forgo the benefit of an ADIT rate base offset during such time period, which can last for years. For these reasons, we find SERI's argument that it does not receive a tax benefit while an uncertain tax position remains unresolved to be unpersuasive. The Commission has acknowledged that tax normalization, which permits utilities to retain the tax effects (benefits) of those expenses when cash outlays have to be made, provides utilities with some cash (deferred taxes) to meet these financing needs.[830] It is not, however, the goal of tax normalization to ensure that utilities have sufficient cash flows to invest in long-lived assets. We disagree with SERI's logic that "if a tax deduction does not provide 'cost-free' cash, then it should not be included in rate

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[825] *Id.* at 62.

[826] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at P 31,525.

[827] *Id.*

[828] SERI Brief on Exceptions at 54.

[829] *Id.*

[830] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at P 31,547.

base,"[831] as a benchmark to use when applying the benefits/burdens test. We also find SERI's attempt to distinguish FIN 48 ADIT from "traditional" ADIT on the basis that FIN 48 ADIT should not be considered "traditional" ADIT until the associated uncertain tax position is resolved and/or because it does not provide sufficient cost-free capital, to be meritless.

312. SERI's methodology of recognizing deferred taxes in rates only after an associated uncertain tax position is resolved is similar to a *flow-through like* method, in which deferred taxes are flowed through rates based upon actual tax settlements with taxing authorities. The Commission has found the practice of applying an "actual taxes paid" regime to a utility's cost of service income tax allowance to result in an inequitable allocation of costs between time periods because the interperiod allocation of taxes in rates depends solely upon tax regulations rather than upon the regulatory principle of matching costs with benefits.[832] The Commission has explained that, under the matching principle, the tax reducing effect of an expense is allocated to the same customers that pay the expense during the same period, and when rates are set so as to permit a utility to recover an expense, the tax reducing effect of that expense is also recognized.[833] Additionally, when recovery of an expense is deferred or prepaid, so too is the tax reducing effect of that expense.[834] We find that this same line of reasoning should apply to SERI's treatment of FIN 48 ADIT.

313. Furthermore, the Commission adopts tax normalization, rather than a flow-through method because tax normalization achieves the Commission's standard that all costs should be allocated among customers and over time in a manner that matches the burdens of costs with the benefits received. The Commission's comprehensive interperiod income tax allocation requirements state that:

> [w]here there are timing differences between the periods in which transactions affect taxable income and the periods in which they enter into the determination of pretax accounting income, the income tax effects of such transactions are to be recognized in the periods in

[831] Initial Decision, 171 FERC ¶ 63,003 at P 176.

[832] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at P 31,527.

[833] *Id.* (noting timing differences can arise from expense or revenue transactions that are either prepaid or deferred in rates).

[834] *Id.* ("[U]nderlying the equity argument is the concept of 'used and useful' property. . . . If current customers are paying the expenses associated with a given piece of equipment or property, because they are receiving service from it, they also should be receiving the benefits of the tax deductions arising from the associated expenses.").

> which the differences between book accounting income and taxable income arise and in the periods in which the differences reverse using the deferred tax method.[835]

314. The Commission requires that comprehensive interperiod tax allocation should be followed whenever transactions enter into the determination of pretax accounting or regulatory income, even though some transactions may affect the determination of taxes payable in a different period. SERI's ultimate decommissioning of Grand Gulf is the underlying transaction that is to be considered in the determination of pretax accounting income. Although SERI has not yet incurred the cost of decommissioning Grand Gulf for pretax accounting income purposes, it has already recovered the expected cost of decommissioning expenses through wholesale rates. As such, we find SERI's deferred tax treatment resulting from uncertain tax positions to be distortive and out of compliance with interperiod tax allocation requirements.

315. The Initial Decision found that SERI's FIN 48 ADIT treatment is restrained by the 2007 Accounting Guidance. The 2007 Accounting Guidance was issued in response to the release of FIN 48, providing clarity to industry with regard to the Commission's accounting and reporting requirements in light of the FASB's new requirements. The 2007 Accounting Guidance details that, given new requirements under FIN 48, jurisdictional entities should continue to adhere to the Commission's existing requirements to measure and recognize:

> current and deferred tax liabilities (and assets) based on the [tax] positions taken or expected to be taken in a filed tax return and recognize uncertainties regarding those [tax] positions by recording a separate liability for the potential future payment of taxes . . . [and] [w]here uncertainties exist with respect to tax positions involving temporary differences, the amounts recorded in the accounts established for accumulated deferred income taxes are based on the positions taken in the tax returns filed or expected to be filed.[836]

316. SERI contends that, because the 2007 Accounting Guidance has a limited effect on rates without prior Commission approval,[837] it appropriately continued to exclude FIN

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[835] *See* 18 C.F.R., pt. 101, *General Instruction 18. Comprehensive Interperiod Income Tax Allocation* (2021).

[836] *See* 2007 Accounting Guidance, 119 FERC at 64,454.

[837] The 2007 Accounting Guidance states in part "[t]his guidance is for Commission financial accounting and reporting purposes only and is without prejudice to the ratemaking practice or treatment that should be afforded the items addressed herein. Neither FIN 48 nor the guidance contained in this letter for implementing the

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48 ADIT from rate base because a change to include FIN 48 ADIT in rate base pursuant to the implementation of the 2007 Accounting Guidance would not have been appropriate. However, SERI misconstrues the applicability of the 2007 Accounting Guidance to *restrict* its ratemaking rather than continue previous ratemaking requirements. Nevertheless, irrespective of the issuance of the 2007 Accounting Guidance, the Commission's preexisting tax normalization requirements still require SERI to include FIN 48 ADIT in rate base. We agree with the Initial Decision's determination that the burden of customer-funded decommissioning trust fund amounts should be weighed when determining whether the FIN 48 ADIT rate base offset benefit should be assumed by customers.

317. SERI also argues that the Initial Decision conflates the customer-funded nuclear decommissioning trust fund with uncertain decommissioning expense tax deductions. SERI maintains that it has already deducted 100% of the decommissioning trust fund contributions pursuant to IRC section 468A.[838] SERI argues that the tax effects of the decommissioning trust fund and uncertain decommissioning expense tax deductions are different, and that its uncertain tax position does not eliminate its tax obligation associated with withdrawals from the decommissioning trust to cover decommissioning expenses in the future. Despite SERI's contention that the tax effects of the customer-funded decommissioning trust fund differ from that of the decommissioning expense deductions, the two economic activities are inherently linked. Although IRC section 468A may permit decommissioning trust fund deposits as a deduction in the taxable year payments or contributions are made, SERI's uncertain tax positions reflect expenses that are recognized for tax purposes in periods prior to when they are recognized in rates. This type of transaction gives rise to timing differences that are subject to the Commission's normalization rules.

318. SERI further argues that its uncertain tax position is for the same liability as its ARO,[839] and the Initial Decision erred by failing to acknowledge the factual relationship

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Interpretation for Commission financial accounting and reporting purposes relieves entities from the requirements of section 154.305, Tax normalization [for interstate pipelines], or Section 35.24, Tax normalization for public utilities, of the Commission's regulations."

[838] SERI Brief on Exceptions at 73 (citing Ex. SER-0044 at 10-11; *see also* Tr. 1242:24 (agreeing amounts were "billed to fund the decommissioning trust fund")).

[839] An ARO is the legal obligation associated with the retirement of a tangible long-lived asset that an entity is required to settle as a result of an existing enacted law, statute, ordinance, or written or oral contract or by legal construction of a contract under the doctrine of promissory estoppel. *See* Financial Accounting Standards Statement (FAS) No. 143, Accounting for Asset Retirement Obligations, issued in June 2001. The

between the two. SERI maintains that while valuation methods may differ, its asset retirement obligation and uncertain tax positions are determined based upon the same cost study to decommission Grand Gulf. Additionally, SERI reasons that, since its uncertain tax position is considered to be an ARO-related cost, and Order No. 631 requires the exclusion of rate base amounts related to asset retirement obligation amounts absent Commission approval, it has appropriately excluded FIN 48 ADIT from rate base. First, we agree with SERI that its FIN 48 ADIT *may* be a related cost to its ARO, and disagree with Trial Staff and the Retail Regulators that these items are distinct. In Order No. 631, the Commission found that a public utility's legal liability to decommission nuclear plants under certain Nuclear Regulatory Commission regulations is an example of an ARO.[840] However, we disagree with SERI's contention that FIN 48 ADIT should be excluded from rate base because its asset retirement obligation has been historically excluded from rate base and must continue such exclusion pursuant to Order No. 631. Order No. 631 states in part that:

> the accounting for asset retirement obligations will not affect jurisdictional entities' ability to seek recovery of costs arising from asset retirement obligations in rates. However, if billings under formula rate tariffs are affected by adoption of these accounting requirements, the jurisdictional entity must obtain approval from the Commission prior to implementing the charge for tariff billing purposes.[841]

Additionally, in adopting the accounting asset retirement obligation requirements, Order No. 631 states "public utilities . . . with formula rate tariffs must not include any cost components related to AROs in their formula rate billing tariffs for automatic recovery in their billing determinants without obtaining Commission approval."[842]

319. Noting that SERI received approval to recover nuclear decommissioning expenses in rates[843] (i.e. asset retirement obligation-related cost) well before the issuance of Order No. 631, SERI's adoption of the asset retirement obligation accounting requirements would not have affected its ability to continue to recover costs arising from its asset

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accounting publication may be obtained from FASB at http://www.fasb.org/. Appendix A, paragraphs A2 through A5, contains a discussion of legal obligations.

[840] Order No. 631, 103 FERC ¶ 61,021 at P 2.

[841] *Id.* P 3.

[842] *Id.* P 27.

[843] Opinion No. 234, 31 FERC ¶ 61,305.

retirement obligation in rates and would not have necessitated Commission reapproval for recovery of those same costs. Furthermore, SERI misinterprets Order No. 631 requirements to only apply to rate base items. We disagree with this interpretation because the regulation states that "all cost components related to the asset retirement obligation that are included in the book balances of all accounts reflected in the cost of service computation supporting the proposed rates"[844] must be identified as part of any initial rate filing or general rate change. In the instant proceeding, we consider all cost components related to SERI's asset retirement obligation that are included in the derivation of its cost of service rates to be of relevance. The fact that amounts are collected from customers through a decommissioning expense line item, rather than through depreciation rates, does not change our determination.

320. SERI argues that, in the absence of a formal Commission ratemaking policy statement concerning uncertain tax positions, the Initial Decision imposes an unduly punitive remedy without fair notice. We disagree with SERI's contention, and for the reasons discussed above, do not believe that the Commission must clarify its existing regulations or issue a policy statement to resolve this issue.

321. As noted above, SERI has been granted Commission approval to recover estimated decommissioning costs for Grand Gulf through wholesale cost of service rates. Entergy Corporation is also entitled to claim uncertain tax positions for estimated decommissioning expenses for tax purposes. There is no dispute that the uncertain tax position here represents an accelerated deduction of estimated decommissioning expenses, which has given rise to the recordation of ADIT. There is also no logical basis to otherwise conclude that customer-supplied funds deposited into SERI's decommissioning trust fund will be used to pay for those same estimated decommissioning expenses in the future. Entergy Corporation's decision to deduct these estimated decommissioning expenses for tax purposes before the economic activity of decommissioning Grand Gulf has occurred, rendering them an *uncertain tax position*, does not change this fact. We disagree with SERI's contention that if FIN 48 ADIT is required as a reduction to rate base, there would be a significant disincentive for any utility to claim favorable tax positions on tax returns.[845] A violation of or misapplication of Commission policy does not render it a new policy when it is enforced. Therefore, enforcing the Commission's existing requirement to include FIN 48 ADIT as a reduction to rate base would not serve as a new disincentive for utilities to utilize certain tax strategies. According to SERI's logic, the mere possibility that ratepayers could benefit from a FIN 48 ADIT rate base reduction if a tax position is sustained, warrants its exclusion until such tax resolution occurs, all the while, receiving an income tax

[844] Order No. 631, 103 FERC ¶ 61,021 at P 62.

[845] Ex. SER-0020 at 29:3-7 (Johnston Ans. Test.).

allowance in its cost of service rates. We disagree with SERI's reasoning because it is inconsistent with the Commission's ratemaking principles. SERI could have submitted a filing pursuant to FPA section 205 to request a different rate treatment for its FIN 48 ADIT to address any disincentives to claim favorable tax positions on tax returns for the benefit of its customers, while still complying with the Commission's tax normalization policy, but it did not do so.

322. Coupling the Commission's tax normalization policy with FIN 48 requires that all uncertain tax positions taken in a given tax year, regardless of their level of certainty, shall be recognized in the proper ADIT accounts and appropriately included in rate base. Jurisdictional entities shall maintain this practice *during* and *until* the taxing authority has made its final determination as to whether an uncertain tax position will be accepted or disallowed, and such outcome has been properly reflected on a utility's revised income tax return for a given tax year. ADIT calculations shall be based upon amounts claimed in an entity's actual tax return.[846] We note that adjustments made to ADIT accounts require Commission authorization. As such, for any subsequent period in which SERI believes it is appropriate to adjust its ADIT balances as a result of a change in tax outcome, SERI shall make a request with the Commission to adjust such ADIT balances with all necessary and proper support. This is not a new requirement. Jurisdictional entities are restricted in their ability to adjust deferred tax accounts without prior approval of the Commission.[847]

323. To remedy SERI's exclusion of certain ADIT balances from rates, we find that customers should be compensated for the resulting excessive revenue requirement charged in UPSA rates in prior periods. We agree with the Initial Decision's finding that SERI's removal of FIN 48 ADIT from the ADIT offset to rate base in the UPSA formula rate is unjust and unreasonable because it represents a violation of the Commission's normalization requirements and the UPSA formula. However, we disagree with the Initial Decision's finding that SERI shall refund $334,475,214 for the 2007 to 2018 period of noncompliance. We agree with Trial Staff and the Retail Regulators that the record shows that SERI's noncompliance began in 2004, and likely continues into the present period. Additionally, the record indicates that not all ADIT resulting from the uncertain tax positions was labeled as FIN 48 ADIT, as the "more likely than not" portion was labeled as 263A, and Account 190 was not properly captured in the estimated refund

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[846] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at P 31,554.

[847] *See* paragraph D to Account 281, *Accumulated Deferred Income Taxes—Accelerated Amortization Property*, paragraph D to Account 282, *Accumulated Deferred Income Taxes—Other property*, paragraph E to Account 283, *Accumulated Deferred Income Taxes—Other*, and paragraph D to Account 190, *Accumulated Deferred Income Taxes* in 18 C.F.R. pt. 101.

amount. We will require a refund amount that appropriately captures the revenue requirement impact resulting from the exclusion of *all* ADIT amounts resulting from SERI's decommissioning uncertain tax positions during the entire 2004 to present period of noncompliance.[848] This refund amount is intended to compensate customers for the excessive revenue requirement incurred as a result of SERI's noncompliance. This refund amount is not intended to reestablish ADIT balances for which an associated uncertain tax position has already been resolved. We therefore modify the Initial Decision's finding to require SERI to compute a refund amount that considers all ADIT amounts resulting from SERI's decommissioning uncertain tax positions, and also considers the timing of when such uncertain tax positions were actually resolved by taxing authorities, such that the ADIT balances used to compute the revenue requirement only include those balances for periods during and until the tax position was actually resolved. The refund amount shall be clearly computed for each year, with interest, and include all necessary and detailed documentation to support the timing of the taxing authority's resolution of all previous tax positions.

324. SERI's accounting and reporting has not been appropriately updated to reflect changes in ADIT balances that would have occurred as associated uncertain tax positions were resolved by taxing authorities in previous periods. It is only in this proceeding that through SERI's motions to lodge the IRS's resolution of its 2015 tax year uncertain tax position, that the Commission has had notice that SERI must change its ADIT balances. The record indicates that SERI's uncertain tax positions taken in prior tax years (2004 to 2014) have been resolved, but SERI has never made a request to change those resulting ADIT balances for accounting and reporting purposes. SERI's accounting books and records must be corrected to reflect its actual ADIT balances and to reflect these balances in Account 282, *Accumulated Deferred Income Taxes—Other Property*,[849] rather than Account 283. The NOPA and RAR inform us and the parties to this proceeding of the fact that SERI's 2015 income tax year is also now resolved. Taking the resolution of SERI's 2015 uncertain tax position into consideration does not, however, change our determination that customers must be compensated for being charged higher than necessary rates in previous periods. The resolution of SERI's 2015 uncertain tax position shall be included in the refund computation, similarly for the presumed *resolved* 2004 to 2014 tax years. If uncertain tax positions taken in tax years 2016 to the present period

[848] As noted above, to the extent that the Commission directs the provision of refunds, Entergy Mississippi shall only receive refunds pursuant to the Settlement and not pursuant to the directives of this order.

[849] 18 C.F.R. pt. 101 requires the use of Account 282 in part, to "include the tax deferrals resulting from adoption of the principle of comprehensive interperiod income tax allocation…which are *related to all property* other than accelerated amortization property" (emphasis added).

have each individually been resolved by taxing authorities, then all necessary and proper documentation supporting the resolution for each tax year shall also be provided as part of the refund filing.

325. In Docket No. ER21-748-001, SERI preemptively computed a one-time credit of approximately $25.2 million, representing a revenue requirement amount by which past customer charges would have been reduced as a result of the 2015 resolution, and in Docket No. ER21-117-001, SERI preemptively proposed to reduce the UPSA rate base by establishing an ongoing credit for ADIT as a result of the 2015 tax resolution. The Commission accepted these filings, subject to refund, set them for settlement and hearing procedures, instituted a FPA section 206 proceeding in Docket No. EL21-46-000, and consolidated these proceedings with proceedings in Docket Nos. ER21-117-000, ER21-117-001, ER21-129-000, ER21-129-001, and EL21-24-000.[850] SERI's proposed one-time credit and ADIT adjustment overlap with the Commission's resolution in the instant proceeding. As part of the refund computation, SERI will include the impact of the 2015 tax resolution on the resulting ADIT adjustment to derive the correct revenue requirement refund amount. As discussed above, the refund computation shall include all ADIT amounts resulting from SERI's decommissioning uncertain tax positions taken during the 2004 to present periods, and shall also consider the timing of when such uncertain tax positions were actually resolved by taxing authorities. Thus, most if not all of the same issues raised in Docket Nos. ER21-748 and ER21-117 will be resolved in the instant proceeding as part of SERI's compliance filing.

326. We direct SERI to make a compliance filing within 60 days of the issuance of this order as discussed above. We additionally direct SERI to refile its FERC Form No. 1s beginning December 31, 2018 to properly reflect ADIT adjustments as a result of this determination. SERI must make the appropriate disclosures to the notes and footnotes of the affected account balances for the years 2018 through 2021.

G. Issue 7: Was it Improper for SERI to Transfer a Portion of the Tax Liability Resulting from the Decommissioning Tax Deductions Recorded in Account 283 to Account 236 after the Enactment of the 2017 Tax Cuts and Jobs Act?

1. Initial Decision

327. The Initial Decision finds that SERI's transfer of part of FIN 48 ADIT in Account 283 to Account 236 because of the Tax Cuts and Jobs Act (TCJA)[851] tax rate reduction is

[850] *See Sys. Energy Res., Inc.*, 174 FERC ¶ 61,153 (2021); *Sys. Energy Res., Inc.*, 174 FERC ¶ 61,082 (2021).

[851] Pub. L. No. 115-97, 131 Stat. 2054 (2017).

unwarranted. To this point, the Initial Decision finds that it "cannot logically be the case . . . that an amount in a *deferred* tax account can be transferred into a *current* tax account."[852] The Initial Decision notes that the 1993 Guidance Letter provides no instruction to re-classify an adjustment of an ADIT account due to a tax rate change into a different account, much less a current account.[853]

328. The Initial Decision states that there was no reason to make the adjustment at all because the FIN 48 amounts that formed the basis of the adjustment would, if rejected by the IRS, result in Entergy paying the IRS tax arising from the uncertain tax position at the original rate in tax year 2017, not the later TCJA rate that became effective on January 1, 2018.[854]

329. The Initial Decision also points out that if the IRS disallows the nuclear decommissioning tax deduction, there never would have been a timing difference, and tax liability will not have been deferred, and have to be repaid to the IRS at the higher tax rate.[855] The Initial Decision requires SERI to make a compliance filing to reverse the transfer of $147.3 million of its 2017 FIN 48 ADIT entries from Account 283 to Account 236.[856]

2. Briefs on Exceptions

a. SERI

330. SERI states that the Initial Decision's refund calculation wrongly ignored the effect of the TCJA on all ADIT account balances. SERI argues that the Initial Decision's conclusion that the TCJA "did not give SERI cause to reduce" SERI's Account 283 FIN 48 balance is squarely at odds with Commission accounting policy.[857] SERI argues that the Initial Decision erred in concluding that the 1993 Guidance Letter has "no instruction . . . to re-classify an adjustment of an ADIT account due to a tax rate change into a

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[852] Initial Decision, 171 FERC ¶ 63,003 at P 570 (emphasis in original).

[853] *Id.*

[854] *Id.* P 571.

[855] *Id.* P 572.

[856] *Id.* P 573.

[857] SERI Brief on Exceptions at 93 (citing Initial Decision, 171 FERC ¶ 63,003 at P 571).

different account."[858] SERI states that the Initial Decision concludes that SERI should have left the Account 283 FIN 48 balance unaltered when it made its accounting entries for the effect of the TCJA. SERI states that the Initial Decision relied in significant part upon Trial Staff witness Ms. Miller's testimony to reach the conclusion that the TCJA did not provide a basis for SERI's reduction of its Account 283 FIN 48 balance. However, SERI alleges that in a proceeding in Docket No. ER18-1182-001, Trial Staff took the opposite position and argued that re-measurement of the Account 283 FIN 48 balance was mandatory. SERI argues that the Initial Decision erred in concluding that Account 236 was the incorrect account to record the effect of the TCJA.[859]

3. Briefs Opposing Exceptions

a. Trial Staff

331. Trial Staff contends that the Initial Decision correctly held that the TCJA did not require SERI to transfer $147.3 million of FIN 48-related ADIT from Account 283 to Account 236,[860] and that SERI's actions were improper. Trial Staff argues that, on exceptions, SERI contends that the transfer was appropriate, ignoring the requirement to obtain Commission approval before transferring the ADIT from Account 283 to Account 236, as indicated in Part E of the Instructions to Account 283.[861] Trial Staff notes that in Opinion No. 545, the Commission confirmed that prior Commission approval was a precondition for a reclassification of an entry from one ADIT account to another.[862]

b. Louisiana Commission

332. The Louisiana Commission argues that SERI incorrectly recorded $147.3 million related to its nuclear decommissioning tax deductions in Account 236, instead of Account 254 as required by Commission regulations. The Louisiana Commission asserts that SERI's excess decommissioning ADIT should have been transferred to Account 254 after the passage of the TCJA as ordered by the Initial Decision in Docket No. ER18-1182. The Louisiana Commission argues that whether the amount is recorded in Account 283

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[858] *Id.* at 94 (citing Initial Decision, 171 FERC ¶ 63,003 at P 570; 1993 Guidance Letter at Item 8 (in record as Ex. LC-0084)).

[859] *Id.* at 94-96.

[860] *Id.* at 97 (citing Initial Decision, 171 FERC ¶ 63,003 at PP 568-573).

[861] *Id.*

[862] *Id.* (citing *Entergy Servs., Inc*. Opinion No. 545, 153 FERC ¶ 61,303, at P 17 (2015), *order on reh'g and clarification*, 156 FERC ¶ 61,196 (2016)).

or Account 254 does not affect the amount that SERI owes back to ratepayers as a result of its tariff and accounting violations but only affects how that refund is calculated. The Louisiana Commission states that, if the excess decommissioning ADIT is left in Account 283, that amount would be included as a rate base offset in the UPSA, as directed by the Initial Decision. The Louisiana Commission states that if the excess decommissioning ADIT is moved to Account 254, UPSA Attachment E provides a mechanism that would give customers a credit equal to the unamortized balance of the excess ADIT multiplied by SERI's before-tax Cost of Capital. The Louisiana Commission states that the refund to ratepayers for the time-value of the ADIT should be the same under either ruling.[863]

333. The Louisiana Commission argues that SERI's accounting also violated the USofA because it recorded the excess decommissioning ADIT, a deferred tax, in Account 236, an account used for the recordation of current taxes. The Louisiana Commission argues that Commission guidance and recent Commission orders explain that excess ADIT that results from a change in the tax rate should be recorded in Account 254 when it is probable that the utility will have to return that amount to customers.[864] The Louisiana Commission argues that SERI's transfer of the $147.3 million to Account 236 was an effort to avoid its return to customers as excess tax and to keep all cash benefits of the deduction for SERI's shareholders. The Louisiana Commission states that an amount recorded in Account 283 should be a rate base reduction pursuant to section 35.24 of the Commission's regulations.[865]

334. The Louisiana Commission maintains that SERI failed to obtain the necessary approval from the Commission before transferring the excess decommissioning ADIT to Account 236. The Louisiana Commission asserts that SERI correctly calculated that $147.3 million of excess ADIT related to its nuclear decommissioning deduction but improperly transferred that amount to Account 236, instead of Account 254. The Louisiana Commission states that the instructions to Account 283 in the USofA preclude the transfer of any amounts in that account without prior Commission approval. The Louisiana Commission states that the Commission has provided prior authorization for utilities to transfer excess ADIT amounts in Account 283 to Account 254, but it has not provided preapproval to transfer those amounts to Account 236.[866]

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[863] Louisiana Commission Brief Opposing Exceptions at 105-106 (citing Ex. SER-0035 at 9 ln.9; Ex. SER-0035 at 18 columns E & F).

[864] *Id.* at 107.

[865] *Id.*

[866] *Id.* at 108-109.

335. The Louisiana Commission contends that SERI's argument that it was precluded from recording the excess decommissioning ADIT in Account 254 because it was not probable that the IRS would approve its deduction misapplies Commission guidance and should be rejected. The Louisiana Commission argues that the determination of whether the return to customers is "probable" depends on whether the expenses related to the deduction will be included in rates. The Louisiana Commission states that FASB Statement of Financial Accounting Standards No. 71, Accounting for the Effects of Certain Types of Regulation (1982) established criteria for regulatory assets and liabilities for regulated entities with cost-based rates and that the probability analysis in FAS 71 related to whether expenses would be included in rates set by ratemaking regulators, not whether it was probable that a deduction would be allowed by the IRS. The Louisiana Commission asserts that SERI's uncertainty claims are not germane to the analysis of whether a regulatory liability should be recorded in Account 254 because those claims of uncertainty relate to the probability of action by the IRS, a tax collector, not a ratemaking regulator that determines whether ADIT should be reflected in rates. The Louisiana Commission states that therefore, it is probable that the Commission will require SERI to return the excess decommissioning ADIT to customers, and therefore SERI must record the excess ADIT as a regulatory liability in Account 254.[867]

336. The Louisiana Commission argues that SERI erroneously recorded the excess decommissioning deferred tax in Account 236, an account used to record current taxes. The Louisiana Commission asserts that the USofA Account 236 definition precludes recording the excess decommissioning ADIT in that account. The Louisiana Commission states that Account 236 is a current tax account, whereas Account 283 is a deferred tax account. The Louisiana Commission states that the excess decommissioning ADIT relates to a future tax year and virtually all of the liability was accrued in 2015, not 2017 or later. The Louisiana Commission states that the excess decommissioning ADIT is a deferred tax, not a current tax for 2017.[868]

c. Mississippi and Arkansas Commissions

337. The Mississippi and Arkansas Commissions argue that SERI's claims that the Decision failed to properly implement the TCJA is meant to distract from SERI's violation of Commission accounting rules.[869] The Mississippi and Arkansas Commissions explain that SERI did not receive advanced approval, based on Commission guidance for Account 283, at paragraph E, to conduct the transfer of $147.3

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[867] *Id.* at 109-112.

[868] *Id.* at 112-113.

[869] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 57 (citing SERI Brief on Exceptions at 93-96).

million from Account 283 to Account 236.[870] The Mississippi and Arkansas Commissions assert that SERI should not have transferred amounts to Account 236 because the transfer highlights SERI's inconsistent tax and accounting arguments.[871] The Mississippi and Arkansas Commissions also explain that the transferred amount of $147.3 million is excess ADIT since SERI's deductions have not been denied even though SERI states that the amount cannot be ADIT under any circumstance.[872] The Mississippi and Arkansas Commissions maintain that the amounts were ADIT before the TCJA's enactment and were surely excess ADIT after.[873] However, the Mississippi and Arkansas Commissions state that, if the IRS denies SERI's uncertain tax deductions, then taxes must be paid at the full tax rate prior to the start of the new policies implemented by the TCJA.[874] Therefore, the Mississippi and Arkansas Commissions assert, no excess ADIT will be available to transfer amounts out of Account 283.[875] The Mississippi and Arkansas Commissions maintain that the Commission should affirm that SERI should not have improperly transferred $147.3 million from Account 283 whether SERI wins or loses the tax deduction.[876]

4. Commission Determination

338. The Initial Decision finds that SERI erroneously transferred $147.3 million of ADIT associated with nuclear decommissioning tax deductions to an accrued tax liability account as a result of the tax rate change enacted by the TCJA. We agree that the transfer from Account 283 to Account 236, Taxes Accrued, was not appropriate. SERI maintains that the $147.3 million ADIT balance, representing the difference between the pre-TCJA rate and the post-TCJA rate, could not remain in an ADIT account because it was required to book the effect in an account other than Account 283 or else there would be

[870] *Id.* at 57-58 (citing Tr. 1328:24-1329:6 (Roberts)).

[871] *Id.* at 58.

[872] *Id.* (citing SERI Brief on Exceptions at 96).

[873] *Id.*

[874] *Id.*

[875] *Id.* 58 (citing Ex. MC-0031 at 13:1-15).

[876] *Id.* at 59.

"no effect on the account balance."[877] SERI supports its reasoning with its interpretation of the 1993 Guidance Letter, which states in part:

> [t]he entity shall adjust its deferred tax liabilities and assets for the effect of the change in tax law or rates in the period that the change is enacted. The adjustment shall be recorded in the proper deferred tax balance sheet accounts (Accounts 190, 281, 282 and 283) based on the nature of the temporary difference and the related classification requirements of the accounts. If as a result of action by a regulator, it is probable that the future increase or decrease in taxes payable due to the change in tax law or rates will be recovered from or returned to customers through future rates, an asset or liability shall be recognized in Account 182.3, Other Regulatory Assets, or Account 254, Other Regulatory Liabilities, as appropriate, for that probable future revenue or reduction in future revenue.[878]

339. SERI maintains that, because the $147.3 million is related to its uncertain tax position, in which it will either be paid under the ETAA[879] if the position is disallowed, or credited to customers if the position is accepted, by taxing authorities, it was appropriate to record the adjustment in Account 236. However, we disagree with SERI's interpretation of the 1993 Guidance Letter because this letter indicates that, upon adjustment of a deferred tax liability or asset, if it is probable that such adjustments will be recovered from or returned to customers as a result of action by a regulator, then that adjustment should be recorded as a regulatory asset or liability, and not as current taxes payable. As discussed under Issue 6, we find that the pending resolution of whether an uncertain tax position prevails or fails is irrelevant to determining whether ADIT is properly recordable for regulatory accounting purposes. The record provides that, pursuant to the TCJA, SERI remeasured its ADIT resulting from the decommissioning uncertain tax positions. This remeasurement then resulted in $147.3 million of excess

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[877] *Id.* at 94 (citing Ex. SER-0044 at 38-39).

[878] *Accounting for Income Taxes*, Docket No. AI93-5-000, at 8 (Apr. 23, 1993) (delegated order)

[879] Initial Decision, 171 FERC ¶ 63,003 at P 447 (noting that under the ETAA, Entergy Corporation files a consolidated return with the IRS each year. Subsidiaries that are not members of Entergy Corporation's consolidated federal income tax group either file separate tax returns or file as a separate consolidated group. The ETAA provides for the allocation among member companies of the resulting tax liabilities and assets from the filing of the consolidated tax returns. The allocation is determined on an individual company basis).

ADIT, which SERI improperly transferred to Account 236. SERI is required to follow the Commission's guidance for remeasuring its FIN 48 ADIT and recognizing deficient or excess ADIT as a regulatory asset or liability, as appropriate.

340. The discrete issue of whether SERI must return the $147.3 million of excess ADIT to customers is determined in the separate initial decision pending before the Commission in Docket No. ER18-1182-000. In that proceeding, the initial decision determined that SERI erroneously excluded the return of $147.3 million of excess ADIT, recorded in Account 236, from SERI's March 2018 rate filing to return all other excess ADIT resulting from the TCJA. Although there is inherent overlap between Issue 7 in the instant proceeding and the issue in Docket No. ER18-1182-000, we will preserve the resolution of the discrete issue of refunds for resolution in Docket No. ER18-1182-000.[880]

341. We direct SERI to refile its FERC Form No. 1s beginning December 31, 2018 to reverse the transfer of excess ADIT or 2017 FIN 48 ADIT recorded in Account 236, and to further reclassify this amount from Account 283 to Account 282. SERI must make the appropriate disclosures to the notes and footnotes of the affected account balances for years 2018 through 2021. Given that we are granting SERI's motions to lodge its 2015 tax resolution documents (the NOPA and the RAR) into the record, we consider this information to have no bearing on the required accounting treatment of the excess ADIT. Nonetheless, the $147.3 million value of excess ADIT must be recomputed to reflect the resolution of the 2015 tax position. SERI has preemptively recalculated this excess ADIT amount to be approximately $17 million, as proposed in Docket No. ER21-129-001.[881] SERI's proposed excess ADIT refund amount in Docket No. ER21-129-001 overlaps with the Commission's resolution in the instant proceeding and in Docket No. ER18-1182-000. As part of the correcting entry, SERI shall also provide a supported computation of excess ADIT resulting from the TCJA, that considers the resolution of its 2015 tax position. If uncertain tax positions taken in tax years 2016 and 2017 have each individually been resolved by taxing authorities, then all necessary and proper documentation supporting the resolution for each tax year shall also be provided as required under Issue 6, to support the computation of excess ADIT.

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[880] As noted above, to the extent that the Commission directs the provision of refunds, Entergy Mississippi shall only receive refunds pursuant to the Settlement and not pursuant to the directives of this order.

[881] *See Sys. Energy Res., Inc.*, 174 FERC ¶ 61,082 at P 11.

H. Issue 8: What Protocols Should be Included in the UPSA?

1. Initial Decision

342. The Initial Decision states that SERI's compliance filing should implement the Trial Staff and the Retail Regulators' protocols proposal, appended to Trial Staff's Post-Hearing Initial Brief.[882] The proposal states that, in 2013, on the Entergy Operating Companies becoming transmission owning members of Midwest Independent Transmission System Operator, Inc. (MISO),[883] the Commission required MISO to submit revised formula rate protocols to expand the scope participation so that all interested parties would be included and required enhanced transparency for customers by making revenue requirements, inputs, calculations, and other information publicly available while also providing interested parties an opportunity to review the information, and directing MISO to implement both formal and informal challenge procedures.[884]

2. Briefs Opposing Exceptions

343. SERI states that it committed to adopt protocols to address the transparency concerns of the Retail Regulators. SERI also states that it has agreed since the beginning of this proceeding that it would adopt formal formula rate protocols that provide the same level of transparency that the Commission has recommended in other formula rate proceedings. SERI notes that on October 19, 2020, SERI filed pursuant to FPA section 205 to add the protocols proposed by Trial Staff to the UPSA. SERI argues that adoption of the protocols should eliminate any lingering transparency concerns, which are the primary basis for Trial Staff's requested FPA section 206 investigation, which is discussed further below.[885]

3. Commission Determination

344. We find the issue of which protocols SERI should include in the UPSA to be moot. The Initial Decision required SERI to adopt the protocols appended to Trial Staff's Post-Hearing Initial Brief, and SERI committed to adopt such protocols. SERI filed to

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[882] Initial Decision, 171 FERC ¶ 63,003 at P 611.

[883] Effective April 26, 2013, MISO changed its legal name to "Midcontinent Independent System Operator, Inc." *See*, *e.g.*, *Midwest Indep. Transmission Sys. Operator. Inc.*, 170 FERC ¶ 61,216, at P1 n.2 (2020).

[884] Initial Decision, 171 FERC ¶ 63,003 at P 597 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at PP 16-18 (2013)).

[885] SERI Brief Opposing Exceptions at 85-87.

amend the UPSA to adopt these protocols in Docket No. ER21-142-000, and the amendment was accepted on December 22, 2020.[886]

I. Issue 9: Was the Recommendation for the Commission to Institute an FPA Section 206 Review of the UPSA Formula Rate within the Scope of this Proceeding, and Should the Commission Institute such a Proceeding?

1. Initial Decision

345. The Initial Decision recommends that the Commission not initiate an FPA section 206 investigation into the UPSA formula rate at this time.[887] The Presiding Judge finds that, while the hearing "unearthed a great deal of information regarding how the UPSA has been implemented"[888] and that SERI has answered charges of "manipulating accounts and distorting rates with contradictory explanations [and] *post hoc* rationalizations of unexplained behavior,"[889] the Commission has "sufficient enforcement and audit mechanisms in place to monitor SERI more closely if it comes to pass that civil or even criminal penalties are warranted" in the future.[890] The Initial Decision also states that it would be premature to initiate an FPA section 206 investigation before the new formula rate protocols have had a chance to "air out the cobwebs in SERI's ledger books for at least the first year" and interested parties have had access to enough information to ask the Commission for an FPA section 206 investigation.[891]

2. Briefs on Exceptions

a. Trial Staff

346. Trial Staff argues that the UPSA formula rate is impermissibly opaque in light of recent Commission decisions that reject formula rate templates for lack of worksheets or clear identification of calculations, allocators, inputs, and the bases for such

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[886] *Sys. Energy Res., Inc.*, Docket No. ER21-142-000 (Dec. 22, 2020) (delegated order).

[887] Initial Decision, 171 FERC ¶ 63,003 at P 627.

[888] *Id.* P 622.

[889] *Id.* P 625.

[890] *Id.* P 626.

[891] *Id.* P 625.

components.[892] Trial Staff asks the Commission to direct SERI to show cause as to why the UPSA formula rate is not unjust and unreasonable when the UPSA fails to detail the basis for inputs, allocations, and calculations used to calculate amounts recovered from customers. Trial Staff notes that Commission policy requires that all formula rate calculations be incorporated into rate schedules so that public utilities cannot unilaterally revise formula rate calculations,[893] and that formula rates must be transparent enough to be understandable and reviewable by affected parties and by the Commission.[894] Trial Staff argues that, even with the addition of its recommended protocols, the UPSA formula rate falls short of these requirements. To support this argument, Trial Staff notes that, in discovery, it learned that SERI maintains two sets of accounting records relevant to the UPSA formula rate relative to its FERC Form No. 1 reporting,[895] and that numerous significant components of SERI's cost of service are not reflected in a worksheet to the UPSA formula rate at all, as exemplified by SERI's presentation of the balance of ADIT reflected in the "Development of Rate Base" in UPSA Attachment A.[896] As another example, Trial Staff states that the phrase "appropriate for ratemaking purposes" in the UPSA formula rate is so general that it fails to provide notice to SERI's customers as to how the "Current Income Taxes" collected under the UPSA formula rate are calculated.

347. Trial Staff maintains that SERI's conduct demonstrates that the current UPSA formula rate allows SERI to unilaterally revise the rate base used to calculate UPSA billings. Trial Staff notes that in contrast to SERI's presentation of its summary calculation of ADIT, each Entergy Operating Company's transmission formula rate under Attachment O of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) includes an ADIT worksheet that provides annual balances for each of the dozens of subaccounts that comprise the USofA ADIT accounts used to

[892] Trial Staff Brief on Exceptions at 9.

[893] *Id.* at 40 (citing *Am. Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, at P 32 (2007) (citing *Me. Yankee Atomic Power Co.*, 42 FERC ¶ 61,307, *reh'g denied*, 43 FERC ¶ 61,453 (1988)).

[894] *Id.* (citing *ISO New England Inc.*, 153 FERC ¶ 61,343, at P 9 (2015)).

[895] *Id.* (citing Trial Staff, et al. July 26, 2019 Joint Motion for Abeyance of Procedural Schedule and Motion for Oral Argument at 3-11).

[896] *Id.* at 41.

calculate rates. Trial Staff concludes that SERI's practices necessitate further investigation by the Commission under FPA section 206.[897]

3. Briefs Opposing Exceptions

a. New Orleans Council

348. The New Orleans Council argues that SERI did not establish that the Lease Renewal's prudence was not an issue and disagrees with SERI's assertion that all parties conceded that SERI's actions were prudent.[898] The New Orleans Council asserts that, although complainants did not raise a prudence challenge, imprudence is the threshold for a successful FPA section 206 challenge although parties may raise the issue of imprudently incurred costs.[899]

b. SERI

349. SERI argues that Trial Staff has not met the FPA section 206 standards to justify an investigation via an order to show cause. SERI states that Trial Staff has identified nothing that requires further investigation.[900] SERI argues that the protocols will provide the necessary detail to address Trial Staff's concerns.[901] SERI also states that Trial Staff repeats its criticisms of SERI's accounting system and its objections to SERI's calculation of ADIT for UPSA rate purposes. SERI states that Trial Staff's argument on the uncertain tax position is unwarranted as customers were not harmed, and SERI's rate treatment was correct.[902]

350. SERI notes that Trial Staff compares the UPSA to the Entergy Operating Companies' formula rates in Attachment O of the MISO Tariff, which include an ADIT worksheet that provides annual balances for each subaccount that is part of the USofA

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[897] *Id.* at 43.

[898] New Orleans Council Brief Opposing Exceptions at 10-11 (citing SERI's Initial Post-Hearing Brief at 17 ("No party has even attempted to show that SERI's decision to renew the Leases was imprudent.")).

[899] *Id.* at 12.

[900] SERI Brief Opposing Exceptions at 92-93.

[901] *Id.* at 88 (citing Trial Staff Brief on Exceptions at 39).

[902] *Id.* at 89-90.

ADIT accounts used to calculate rates.[903] SERI argues that this comparison does not establish that the UPSA is unjust or unreasonable. SERI argues that there are multiple approaches to implementing formula rates and that the protocols provide for virtually identical annual disclosure and information exchange procedures as those that apply for the Attachment O rates.[904]

351. SERI states that, for the first time in the proceedings, Trial Staff criticizes the specific instruction "Items from Monthly Tax Determination that are appropriate for ratemaking purposes," and SERI argues that this criticism is circular.[905] SERI notes that Trial Staff witness Mr. Poffenberger cited this provision in response to a question about whether an interested party would "be able to calculate the *Monthly* Capacity Charges" in the UPSA.[906] SERI notes that Mr. Poffenberger focused on the difficulties in reconciling monthly formula inputs with annual FERC Form No. 1 data and listed a number of UPSA instructions that refer to monthly inputs.[907]

4. **Commission Determination**

352. We affirm the Initial Decision's finding that an FPA section 206 investigation is not needed at this time. We note that, in Docket No. EL20-72-00, the Commission established a new hearing involving the UPSA, the scope of which includes the issues described not only in the Docket No. EL20-72-000 complaint but "may also include allegations *relating to* what has been identified in the Complaint [2020 Complaint], but which may not be specifically known at this time."[908] There, the Commission stated that the 2020 Complaint stated that "SERI's UPSA formula rate does not identify numerous allocations, formulas, and subaccount descriptions necessary to determine what costs SERI has included or excluded from the Monthly Capacity Charge," which "makes it impossible for SERI's customers to determine whether UPSA formula rate inputs are correct and reasonable."[909] In response, the Commission found that "it is appropriate to

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[903] *Id.* at 90 (citing Trial Staff Brief on Exceptions at 41-42).

[904] *Id.* at 90-91.

[905] SERI Brief Opposing Exceptions at 91 (citing Trial Staff Brief on Exceptions at 42-43).

[906] *Id.* (citing Ex. S-0068 at 7:14-16).

[907] *Id.* (citing Ex. S-0068 at 7-8).

[908] *La Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 176 FERC ¶ 61,095, at P 10 (2021).

[909] *Id.* (citing Louisiana Commission Sept. 21, 2020 Complaint, Docket No. EL20-

set for hearing the issues discussed in the Complaint [in Docket No. EL20-72-000], which may pertain to specificity of allocations, formulas, and subaccounts."[910] Consequently, we find that the breadth of the pending hearing in Docket No. EL20-72-000, in combination makes the establishment of a separate FPA section 206 investigation in this proceeding unnecessary at this time.

The Commission orders:

(A) The Presiding Judge's findings are hereby affirmed in part and modified in part, as discussed in the body of this order.

(B) As discussed above, SERI is hereby directed to submit a compliance filing within 60 days of the issuance of this order.

(C) SERI's request for privileged treatment for specified portions of the NOPA is granted, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

72-000, at 6.

[910] *Id.* P 11.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Louisiana Public Service Commission
v.
System Energy Resources, Inc.

Docket No. EL18-152-001

(Issued December 23, 2022)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order[1] that affirms in part and modifies in part the Initial Decision issued by the Presiding Judge in the captioned proceeding.

2. We are essentially asked to abrogate a contract, a request that has been styled as a complaint by the Louisiana Public Service Commission (Louisiana Commission) in which the Louisiana Commission alleges that System Energy Resources, Inc. (SERI) and Entergy Services, Inc. (Entergy Services) violated the filed rate and the Commission's ratemaking and accounting requirements in billing the costs of the Grand Gulf Nuclear Power Station's (Grand Gulf) lease renewals (collectively, Lease Renewal) through the Unit Power Sales Agreement (UPSA) formula rate.[2] The majority concludes that, while the formula in the UPSA is the filed rate, inputs, such as the Lease Renewal payments, are not the filed rate; therefore—so the reasoning goes—the majority is free to order refunds as to the inputs.[3] By disallowing payments under the Lease Renewal and refusing to recognize it as an extension of the Original Sale-Leaseback Agreement, the majority effectively abrogates the various agreements. Everyone unfortunate enough to be operating with a Sale-Leaseback Agreement that includes a renewal option should take note. I would not be surprised if today's order sounds the death knell for such arrangements going forward.

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[1] *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 181 FERC ¶ 61,243 (2022) (Order).

[2] *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 171 FERC ¶ 63,003, at P 75 (2020) (Initial Decision). The UPSA is between SERI and Entergy Arkansas, LLC, Entergy Louisiana L.L.C., Entergy Mississippi, LLC., and Entergy New Orleans, LLC (collectively, Entergy Operating Companies). An additional Entergy Operating Company, Entergy Texas, Inc., does not purchase Grand Gulf energy from SERI.

[3] Order, 181 FERC ¶ 61,243 at P 148 & n.425.

3. Before addressing the merits of this particular case, I would be remiss if I did not ask why we are involving ourselves at all. The Commission routinely declines to exercise primary jurisdiction over contract disputes, and I would have done so here. Courts are perfectly capable of adducing the necessary evidence and ruling on the merits of claims sounding in contract. Given the history of this proceeding, I can only imagine that judicial action would have led to a swifter resolution of this case. This proceeding has languished before the Commission for over four years,[4] with briefs on exception to the Initial Decision pending for two years.[5]

4. To the merits: having staked its position that the Lease Renewal is not a continuation of the Original Sale-Leaseback Agreement, the majority concludes that SERI should have sought Commission approval for the Lease Renewal pursuant to FPA section 203(a)(1)(D).[6] I disagree.

5. In 1988, SERI entered into the Original Sale-Leaseback transactions regarding Grand Gulf for an initial term expiring in 2015. FPA section 203(a)(1)(D)[7] was enacted in 2005 after execution of the 1988 Original Sale-Leaseback Agreement. As part of the original 1988 transactions, SERC transferred ownership of that asset to the new owners, and the lease extension in 2015 did not provide for SERI to reacquire any ownership in those assets.

6. Nevertheless, the majority now determines that SERI was required to seek prior authorization under FPA section 203(a)(1)(D) before entering into the Lease Renewal, which it unaccountably describes as a stand-alone lease. The majority "disagree[s] with SERI that the Lease Renewal should be considered part of the Original Sale-Leaseback."[8] According to the majority, "[t]he Lease Renewal was not simply an extension of the Original Sale-Leaseback under the terms of that agreement, pursuant to, for example, an evergreen clause; rather, after a dispute arose about the fair market rental value of the Leased Assets for a three-year rental term and Owner-Lessors commenced a September 26, 2013 action in a California court to resolve this issue, SERI and the Owner-Lessors altered the terms of their negotiation and executed new lease instruments that

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[4] This proceeding commenced on May 18, 2018 and was filed pursuant to Federal Power Act (FPA) section 206. 16 U.S.C. § 824e.

[5] *Sys. Energy Res., Inc.*, 181 FERC ¶ 61,120 (2022) (order approving partial settlement).

[6] Order, 181 FERC ¶ 61,243 at P 172.

[7] 16 U.S.C. § 824b(a)(1)(D).

[8] Order, 181 FERC ¶ 61,243 at P 173.

memorialized a new lease term as well as the amounts and frequency of the new rental payments."[9] "[G]iven these changes," the majority finds that "the Lease Renewal did constitute a lease that required authorization under FPA section 203(a)(1)(D)."[10]

7. The Presiding Judge found otherwise stating that given the "absence of any actual disposition of ownership of generating facilities, section 203 of the FPA does not apply to these transactions and Commission approval under that provision is not required for SERI to engage in them."[11]

8. As to FPA section 203(a)(1)(D), the majority is wrong. The Lease Renewal *was* an extension of the Original Sale-Leaseback Agreement, which expressly provided for SERI to renew the term "for one or more periods of three years or such shorter period as shall extend to the expiration of the License."[12] Ultimately, the parties agreed upon an extension of 21 years, which is, of course, seven *three-year periods*. Moreover, upon the expiration of any Renewal Term, the Lessee could also exercise one of several options, including a renewal option in accordance with section 12(b) of the Original Sale-Leaseback Agreement. In that respect, it is more like an evergreen clause than not. The majority's contention that there was no reason to conclude at the time of a 1991 settlement approved by the Commission related to the Original Sale-Leaseback Agreement[13] that it would continue beyond the 2015 expiration date is belied by the terms of the agreement.

9. The Original Sale-Leaseback Agreement required SERI to make a decision in 2013 whether or not to relinquish its interest or to renew the lease at a fixed rate or a Fair Market Rental Value rate. The Original Sale-Leaseback Agreement contemplated that the parties would agree as to the Fair Market Rental Value and set forth a process in the event they did not agree. Ultimately, they were able to mutually agree to the renewal term and the Fair Market Rental Value.[14] The fact that they litigated issues until an

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[9] *Id.* (citations omitted).

[10] *Id.* P 174.

[11] Initial Decision, 171 FERC ¶ 63,003 at P 307; *see also id.* PP 285-306.

[12] Ex. LC-0012, page 28 of 66.

[13] *See* Order, 181 FERC ¶ 61,243 at PP 142.

[14] According to SERI, at all times SERI took 100% of the output of the leased portion of the plant, operated the entire plant, retained the obligation to fund and be responsible for 100% of the future decommissioning of the plant and for funding and making all requisite capital additions. *See* Initial Decision, 171 FERC ¶ 63,003 at P 29. Had SERI relinquished the capacity under the Grand Gulf leases, it would have had to

agreement was reached is of no moment. There was a seamless transition on July 15, 2015, with no gaps in time, at which point the basic term ended, and the renewal term began—all with no actual change in ownership.

10. The Lease Renewal implements and cross-references key sections 12(b) and 13(a) of the Original Sale-Leaseback Agreement and makes clear that "[a]ll of the other terms and provisions of the Lease and each other Transaction Document shall continue in full force and effect."[15]

11. While claiming to be issued pursuant to FPA section 203, in reality, today's order merely abrogates SERI's agreements, does so contrary to *Mobile-Sierra*,[16] and modifies the essential terms of the parties' agreement. The majority notes[17] that, while its analysis of rate effects under FPA section 203 differs from the analysis under FPA section 205,[18] SERI never submitted a filing pursuant to either FPA section 203 or 205 to recover the costs of the Lease Renewal rental expenses. SERI is directed to either file an FPA section 203 application within 60 days of the issuance of this order or state in its compliance filing when it plans to submit its FPA section 203 application requesting authorization of the Lease Renewal.[19] The order also directs SERI to refile its FERC Form No. 1 to account for the commencement of a separate lease from the Original Sale-Leaseback.[20]

12. The disallowance of the Lease Renewal payments is unlawful. Perhaps in tacit recognition of the illogic of its FPA section 203 argument, the majority states that, regardless of the Lease Renewal's classification as a standalone lease or a continuation of the original lease, the Commission would apply its original cost principle to SERI's recovery of the Lease Renewal payments in the UPSA rates.[21] Finding that there was an

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secure replacement capacity and that would have been at a market price.

[15] Ex. LC-0017, page 4 of 33.

[16] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

[17] Order, 181 FERC ¶ 61,243 at P 148 n.426.

[18] 16 U.S.C. § 824d.

[19] Order, 181 FERC ¶ 61,243 at P 176.

[20] *Id.* P 147.

[21] *Id.* P 141.

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acquisition premium *in substance* without prior Commission approval under FPA section 205, the majority directs, in part, SERI to make refunds for all amounts recovered under the Lease Renewal and the portion of the lease payments that were charged to ratepayers on and after January 1, 2014, that exceeded the payments set forth in the amortization schedule under the Original Sale-Leaseback Agreement.[22] In doing so, the majority gives short shrift to the fact that the accounting principles SERI followed were the result of a 1990 audit that FERC conducted and which led to a settlement in 1991 that the Commission itself approved.[23] According to the order, "[p]ursuant to the 1990 Audit Report[,] SERI was required to treat the Original Sale-Leaseback on its books as a financing (long-term debt) rather than as an outright sale and subsequent lease."[24] "SERI maintained the same book treatment for the Renewal Lease as the Original Sale-Leaseback, by invoking a *re-financing* of what remained of the financing under the Original Sale-Leaseback by stretching out the remaining principal payments and changing the interest rates to fit the boundaries of the Lease Renewal rental payments."[25] The record demonstrates that SERI treated the Lease Renewal in compliance with the terms of the 1991 settlement.

13. As to why the Commission's acquisition adjustment policy cannot be applied to the Lease Renewal, SERI argued that there is no direct precedent to support applying the acquisition adjustment principles to a Lease Renewal. SERI also argued that it did not acquire any assets, did not use the Lease Renewal to write-up rate base and did not earn any return on the Leased Assets.[26] According to SERI, the Original Sale-Leaseback involved a true sale as SERI sold a portion of the Grand Gulf plant, leased it back at a negotiated rental rate, and charged customers only for the lease costs.[27] SERI argued that its customers are paying a fair market price in order to continue to receive energy and capacity from the leased portion of the facility; they are not paying twice for the asset.[28] Yet, the majority "find[s] that the Commission's existing policies are sufficient and appropriate to resolve this issue and agree with the Initial Decision's finding that the

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[22] *Id.* P 147; *see also* PP 133, 137.

[23] *See id.* PP 12-14 & n.27.

[24] *Id.* P 135 (citing Docket No. FA89-28-000, FERC Audit Report, Division of Audits of the Office of Chief Accountant, at Schedule No. 3 (December 21, 1990)).

[25] *Id.* P 136 (citation omitted).

[26] *See id.* P 78.

[27] *See id.* P 109.

[28] *See id.* PP 152, 157.

acquisition adjustment policy can apply to the Lease Renewal."[29] The majority asserts that in order for a utility to receive rate recovery of any amounts related to an acquisition premium, a public utility must request Commission authorization pursuant to section 205 of the FPA,[30] and the majority states that the same holds true here for amounts related to the Lease Renewal.[31] Based on the record, I am not convinced. SERI has explained that this transaction does not involve an acquisition premium and that there is no precedent regarding lease renewals that requires this outcome.

14. Today's order is based on flawed factual and legal predicates. I remind the parties that they may engage in settlement negotiations at any time and should do so promptly.

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

[29] *Id.* P 143.

[30] *Id.* P 144 (citing *Ameren Corp.*, 140 FERC ¶ 61,034, at P 31 (2012) (citing *Duke Energy Moss Landing*, 86 FERC ¶ 61,227, at 61,816 (1999)).

[31] *Id.*

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