130 FERC ¶ 61,023
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer and Philip D. Moeller.

Entergy Services, Inc. Docket No. ER07-956-001

OPINION NO. 505

ORDER AFFIRMING IN PART AND REVERSING IN PART INITIAL DECISION

(Issued January 11, 2010)

1. This case is before the Commission on exceptions to an Initial Decision[1] issued September 23, 2008, and involves rates filed by Entergy Services, Inc. (Entergy)[2] on behalf of five Entergy Operating Companies[3] pursuant to Service Schedule MSS-3 of the Entergy System Agreement (System Agreement), implementing for the first time the

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[1] *Entergy Services, Inc.*, 124 FERC ¶ 63,026 (2008) (Initial Decision).

[2] Entergy is a wholly owned subsidiary of Entergy Corporation that provides operating services to six operating companies (Operating Companies). Entergy Power Inc. (EPI) is a subsidiary of Entergy. System Energy Resources, Inc. (SERI) is another Entergy affiliate, which owns and operates the Grand Gulf nuclear facility. Entergy Corporation is a public utility holding company that provides electric service through the Operating Companies.

[3] The five Operating Companies involved in this proceeding are, at the relevant times for filing pursuant to the first bandwidth calculation: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States, Inc. (Entergy Gulf States), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (Entergy New Orleans). The sixth Operating Company, Entergy Texas, Inc. was created in 2007 and is accordingly not involved in this proceeding, which pertains to the 2006 bandwidth payment.

Commission's bandwidth remedy as provided for in Opinion Nos. 480 and 480-A.[4] On July 27, 2007, the Commission accepted these proposed rates for filing, suspended them for a nominal period, to become effective June 1, 2007, as requested, subject to refund, and ordered the proceeding to hearing and settlement judge procedures.[5] In this order, as discussed below, we affirm in part and reverse in part the Initial Decision.

I. Background

2. On June 14, 2001, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint against Entergy pursuant to section 206 of the Federal Power Act (FPA).[6] The Louisiana Commission alleged that the System Agreement, a rate schedule that includes seven service schedules governing the allocation of certain costs associated with the integrated operations of the Entergy system, no longer operated to produce rough production cost equalization, as required by Commission precedent.[7]

3. That complaint resulted in Opinion No. 480, in which the Commission found that rough production cost equalization had been disrupted on the Entergy system. In Opinion Nos. 480 and 480-A the Commission accepted a numerical bandwidth of +/- 11 percent of the Entergy system average production cost in order to maintain the rough equalization of production costs among the Operating Companies. The Commission stated that the bandwidth would be implemented prospectively and would be effective for calendar year 2006, and that any equalization payments would be made in 2007 after a full calendar year of data became available.

4. On April 10, 2006, Entergy submitted a compliance filing to implement the directives of Opinion Nos. 480 and 480-A (April Compliance Filing). In its order[8]

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[4] *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005), *order on reh'g*, *Louisiana Pub. Serv. Comm'n. v. Entergy Servs., Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *aff'd in part and remanded in part*, *sub nom. Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

[5] *Entergy Services, Inc.*, 120 FERC ¶ 61,094 (2007) (Hearing Order).

[6] 16 U.S.C. ¶ 791a *et seq.*, ¶ 824 *et. seq.* (2008).

[7] A lengthy history of Commission precedent regarding rough production cost equalization can be found in the Initial Decision. Initial Decision, 124 FERC ¶ 63,026 at P 21-37.

[8] *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006) (November Compliance Order).

accepting the compliance filing, the Commission accepted Entergy's proposal to include the bandwidth formula in Service Schedule MSS-3.[9] However, the Commission rejected proposed revisions to Service Schedule MSS-3 that had not been ordered by the Commission in Opinion Nos. 480 and 480-A. The Commission stated that Entergy should make a section 205 filing if it desired to make any changes to the methodology in Exhibits ETR-26 and ETR-28.

5. Another compliance filing was filed on December 18, 2006 (December Compliance Filing), and accepted by the Commission on April 27, 2007.[10] Additionally, on March 30, 2007 and April 6, 2007, the Operating Companies submitted certain proposed modifications to the December Compliance Filing.[11] On May 25, 2007, the Commission issued additional orders regarding those filings.[12] According to Entergy, the proposed rates in this bandwidth filing were calculated in accordance with Service Schedule MSS-3, as revised, pursuant to the May 25 Orders.

II. <u>Entergy's Current Compliance Filing</u>

6. On May 29, 2007, Entergy filed rates in accordance with Service Schedule MSS-3 of the System Agreement. This proceeding involves the first annual filing required under the Commission's previously issued Opinion Nos. 480 and 480-A. In its filing, Entergy calculated the bandwidth payments and receipts under the Service Schedule MSS-3 bandwidth formula using data as reported in each Operating Companies' 2006 FERC Form 1. The compliance filing quantified the disparities in the production costs for each Operating Company, and based upon the calculation, determined the payments and

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[9] Service Schedule MSS-3 has two separate and distinct functions. The first function includes a methodology for pricing energy exchanged among the Operating Companies and provides for an after-the-fact, hour-by-hour allocation of the cost of energy from an Operating Company whose generation provided energy in excess of that company's load to an Operating Company that produced less than its load. The second function contains the formula to calculate the annual bandwidth remedy payments and receipts.

[10] *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 119 FERC ¶ 61,095 (2007) (April Compliance Order).

[11] *See* March 30, 2007 filings in Docket Nos. ER07-682-000, ER07-683-000 and ER07-684-000, and April 6, 2007 filing in Docket No. ER07-727-000.

[12] *Entergy Services, Inc.*, 119 FERC ¶ 61,190 (2007); *Entergy Services, Inc.*, 119 FERC ¶ 61,191 (2007); *Entergy Services, Inc.* 119 FERC ¶ 61,192 (2007); *Entergy Services, Inc.*, 119 FERC ¶ 61,193 (2007) (collectively, May 25 Orders).

receipts for each Operating Company, consistent with the bandwidth formula. Each Operating Company's allocated average system production costs are compared to the Operating Company's actual production costs to determine the dollar and percent disparity as seen below:

Company	Initial Disparity	Final Disparity
Entergy Arkansas, Inc.	-29.99%	-11.00%
Entergy Gulf States, Inc.	8.68%	3.45%
Entergy Louisiana, LLC	8.8%	3.45%
Entergy Mississippi, Inc.	8.00%	3.45%
Entergy New Orleans, Inc.	-2.44%	-2.44%

7. Entergy Arkansas was the only Operating Company to have an initial disparity exceeding +/- 11 percent. Thus, as seen below, it was the only company obligated to make payments. The payments amounted to $251.7 million:

Company	(Payment)/Receipt in Millions of Dollars
Entergy Arkansas, Inc.	(251.7)
Entergy Gulf States, Inc.	120.1
Entergy Louisiana, LLC	91.0
Entergy Mississippi, Inc.	40.6
Entergy New Orleans, Inc.	0

8. The production costs include all direct costs, fixed and variable, of the Operating Company's owned generating facilities. It includes the demand and energy costs associated with power purchases. It also includes indirect costs or common costs, such as

administrative and general expense, and the return of and on general and intangible plant functionalized to the production function.

9. In the Hearing Order, the Commission ordered hearing and settlement procedures to examine evidence pertaining to the underlying production costs from which Entergy calculated its filing, and allowed the parties to raise prudence issues.[13]

10. A hearing was held in June and July 2008 and ultimately resulted in the Initial Decision. Briefs were filed by Entergy, the Louisiana Commission, the Arkansas Commission, the Mississippi Commission, the Council of the City of New Orleans (New Orleans), Union Electric and Commission Trial Staff (Staff).

11. The Initial Decision covered various issues, including: the correct methodology for bandwidth calculations; correct source of data for the Energy Ratio Calculation; prudence of Entergy Arkansas's capacity purchases; Union Electric contract issue; nuclear depreciation and decommissioning issue and six separate accounting issues. In the Initial Decision, the presiding judge (Presiding Judge) resolved the proper methodology for determining bandwidth payments, accepting the position of Staff that the correct methodology is found in Service Schedule MSS-3. The Presiding Judge further found, *inter alia*, that Entergy used the correct source of data to determine the Energy Ratio calculation; that Entergy was not imprudent for not acquiring certain coal-based capacity (Independence Steam Electric Station Unit No. 2 (ISES 2)) in 1996 and 1997; that a portion of Entergy Arkansas' bandwidth payments should be paid by Ameren; that the nuclear depreciation rate used by Entergy in calculating the bandwidth formula should reflect the actual granted license duration; and, with some corrections, that Entergy utilized proper accounting practices.

12. Having fully evaluated the Initial Decision, the parties' briefs, and the record before us, we affirm the Presiding Judge's findings (1) that Entergy did not act imprudently in declining to purchase ISES 2 capacity; (2) that the bandwidth formula in Service Schedule MSS-3 is the lawful rate; (3) that tax refunds associated with net operating loss carrybacks are properly recorded in Account 143; (4) that Entergy properly excluded certain accumulated deferred income taxes from the bandwidth calculation; and (5) that Entergy presented an appropriate method for correcting an error that resulted in including an unregulated portion of the River Bend nuclear facility in the bandwidth calculation. However, we reverse the Presiding Judge's rulings that (1) Entergy Arkansas should be allowed to allocate a portion of its bandwidth payment to Union Electric; (2) that Entergy erroneously calculated its nuclear depreciation and decommissioning expenses; (3) that Entergy properly accounted for interim storm damage cost recovery;

[13] Hearing Order, 120 FERC ¶ 61,094 at P 16, 19.

(4) that Entergy properly accounted for the annual amortization expense of the Spindletop regulatory asset; and (5) that Entergy properly used the FERC Form 1 as the source of data to calculate the Energy Ratio. To the extent a matter is not addressed, we summarily affirm the presiding judge.

III. Discussion

A. Prudence Determination: ISES 2 Capacity

13. This issue concerns whether Entergy Arkansas' decision in 1996 and 1997 not to exercise its option to purchase ISES 2 capacity was prudent.

1. Background

14. In the 1970s, the Entergy system was almost entirely based upon oil and gas-fired generation. Due to high gas and oil prices and federal laws curtailing construction of gas-fired units, Entergy expanded into nuclear and coal-fired generating units.[14] This expansion included ISES 2, which is an 842 MW coal-fired electric generation unit that was placed in service in 1984, and was operated by Entergy Arkansas.[15]

15. In 1988, the Grand Gulf nuclear plant came on line at a higher cost than the expected cost projections. In Commission Opinion Nos. 234[16] and 292,[17] the Commission ruled that each Operating Company should get an allocated share of the output pertaining to Grand Gulf so as to maintain rough production cost equalization among the Operating Companies. The Commission assigned Entergy Arkansas a 36 percent share of the output of SERI's share of Grand Gulf. However, when Grand Gulf came on line, load growth on the Entergy system had fallen, gas had become cheaper and more plentiful, and federal restrictions on constructing gas-fired generation units had eased.[18]

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[14] Initial Decision, 124 FERC ¶ 63,026, at P 265 (citing Exhibit No. S-1; Exhibit No. S-18).

[15] Entergy Initial Brief at 35.

[16] *Middle South Energy, Inc*., 31 FERC ¶ 61,305 (1985).

[17] *Mississippi Industries v. FERC*, 814 F.2d 773 (D.C. Cir. 1987).

[18] Initial Decision, 124 FERC ¶ 63,026 (citing Exhibit No. S-18 at 19).

16. Therefore, in 1990, Entergy Arkansas sold its share of ISES 2, along with a 100 percent share of the gas-fired Ritchie Unit 2, to EPI. Under the terms of that sale Entergy Arkansas maintained a right of first refusal to repurchase the ISES 2 capacity at net depreciated value.[19] Moreover, the terms of the sale required that the capacity could not be used outside of Arkansas, without the Arkansas Commission's prior consent. Under these terms, the Arkansas Commission approved the sale.[20]

17. Soon after, New Orleans filed a complaint with the Commission alleging that Entergy Arkansas' sale of its share of ISES 2 and other gas-fired unit capacity would negatively impact New Orleans' ratepayers. The Louisiana Commission joined in that complaint. After a hearing, the Commission issued Opinion No. 386, essentially finding that Entergy's decision-making process was flawed.[21] Opinion No. 386 described the steps Entergy should have taken during the decision-making process, but the Commission made no determination as to whether Entergy was imprudent.

18. In 1996, EPI decided to sell 180 MW of its ISES 2 capacity. In accordance with the terms of the 1990 contract, EPI first offered the capacity to Entergy Arkansas at net depreciated book value. On April 3, 1996, EPI sent a letter to Entergy Arkansas offering to sell it 180 MW of ISES 2 capacity at $450/kW, or a total of over $80 million.[22] According to Entergy, Entergy Arkansas' staff determined "that it would cost more to acquire and operate ISES 2 than it would to meet Entergy's load requirements using the alternative resources"[23] and declined its purchase option for the ISES 2 capacity.

19. EPI then attempted to sell the ISES 2 capacity to its existing co-owners as well as to other third parties. Eventually, EPI was able to sell a little less than half of the ISES 2 capacity to the City of Jonesboro, Arkansas. In 1997, EPI reached an agreement to sell some, but not all, of its remaining ISES 2 capacity to East Texas Electric Cooperative. EPI again offered Entergy Arkansas an opportunity to exercise its right of first refusal,

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[19] Entergy Initial Brief at 35.

[20] *Id*.

[21] *City of New Orleans v. Entergy Corp*., 65 FERC ¶ 61,333 (1993) (Opinion No. 386).

[22] Entergy Initial Brief at 36.

[23] *Id*.

but Entergy Arkansas again refused, determining "that the capacity would not be beneficial based on essentially the same grounds as in 1996."[24]

20. At hearing, the Louisiana Commission challenged the prudence of Entergy Arkansas' decisions in 1996 and 1997 to decline to acquire the ISES 2 capacity.

2. Initial Decision

21. The Presiding Judge finds that Entergy Arkansas' decision not to obtain ISES 2 capacity was not imprudent at the time it was made, and that, generally, utility management is presumed to have acted prudently. The Presiding Judge states that there must be sufficient evidence to establish a claim of imprudence. He states that it is only when a party in the proceeding creates "serious doubt" as to the prudence of an expenditure that the burden shifts and the applicant has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.[25] He finds that the Commission held in *New England Power Co.* that while in hindsight it may be clear that a management decision was wrong, the Commission's task is to "review the prudence of the utility's actions and costs resulting therefrom based on the particular circumstances existing either at the time the challenged costs were actually incurred, or the time the utility became committed to incur those expenses."[26]

22. The Presiding Judge finds that there were deficiencies in the Louisiana Commission's use of "PROMOD" to recalculate each Operating Company's fuel and purchase power costs for 2006.[27] The Louisiana Commission's witness Baron used this data to recalculate the 2006 bandwidth formula, assuming that Entergy Arkansas owned 164-180 MW of ISES 2 capacity in 2006. Based on the results of this recalculation, Mr. Baron opined that Entergy Arkansas' bandwidth payments should increase by $23 million, with the Louisiana Commission being the primary beneficiary of this recalculation.

23. The Presiding Judge cites several problems with the evidence presented by the Louisiana Commission. For example, the Presiding Judge finds that the Louisiana Commission's purchase price for ISES 2 is flawed because it assumed a lower price than

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[24] *Id*. at 37.

[25] Initial Decision, 124 FERC ¶ 63,026 at P 278.

[26] *Id*. P 278 (citing *New England Power Co.*, 31 FERC ¶ 61,047, at 61,084 (1985), *aff'd sub nom. Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986)).

[27] PROMOD is a computer programming production cost simulation model.

Entergy Arkansas would have actually paid, thus overstating the benefits of the transaction.[28] The Presiding Judge also finds that the Louisiana Commission's analysis inappropriately speculates that Entergy Arkansas would have retained the ISES 2 capacity from 1996 to 2006. The Presiding Judge states that "there is little doubt" that Entergy would have used ISES 2 to serve system-wide needs and that substantial capacity would have been used outside of Arkansas.[29]

24. In addition, the Presiding Judge finds that while the Louisiana Commission speculated that Entergy needed increased capacity by the year 2000, Entergy's historical projections demonstrated that it did not need additional capacity until 2005. The Presiding Judge also states that the Louisiana Commission adjusted the settings in the PROMOD model to reflect the hypothetical sale of ISES 2 from EPI to Entergy Arkansas, but then failed to reduce the EPI sales transactions to reflect the fact that once EPI no longer owned the ISES 2 capacity, it would not continue to make energy sales from that capacity. The Presiding Judge notes that this error leaves EPI with more megawatts of sales obligations than megawatts of generation.[30] He states that once this error is corrected, the net benefits of repurchasing ISES 2 all but disappear.

25. The Presiding Judge further finds that the PROMOD analysis does not adequately capture the market's anxiety over the advent of cogeneration and retail open access. He contends that because of market conditions at the time, Entergy could have been soundly criticized for purchasing the ISES 2 capacity.[31] He also finds that the Louisiana Commission's witness Hayet did no analysis comparing the costs of ISES 2 to the costs of Entergy returning other existing units to service. The Presiding Judge notes that, on the other hand, Entergy's witness Hurstell made a comparison of the costs of acquiring ISES 2 to the costs of returning the most expensive unit to service, and demonstrated that it was still cheaper to bring back even the most expensive reserve unit.[32]

26. The Presiding Judge states that Entergy established that it correctly made the decision not to repurchase ISES 2 capacity. He finds that Entergy has reasonably operated its system so as to minimize production costs, and to maintain reliability, and capacity. He notes that Entergy's witness Gallaher testified that at the time Entergy had

[28] Initial Decision, 124 FERC ¶ 63,026 at P 286.

[29] *Id*. P 282.

[30] *Id*. P 303.

[31] *Id*. P 307.

[32] *Id*. P 309 (citing Exh. No. ESI 97; Tr. at 2491-94 [Hurstell]).

excess capacity and the cost of acquiring the additional ISES 2 capacity was not justified.[33]

27. The Presiding Judge also finds that Entergy significantly increased the amount of energy it purchased from third parties from 1996-2006, while decreasing dependence on its own oil and gas-fired generation. He states that by 2006, the output of Entergy's own oil and gas-fired generation units had fallen by two-thirds, to 13 percent of system requirements. He states that this energy was replaced by a combination of more cost effective purchases from merchant generators and other direct purchases. He notes that Entergy witness Schnitzer opined that overall Entergy saved its Operating Companies $900 million in production costs for 2006, with obvious savings to customers and ratepayers.[34]

28. In addition, the Presiding Judge states that Entergy's decision not to obtain ISES 2 capacity was not imprudent because Entergy faced uncertainty over the advent of retail open access during this time period, which would have allowed retail customers "to shop" among competing power suppliers. The Presiding Judge also notes that, in 1996, Entergy was aware that it would soon lose 500 MW of its industrial customer load to cogeneration.[35] Consequently, Entergy was also concerned that if it lost significant load, it would not be able to recover the cost of the capacity it already had. The Presiding Judge finds that in 1996 and 1997 Entergy could not have reasonably foreseen the death of retail open access, and that consequently both cogeneration and retail open access were viable threats to Entergy's customer load.

29. In conclusion, the Presiding Judge finds that Entergy was not imprudent and that no remedy is justified. However, the Presiding Judge finds that if the Commission were to make a contrary finding, the appropriate remedy would assess any costs of imprudence to Entergy's shareholders and not to the Arkansas ratepayers.

3. Briefs on Exceptions

30. The Louisiana Commission argues that the Presiding Judge erred in approving Entergy's decision not to repurchase capacity from ISES 2. It contends that the Commission's decision in Opinion No. 386[36] requires a utility to engage in a reasonable

[33] *Id*. P 318 (citing Exh. No. ESI-37 at 7-9).

[34] *Id*. P 325.

[35] *Id*. P 346.

[36] Opinion No. 386, 65 FERC ¶ 61,333 (1993).

decision-making process before deciding to decline an important resource opportunity.[37] It contends that this precedent has special applicability for this case because the ruling involved the spinoff of the same capacity that was offered to Entergy for repurchase in 1996 and 1997. It notes that in that case the Commission determined that Entergy's process for the ISES 2 spinoff was flawed because the utility did not perform a detailed, formalized study, did not perform a 20-year study that would capture the long-term benefits provided by a base load unit, and did not retain documentation as to how it reached the decision.

31. The Louisiana Commission maintains that Entergy engaged in virtually no process in reaching its decision. It contends that Entergy initially provided only one study to support its decision, and this study considered only fixed costs, covered only a 10-year period, and considered only the effects on Entergy Arkansas. It argues that Entergy later stated that it relied on an Integrated Resource Plan prepared by Entergy in 1995, the year prior to the ISES 2 decision.[38] It contends that Entergy's witness Gallaher's description of the ISES 2 process, which included mental analysis, discussions, and undocumented cerebral studies, is virtually identical to the process described in Opinion No. 386.[39]

32. The Louisiana Commission argues that Mr. Gallaher's memory was called into question at the hearing, and that he alternately remembered details of the Integrated Resource Plan, forgot having ever seen it, and then remembered it in great detail for his testimony. It also contends that the Integrated Resource Plan is insufficient on its face to support Entergy's decision. It contends that the Integrated Resource Plan was a general analysis, and that its acquisition options involved new construction and did not evaluate the costs of acquiring a depreciated coal unit similar to ISES 2.[40] The Louisiana Commission adds that the Presiding Judge failed to address the process issue, and failed to provide any rationale for determining it was adequate.[41]

33. The Louisiana Commission maintains that even if Entergy did rely on the Integrated Resource Plan, its decision was still imprudent. It contends that Entergy failed to show how an Integrated Resource Plan-based analysis could be sufficient. It argues

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[37] Louisiana Commission Brief on Exceptions at 59-60.

[38] *Id*. at 67.

[39] *Id*. (citing Opinion No. 386, 65 FERC ¶ 61,333 at 65,007).

[40] *Id*. at 70.

[41] *Id*. at 71.

that the Integrated Resource Plan could not have forecast the cost of purchases in the market for more than a few years.[42]

34. The Louisiana Commission argues that it presented two studies that demonstrated that a reasonable utility planner would have chosen to repurchase the ISES 2 capacity, while Entergy provided no long-term side-by-side analysis to justify its decision. It contends that, instead, Entergy offered criticisms of the Louisiana Commission's PROMOD study, leveled by a witness with virtually no experience with PROMOD. The Louisiana Commission contends that the Presiding Judge accepted Entergy's criticisms of the Louisiana Commission's studies as a valid reason to absolve Entergy of its burden of proof.

35. The Louisiana Commission contends that the Presiding Judge erred in finding that Entergy did not have the burden of proof on the prudence issue because the Louisiana Commission failed to raise "serious doubt."[43] It states that the Presiding Judge's finding that PROMOD is ill-suited for the task of reviewing the ISES 2 repurchase is "stunning" because Entergy relies on PROMOD when planning activities are actually performed.[44]

36. The Louisiana Commission contends that the Presiding Judge's criticism that the Louisiana Commission had trouble running the PROMOD program demonstrates the Presiding Judge's inexperience with the litigation process in the utility context. It states that it has to obtain a license to use the model licensed to Entergy, obtain the relevant database, and learn the specific modeling approaches for Entergy. It argues that difficulties are normal when an outside party obtains access to a utility production cost model.[45]

37. The Louisiana Commission argues that the Presiding Judge's criticism that ISES 2 capacity would not have yielded a positive return for a number of years demonstrates the Presiding Judge's lack of understanding of resource planning. It contends that because PROMOD is a variable production cost model, it is not supposed to factor in acquisition costs. It contends that, instead, a reasonable planner would calculate the fixed cost

[42] *Id*. at 82.

[43] *Id*. at 73.

[44] *Id*. at 74.

[45] *Id*. at 75.

impacts of resource alternatives outside of PROMOD. It further argues that any base load acquisition is likely to require a number of years before it yields a positive return.[46]

38. The Louisiana Commission contends that the Presiding Judge's references to market conditions cannot justify the decision to turn down ISES 2 capacity. It argues that the surplus of capacity that allegedly existed in 1996 was expected to disappear over time. It argues that even the Integrated Resource Plan projected that Entergy's excess reserves would be consumed by 2004. It contends that the Presiding Judge erred in accepting the proposition that short-term planning was sufficient for long-term decisions. It argues that ISES 2 would have provided base load capacity for decades.[47] The Louisiana Commission also argues that Entergy failed to aggressively pursue potential buyers for the capacity.

39. The Louisiana Commission maintains that the Commission should clarify how imprudence penalties should be imposed in the bandwidth proceedings. It contends that the evidence in this case demonstrates that there are legitimate issues concerning the use of the bandwidth calculation to determine which company should make payments to other companies. It argues that paradoxically if a company would have lowered its costs by acting prudently, its bandwidth payment goes up. It contends that one solution is to allocate the imprudence penalty proportionately among the companies that are subject to the bandwidth calculation each year. It states that each participating Operating Company would receive a payment proportionate to its energy ratio divided by the total energy ratios of the participating companies.

4. <u>Briefs Opposing Exceptions</u>

40. Entergy argues that when it filed its Integrated Resource Plan in 1995 the Louisiana Commission's staff made no critical comments, and the Louisiana Commission itself never gave any indication that it was dissatisfied in any respect. Entergy contends that the Louisiana Commission did not claim that the sale of ISES 2 capacity was imprudent until twelve years after the sale, after unexpected increases in the price of natural gas.[48] Entergy contends that it is uncontroverted that the cost of ISES 2 capacity was more expensive than the cost of the alternatives identified in the Integrated Resource Plan. It argues that the Louisiana Commission's ex post facto analysis uses significantly different assumptions about Entergy's need for capacity than Entergy had made in 1995 and submitted to the Louisiana Commission for review.

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[46] *Id*.

[47] *Id*. at 87.

[48] Entergy Brief Opposing Exceptions at 41.

41. Entergy and Staff contend that the Louisiana Commission ignores the legal standard of review for prudence decisions discussed by the Initial Decision. Entergy argues that the Louisiana Commission does not even cite to the Commission's *New England Power Co*. decision, much less make any effort to explain why the Louisiana Commission contends that Entergy Arkansas' ISES 2 decisions are imprudent under the *New England Power Co*. standard. It contends that the Louisiana Commission does not address the testimony cited in the Initial Decision regarding market conditions at the time the ISES 2 decisions were made, other than to argue that market conditions were irrelevant.[49]

42. Entergy contends that the Louisiana Commission's argument that Entergy's process was insufficient in reaching a decision on ISES 2 capacity is not grounded in the law or the factual record of this proceeding. Entergy states that, contrary to the exceptions made by the Louisiana Commission, there is no "contemporaneous documentation" requirement under the Commission's prudence decisions.

43. Entergy and Staff contend that in the case cited by the Louisiana Commission, Opinion No. 386, which faulted Entergy's process, the Commission did not find that Entergy was imprudent.[50] Staff points out that the Commission subsequently deferred consideration of any prudence disallowance until the Entergy system added capacity.[51] Thus, Staff asserts, the passage cited by the Louisiana Commission supports the Commission's finding that Entergy's decision-making regarding the spin-off was "flawed" and not a prudence disallowance.

44. Entergy maintains that the Louisiana Commission mischaracterizes the record when it asserts that Entergy engaged in insufficient process. Entergy contends that the ISES 2 decision was based on a detailed analysis conducted by Entergy that was contained in the Integrated Resource Plan, which was finalized only after years of work, including collaboration with the Louisiana Commission.[52] Entergy argues that the Louisiana Commission mischaracterizes Entergy's witness Gallaher's testimony, arguing that his review of the analysis performed by his staff was not a mere "mental comparison." Entergy argues that any inability of Mr. Gallaher to recall aspects of the

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[49] *Id*. at 45.

[50] *Id*. at 47 (citing Opinion No. 386, 65 FERC ¶ 61,333 at 62,566).

[51] Staff Brief Opposing Exceptions at 40.

[52] *Id*. (citing Exh. ESI-37 at 39-30).

analysis are due to the fact that the Louisiana Commission waited 12 years after the ISES 2 decision was made to bring its prudence claim.[53]

45. Entergy contends that it did present studies showing that the ISES 2 purchase would have been uneconomic based on circumstances known in 1996. It contends that, in addition to the Integrated Resource Plan, it presented two calculations confirming the testimony of Mr. Gallaher that the projected costs of the ISES 2 capacity were higher than the cost of Entergy's alternatives, and thus that the ISES 2 purchase was not economic when compared to those alternatives.

46. Entergy rejects the Louisiana Commission's attacks on the Integrated Resource Plan. It contends that the Louisiana Commission's contention that the Integrated Resource Plan's 10-year timeframe was unreasonably short ignores the fact that the Integrated Resource Plan was developed in consultation with the Louisiana Commission. It argues that the Integrated Resource Plan reasonably projected that Entergy would not need to acquire any additional capacity in 2000 and 2001, which would have been the case whether or not the ISES 2 capacity was purchased in 1996 or 1997.[54]

47. Moreover, Staff states that the Presiding Judge correctly found that, even if one assumes that the Louisiana Commission raised serious doubts of imprudence, Entergy's evidence rebuts the Louisiana Commission's position.[55] Staff states that the Presiding Judge determined that additional evidence establishes that market conditions in 1996 and 1997 cautioned strongly against acquisition of the ISES 2 capacity.[56] Staff adds that Entergy witness Gallaher testified that the "all-in" cost (total cost of ownership including capital, operations and maintenance expense and fuel) of ISES 2 was higher than the cost of other alternatives identified in the just-completed 1995 Integrated Resource Plan.[57]

48. Staff also disposes of the Louisiana Commission's PROMOD analysis, noting that the Presiding Judge correctly found that there are deficiencies in the Louisiana Commission's PROMOD input assumptions. Staff states that the deficiencies, as noted by the Presiding Judge, prevented the analysis from accurately capturing market conditions in 1996 and 1997. Staff notes that the Presiding Judge found several

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[53] *Id*. at 49.

[54] *Id*. at 60.

[55] Staff Brief Opposing Exceptions at 45.

[56] *Id*.

[57] *Id*. (citing Ex. ESI-37 at 17-18).

deficiencies, such as: (1) the assumed purchase price for ISES 2 is flawed; (2) the analysis of the benefits of the ISES 2 repurchase opportunity inappropriately speculates that Entergy Arkansas would have retained ISES 2 from 1996 to at least 2006.[58]

49. Staff also notes two other important considerations cited by the Presiding Judge: (1) it was reasonable for Entergy to perceive a threat from cogeneration and retail open access, both threats to loss of load, during this time period;[59] and (2) the market reaction to Entergy's attempted sales of the ISES 2 capacity demonstrates that the ISES 2 capacity was unattractive in 1996 and 1997.[60] On the second point, Staff points out that the record shows that Entergy offered to sell ownership of capacity only after it was unable to make sales of that capacity into the market on anything other than a short-term basis.[61] Staff argues that if, as the Louisiana Commission alleges, any reasonable system planner would have been able to determine that the purchase of ISES 2 capacity would be beneficial, then one would expect that EPI would have easily been able to sell at net book value the entire 180 MW of capacity that it was making available.

50. Thus, Staff maintains that in light of: (1) considerable uncertainty of the impact of retail competition and increased cogeneration on future projected load; (2) the fact that even less expensive resource alternatives were available; (3) the System did not expect to need additional capacity for many years; (4) the region's oversupply in the early to mid 1990s and low gas prices made it difficult for EPI to market the capacity that it had purchased from Entergy Arkansas; and (5) as of 1996, EPI was unable to sell 180 MW of its capacity on a long or intermediate term basis and had to resort to short-term sales, it would be reasonable for a system planner looking at the kind of analyses presented by the Louisiana Commission to conclude that any projected benefits ten or more years in the future were too uncertain to outweigh the certain high costs in the early years.

5. Commission Determination

51. We affirm the Presiding Judge's finding that the Louisiana Commission has not shown that Entergy's 1996 and 1997 decisions not to exercise Entergy Arkansas' option to purchase ISES 2 capacity were imprudent. In *New England Power Co.*, the Commission explained its prudence standard:

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[58] *Id*. at 44 (citing Initial Decision, 124 FERC ¶ 63,026 at P 311-12).

[59] *Id*. at 46 (citing Initial Decision, 124 FERC ¶ 63,026 at P 346-51).

[60] *Id*. at 47 (citing Initial Decision, 124 FERC ¶ 63,026 at P 352-53).

[61] *Id*. at 47 (citing Ex. ESI-52 and Ex. LC-16 at 15).

> [W]e reiterate that managers of a utility have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers. In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time. *We note that while in hindsight it may be clear that a management decision was wrong*, our task is to review the prudence of the utility's actions and the costs resulting therefrom based on the particular circumstances existing either *at the time the challenged costs were actually incurred*, or the time the utility became committed to incur those expenses.[62]

In addition, the Commission has held that this prudence standard "permits considerable latitude, in that the Commission, in reviewing a decision … does not look for a single correct result or require that every possible alternative be evaluated."[63]

52. The utility does not have the burden of demonstrating that expenditures are prudent. Rather, a challenger to prudence must create a "serious doubt" as to the prudence of an expenditure; however, once that serious doubt is created, the burden shifts to the applicant to demonstrate that the expenditure in question was prudent.[64] To determine prudence, the inquiry is not just whether the utility made a mistake in deciding whether or not to engage in an action, but whether it acted imprudently in failing to consider the costs and benefits of that action before undertaking it.[65]

53. Here, the Presiding Judge examined the facts presented to him, and concluded, based on those facts, that the Louisiana Commission has failed to cast a serious doubt on the prudence of Entergy's conduct. Even had the Louisiana Commission created a serious doubt, we find that the totality of the evidence in the record supports the Presiding

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[62] *New England Power Co.*, 31 FERC ¶ 61,047 at 61,084.

[63] *Dakota Gasification Co.*, 77 FERC ¶ 61,271 (1996).

[64] *Kentucky Utilities Co.*, 62 FERC ¶ 61,097, at 61,698 (1993) (*Kentucky Utilities*).

[65] *Id.* at 61,709 ("risks are inherent in business and imprudence is based not on the mere presence of risks but on the failure to carefully evaluate the risks and weigh them against the potential benefits").

Judge's finding that Entergy's decision not to repurchase the ISES 2 capacity was prudent at the time it was made.[66]

54. Most of the Louisiana Commission's arguments evolve from its strained interpretation of Opinion No. 386 as setting forth the Commission's prudence standard that should be applied in this proceeding. Indeed, the Louisiana Commission goes to great lengths to try to divine a prudence standard from Opinion No. 386, when in fact no such standard exists. As Staff correctly points out, no prudence determination was ever made by the Commission.[67] Thus, Opinion No. 386 provides no precedent for determining whether an entity acted imprudently. In this regard, contrary to the Louisiana Commission's claims, the Commission did not, for prudence purposes, require Entergy to produce an after-the-fact study of ISES 2 versus alternatives. Nor did it require Entergy to conduct a side-by-side analysis or to establish the sufficiency of its process with contemporaneous documentation to establish its prudence.[68] Rather, the Commission discussed those matters only in the context of its analysis finding that actions by Entergy were "flawed," not that they were imprudent.[69] In contrast to the Louisiana Commission's "prudence standard," the Presiding Judge properly applied the

[66] We note that the Presiding Judge is entitled to deference with regard to the credibility of witnesses and evidence, and the amount of weight to be accorded to particular testimony or evidence. *See El Paso Natural Gas Co.*, 67 FERC ¶ 61,327, at 62,156 (1994) ("In matters where a decision had to be made as to the relative weight to be accorded the testimony of a witness, we will give great deference to the decision of the ALJ"); *Williams Natural Gas Co.*, 41 FERC ¶ 61,037, at 61,095 (1987) ("[T]he rationale for affording deference to the determinations of the trier of fact on credibility is that the trier of fact is in the best position to evaluate such elusive factors as motive or intent."). Thus, the Commission will not overturn the Presiding Judge's judgment as to what evidence he found meaningful or worthy of weight absent some clear indicator of error, which is not present here.

[67] Staff Brief Opposing Exceptions at 40. While the Commission found that Entergy's decision-making was "flawed," it deferred consideration of any prudence matter until capacity was added to the Entergy system. *See also* Opinion No. 386, 65 FERC ¶ 61,333 at 62,566 ("we make no finding as to the prudence of costs incurred if capacity additions are made. Hence, we vacate that portion of the Initial Decision which addresses such capacity additions.").

[68] Louisiana Commission Brief on Exceptions at 61-62.

[69] Flawed or even wrong decision-making does not equate to imprudence. *See, e.g.*, *New England Power Co.*, 31 FERC ¶ 61,047 at 61,084.

Commission's prudence standard, as set forth in *New England Power Co.* and discussed above, and correctly found that the Louisiana Commission had not raised a serious doubt as to Entergy's prudence. Moreover, even if the Louisiana Commission had raised a serious doubt, the Presiding Judge properly found that the totality of the evidence in this record supports a finding that Entergy acted prudently in deciding not to obtain the ISES 2 capacity.

55. In particular, the Presiding Judge found that Entergy's decision was based upon the Integrated Resource Plan, a long-term resource acquisition plan for meeting Entergy's loads, which was completed only a few months before the 1996 decision. We affirm the Presiding Judge's finding that the Integrated Resource Plan took into account two major factors: the availability of relatively cheap capacity for the subsequent 9-10 years and the need to retain flexibility in light of projected changes in the industry. Accordingly, Entergy determined in the Integrated Resource Plan that "the most appropriate resource management strategy is one that does not involve any long-term resource commitments for the next few years."[70] The strategy Entergy adopted maintained as much flexibility as possible.[71]

56. We find that it was with this strategic plan in mind that Entergy evaluated the ISES 2 option and weighed it against other alternatives. Entergy Arkansas had previously owned and operated the ISES 2 unit and was familiar with the costs and operating characteristics of the unit.[72] According to Entergy witness Gallaher, the cost of ownership of ISES 2 was higher than the cost of other alternatives identified in the Integrated Resource Plan.[73] Moreover, Entergy was pursuing a more flexible approach to resource acquisition in light of the potential load loss from retail competition and expanded generation.

57. The Louisiana Commission only now claims that Entergy should have performed a 20-year study, as well as a more detailed, formalized study. While this may or not be a better approach to take when considering whether to purchase or sell capacity, it is irrelevant to determining whether or not Entergy was imprudent with respect to its decision not to purchase the ISES 2 capacity. Entergy's Integrated Resource Plan resulted from a lengthy process in which the Louisiana Commission itself was involved in developing an appropriate plan for the Entergy System. Further, the evidence shows

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[70] Exh. ESI-38 at S2025.

[71] *Id*.

[72] Tr. 1329

[73] Exh. ESI-37 at 17-18.

that Entergy filed its Integrated Resource Plan with the Louisiana Commission, and it never indicated to Entergy that its decision not to repurchase capacity from ISES 2 was imprudent or wrong.[74] Indeed, more than 12 years passed before the Louisiana Commission decided to challenge the sale of the ISES 2 capacity as imprudent. Notably, however, the Louisiana Commission fails to explain its own actions at the time Entergy's decision was actually made. Its well after-the-fact rationalizations and arguments as to why different studies should have been performed by Entergy fail to demonstrate that Entergy's decision, at the time it was made, was imprudent.

58. We further find that the evidence demonstrates that the market conditions at the time strongly cautioned against Entergy's acquisition of the ISES 2 capacity. Specifically, Entergy was in an excess capacity position, and had recently placed 1300 MW of generation in extended reserve shutdown. The electric utility industry was in the midst of a fundamental transformation in the 1995-1996 timeframe, with competition and open access a reality on the wholesale level due to actions of the Commission.[75] However, there was a surplus of capacity on the market in 1996 and 1997 and there was a reasonable belief that this surplus would continue to grow.[76] As the Presiding Judge points out, even the Louisiana Commission recognized surplus market conditions existed in 1996 and 1997.[77] Entergy possessed excess capacity, natural gas prices were low, and there was a favorable short-term purchase power market;[78] ignoring these factors would hardly have been the prudent approach to take.

59. In addition, further supporting Entergy's decision not to acquire the ISES 2 capacity, Entergy was forced to consider retail open access and cogeneration, and how these factors might result in a loss of load.[79] Indeed, by April of 1996, retail open access was more a question of "when" rather than "if."[80] Entergy had to believe that some of its industrial customers might begin purchasing energy from alternative sources. Consequently, Entergy had to be concerned that if it lost significant load, then it would

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[74] Exh. ESI-37 at 29-30.

[75] Entergy Brief Opposing Exceptions at 37.

[76] Initial Decision, 124 FERC ¶ 63,026 at P 334.

[77] Tr. at 2722.

[78] Initial Decision, 124 FERC ¶ 63,026 at P 335.

[79] *Id*. P 346.

[80] *Id*. P 347.

not be able to recover the cost of capacity that it already owned. The Louisiana Commission raises no serious doubts as to Entergy's actions at that time.

60. Further underscoring the difficult circumstances Entergy found itself in at this time, EPI experienced difficulty in selling all of the ISES 2 capacity. Contrary to the Louisiana Commission's assertion, Entergy did actively seek buyers for the ISES 2 capacity. It offered the capacity to at least 10 other unaffiliated entities in addition to Entergy Arkansas. Only one of these 10, the City of Jonesboro, purchased any capacity, and it purchased less than half of the capacity that EPI had offered. Thus, at least nine other entities came to the same conclusion as Entergy Arkansas in 1996 and 1997, that the ISES 2 capacity supply was not desirable. Speculation by the Louisiana Commission that others would have purchased this capacity for long-term needs is simply not supported by the record in this proceeding and fails to raise any serious doubts as to the prudence of Entergy's actions. Indeed, the Louisiana Commission's speculative assertions are directly contradicted by the evidence that no entities were interested in obtaining that capacity. The fact that 12 years later some entities may have been better off if they had purchased the capacity (in light of increasing natural gas prices) is interesting,[81] but entirely irrelevant to whether Entergy was imprudent at the time it made its decision not to purchase the ISES 2 capacity.

61. The Louisiana Commission's PROMOD analysis, which the Louisiana Commission seeks to use to demonstrate that Entergy was imprudent, is also unavailing. The analysis simply uses a computer programming model to recalculate the bandwidth payments in this proceeding assuming that Entergy Arkansas owned 164-180 MW of ISES 2 capacity in 2006.[82]

62. As the Presiding Judge explains, the Louisiana Commission's PROMOD analysis is problematic in many respects that prevent it from accurately capturing market conditions in 1996 and 1997.[83] He further correctly holds that "the evidence simply does not meet the required evidentiary threshold and does not establish serious doubts that Entergy acted imprudently.[84] We affirm the Presiding Judge's findings with respect to

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[81] As the Presiding Judge found, "[a]t best, the [Louisiana Commission's] case supports a belief that looking at the issue from hindsight, Entergy may have benefitted from the 1996 acquisition of ISES 2 capacity." *Id*. P 281.

[82] If Entergy Arkansas had repurchased 164 MW of ISES 2 capacity, the Louisiana Commission maintains that, all else being equal, Entergy Arkansas' bandwidth payments would have increased by $23 million.

[83] *Id.* P 285-312.

[84] *Id.* P 316.

the deficiencies in the Louisiana Commission's PROMOD analysis in all respects. In this regard, we will address further only several of the Louisiana Commission's arguments with respect to its PROMOD analysis. First, the Louisiana Commission presumes that Entergy Arkansas would have retained the ISES 2 capacity from 1996 until at least 2006. However, as the Presiding Judge explains, there is no reason to assume that Entergy would not have sought consent from the Arkansas Commission to use the ISES 2 capacity to serve system-wide needs. Moreover, it is likely that "substantial capacity would have been used outside of Arkansas."[85] As the Arkansas Commission witness Berry testified, Entergy Arkansas would have re-sold the ISES 2 capacity under Service Schedule MSS-4 to one or more of the Operating Companies because all of them were relatively deficient in base-load capacity. This would have had a substantial impact on bandwidth payments and receipts, because, among other things, the owning Operating Companies would have had increased receipts or reduced payments.[86]

63. In addition, the PROMOD model fails to satisfactorily account for the acquisition costs of the ISES 2 capacity. It cannot be considered imprudent to decline to make large upfront payments to acquire a resource based on the assumption that benefits will accrue years in the future when there are serious concerns about whether the assumed benefits will ever be achieved. As the Presiding Judge notes, even the Louisiana Commission admits that ISES 2 capacity would not have yielded a positive return for nine to fourteen years.[87] Under Entergy's view, the purchase of the ISES 2 capacity never would have paid off, and would have had a peak deficit of $56 million.[88]

64. The Louisiana Commission has failed to create any doubt, much less "serious doubt," as to Entergy's prudence with respect to its decision not to purchase ISES 2 capacity. Rather, the record in this proceeding demonstrates that Entergy did not act imprudently at the time of its decision.

B. Other Prudence Issues

65. This issue concerns several prudence matters not discussed by the Presiding Judge in the Initial Decision, but raised by Entergy.

[85] Initial Decision, 124 FERC ¶ 63,026 at P 287.

[86] *Id*. P 296.

[87] Tr. at 1461 (Hayet).

[88] Exh. ESI-41 at 20.

1. Briefs on Exceptions

66. Entergy argues that the Commission should rule on other prudence issues that were raised in this proceeding. Entergy notes that the prudence issues raised by Entergy were initially raised in a 2006 Arkansas Commission complaint which was later dismissed by the Commission. Entergy states that the Commission did not rule on the substance of the Arkansas Commission's prudence claims and dismissed them without prejudice against any party raising the same claims in the first annual bandwidth proceeding, i.e., this proceeding.[89] Entergy states that it addressed three specific prudence allegations that were raised in the Arkansas Commission's complaint: (1) the Operating Companies' transmission planning had been imprudent; (2) the Operating Companies imprudently failed to purchase lower cost energy that was available on the wholesale market; and (3) the Operating Companies' generation planning practices were imprudent.[90] Entergy maintains that in the Findings of Fact, the Initial Decision adopts Entergy's position with respect to the Arkansas Commission complaint issues.[91] It contends that the Commission should affirm the Initial Decision's Findings of Fact and make clear that the prudence claims raised in the Arkansas Commission's complaint have been resolved and that the doctrine of *res judicata* bars parties from raising the issues in future proceedings.

2. Briefs Opposing Exceptions

67. The Louisiana Commission contends that Entergy's attempt to bar parties from raising prudence issues in the future, even if they were not litigated in this case, is a meritless request for an advisory opinion. It argues that the orders setting this case for hearing provided the opportunity to challenge the prudence of the cost inputs to the bandwidth, but did not mandate that all pre-2007 actions of Entergy be analyzed and resolved in the time period allowed in this docket. It further contends that the Commission has held that issues affecting the System Agreement could be raised in each year's annual filings, not just the 2006 test year filing.[92]

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[89] Entergy Brief on Exceptions (citing *APSC v. Entergy Servs., Inc.*, 119 FERC ¶ 61,223 (2007)).

[90] *Id*. at 30.

[91] *Id*. (citing Initial Decision, 124 FERC ¶ 63,026 at P 665-68).

[92] Louisiana Brief Opposing Exceptions at 52 (citing *Arkansas Pub. Serv. Comm'n v. FERC*, 119 FERC ¶ 61,223 (2007)).

68. The Arkansas Commission states that a joint statement of issues was negotiated and submitted by all the parties to this proceeding, including Entergy. It contends that Entergy had every opportunity to add any issue to the joint statement of issues and chose not to do so. It argues that the Presiding Judge could not have been in error not to rule on issues that were neither identified by any party nor litigated through evidence and legal argument.[93]

69. Staff contends that parties should not necessarily be barred from raising prudence issues in future proceedings. Staff contends that Entergy's request to bar prudence claims that could have been raised in this proceeding is, at best, premature and should be rejected.

3. Commission Determination

70. We reject Entergy's request to find that prudence claims that could have been raised in this proceeding are now barred.[94] In the order setting this case for hearing, the Commission stated that "the Commission cannot determine, absent specific facts, all the circumstances in which a state might be preempted from reviewing the prudence of the underlying production costs for the system."[95] Similarly, it is only when the Commission knows the specific facts concerning a future prudence allegation that it can make a determination as to whether *res judicata*[96] should apply. As we stated responding to a similar motion by Entergy in a different proceeding, "[t]he doctrines of *res judicata* or collateral estoppel depend on the particular facts challenged and arguments raised by a party, and thus are decided in the first instance by the Presiding Judge."[97] Accordingly,

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[93] Arkansas Commission Brief Opposing Exceptions at 45.

[94] While, as Entergy points out, the Commission dismissed the Arkansas Commission's 2006 complaint without prejudice, no party raised any argument with respect to possible imprudent actions by Entergy in the past (with the exception of the ISES 2 issue discussed above.)

[95] Hearing Order, 120 FERC ¶ 61,094 at P 16.

[96] The doctrine of *res judicata* precludes the relitigation of a claim or issue that was the subject of a prior cause of action between the parties. "The doctrine of *res judicata* holds that a judgment on the merits in a prior suit bars a second suit involving identical parties … based on the same cause of action." *Nat'l Comm. For the New River, Inc. v. FERC,* 433 F.3d 830, 834 (D.C. Cir. 2005) (quoting *Apotex, Inc. v. FDA,* 393 F.3d 210 217 (D.C. Cir. 2004)).

[97] *Entergy Services, Inc*., 127 FERC ¶ 61,226 (2009).

should a party raise a prudence claim that arguably should have been raised in this proceeding, it will be up to the Presiding Judge, and then the Commission, at that time to determine if *res judicata* applies.

C. Union Electric's Contract with Entergy Arkansas

71. This issue concerns a contract between Union Electric and Entergy Arkansas and whether Entergy Arkansas may recover bandwidth payments from Union Electric.

1. Background

72. Entergy Arkansas and Union Electric, a load-serving entity, entered into a service agreement effective April 1, 1999, prior to the implementation of the bandwidth remedy. The contract provides for the sale of 165 MW of capacity from Entergy Arkansas' White Bluff coal plant to Union Electric. When White Bluff is unavailable, Entergy Arkansas substitutes capacity from another plant.

73. There is a fixed $11.25 per kW monthly rate for capacity and a variable energy rate based upon a formula, which is contained in Appendix A of the contract and calculates Union Electric's monthly energy charge based upon certain variable expenses of the billing cycle.[98] These variable expenses are fuel and purchased energy. Through the variable "PE" (purchased energy expense-Account 555), Entergy allocated a share of Energy Arkansas' 2006 bandwidth payments to Union Electric.

74. At the hearing, Union Electric did not dispute that a portion of Entergy Arkansas' bandwidth payments result from serving Union Electric's load.[99] Union Electric argued instead that the service agreement does not provide for it to be assessed a portion of Entergy Arkansas' bandwidth payment.

2. Initial Decision

75. The Presiding Judge finds that the evidence supports Entergy's position that the contract allows Entergy Arkansas to allocate to Union Electric a pro rata share of the bandwidth payment. He cites Entergy's assertion that because the Commission had determined that the bandwidth payments should be recorded in Account 555, it has implicitly determined already that the bandwidth payments are purchased power expenses.[100] He contends that for the Commission to have jurisdiction, bandwidth

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[98] Initial Decision 124 FERC ¶ 63,026 at P 365.

[99] *Id*. P 407.

[100] *Id*. P 382-85.

payments would have to be for the sale of electric power in interstate commerce, and therefore are for the purchase of "energy."[101]

76. The Presiding Judge finds that the bandwidth payments constitute a portion of the price Entergy Arkansas pays for its share of the total system's energy allocated to it under Service Schedule MSS-3. He contends that because the bandwidth payments represent a reallocation of payments made under the System Agreement, they constitute a portion of the payments Entergy Arkansas makes for energy allocated to it under Service Schedule MSS-3. He finds that the bandwidth remedy, which was developed to achieve rough production cost equalization, contemplates that wholesale requirements customers will have the responsibility for their allocated share of any payments or receipts.[102]

77. The Presiding Judge explains that, under the bandwidth remedy, cost allocation and rate setting are not separate and distinct because the costs incurred on behalf of Entergy's customers, like Union Electric here, are used to determine the amount of the remedy payment. He also states that Union Electric would be granted a windfall because it would avoid its fair share of purchased energy related expenses. The Presiding Judge finds that while the bandwidth remedy was not in effect when the 1999 Union Electric agreement was entered into, the agreement does obligate Union Electric to pay its share of Entergy's energy related expenses attributable to Union Electric.[103]

78. The Presiding Judge finds that the plain language of the contract establishes that Entergy has properly allocated a pro rata portion of the bandwidth payment attributable to Union Electric's energy usage. He states that he does not find the contract ambiguous, but assuming arguendo that it is, in order to examine parol and extrinsic evidence, he states that the evidence establishes that Union Electric agreed to pay a variable purchased energy expense, in lieu of a higher fixed energy charge. He contends that Union Electric intentionally declined to pay a fixed energy charge as it had in an earlier 1991 contract, and signed up for a variable purchase energy expense provision, and that that charge is now paid through the bandwidth remedy pursuant to Opinion Nos. 480 and 480-A.[104]

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[101] *Id.* P 375.

[102] *Id*. P 404.

[103] *Id*. P 407.

[104] *Id*. P 410.

3. **Briefs on Exceptions**

79. Union Electric argues that the Initial Decision errs in failing to give effect to the plain language of the 1999 Agreement. It contends that the dispute centers on variable "PE," which is defined as "purchased energy expense charged to Account 555," in the fuel and purchased power energy rate formula set forth in Appendix A to the 1999 Agreement. Union Electric maintains that a payment such as the rough production cost equalization payment that is based on production cost disparities among the Operating Companies and that does not result in additional energy flowing to Entergy Arkansas is not a "purchased energy expense" and, therefore, cannot be passed through to and recovered from Union Electric under the 1999 Agreement.[105]

80. Union Electric contends that its position is based on Commission precedent that states that where a contract is clear and unambiguous the plain language of the contract controls,[106] and that when the meaning of a contract is evident on its face, there is no need to resort to extrinsic evidence or otherwise look beyond the "four corners" of the contract. Union Electric contends that the Initial Decision veers off course by reviewing evidence proffered by Union Electric, Entergy and Staff in disregard of that standard.

81. Union Electric argues that the correct way to interpret the 1999 Agreement, consistent with Commission precedent and the record evidence, would be to examine the plain language of the 1999 Agreement, which specifies in pertinent part "purchased energy expense," and read it in light of the common meaning, that is, that it means not just an expense related to energy, but an expense related to energy that has been purchased.[107]

82. Union Electric argues that the Initial Decision errs by ignoring the clear distinction between "purchased energy expenses," which are recoverable by Entergy Arkansas under the 1999 Agreement, and "all energy-related expenses," which are not. Union Electric maintains that there is no evidence that the plain language and plain meaning of the 1999 Agreement allow all energy-related expenses to be passed through variable PE, nor is there a provision in the 1999 Agreement that expressly allows the pass through of all energy-related expenses.

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[105] Union Electric Brief on Exceptions at 15.

[106] *Id*. at 16 (*citing*, *e.g.*, *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 15, *reh'g denied*, 108 FERC ¶ 61,304 (2004)).

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

83. Union Electric contends that the Presiding Judge erred in rejecting the testimony of Union Electric witness Schukar and Staff witness Sammon because they are not "contract law experts."[108] It argues that the Initial Decision provides no explanation as to why an academic expert would be required, as an initial matter, to interpret the plain language of a power purchase agreement that is unambiguous, or why the testimony of two witnesses who have been involved in the electric industry for decades and have reviewed countless such agreements should be ignored or given minimal weight.

84. In addition, Union Electric argues that exclusion of certain testimony of Mr. Schukar and Mr. Sammon is inappropriate because the Commission has a stated preference for the admission of evidence, unless it has no possible relationship to the controversy, is irrelevant, immaterial, or unduly repetitious.[109] Union Electric also contends that it is troubling that the Presiding Judge failed to apply the same standard to all witnesses on the Union Electric contract issue, by readily accepting the testimony of Entergy witnesses regarding the plain language of the 1999 Agreement.

85. Union Electric argues that the Initial Decision incorrectly holds that "the Commission had determined that the bandwidth payments should be booked in Account 555," and that "Entergy has been directed … by the Commission" to charge the rough production cost equalization payment to Account 555.[110] Union Electric contends that the Commission simply accepted the proposal with no discussion as to whether Account 555 was the correct account and why those costs should be recorded there.[111]

86. Union Electric argues that the Initial Decision misunderstands how Service Schedule MSS-3 and the System Agreement operate. Union Electric contends that the Initial Decision accepts the notion that a rough production cost equalization payment is nothing more than a "reallocation" of the payments Union Electric already is obligated to make under the 1999 Agreement. Union Electric contends that Entergy Arkansas' 2007 bandwidth payment arises from the fact that Entergy Arkansas sold more energy than it purchased from the other Operating Companies in 2006, and that the payment therefore does not relate to any energy that was purchased by Entergy Arkansas and provided to Union Electric, either in 2006 or 2007.

[108] *Id*. at 26 (citing Initial Decision, 124 FERC ¶ 63,026 at P 400).

[109] *Id*. at 27 (citing 18 C.F.R. § 385.509(a); *Entergy Servs., Inc. and EWO Marketing LP*, 109 FERC ¶ 61,108, at P 7 (2004)).

[110] *Id*. at 35 (citing Initial Decision, 124 FERC ¶ 63,026 at P 373, 400).

[111] *Id*. (citing Union Electric Reply Brief at 8).

87. Union Electric argues that the Initial Decision errs by relying on extrinsic evidence. Specifically, Union Electric contends that the Initial Decision errs by relying on testimony from Entergy witness Hurstell that Union Electric's intent in entering the 1999 Agreement was to allow Entergy Arkansas to recover from Union Electric all energy-related costs, such as the bandwidth payment. Union Electric maintains that instead it negotiated an energy rate that, although it could fluctuate, was specific enough to capture only certain energy charges.[112]

88. Union Electric argues that the Initial Decision confuses or blurs the difference between cost allocation and cost recovery. Union Electric contends that the issue set for hearing was not whether the System Agreement and its Service Schedule MSS-3 called for a particular allocation, but whether the 1999 Agreement allowed that allocation to be recovered from Union Electric. Union Electric argues that consequently the Initial Decision's finding that Entergy Arkansas' "allocation" of a portion of its bandwidth payment to Union Electric was just and reasonable does not address the issue presented for hearing.

89. Union Electric argues that the Initial Decision ignores the 1999 Agreement's existence and all of the contract issues raised in this proceeding. It contends that the Initial Decision pays no attention to Union Electric's arguments concerning the "public interest" standard, which it maintains Entergy has not even tried to meet.

90. Union Electric also argues that the Initial Decision errs in ignoring the market-based rate nature of the 1999 Agreement and finding that Union Electric would realize a windfall. Union Electric contends that in a market-based rate contract, the just and reasonable rate is the rate the parties negotiate. It argues that, therefore, it is not a windfall for Union Electric to avoid a charge that is not specified or otherwise applicable under the 1999 Agreement, nor is Entergy Arkansas being deprived of any payment if it does not receive an amount it had not bargained for in the 1999 Agreement.[113] Union Electric argues that, to the contrary, because the bandwidth payment is not a purchased energy expense under the 1999 Agreement, Entergy Arkansas would receive a windfall if it were allowed to recover rough production cost payments from Union Electric.

91. Staff argues that the Presiding Judge erred in finding that the Union Electric contract allows Entergy Arkansas to allocate Union Electric a portion of the bandwidth payment. Staff contends that the plain language of the Agreement does not provide for the recovery of bandwidth payments through purchased energy expense charged to Account 555. Staff argues that, while the Presiding Judge correctly found that the

[112] *Id*. at 40.

[113] *Id*. at 50.

contract is not ambiguous, he erred in nevertheless relying on parol evidence. For example, Staff contends that the Presiding Judge erroneously accepted Entergy's assertion that because the Commission has determined that bandwidth payments are properly recorded in Account 555, it has implicitly determined already that bandwidth payments are purchased power expenses. Staff contends that the Commission did not suggest that bandwidth payments are in any way similar to purchased energy expenses, or that they should be treated as such, simply because the payments are recorded in Account 555.

92. Staff argues that the character of the bandwidth payments shows that these payments are not purchased energy expenses at all. Staff argues that bandwidth payments are made by Operating Companies in order to roughly equalize production costs among the Operating Companies. Staff contends that there is no power being bought or sold, nor are there purchasers or sellers of power. Further, Staff contends that its witness, Mr. Sammon, testified that Entergy Arkansas' bandwidth payment is the net effect of demand-related and energy-related cost imbalances, and not what is meant by "purchased energy expense."[114] Staff adds that the definition of Account 555 indicates that this account is not restricted to payments for power.

93. Staff contends that the Presiding Judge erred in rejecting a portion of Staff witness Sammon's testimony on the grounds that he is not qualified as a contract law expert. Staff contends that rather being called as a "contract law expert," Mr. Sammon was called as a ratemaking expert witness to testify as to whether bandwidth payments are "purchased energy expense charged to Account 555" as ratemaking experts understand the meaning of the phrase. Staff contends that Mr. Sammon's duties and responsibilities as an Energy Industry Analyst in the Office of Administrative Litigation at the Commission are defined as technical analyses of electric matters in proceedings set for hearing, including the review of rates, terms and conditions of rate schedules and tariffs.[115] Staff contends that Mr. Sammon is no less qualified to express an opinion on this subject than were the Entergy and Union Electric witnesses.

4. <u>Briefs Opposing Exceptions</u>

94. Entergy argues that the Initial Decision properly found that Entergy Arkansas was entitled to recover bandwidth payments from Union Electric. It contends that the bandwidth payments are recoverable under the plain meaning of the Union Electric contract. It contends that bandwidth payments are payments for energy and not capacity, and thus represent payments for purchased energy. Accordingly, it asserts that the

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[114] Staff Brief on Exceptions at 37.

[115] *Id*. (citing Ex. S-1 at 2).

bandwidth payments are recoverable under the Union Electric contract, which provides for the recovery of "Purchased Energy Expense Charged to Account 555."[116]

95. Entergy contends that arguments by Union Electric and Staff that bandwidth payments are not payments for purchased energy have no merit. It argues that Union Electric does not attempt to address the central point that the Commission found in a prior order[117] that bandwidth payments represent payments for purchased power, nor does Union Electric make any effort to explain why the Commission would find that bandwidth payments should be recorded in Account 555 if they are not purchased power payments. Entergy contends that Staff's contention that there is a distinction between payments for purchased power and net settlements makes no sense. It explains that Account 555 instructions do not reference "net settlements" in a vacuum, but instead refer to net settlements for "transactions under pooling or interconnection agreements."[118] It contends that the only possible transactions that occur under pooling interconnection agreements are purchases and sales of power and other jurisdictional services.

96. Entergy contends that arguments that bandwidth payments are established only to equalize production costs among the Operating Companies rather than payments for purchased power are inconsistent with the nature of the bandwidth remedy and the Commission's jurisdiction. It explains that bandwidth payments do not constitute some payment that is unrelated to the exchange of power, nor would the Commission have the jurisdiction under the FPA to order such payments if they were not so related to the exchange of power.[119]

97. Entergy argues that Staff is mistaken in arguing that bandwidth payments are not payments in exchange for energy because Entergy Arkansas did not obtain any energy from the other Operating Companies in return for the bandwidth payment. Entergy contends that bandwidth payments are additional payments required of Entergy Arkansas that are directly related to its wholesale transactions with the other Operating Companies. It contends that they represent a charge paid by Entergy Arkansas that, in combination with all of the other provisions of the Operating Agreement, result in a just and

[116] Entergy Brief Opposing Exceptions at 84.

[117] November Compliance Order, 117 FERC ¶ 61,203 at P 27.

[118] Entergy Brief Opposing Exceptions at 85.

[119] *Id*. at 89.

reasonable payment for all of the capacity and energy that is allocated to Entergy Arkansas under the System Agreement.[120]

98. Entergy disagrees with Union Electric's contention that the Initial Decision fails to preserve the sanctity of the contract. Entergy argues that the notion that the Commission and courts will uphold the sanctity of contracts is premised on a policy that parties will be held to the bargain they negotiated. It argues that the bargain negotiated between Union Electric and Entergy Arkansas is evidenced by the plain meaning of the contract. It contends that the Initial Decision properly concluded that the contract is unambiguous and that Union Electric's share of the bandwidth payments is recoverable under the terms of the contract. Similarly, Entergy maintains that Union Electric's claim that the Initial Decision improperly relied on extrinsic evidence is unfounded; Entergy contends that the Initial Decision is unequivocal that the contractual intent of the parties is evidenced by the plain language of the Union Electric contract.[121]

99. Entergy disagrees with Union Electric and Staff that the Presiding Judge unreasonably rejected the expert testimony of Staff witness Sammon and gave inadequate weight to Union Electric's witness Shukar. It contends that the Initial Decision recognizes that neither Union Electric nor Entergy offered experts on contract law. It further contends that the Initial Decision does not reject the testimony of either expert. Entergy argues that paragraphs 394 and 396 of the Initial Decision recognize Sammon's experience in the regulatory field and his current duties. It contends that these findings support the presentation of expert testimony consistent with the Commission's reliance on Mr. Sammon's expertise, provided that such testimony is not couched as dispositive legal opinion.[122] Entergy argues that the real complaint of Union Electric and Staff is the weight afforded to their expert testimony, which is well within the Presiding Judge's discretion.

5. Commission Determination

100. We agree with the Presiding Judge that wholesale customers of Entergy's Operating Companies should be responsible for any bandwidth payments made by an Operating Company. However, we disagree with the Presiding Judge that the 1999 Agreement allows Entergy Arkansas to collect an allocated portion of its bandwidth payments from Union Electric through the purchased energy variable in the rate formula set forth in the 1999 Agreement. Contrary to the Presiding Judge's reliance on the plain

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[120] *Id*.

[121] *Id*. at 91.

[122] *Id*. at 93.

language of the 1999 Agreement, we conclude that the 1999 Agreement is ambiguous and analyze it accordingly.

101. The 1999 Agreement calculates Union Electric's monthly energy charge based on certain actual variable expenses for the billing month, primarily fuel and purchased energy. It is through the purchased energy variable that Entergy Arkansas is flowing its 2006 bandwidth payments through to Union Electric. In the rate formula, purchased energy is defined as "purchased energy expense charged to Account 555."[123] As discussed below, we conclude that the bandwidth payments cannot legitimately be characterized as a "purchased energy expense charged to Account 555," but instead are payments to roughly equalize production costs among the Operating Companies.

102. Service Schedule MSS-3 contains a formula for determining bandwidth payments and receipts among the Entergy Operating Companies. This formula calculates each Operating Company's actual production cost and compares it to an allocated share of the Entergy System average production cost to determine if payments are required. As Staff argues, under the bandwidth formula, production costs are broken down into fixed and variable cost components.[124] The fixed production costs include the costs of both owned and purchased capacity and are allocated to each Operating Company based on a demand ratio. The variable costs include the costs of both self-generated and purchased energy and are allocated based on an energy ratio. The bandwidth payments are then determined based on the net effect of demand related and energy-related imbalances. Therefore, the bandwidth payments cannot be attributed solely to energy or purchased energy or described as strictly purchased energy expense, but are a combination of both demand and energy costs for all production resources, not just purchases.

103. We disagree with the Presiding Judge's finding that Entergy has established that bandwidth payments are solely for the sale and purchase of energy. In fact, as established above, the character of the bandwidth payments demonstrates that these payments are not solely purchased energy expenses. Instead, as Staff witness Sammon testified, the bandwidth payments are payments made by an Operating Company with actual production costs below the Entergy System average to Operating Companies with production costs above the Entergy System average in order to roughly equalize

[123] *See* Initial Decision, 124 FERC ¶ 63,026 at P 365-67.

[124] Staff Brief Opposing Exceptions at 15.

production costs among the Operating Companies.[125] They are based on total production costs, including capacity and energy costs associated with purchases and each Operating Company's owned generation. Therefore, we find that the bandwidth payments should not be construed as purchased energy expenses.

104. We also disagree with the Presiding Judge's acceptance of Entergy's assertion that the Commission has already decided in a prior order that bandwidth payments are purchased power expenses.[126] In the cited November Compliance Order, the Commission did allow the recording of bandwidth payments in Account 555 (Purchased Power). However, the Commission did not suggest at that time that bandwidth payments are in any way purchased energy expenses, or that they should be treated as such, simply because these payments are recorded in Account 555. We note that Entergy asked to place bandwidth payments in Account 555 because this account "includes net settlements for the exchange of energy and capacity reserves, among other things, and for transactions under pooling agreements."[127] In accepting Entergy's proposed request the Commission noted that Account 555 provides for net settlements for transactions "under pooling or interconnection agreements wherein there is a balancing of debits and credits for energy, capacity, etc." Under no reasonable interpretation of the November Compliance Order can it be argued that the Commission found that bandwidth payments are in fact purchased energy expenses. Even if the bandwidth payments were solely an energy-related expense, as discussed above, they cannot be construed to be an expense related to energy that has been purchased. As Union Electric points out, the purchased energy variable in the 1999 Agreement does not explicitly provide for the recovery of all energy related-expenses, but rather only purchased energy expenses charged to Account 555. Therefore, based on the above, we find that it would be unreasonable to interpret the 1999 Agreement to allow Entergy Arkansas to include its total bandwidth payments as purchased energy expenses in the purchased energy variable in the 1999 Agreement.

D. <u>Energy Ratio Calculation</u>

105. This issue contains two parts: (1) whether parties must follow the bandwidth formula as contained in Service Schedule MSS-3 or in Exhibits ETR-26 and ETR-28; and

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[125] Mr. Sammon's testimony was given as a ratemaking expert on the issue of whether the bandwidth payments are purchased energy expense as defined by the Commission's rules and regulations. This subject matter is certainly within his qualifications.

[126] Initial Decision, 124 FERC ¶ 63,026 at P 373, 400.

[127] November Compliance Order, 117 FERC ¶ 61,203 at P 27.

(2) the appropriate source of data for determining the Energy Ratio variable for the 2006 bandwidth calculation.

1. **Background**

106. Exhibits ETR-26 and ETR-28 are exhibits that were prepared by Entergy in Docket No. EL01-88-001 (the underlying docket in Opinion Nos. 480 and 480-A) to compute and compare the historical production costs of the Operating Companies. These exhibits formed the basis for the Commission's determination in Opinion Nos. 480 and 480-A that "[f]uture production cost comparisons among the Operating Companies should follow the methodology in Exhibit ETR-26."[128] Exhibit ETR-28 is a production cost analysis for the Operating Companies for the 12 months ending August 31, 2002 and details the numbers supporting the 2002 data in Exhibit ETR-26.

107. Based on the Commission's guidance in Opinion Nos. 480 and 480-A to follow the methodology in Exhibit ETR-26, Entergy submitted a compliance filing in Docket No. EL01-88-004. This compliance filing converted the methodology and calculations of Exhibits ETR-26 and ETR-28 into a stated formula in Service Schedule MSS-3 of Entergy's System Agreement (April 2006 Compliance Filing) to calculate bandwidth payments and receipts. Entergy's April 2006 Compliance Filing proposed certain amendments to the System Agreement and modified Service Schedule MSS-3 to include new sections 30.11 through 30.14. The compliance filing also included proposed revisions to Exhibits ETR-26 and ETR-28 that had not been ordered by the Commission in Opinion Nos. 480 and 480-A.

108. In the Commission's order accepting Entergy's April 2006 Compliance Filing, the Commission accepted the compliance filing but rejected, as beyond the scope of the compliance filing, Entergy's request to make non-compliant adjustments to the methodology reflected in Exhibits ETR-26 and ETR-28.[129] The Commission explained that future changes to the methodology set forth in Exhibits ETR-26 and ETR-28 would not be automatic and, any time Entergy seeks to make a change, it must make a section 205 filing with the Commission.[130] The Commission also explained that customers may file section 206 complaints if they seek to make a change, and that the Commission must

[128] Opinion No. 480, 111 FERC ¶ 61,311 at P 33. Exhibit ETR-26 compares historical production costs of the Operating Companies for the years 1983-2001 and for the 12 months ending 2002.

[129] November Compliance Order, 117 FERC ¶ 61,203 at P 69.

[130] *Id.*

institute a section 206 proceeding on its own motion if it seeks a change.[131] The November Compliance Order also directed Entergy to make a further compliance filing to reflect the Commission's modifications. Entergy submitted that filing in its December 2006 Compliance Filing and further revised Service Schedule MSS-3 as required by the November Compliance Order. The Commission accepted the December 2006 Compliance Filing in April 2007.[132]

109. Subsequent to the December 2006 Compliance Filing, Entergy proposed amendments to the Service Schedule MSS-3 bandwidth formula through section 205 filings and the Louisiana Commission also sought amendments to the formula through section 206 filings.[133] The issue presented here is whether Entergy, in determining the Energy Ratio variable in the bandwidth formula, should follow Exhibits ETR-26 and ETR-28 and thereby use data reflected in its Intra-System Bill[134] or whether it should follow Service Schedule MSS-3 and thereby use data reflected in its FERC Form 1.

110. The Energy Ratio used in the bandwidth formula in Service Schedule MSS-3 is each Operating Company's annual energy usage as a percentage of the total system's annual energy usage. Each Operating Company's annual energy usage is referred to as its "net area load." Net area load is the basis on which the Entergy System's variable production costs are allocated to each of the Entergy Operating Companies. For example, if the system's total net area load is 100 MWh, and one of the Operating Company's net area load is 20 MWh, for purposes of calculating the bandwidth payments and receipts, the Operating Company would be allocated a 20 percent share of the system's variable production costs.

111. In the context of the bandwidth calculation, "net area loads" are the sales obligations of an Operating Company, which obligations consist of the retail loads plus

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[131] *Id.*

[132] April Compliance Order, 119 FERC ¶ 61,095.

[133] Entergy has filed amendments to Service Schedule MSS-3 in several proceedings, including Docket Nos. ER07-682-000, ER07-683-000, and ER07-684-000, ER07-727-000, ER07-985-000 and ER08-774-000. The Louisiana Commission has sought amendments to Service Schedule MSS-3 through several section 206 proceedings, including Docket Nos. EL07-52-000 and EL08-51-000.

[134] The Intra-System Bill is a monthly after the fact billing to the separate Operating Companies that provides data on a monthly basis relating to transactions among the Operating Companies. FERC Form No. 1 is a comprehensive financial and operating report submitted for electric rate regulation and financial audits.

the wholesale requirement sales. It does not include the cost of providing Exchange Energy to other Operating Companies, pursuant to Service Schedule MSS-3, and it does not include the cost of making non-requirement wholesale sales (so-called "opportunity sales") to other entities.[135] To the extent such transactions occur, the revenue received is treated as a credit or reduction to the costs otherwise included in the calculation of the production costs.[136]

112. Exhibits ETR-26 and ETR-28 used the Intra-System Bill as the source of data to calculate the Energy Ratio. The source of data that Entergy uses in the 2006 bandwidth calculation to calculate the Energy Ratio is its FERC Form 1.[137] The currently effective formula in Service Schedule MSS-3 on file with the Commission at the time of the 2006 bandwidth filing did not specify which data source should be used for the calculation of the Energy Ratio. Prior to the 2006 bandwidth filing, Entergy did not submit a section 205 filing to change the source of the data to calculate the Energy Ratio from what had been used in Exhibits ETR-26 and ETR-28.

113. The differences in the two data sources involve the treatment of non-requirement sales. Calculating the net area load as reported by the Intra-System Bill includes non-requirement sales by individual Operating Companies. Calculating the net area load as reported by the FERC Form 1 takes out the non-requirement sales by individual Operating Companies. The bandwidth payments and receipts will vary depending on the source of data used.

2. <u>Initial Decision</u>

114. The Presiding Judge finds that Service Schedule MSS-3 was the lawful rate controlling the methodology used by Entergy to determine the Energy Ratio variable in the bandwidth formula, but that Exhibits ETR-26 and ETR-28 continue to control and are applicable where Service Schedule MSS-3 does not address an issue, in accordance with previous directives of the Commission.[138]

115. The Presiding Judge disagrees with Entergy's argument that Exhibits ETR-26 and ETR-28 are now reduced to only discretionary guidance.[139] The Presiding Judge

[135] Revised Exhibit ESI-6 at P 38-39.

[136] Exh. S-1 at P 15.

[137] Initial Decision, 124 FERC ¶ 63,026 at P 500 (citing Exh. No. ESI-11).

[138] *Id*. P 253-54.

[139] *Id*. P 259.

contends that Entergy must make a section 205 filing to deviate from following the methodology set forth in Exhibits ETR-26 and ETR-28, with respect to issues or areas not covered by Service Schedule MSS-3, but expressly covered by Exhibits ETR-26 and ETR-28.

116. The Presiding Judge adds, however, that he recognizes that there are obvious deficiencies in some situations with a rote application of Exhibits ETR-26 and ETR-28. He finds that Entergy should seek to amend any patent deficiencies it discovers when applying Exhibits ETR-26 and ETR-28.

117. With regard to the source of data to determine the Energy Ratio variable in the bandwidth formula, the Presiding Judge finds that Entergy properly used data from the FERC Form 1 to make its calculations.[140] The Presiding Judge states that even if Service Schedule MSS-3 had not been later changed under section 205 to allow for use of FERC Form 1 data, he still finds that Entergy's methodology in the instant filing is consistent (although not identical) with the methodology set forth in Exhibits ETR-26 and ETR-28, since it is substantially derived from and sourced by the Intra-System Bill data.[141] The Presiding Judge also finds that, in this unique situation, Entergy followed Exhibits ETR-26 and ETR-28 as consistently as it could if it wanted to avoid substantial errors in the bandwidth formula.[142]

118. The Presiding Judge agrees with Entergy that using the values reflected in the Intra-System Bill data will cause incorrect calculations and result in disparities in the production costs, and an incorrect bandwidth payment/receipt schedule.[143] The Presiding Judge explains that during times when an operating company may have excess capacity beyond its requirement sales, it may make sales of surplus energy in the wholesale market, which are referred to as "non-requirements" sales. The Presiding Judge states that in the Intra-System Bill, the net area is determined based upon a coincident hourly basis measuring the demand for each Operating Company and the total load for the

[140] Initial Decision, 124 FERC ¶ 63,026 at P 530.

[141] The net area loads reflected in the bandwidth calculation by Entergy came from page 401 of the FERC Form No. 1, "Electric Energy Account", Initial Decision, 124 FERC ¶ 63,026 at P 500 (citing Exhibit No. ESI-11). The Intra-System Bill was used to determine the values which are reflected on page 401 of FERC Form No. 1, but certain data, such as purchases from qualified facilities do not come from the Intra-System Bill, Initial Decision, 124 FERC ¶ 63,026 at P 503.

[142] *Id.* P 531-32.

[143] *Id.* P 505 (citing Exh. ESI-6 at 37).

system by each hour and this measures the "responsibility ratio" for each Operating Company.[144] He maintains that the purpose of this is to measure the requirements for each Operating Company. He explains that in calculating the value for the net area in the Intra-System Bill, certain transactions are excluded, such as sales pursuant to unit power sales greements, exchange energy, inadvertent energy, firm sales, unaccounted for energy and joint account system sales. He states that calculating the net area load as reported by the Intra-System Bill would include non-requirements sales by individual Operating Companies.[145] The Operating Company making these non-requirements sales would have the cost burden of Service Schedule MSS-1 (reserve equalization) and Service Schedule MSS-2 (transmission equalization) associated with these transactions.[146]

119. The Presiding Judge explains that variable production costs are the net of the revenues received from non-requirements sales and that such revenue credits are a required input in the bandwidth calculation and are defined as revenues received from customers outside an Operating Company's net area and are recorded as production services in Account No. 447.[147]

120. The Presiding Judge contends that net area load values and non-requirements sales revenue credits need to be "in sync," or the allocation of the variable costs would be incorrect.[148] Because non-requirements sales revenues are treated as revenue credits in the bandwidth calculation,[149] net area load values must not include non-requirement sales in order for the revenues and net area load to be in sync; otherwise the allocation of

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[144] *Id.* P 507.

[145] *Id.* P 509.

[146] The allocation of the cost burdens to the particular Operating Company making non-requirements sales, pursuant to Service Schedules MSS-1 and MSS-2, is accomplished by including that load in the "net area" value used in the Intra-System Bill to calculate the appropriate responsibility ratio. *Id.* P 510.

[147] *Id.* P 512.

[148] *Id.* P 513.

[149] Section 30.12 of the bandwidth formula removes revenue credits from the variable production expenses.

variable costs would be incorrect.[150] He states that to accurately reflect allocated production costs and to avoid this potential synchronization error which would artificially create disparities, use of the FERC Form 1 data is necessary.[151]

3. <u>Briefs on Exceptions</u>

121. The Louisiana Commission asserts that Entergy does not have the power under the FPA to change its approved rate without notification to the Commission. It further contends that cases interpreting the filed rate doctrine make it clear that a tariff filed in contravention of legal authority does not become an inviolate filed rate. The Louisiana Commission also cites to *East Tennessee*[152] to support its position that a deviation cannot be slipped into the Tariff by the Commission. In the *East Tennessee* case, the Louisiana Commission maintains, the court addressed a Purchased Gas Adjustment clause in a filed rate that deviated from the requirements of the Commission's Purchased Gas Adjustment Clause regulations.

122. The Louisiana Commission argues that even if Entergy's tariff includes deviations from the bandwidth methodology, they are *void ab initio* for failure to follow the procedure specified by the Commission.

123. The Louisiana Commission argues that the Presiding Judge approved a perceived surreptitious change[153] in the approved methodology that conflicts with Opinion No. 480's directive to follow the methodology in Exhibits ETR-26 and ETR-28. It maintains that Entergy did not inform the Commission of any change when it made the compliance

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[150] Staff witness Sammon explains that all sales, whether they are requirements sales or non-requirements sales, must be accounted for in a cost-of-service as either part of the calculation of the seller's energy and demand allocators or as a revenue credit. Under no circumstances can the load associated with a sale be included in the allocators and the revenue associated with that sale be included in the revenue credits. (Exhibit S-1 at 13). The load data and the revenue credits must be synchronized in the cost-of-service in order for an error to be avoided.

[151] *Id.*

[152] *East Tennessee Natural Gas Co. v. FERC*, 631 F.2d 794 (D.C. Cir. 1980).

[153] The change that the Louisiana Commission is referring to is the change in the source of the data from the Intra-System Bill used in Exhibits ETR-26 and ETR-28 to source the data from the FERC Form 1 in calculating the Energy Ratio.

filing.[154] It argues that Commission precedent requires parties seeking changes to the bandwidth methodology to make a section 205 or section 206 filing.[155]

124. The Louisiana Commission argues that the Presiding Judge incorrectly permitted Entergy to change the methodology in Exhibits ETR-26 and ETR-28 for calculating the Energy Ratios of the Operating Companies without the section 205 filing required by previous Commission orders. It argues that the Presiding Judge effectively ruled that it is not a change in methodology to correct an error,[156] but at the same time found that the Commission requires Entergy to seek to amend any deficiencies it discovers when applying Exhibits ETR-26 and ETR-28.[157] It argues that contrary to the ruling of the Presiding Judge, a change made to correct an error is still a change requiring a section 205 filing. It further argues that contrary to the reasoning of the Presiding Judge, a tariff change made in contravention of legal authority does not become a "filed rate."

125. The Louisiana Commission contends that the tariff language included in Entergy's April 2006 Compliance Filing did not adequately notice any change in the calculation of the Energy Ratios. It argues that the change implemented by Entergy constitutes a methodological change for two reasons. First, it switches the data source used to compute the area loads. Second, this switch was made to exclude load data that was included in the years covered by Exhibits ETR-26 and ETR-28.

4. Briefs Opposing Exceptions

126. Entergy and the Mississippi Commission argue that it is a matter of black letter law that a utility must comply with terms of its tariff filed pursuant to section 205 of the FPA unless and until the Commission accepts a change to that tariff pursuant to a subsequent section 205 filing or orders a change pursuant to section 206.[158] Entergy contends that any argument that the bandwidth filing should calculate payments in a manner that is inconsistent with the Commission-approved bandwidth formula included in Service Schedule MSS-3 should be rejected as a matter of law.

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[154] Louisiana Commission Brief on Exceptions at 18.

[155] *Id.*

[156] *Id*. at 22 (citing Initial Decision, 124 FERC ¶ 63,026 at P 260, 531).

[157] *Id*. (citing Initial Decision, 124 FERC ¶ 63,026 at P 262).

[158] Entergy Brief Opposing Exceptions at 8; Mississippi Commission Brief Opposing Exceptions at 4.

127. Entergy contends that the Louisiana Commission is attempting to dodge the black letter law by arguing that the Commission is required to follow the methodology in Exhibits ETR-26 and ETR-28. Entergy contends that in several sections of the Louisiana Commission's brief, the Louisiana Commission argues that Entergy slipped methodology changes by the Commission.[159] Entergy argues that the bandwidth formula is consistent with the Exhibit ETR-26 and ETR-28 methodology (aside from previously accepted section 205 amendments to the formula).

128. Staff asserts that the Presiding Judge correctly found that an amendment already accepted by the Commission takes precedence over any conflict with the methodology in Exhibits ETR-26 and ETR-28.

129. Staff argues that the Presiding Judge correctly found that Entergy's use of FERC Form 1 data as the source for net area load is the necessary method to reach an accurate result under the bandwidth formula. Staff contends that the approach suggested by the Louisiana Commission no longer conforms to the Commission-approved methodology and must be rejected.[160]

130. Entergy argues that it has consistently taken the position that the use of FERC Form 1 data is consistent with both the bandwidth formula and Exhibits ETR-26 and ETR-28. It contends that use of the FERC Form 1 data as the source for the Energy Ratio variable is consistent with the filed bandwidth definition of the Energy Ratio variable.

131. Entergy contends that it did not make a section 205 filing to change the source of the data for net area load prior to the 2006 bandwidth compliance filing, because Entergy did not believe it was necessary to amend the formula to use FERC Form 1 data instead of Intra-System Bill data. It contends that it was only out of an abundance of caution that it later made such a section 205 filing in Docket No. ER08-774-000 on April 1, 2008.[161]

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[159] Entergy Brief Opposing Exceptions at 9 (citing Louisiana Commission Brief on Exceptions at 14).

[160] Staff Brief on Exceptions at 9 (citing Initial Decision at P 514).

[161] Because the source of data for the Energy Ratio variable became an issue in this proceeding, Entergy made a section 205 filing in Docket No. ER08-774-000 to clearly define the source of the data for calculating the Energy Ratio variable. It "filed the proposed amendment to the definition of the Energy Ratio variable to eliminate any possibility of doubt as to the source of data to be used in calculating the rough production cost equalization bandwidth payments and receipts." A settlement was reached in that case among all parties, including the Louisiana Commission, and it was agreed that FERC Form 1 data would be the source of data for the Energy Ratio calculation. The uncontested settlement was approved in this case in *Entergy Services, Inc.*, 125 FERC

(continued…)

Entergy argues that contrary to the Louisiana Commission's position, the Commission did not find in Docket No. ER08-774-000 that a separate filing was required to use FERC Form 1 data to calculate the Energy Ratio variable. Entergy contends that the Commission did not discuss whether an amendment was required, but simply accepted the amendment for filing, subject to refund and hearing procedures.[162]

132. The Arkansas Commission argues that there is no support for the Louisiana Commission's argument that Entergy "snuck" a change into Service Schedule MSS-3. It contends that the Louisiana Commission's claim of a lack of notice is refuted by the fact that the Louisiana Commission had the April 2006 Compliance Filing and protested it. The Arkansas Commission argues that the Louisiana Commission's reliance on *City of Cleveland* is misplaced, because that case addressed a rate on file that was deemed a mistake, and accordingly bears no relation to Service Schedule MSS-3.[163]

5. Commission Determination

133. We affirm the Presiding Judge with regard to the standard to be applied with respect to the bandwidth formula.[164] The formula in Service Schedule MSS-3 that was previously accepted by the Commission[165] is now the lawful rate, and takes precedence in any conflict with the methodology found in Exhibits ETR-26 and ETR-28. That formula was filed by Entergy in compliance with Opinion No. 480 to implement the methodology in Exhibits ETR-26 and ETR-28.

134. However, as the Presiding Judge recognized, in instances where there are details omitted from the accepted Service Schedule MSS-3 formula (such as the source of data to

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¶ 61,331 (2008). The effective date of this settlement is June 1, 2008, and will be applied to the formula used to determine the 2007 calendar year bandwidth payments and receipts. The issue remains here because this case examines 2006 calendar year data.

[162] *Entergy Services, Inc.*, 124 FERC ¶ 61,163 (2008).

[163] Arkansas Commission Brief Opposing Exceptions at 11.

[164] Initial Decision, 124 FERC ¶ 63,026 at P 253-54.

[165] November Compliance Order, 117 FERC ¶ 61,203, April Compliance Order, 119 FERC ¶ 61,095 (2007).

use to calculate formula inputs), the underlying details included in the methodology used in Exhibits ETR-26 and ETR-28 control.[166]

135. The controlling methodology to determine the net area load is the formula Entergy used in its December 2006 Compliance Filing.[167] That filing specified the formula to be used to determine the Energy Ratio variable. [168] That formula was accepted by the Commission and is now the lawful rate.

136. The Louisiana Commission's argument that formula changes were somehow slipped into the April 2006 Compliance Filing without notice is unavailing. This formula was filed by Entergy to comply with Opinion No. 480, was properly noticed, and interested entities, including the Louisiana Commission, intervened and filed protests to various aspects of the filing.[169] The formula was further revised in the December 2006 Compliance Filing and the Louisiana Commission had another opportunity to comment on that filing. The Louisiana Commission's argument is nothing more than a collateral attack on the Commission's orders accepting the compliance filings and we reject it. The Louisiana Commission had every opportunity to raise its concerns when the April 2006 Compliance Filing and the December 2006 Compliance Filing were made. For whatever reason, it did not do so.[170]

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[166] Any modifications to the currently effective formula must be through a section 205 or 206 filing. November Compliance Order, 117 FERC ¶ 61,203 at P 69. This would include any amendment or deficiencies that are discovered in the underling methodology of Exhibits ETR-26 and ETR-28.

[167] While Entergy first proposed the Service Schedule MSS-3 bandwidth formula in the April 2006 Compliance Filing, the definition of the Energy Ratio was further revised in the December 2006 Compliance Filing to remove energy losses from the numerator.

[168] Section 30.13 of Service Schedule MSS-3 defines the Energy Ratio as "Each Company's Annual Energy (Net Area Requirements less Non-Requirements Sales for Resale) Divided by the Sum of all Companies Annual Energy." (Original Sheet No. 48J from Entergy's December 2006 Compliance Filing).

[169] *See* November Compliance Order, 119 FERC ¶ 61,095 (2007).

[170] The Louisiana Commission was readily able to raise a number of issues with respect to the formula in Service Schedule MSS-3 in the proceedings concerning the April 2006 Compliance Filing and the December 2006 Compliance Filing, and there is no evidence that it could not have raised these very same concerns at the time the compliance filings were made.

137. However, we disagree with the Presiding Judge that FERC Form 1 data must be used in this bandwidth filing, and that use of that data is the only way to achieve the correct result. Although Entergy provided the formula to be used in determining the Energy Ratio in the December 2006 Compliance Filing, it did not specify the source of data to be used in determining the Energy Ratio. Because Exhibits ETR-26 and ETR-28 sourced the data from the Intra-System Bill,[171] and Entergy did not seek to make a change from that in a section 205 filing, the formula must source the data from the Intra-System Bill. However, because Entergy's formula provides that non-requirement sales will be removed from the Net Area Requirements, Entergy must remove the non-requirement sales[172] when it calculates the Energy Ratio in order to be in compliance with the Commission-accepted formula in Entergy's System Agreement.

E. <u>Nuclear Depreciation Issue</u>

138. This issue concerns the appropriate nuclear depreciation and decommissioning expense to be used for the 2006 bandwidth calculation.

1. <u>Background</u>

139. There are five nuclear units within the Entergy System. Entergy Arkansas' nuclear generating units ANO-1 and ANO-2 were granted 20-year license extensions by the Nuclear Regulatory Commission (NRC), in 2001 and 2005, respectively, for a new life use expectancy of 60 years. These units are regulated by the Arkansas Commission, which has left the depreciation rate the same, reflecting a 40-year life, which is what Entergy used in calculating the bandwidth remedy. The Arkansas Commission had reflected the 20-year license extension in retail rates for decommissioning, but not depreciation purposes.

140. Of the remaining nuclear units, Waterford 3, River Bend and Grand Gulf, none have applied for nor received a license extension. Entergy Louisiana owns the Waterford 3 unit, which is regulated by the Louisiana Commission. Entergy Gulf States owned the River Bend unit, at all relevant times herein, which was regulated by the Louisiana Commission and PUCT.[173]

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[171] In developing Exhibits ETR-26 and ETR-28 in Docket No. EL01-88, Entergy sourced the data from the Intra-System Bill to calculate the Energy Ratio. No one disputes this fact. (Exh. AC-8 at 22-23).

[172] The non-requirements sales include the individual Operating Company off-system opportunity sales.

[173] Initial Decision, 124 FERC ¶ 63,026 at P 422 (citing Exh. No. S-18).

141. For the Waterford 3 and River Bend units, the Louisiana Commission used 60 years for both decommissioning and depreciation. The Louisiana Commission based this upon Entergy's plan to apply for an extension and the expectation that the NRC would grant a license extension.[174] The original license expiration date is December 2024 and August 2025, respectively.

142. Grand Gulf is a single nuclear unit, which is 90 percent owned by an Entergy affiliate, SERI. SERI sells its share of Grand Gulf to the Operating Companies under long-term power supply contracts.

2. Initial Decision

143. The Presiding Judge finds that Entergy's nuclear depreciation and decommissioning expenses are not just and reasonable, and are inconsistent with Commission precedent. The Presiding Judge finds that Entergy must recalculate the nuclear depreciation and decommissioning expenses for the applicable Operating Companies and readjust the bandwidth calculation to reflect the actual operational life as determined by the NRC granted license, including any granted extensions.[175]

144. The Presiding Judge finds that the Commission has the authority pursuant to the FPA to determine the depreciation and decommissioning expenses for the Operating Companies participating in the interstate System Agreement that are used to calculate and ultimately determine the payments and receipts pursuant to the bandwidth formula.

145. The Presiding Judge finds that depreciation should be recovered equitably over the life of an asset so that the utility can recover its capital investment over the life of the asset and the ratepayers who take service from the asset can contribute equitably to capital recovery, over the life of the asset.

146. The Presiding Judge finds that no suitable reason was provided by Entergy or the Arkansas Commission as to why the depreciation rate, which was originally based upon the NRC license, was not adjusted when the license was extended. Despite arguments made at hearing regarding the potential for manipulation of the bandwidth, the Presiding Judge found no evidence of any improper motive by the Arkansas Commission for the purpose of reducing bandwidth payments. However, the Presiding Judge does find that

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[174] *Id*. P 423.

[175] *Id*. P 492 (citing Exh. No. S-18).

consistency in setting nuclear depreciation expenses would prevent the creation of an incentive for manipulation of the bandwidth.[176]

147. The Presiding Judge also finds that no new depreciation study is required prior to making the nuclear depreciation recalculations, as it is not necessary and because the depreciation expenses had previously been determined based upon the duration of the NRC license.

3. Briefs on Exceptions

148. Entergy and the Arkansas Commission argue that the Initial Decision erred in ordering revisions to the depreciation expenses using the nuclear facility license life authorized by the NRC. They contend that the bandwidth formula requires the use of actual costs for depreciation and decommissioning expense, as recorded by the Operating Companies in their 2006 FERC Form 1 filings.[177] They contend that the Presiding Judge fails to understand that setting reconstructed depreciation and/or decommissioning expenses for purposes of determining the bandwidth formula rate that are different from the actual expenses collected pursuant to retail rates and recorded in the FERC Form 1 filings is inconsistent with the Commission's edict to compare and roughly equalize the actual production costs for the Operating Companies.[178]

149. Entergy argues that while it is true that the tariff language permits the Commission to rule on what depreciation expense should be reported in the FERC Form 1 filings, nothing in the tariff language allows the Commission to decide in this proceeding that something other than what was approved by each of the retail regulators and reported in the 2006 FERC Form 1 filings should be used for purposes of the bandwidth calculation. The Arkansas Commission argues that the Presiding Judge errs by rejecting those actual costs on Entergy Arkansas' books reported in its FERC Form 1 for 2006, and finding that they must be recalculated to substitute imputed data for actual 2006 data. It argues that the Presiding Judge's concern for future generations of wholesale ratepayers might be valid in the normal course of setting rates for the future; however, the bandwidth payment calculation is concerned only with reflecting actual production costs based on actual data and information for each calendar year.[179]

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[176] *Id*. P 466.

[177] Entergy Brief on Exceptions at 11.

[178] *Id*. at 11 (citing November Compliance Order at P 15).

[179] *Id*. at 17.

150. Entergy contends that Commission precedent cited in the Initial Decision regarding nuclear depreciation rates in typical wholesale contracts is not applicable to the bandwidth formula, which is different from a typical electric wholesale rate between a utility and a third party.[180] It argues that while the Commission has set depreciation rates in other cases, it has done so only for purposes of setting a wholesale rate. It contends that, by contrast, the bandwidth formula presents a unique circumstance to which the Commission has heretofore not applied its depreciation rate policies. It contends that the bandwidth formula is unique in that it is not setting a stand-alone wholesale rate, but rather is setting a wholesale rate for purposes of roughly equalizing the Operating Companies' actual production costs.

151. Entergy argues that any change to depreciation and/or decommissioning expenses must be prospective only. Entergy argues that the Initial Decision misses the point in concluding that the filed rate doctrine and the rule against retroactive ratemaking are not applicable here because Entergy's filing was accepted subject to refund. It contends that the use of reconstructed depreciation rates deviates from the bandwidth formula and, accordingly, would require an amendment to the bandwidth formula.

152. The Arkansas Commission contends that the Presiding Judge rejects evidence that it is the general practice of the Commission to defer to state regulators' determination of depreciation ranges for generation units that are subject to state commission jurisdiction as well as Commission jurisdiction. It contends that the Presiding Judge recognized that his ultimate recommendation for the Commission to re-set the depreciation expenses for ANO, Waterford 3 and River Bend units from what is reported by Entergy Arkansas, Entergy Louisiana and Entergy Gulf States in their FERC Form 1 filings will cause confusion.[181]

153. Entergy and the Arkansas Commission argue that a double benefit to Louisiana customers would occur if the Commission orders that the Louisiana Commission-jurisdictional depreciation rates be restated for purposed of the bandwidth formula. They contend that Louisiana customers' retail rates are lower due to the Louisiana Commission lowering depreciation rates using an assumed 60-year depreciable life, and second, Louisiana customers would receive higher bandwidth payments based on the use of the NRC-authorized 40-year depreciable life. They maintain that using reconstructed depreciation rates will produce an inequitable result where Arkansas customers would have paid the higher depreciation costs in their 2006 retail rates based on a 40-year

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[180] *Id*. at 15 (citing Initial Decision, 124 FERC ¶ 63,026 at P 437, 442-43, 447-48).

[181] *Id*. at 20.

depreciable life, and then would have to pay the increased bandwidth payments based on a 60-year depreciable life.[182]

154. The Arkansas Commission contends that the Presiding Judge finds that the reasons behind the Arkansas Commission's decision regarding nuclear depreciation rates for ANO-1 and ANO-2 are irrelevant,[183] while also finding that "the potential for manipulation of the bandwidth"[184] is a relevant factor for the Commission to consider. The Arkansas Commission argues that, in the proceeding giving rise to the bandwidth remedy, the Arkansas Commission pointed out that adoption of a bandwidth would give rise to numerous perverse incentives for retail regulators to make decisions that would improve their positions in bandwidth payments and receipts. It contends that the Commission rejected this position in Opinion No. 480-A. [185] It further contends that if the Commission is to consider the "potential" for ratemaking manipulations as a fatal flaw requiring Commission correction, then other portions of the formula are equally flawed.

155. The Arkansas Commission argues that the Presiding Judge erred in finding that no suitable reason was provided as to why the depreciation life was not extended when the NRC license was extended. It contends that the Arkansas Commission did not revise the depreciation rates because there was no evidence in the record that would support such a revision. It further contends that the impact of a depreciation rate update for Entergy Arkansas would likely result in an overall increase in retail rates on top of a requested $150 million increase and in addition to $252 million in bandwidth payments for 2006 by Entergy Arkansas.[186]

156. The Arkansas Commission argues that the Presiding Judge erred in assuming that the Arkansas Commission reset the decommissioning expense to zero for the ANO units on the basis of their NRC-issued license extension. It contends that the Initial Decision does not enhance the security of funds necessary to decommission the ANO units of Entergy Arkansas, because nothing that the Initial Decision recommends will affect the

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

[183] *Id*. (citing Initial Decision, 124 FERC ¶ 63,026 at P 465).

[184] *Id*. (citing Initial Decision, 124 FERC ¶ 63,026 at P 466).

[185] *Id*. at 22 (citing Opinion No. 480-A, 113 FERC ¶ 61,282 at P 46).

[186] *Id*. at 27.

amount of secure decommissioning funds that are set aside by Entergy Arkansas for retail and wholesale ratemaking purposes.[187]

157. The Arkansas Commission argues that the Presiding Judge's finding that the FERC Form 1 reported depreciation expense must be adjusted by the substitution of imputed data for actual data for 2006, in the absence of a depreciation study to support an adjustment, violates Commission regulations requiring that a change in depreciation expense for ratemaking purposes must be supported by a depreciation study.[188] The Arkansas Commission contends that there is no study in the record to support the recommendation's adjustment to the actual depreciation rate for the ANO, Waterford 3 and River Bend units. It notes that the Initial Decision's failure to order the preparation of a new study fails to recognize nuclear plant investments placed into service by Entergy Arkansas since the last study was conducted in 2001, including an additional $400 million in steam generator additions incurred by Entergy Arkansas for ANO 1 and ANO 2.[189]

158. Staff also argues that a full study should have been ordered. Staff explains that section 35.13(h)(10)(iv) of the Commission's regulations requires detailed studies to support a change in the depreciation rates even though Entergy's prior approved jurisdictional rate (i.e., the bandwidth formula) did not change. Staff argues that it would not be appropriate to adjust the underlying cost inputs for depreciation and decommissioning expense used in the 2006 bandwidth calculation to reflect the proper service lives for certain plants without also providing a comprehensive depreciation study of all of the Operating Company-owned nuclear plants.[190]

159. Entergy argues that if depreciation rates are changed, a full study should be ordered, as opposed to a simplified study that simply changes the nuclear facility license lives. It contends that a proper depreciation study would not make piecemeal adjustments to the depreciation expense, but rather would consider plant additions and retirements, as well as other factors. Entergy also argues that in order to properly implement the Presiding Judge's recommendation, numerous hypothetical calculations would have to make, creating a morass that would lead to yet another round of litigation.

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[187] *Id*. at 46.

[188] *Id*. at (citing 18 C.F.R. § 35.13 (h)(10)(iv)).

[189] *Id*. at 38.

[190] Staff Brief on Exceptions at 22.

160. However, Entergy argues that decommissioning expenses should not be revised and no new studies should be ordered. It contends that the level of decommissioning expense must be based on what will be needed to adequately decommission a nuclear plant and that because the record contains no new evidence that the existing amounts in Entergy Arkansas' decommissioning fund are inadequate, there are no grounds to perform a new decommissioning study.[191]

4. Briefs Opposing Exceptions

161. The Louisiana Commission argues that Entergy failed to record its nuclear depreciation costs in accordance with Commission policy, which makes its bandwidth calculation unjust and unreasonable. It contends that Commission policy requires that nuclear depreciation costs be based on service lives consistent with the license lives approved by the NRC. It argues that the license lives for the ANO 1 and 2 nuclear units, owned by Entergy Arkansas, were extended from 40 years to 60 years, but the shorter depreciation lives were reflected in the bandwidth calculation, providing large benefits to Entergy Arkansas.[192]

162. The Louisiana Commission contends that the Commission has ruled that the depreciation life for Grand Gulf should not be changed in anticipation of a license extension because the Commission has consistently based depreciation costs on the actual life of a nuclear facility license at the time of calculation.[193] It further contends that in Docket No. EL08-50-000, Entergy and the Arkansas Commission argued that the Commission policy to use the approved license life should control the depreciation expense for the Grand Gulf unit.

163. The Louisiana Commission disputes the assertion by Entergy and the Arkansas Commission that the Commission is bound to accept the costs recorded on FERC Form 1. It contends that the Commission set the case for hearing in part to examine the reasonableness of the underlying cost inputs.[194] It further contends that the Commission stated in a prior order that the justness and reasonableness of all cost inputs would be

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[191] *Id.* at 26.

[192] Louisiana Commission Brief Opposing Exceptions at 9.

[193] *Id*. at 9 (citing *Louisiana Pub. Serv. Comm'n v. System Energy Resources, Inc*., 124 FERC ¶ 61,003, at P 14 (2008)).

[194] *Id*. at 22 (citing *Entergy Services, Inc*., 120 FERC ¶ 61,904, at P 16 (2007)).

subject to examination in the annual bandwidth proceedings.[195] The Louisiana Commission argues that the position of Entergy and the Arkansas Commission is inconsistent with other issues, such as the Account 190 ADIT issue, where both Entergy and the Arkansas Commission defend Entergy's changes to the FERC Form 1 data.

164. The Louisiana Commission argues that, contrary to the arguments of the Arkansas Commission, the Commission has a policy not to defer to state regulators when setting depreciation rates for wholesale purposes. It contends that the Arkansas Commission cannot cite a single precedent for its position that it is the general practice of the Commission to defer to state regulators' determination of depreciation ranges. The Louisiana Commission argues that the exercise of Commission jurisdiction to establish depreciation rates is essential to prevent manipulation of the bandwidth and to ensure consistent cost treatment among jurisdictions.

165. The Louisiana Commission and Staff dispute contentions by the Arkansas Commission and Entergy that Service Schedule MSS-3 requires using the rates established by retail regulators. They contend that Service Schedule MSS-3 requires that the Commission establish the appropriate depreciation rates for use in the bandwidth formula. The Louisiana Commission argues that the Commission, not retail regulators, has exclusive jurisdiction under the FPA to regulate all aspects of the bandwidth calculation.[196] The Louisiana Commission disputes assertions made by the Arkansas Commission that Exhibits ETR-26 and ETR-28 do not require use of 2006 depreciation data. It argues that Exhibits ETR-26 and ETR-28 depreciation rates reflected the correct lives for every unit and every year of the study period, except for a fourteen month period for ANO 1.

166. The Louisiana Commission disputes assertions by Entergy and the Arkansas Commission that calculating depreciation rates should be prospective, so that the remedy would not apply for the 2007 bandwidth year. It contends that Entergy's bandwidth filing is prospective from the date it was made effective and, under the Commission's hearing order, adjustments to make that filing just and reasonable are also prospective from the effective date. The Louisiana Commission also contends that a full depreciation study is not necessary to correct the service lives for the nuclear units. It contends that the Commission does, however, have the discretion to require it as a compliance filing.

167. Staff argues that Service Schedule MSS-3 does not preclude the Commission from establishing depreciation and decommissioning rates to be used in the bandwidth

[195] *Id*. at 22 (citing *Arkansas Pub. Serv. Comm'n v. Entergy Services*, Inc., 119 FERC ¶ 61,223 (2007)).

[196] *Id*. at 33.

calculation. It maintains that Entergy mischaracterizes the Initial Decision in contending that it concludes that the Commission should disregard the actual expenses incurred and recovered by the Operating Companies in 2006 for nuclear depreciation and decommissioning, and instead set "reconstructed" depreciation and decommissioning costs to be used for purposes of the bandwidth formula.[197] Staff argues that rather than using reconstructed depreciation rates, the Presiding Judge correctly followed Commission precedent with respect to the license lives of nuclear plants that are "underlying inputs" to the depreciation expense used in the 2006 bandwidth calculation. Staff contends that adjusting an underlying input for the bandwidth calculation does not result in the setting of "reconstructed" depreciation rates. Staff argues that, rather, it adjusts incorrect amounts reflected in the Operating Companies' FERC Form 1s to reflect the correct "actual" license lives.[198]

168. Staff also disagrees with Entergy's contention that the Commission may not step in and set nuclear depreciation and decommissioning expenses for use in the bandwidth formula. Staff contends that the Commission could specify that the depreciation amounts recorded in FERC Form 1 reflect Commission ratemaking practices, regardless of what the state commissions may require.

169. The Arkansas Commission agrees with Staff that a comprehensive depreciation study is required before currently-applicable nuclear depreciation rates may be recalculated for ratemaking purposes. It contends that imputing depreciation rates into the bandwidth that are different from actual depreciation rates does not change what ratepayers paid for depreciation. It argues that section 30.12 of the bandwidth formula mandates that Entergy use the actual data that exist on the Operating Companies' books for 2006 to populate the bandwidth calculation formula. It argues that use of any imputed data that differs or deviates from 2006 actual data is not permitted by section 30.12. It argues that a change in depreciation expense for the bandwidth would trigger a corresponding change in the accumulated reserve for depreciation and accumulated delayed income taxes, to reflect the cumulative change in depreciation expense. [199]

5. <u>Commission Determination</u>

170. We reverse the Presiding Judge's finding that Entergy erroneously calculated nuclear depreciation and decommissioning expenses and that the appropriate nuclear deprecation expenses should be based on the actual duration of the license in effect,

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[197] Staff Brief Opposing Exceptions at 14.

[198] *Id*. at 15.

[199] Arkansas Commission Brief Opposing Exceptions at 30.

including granted extensions. We further find that Entergy correctly accounted for 2006 nuclear depreciation and decommissioning expense data for the nuclear units owned by the Operating Companies by using the actual data that exists on the Operating Companies' books for 2006. As discussed above, the bandwidth formula in Service Schedule MSS-3 that was accepted by the Commission in 2006 is the lawful rate that is effective for this proceeding, and takes precedence in any conflict with the methodology found in Exhibits ETR-26 and ETR-28.[200] However, in instances where there are details omitted from the Service Schedule MSS-3 formula, the underlying details included in the methodology used in Exhibits ETR-26 and ETR-28 control.[201] Any changes to Service Schedule MSS-3 (as accepted by the Commission in the November Compliance Order) must be made through a section 205 or section 206 filing. This includes amendments to correct any errors that may be discovered in the underlying methodology of Exhibits ETR-26 and ETR-28.

171. Pursuant to Service Schedule MSS-3, the bandwidth formula provides for the inclusion of nuclear depreciation and decommissioning expenses in the calculation of actual production costs for those Operating Companies that own nuclear units. Section 30.12 of the bandwidth calculation formula of Service Schedule MSS-3 establishes the requirement for determining each Operating Company's "Actual Production Cost" for bandwidth calculation purposes under the bandwidth remedy. Section 30.12 expressly provides that the bandwidth's determination of production costs "be based on the actual balances on the Company's books as of December 31 of the previous year, except for Fuel Inventory, Materials & Supplies and Prepayments which shall be based on the average of the beginning and ending account balances on the Company's books." Thus, for calculating the 2006 production payments to be made in 2007, section 30.12 of Service Schedule MSS-3 mandates that Entergy use *the actual data that exists on the Operating Companies' books for 2006*.

172. Accordingly, in its compliance filing, Entergy calculated the bandwidth formula by using FERC Form 1 data that contained the depreciation and decommissioning expenses recorded and recovered in rates in calendar year 2006. Section 30.12 contains two provisions that address depreciation source data and nuclear depreciation expense: nuclear depreciation and amortization expense[202] and nuclear accumulated provision for

[200] *Supra* P 133.

[201] *Id.* P 133.

[202] The term is defined as follows: "Nuclear Depreciation and Amortization Expense associated with NPP above, as recorded in Accounts 403 and 404 and Decommissioning Expense, as approved by Retail Regulators, unless the jurisdiction for

(continued…)

depreciation and amortization.[203] Both provisions require that Entergy use depreciation and decommissioning expenses recorded in specified accounts by the Operating Companies in FERC Form 1,[204] and Entergy properly did so in its compliance filing. Moreover, although the Presiding Judge is correct that the two provisions state that the Commission has the authority to change the depreciation and decommissioning expenses included in the bandwidth formula, we will not do so in a proceeding established to determine the actual production costs of the Operating Companies for 2006. Any changes to the bandwidth formula require a section 205 or 206 filing.[205]

173. There is no question that the Commission has the authority to determine depreciation and decommissioning expenses for purposes of setting a wholesale rate. However, that is not what is before us in this proceeding. Here, the purpose is to establish the payments and receipts necessary under the bandwidth formula set forth in Service Schedule MSS-3. It is, thus, not about what production costs would have been if different depreciation rates had been in effect in 2006, but simply about applying the formula using actual 2006 data. Indeed, while the Presiding Judge contends that adjusting the depreciation rates of ANO 1 and ANO 2 would be more equitable for

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determining the depreciation and/or decommissioning rate is vested in the FERC under otherwise applicable law." Service Schedule MSS-3, section 30.12.

[203] The term is defined as follows: "Nuclear Accumulated Provision for Depreciation and Amortization excluding [Asset Retirement Obligations] associated with NPP above, as recorded in FERC Account 108 and 111 (consistent with the accounting related to Statement of Financial Accounting Standards (SFAS) 143 approved by the retail regulator having jurisdiction over the Company, unless the FERC determines otherwise." Service Schedule MSS-3, section 30.12.

[204] "All Rate Base, Revenue and Expense items shall be based on the actual amounts on the Company's books for the twelve months ended December 31 of the previous year as reported in FERC Form 1 or such other supporting data as may be appropriate for each Company." Service Schedule MSS-3, section 30.12 n.1.

[205] We note that, if Entergy desires to change its depreciation rates reflected on its books and include such depreciation rate changes in its bandwidth calculation, it must make a section 205 filing. A comprehensive depreciation study, not just the reflection of a longer nuclear facility license, would be required before currently-applicable nuclear depreciation rates could be recalculated for ratemaking purposes.

ratepayers (and upon which we take no issue), that is a matter solely for a future section 205 or 206 proceeding, not this bandwidth remedy proceeding.[206]

F. Accounting For Tax Refunds Resulting From Net Operating Loss (NOL) Carrybacks

174. This issue addresses the proper accounting for a $242 million tax refund received in 2006 for NOL carrybacks[207] associated with Hurricanes Katrina and Rita, and whether those amounts should be included in the 2006 bandwidth calculation.

1. Background

175. As a result of Hurricanes Katrina and Rita, Entergy Louisiana, Entergy Gulf States, and Entergy Mississippi suffered major storm damage losses. Under the NOL carryback provision contained in the Gulf Opportunity Zone Act of 2005, the affected Operating Companies expected to receive in the second quarter of 2006 a $242 million refund of taxes paid prior tax years.[208] In each of their 2005 FERC Forms No. 1, the Operating Companies reported the tax refunds resulting from NOL carrybacks in Account 165 (Prepayments), an account used in the bandwidth calculation. However, the Operating Companies excluded the tax refunds from the bandwidth calculation. The Louisiana Commission alleged at hearing that the tax refunds should have been included in the bandwidth calculation.

2. Initial Decision

176. The Presiding Judge finds that Entergy properly calculated the balance of prepayments properly includable in Account 165, and that the amounts associated with a NOL carryback should not be included within the bandwidth formula. Additionally, the Presiding Judge finds that the tax refund would have been more appropriately recorded in

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[206] There is also no need to order that new studies be performed, as our determination here is that Entergy correctly accounted for its nuclear depreciation and decommissioning expenses.

[207] Hurricanes Katrina and Rita caused Entergy's Operating Companies business losses which exceeded their total income for 2005. Under the tax law, any unused portion of the loss, i.e., a net operating loss (NOL), can be used to offset income and reduce taxes in another year. NOLs used to offset income of prior years are known as NOL carrybacks and an income tax refund of taxes paid in prior years is received.

[208] The income tax refund was received by Entergy in April 2006.

Account 143 (Other Accounts Receivable), rather than Account 165.[209] He also finds that this difference has no impact on the bandwidth calculation because Account 143 is an account excluded from the bandwidth formula.

177. The Presiding Judge adopts the position of the Mississippi Commission's witness Larkin, who testified that Entergy exercised solid accounting practices to determine whether balances in the prepayment accounts represent the same type of prepayments previously incorporated in Exhibits ETR-26 and ETR-28, and properly assessed whether they were related to production functions. The Presiding Judge finds that Entergy properly excluded the tax recoveries because they were not related to production functions. He notes that Exhibits ETR-26 and ETR-28 were written before Hurricanes Katrina and Rita occurred, and did not envision or account for these massive events, and that these tax refunds are unrelated to the production function of Entergy.

3. Briefs on Exceptions

178. The Louisiana Commission argues that the Presiding Judge approved a methodology deviation to allow Entergy to remove from the bandwidth calculation amounts it recorded in Account 165, based on a unilateral determination by Entergy that these amounts are not production costs.[210] It contends that such a methodology change requires a section 205 filing. It also argues that there is insufficient support for the findings that these tax refunds related to NOL carrybacks are not related to production costs and that they are not the same type of prepayment previously incorporated in Exhibit ETR-26 and ETR-28 calculations.

179. The Louisiana Commission maintains that the NOL carrybacks were carried back against taxes for all functions, including generation, transmission and distribution, acting as an offset to production and non-production costs. It argues that these NOL carrybacks offset Entergy's total 2005 tax liability, which was calculated based upon all of Entergy's revenues, not merely on amounts related to non-production functions.[211]

180. The Louisiana Commission contends that the Presiding Judge's finding that Account 143 would have been the more appropriate account to use is not supported by substantial evidence. The Louisiana Commission contends that tax refunds related to NOL carrybacks do not belong in Account 143 because the definition of that account clearly applies to "open accounts" or "accounts receivable," and these tax refunds are not

[209] Initial Decision, 124 FERC ¶ 63,026 at P 555.

[210] Louisiana Commission Brief on Exceptions at 41.

[211] *Id*. at 43.

accounts receivable.[212] It further argues that this conclusion is not germane because Entergy booked the amount to Account 165 and included Account 165 in the bandwidth calculation.[213]

181. Conversely, Staff and New Orleans argue that the Presiding Judge correctly found that Account 143 would have been the more appropriate account to record the tax refunds related to NOL carrybacks. They also argue, however, that the Presiding Judge erred by failing to direct Entergy to remove the tax refunds from Account 165 and record them in Account 143. Staff contends that the Presiding Judge should have directed Entergy to correct its FERC Form 1 filings by using Account 143 and asserts that the Commission should direct Entergy to make these corrections.

182. Additionally, New Orleans argues that the Presiding Judge never addressed the threshold question of whether the tax refunds related to NOL carrybacks should have been recorded in Account 165.[214] New Orleans states that the Louisiana Commission's primary support for its argument is that Exhibits ETR-26 and ETR-28 included all Account 165 prepayments in their calculations and, thus, Entergy was not free to stray from this treatment – regardless of whether the tax refunds in question lack the requisite characteristics of a prepayment. New Orleans notes that prepayments are defined by the Commission's Uniform System of Accounts (USofA) and by common everyday usage are payments made in advance on obligations not yet fully owed. According to New Orleans, Entergy did not make any payments in advance on its tax obligations. Rather, the federal government owed the tax refunds to Entergy because of subsequent legislative action that changed the tax obligations after payments were due and made, not because Entergy remitted its underlying tax payments in advance.

183. New Orleans contends that Entergy's decision to report these refund obligations in Account 165 created a fiction that the Operating Companies had prepaid their earlier year tax obligations and were now being refunded those prepayments. New Orleans also argues that the Presiding Judge failed to consider evidence New Orleans proffered during the hearing that cited to Financial Accounting Standards Board Statement No. 109 (FASB Statement 109), Accounting for Income Taxes. New Orleans states that FASB Statement 109 describes the proper treatment for tax refunds related to NOL carrybacks,

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[212] *Id*. at 45.

[213] *Id*. at 45 (citing Initial Decision, 124 FERC ¶ 63,026 at P 546).

[214] New Orleans Brief on Exceptions at 11.

requires the tax refunds to be recorded as receivables, and was adopted by the Commission in 1993.[215]

4. Briefs Opposing Exceptions

184. The Louisiana Commission argues that Staff's contention that Entergy should be directed to change its accounting for tax refunds related to NOL carrybacks and to record the amounts in Account 143 instead of Account 165 should be rejected because it is contrary to the USofA and the bandwidth formula and is not supported by evidence. The Louisiana Commission argues that the description for Account 143 does not address a refund of previously paid taxes or reductions in future taxes that will be paid and, therefore, Account 143 is not a correct account for recording tax refunds related to NOL carrybacks. According to the Louisiana Commission, the weight of the evidence shows that the costs were correctly recorded in Account 165 and a portion of those costs, as properly allocated by the formula, should be included in production costs.

185. Contrary to the Louisiana Commission's arguments, Staff, Entergy, the Mississippi Commission, and the Arkansas Commission contend that the Presiding Judge correctly determined that the NOL carrybacks are not production costs and are properly excluded from the bandwidth calculation.

186. Staff responds to the Louisiana Commission's argument that tax refunds related to NOL carrybacks should not be recorded in Account 143 because the definition of the account applies to "open accounts" or "accounts receivable" and that the tax refunds are not accounts receivable. First, Staff notes that Entergy's independent auditor believed that the tax refunds related to NOL carrybacks were receivables and Entergy described them as receivables in a footnote in the SEC Form No. 10-K. Second, Staff argues that the Louisiana Commission's reading of Account 143 is unduly restrictive, noting that the lists of items appearing in accounts are intended to be representative, but not exhaustive. Thus, Staff argues that the evidence is undisputed that the tax refunds related to NOL carrybacks are akin to accounts receivable and should be booked as other accounts receivable in Account 143.[216]

187. Entergy contends that prepayments that are not related to production costs should be removed from the bandwidth calculation. It further contends that the amounts at issue here are tax refunds related to NOL carrybacks resulting solely from Hurricanes Katrina and Rita. Entergy argues that the partial refund of 2005 taxes does not constitute a 2006 production cost, and therefore the appropriate allocation to production costs is zero.

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

[216] Staff Brief Opposing Exceptions at 30.

188. The Mississippi Commission argues that the Louisiana Commission contends that Entergy must, by rote, follow the procedure of taking the beginning and ending balance of Account 165, calculate the average and include the result in the bandwidth calculation. The Mississippi Commission states that there is a flaw with such logic and it is absurd to assume that, because no adjustments to prepayments were made in the past, there does not exist an instance where certain new prepayments should not be part of the bandwidth calculation. It argues that the Louisiana Commission's theory refuses to allow Entergy the ability to exercise any judgment or assessment as to whether the balances in Account 165 represent the same types of prepayments that were incorporated in Exhibits ETR-26 and ETR-28 and whether they are related to the production function. It contends that there is no way to fairly functionalize these costs to the production function since over 95 percent of the costs are transmission and distribution related.[217]

189. The Arkansas Commission contends that the Presiding Judge was correct to find that the removal of non-production related tax refunds related to NOL carryback amounts from Account 165 for purposes of the bandwidth calculation is consistent with Exhibits ETR-26 and ETR-28.[218]

5. Commission Determination

190. We affirm the Presiding Judge's decision that the tax refunds related to NOL carrybacks are properly recorded in Account 143, rather than Account 165, and are properly excluded from the bandwidth calculation. The text of Account 165 provides that the account "shall include amounts representing prepayments of insurance, rents, taxes, interest and miscellaneous items." Prepayments such as those considered by Account 165 represent expenses for a service or a supply paid in advance that will be consumed or used in future accounting periods, such as insurance or rent.[219] As the prepayment is consumed or used, the prepayment is extinguished or amortized over the applicable accounting periods.[220] The refund of the income taxes for the NOL carrybacks represents a reduction of income tax expense, not a prepayment of an expense.[221] The tax refund

[217] Mississippi Commission Brief Opposing Exceptions at 11.

[218] Arkansas Commission Brief Opposing Exceptions at 20.

[219] Exh. S-6 at 8.

[220] For example, an insurance premium is paid upfront at the beginning of or prior to the start of the period of coverage; the payment of the insurance premium for the entire period is recorded as a prepayment in Account 165 and amortized to expense over a monthly basis over the coverage period.

[221] *Id*. at 9.

cannot be considered a prepayment of an expense that will be amortized to future accounting periods and therefore should not be classified and reported as a prepayment in the Operating Companies' FERC Form 1 filings.

191. Further, upon a review of the record and the USofA, we conclude that Account 143 is the proper place to record the expected income tax refunds resulting from a NOL carryback. We recognize that the text of Account 143 (Other Accounts Receivable) does not specify tax refunds related to NOL carrybacks. However, consistent with the USofA and as Staff argues, the items listed in the text to accounts are intended to be representative, not exhaustive.[222] We find that Account 143 includes amounts due to the entity that will be satisfied through a cash payment or other consideration, which is the situation here.[223] We also note that Entergy's independent auditor indicated that the expected amount of the refund was a receivable.[224] In addition, as cited by New Orleans, FASB Statement 109 provides that a receivable is recognized for the amount of taxes paid in prior years that is refundable by carryback of an operating loss or unused tax credits of the current year. Thus, the tax refunds related to NOL carrybacks at issue here represent an account receivable and should therefore be recorded in FERC Form 1 in Account 143.

192. The Louisiana Commission is wrong to assert that including NOL carrybacks in Account 143 is not appropriate. As explained by Staff witness Nicholas, the amounts associated with the expected tax refund are properly considered an account receivable and should have been included in Account 143.[225] In addition, New Orleans witness Mathai and Mississippi Commission witness Larkin testified that Account 143 is the correct account.[226]

193. The Louisiana Commission argues that tax refunds related to NOL carrybacks should be included in Account 165 and, accordingly, in the 2006 bandwidth calculation. However, our finding here that the tax refunds are appropriately recorded in Account 143 and the fact that Account 143 is not a component of the bandwidth formula moots the need to address whether the tax refunds should have been removed from the bandwidth calculation had they been appropriately recorded in Account 165.

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[222] 18 C.F.R. Part 101, General Instruction No. 6, Item Lists (2009).

[223] Exh. S-6 at 8.

[224] *Id*.

[225] *Id*. at 9.

[226] Exh. CNO-1 at 10; Exh. MC-1 at 4.

194. Lastly, we direct the Operating Companies to correct both their accounting ledgers and 2005 FERC Form No. 1 filings by recording the expected tax refunds resulting from NOL carrybacks in Account 143.

G. Accounting for Recovery of Hurricane Storm Costs

195. This issue addresses the proper accounting for Hurricanes Katrina and Rita-related damage costs, recoveries, related regulatory assets and regulatory liabilities. This issue also addresses how Hurricanes Katrina and Rita related damage costs and recoveries should be reflected in the 2006 Bandwidth calculation.

1. Background

196. Prior to Hurricanes Katrina and Rita, the Operating Companies began recovering accruals for property insurance in their retail rates.[227] The Operating Companies recorded the property insurance accruals by debiting Account 924 (Property Insurance) and crediting Account 228.1 (Accumulated Provision for Property Insurance). During 2005, the Operating Companies (except Entergy Arkansas) suffered extensive storm damage from Hurricanes Katrina and Rita, in excess of $1.5 billion, primarily to transmission and distribution systems.[228] The Operating Companies recorded its actual non-capital storm damage costs by debiting Account 228.1. These storm damage costs, recorded in Account 228.1, exceeded the accumulated balance of property insurance previously accrued and, by the end of 2005, the account carried a debit balance. The Operating Companies reported the debit balance in Account 228.1 as a regulatory asset in their 2005 FERC Form 1.

197. In 2006, the Louisiana Commission authorized Entergy Gulf States and Entergy Louisiana to begin recovering interim storm damage costs.[229] Entergy Gulf States and Entergy Louisiana accounted for interim storm damage recoveries by debiting Account 407.3 (Regulatory Debits) and crediting Account 254 (Regulatory Liabilities).[230]

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[227] As explained by the Presiding Judge, historically, utilities were unable to insure their transmission and distribution systems at reasonable rates since Hurricane Andrew in 1991. In response, regulatory entities began authorizing annual accruals collected in rates which were being set aside in Account 228.1 to cover unforeseen future storm damages. Initial Decision, 124 FERC ¶ 63,026 at P 562.

[228] *Id*. P 557.

[229] Exh. LC-41.

[230] Initial Decision, 124 FERC ¶ 63,026 at P 559.

198. The Louisiana Commission argued at hearing that damages that exceeded the storm reserve should have accrued to Account 228.1 and should be accounted for by amortizing excess losses to Account 924.[231] It argued that Entergy failed to properly record all storm damage expenses associated with Hurricanes Katrina and Rita in Account 924 and, therefore, failed to include these costs in the bandwidth formula.[232]

2. **Initial Decision**

199. The Presiding Judge finds that Entergy properly accounted for Hurricanes Katrina and Rita storm damage costs and interim recovery of storm costs, but that Entergy should exclude from Account 924 any portion previously included in the bandwidth calculation, which relates to Account 228.1, and which does not relate to a production function.[233]

200. The Presiding Judge finds that regulatory assets are generally recorded in a separate account and represent the storm damages incurred that exceed the provision in Account 228.1.[234] He states that the regulatory asset is amortized to a regulatory expense account as revenues are collected. He states that there is no expensing of those excess losses above the reserve balance to Account 924, since the recovery is not property insurance but that of a regulatory asset.[235] He finds that the only amount charged to Account 924 is the authorized accrual for property insurance, and that the property insurance expensed to Account 924 can only be charged by direction of the regulatory entity with authority over the utility.

201. The Presiding Judge finds that under the definition of regulatory assets and liabilities, Entergy properly accounted for interim storm recovery in Account 254 and Account 407.3. He explains that interim recoveries were the first part of a two-stage process and that interim recoveries were subject to true-up and refund when permanent rate recovery was to be determined in the second stage of the process.[236] The Presiding Judge finds that the totality of the evidence supports the finding that Entergy properly accounted for interim storm recovery and exercised proper accounting practices.

[231] *Id*. P 560.

[232] *Id*. P 561.

[233] *Id*. P 585.

[234] *Id*. P 564 (citing Exh. No. MC-1 at 20-23).

[235] *Id.* P 565.

[236] *Id*. P 578.

3. **Briefs on Exceptions**

202. The Louisiana Commission argues that the Presiding Judge's finding that Entergy properly accounted for interim storm damage ignores evidence that the methodology advocated by Entergy represents a deviation from the normal reserve accounting methodology that has been utilized for decades.[237] According to the Louisiana Commission, under normal reserve accounting, amounts allowed in rates for storm damage recoveries should be debited to Account 924 and credited to Account 228.1. Additionally, actual storm damage costs are to be debited to Account 228.1. In this manner, the Louisiana Commission asserts, Account 228.1 is self-balancing because it tracks recoveries through the Account 924 expense amounts against actual damage costs. It argues that, in 2006, Entergy departed from its historical accounting for storm damage recoveries and recorded $28 million in storm damage recoveries it received for Hurricanes Rita and Katrina as a regulatory liability in Account 254, instead of recording the recoveries in Account 924.[238] It notes that Entergy witness Bunting conceded that Entergy has never before recorded storm damage recoveries as a regulatory liability.[239]

203. The Louisiana Commission also argues that the storm damage interim recoveries were not regulatory liabilities.[240] It contends that there was no requirement or expectation that those amounts would ever have to be refunded to ratepayers, and that the 2006 recoveries do not meet the definition of a regulatory liability under the USofA.[241] Staff and New Orleans join the Louisiana Commission on this point, arguing that the interim recoveries should not have been recorded as a liability in Account 254.[242] New Orleans adds that the threshold question is whether the interim recoveries are a liability or not. New Orleans contends that a liability exists when there is a probability that a debt is owed for which there is an obligation to pay, and that Entergy Gulf States and Entergy Louisiana never owed anyone a refund of the interim recovery.

204. Staff and New Orleans also argue that the Presiding Judge erred in finding that Entergy's accounting for storm damage costs and interim recovery of those costs was

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[237] Louisiana Commission Brief on Exceptions at 47.

[238] *Id*. at 48.

[239] *Id*. at 48 (citing Tr. 820).

[240] *Id*. at 51-54.

[241] *Id*.

[242] Staff Initial Brief at 18.

appropriate, however, for reasons other than those cited by the Louisiana Commission. Staff and New Orleans contend that Entergy Gulf States and Entergy Louisiana improperly recorded in Account 228.1 the non-capital storm damage costs in excess of accumulated property insurance accruals.[243] They argue that if it had been probable that the excess non-capital storm damage costs would be recovered through future rates, the excess damage costs for Hurricanes Katrina and Rita should also have been recorded as a regulatory asset in Account 182.3 with offsetting credits to the operation and maintenance (O&M) expense accounts[244] charged or debited with the excess storm losses.[245] Staff contends that the Presiding Judge does not address Entergy's error regarding the excess balance in Account 228.1 and therefore fails to require the necessary correction.

205. Staff also argues that Entergy Louisiana and Entergy Gulf States should be required to correct their accounting and the appropriate pages of their 2006 FERC Form No. 1 filings for the storm losses and interim recoveries related to storm damage, to show interim recoveries as a reduction to Account 182.3 with amortization recorded in the appropriate O&M expense accounts and eliminate the use of Account 407.3. Staff argues that Entergy Louisiana and Entergy Gulf States should also submit corrected 2006 FERC Form No. 1 pages to the Commission and correct and submit revisions of the 2006 bandwidth calculation to incorporate these accounting and FERC Form 1 reporting corrections.

206. With regard to the Presiding Judge's finding that Entergy should re-assess Account 924 and exclude any portion previously included in the bandwidth calculation, which relates to accruals in Account 228.1, Staff, Entergy, and the Louisiana Commission disagree. Staff argues that, under section 30.12 of Service Schedule MSS-3, the actual production cost formula functionalizes Account 924 to production using a labor allocator, and not based on a direct assignment of costs.[246]

207. Entergy contends that adopting the proposal in the Initial Decision to change the way that costs in Account 924 are allocated to production would require an amendment to the bandwidth formula, which it contends cannot be implemented in this proceeding. Entergy contends that this proceeding addresses Entergy's implementation of the

[243] Staff Briefs on Exceptions at 13.

[244] O&M expense accounts include the Accounts 500-598 and 901-935 of 18 C.F.R. Part 101 (2009).

[245] *Id*. (citing Ex. S-12 at 10:20 – 13:14; Tr. 2196:13 – 2198:9).

[246] *Id*. at 9.

bandwidth formula that was in effect at the time Entergy made its filing for 2006 production costs. It contends that there is no assertion that Entergy did not accurately implement the bandwidth formula with respect to amounts accrued to Account 924. Entergy further contends that there are practical difficulties with reassessing Account 924 because each Operating Company includes accrual amounts authorized by retail regulators going back many years. Entergy contends that such retail regulatory authorization orders, however, do not break-down authorized accrual amounts into production and non-production categories. It argues that, as a result, any attempt to exclude Account 924 non-production accrual amounts from the bandwidth calculation would require assumptions and approximations that were not contemplated by the retail regulators. Entergy argues that this is why the bandwidth formula uses the functionalization process to allocate Account 924 costs to production.[247]

208. The Louisiana Commission argues that the finding that Entergy's accounting for storm damage recoveries was appropriate because a portion of those costs are attributable to transmission and distribution damages, and those costs should not be included in the production cost formula, is based on a misunderstanding of the bandwidth remedy. It contends that the bandwidth formula already recognizes that a portion of storm damage costs are attributable to the transmission and distribution functions, and that it is inappropriate to remove in totality an entire cost category from the bandwidth methodology when there is already an approved method in place to functionalize those costs to production.[248]

4. Briefs Opposing Exceptions

209. Entergy, Staff, the Mississippi Commission and the Arkansas Commission argue against the Louisiana Commission's position that interim recoveries were appropriately recorded in Accounts 924 and 228.1. Entergy disputes the Louisiana Commission's claim that its accounting was internally inconsistent because it did not reduce the debit balance in Account 228.1 with the interim recoveries. Entergy contends that its accounting was driven by the Louisiana Commission's interim storm recovery order, which was different from prior storm cost orders.[249] Entergy also argues that proper accounting must follow the regulatory authorization that was granted, and the Louisiana

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[247] *Id*. at 28.

[248] *Id*. at 55.

[249] Entergy Brief Opposing Exceptions at 20.

Commission did not authorize an adjustment to the Account 924 storm damage reserve.[250]

210. Staff and the Mississippi Commission contend that Account 924 is not appropriate for recording "after the fact" recovery of storm losses. Staff contends that Account 924 is used to record reserve provisions for future potential storm losses when authorized by a regulatory authority. Staff argues that the USofA requires "after the fact" recovery of storm losses in excess of reserve provisions in Account 228.1 to be accounted for as a regulatory asset and for the regulatory asset to be amortized to the appropriate O&M accounts as the losses are recovered in rates.[251] Finally, the Arkansas Commission argues that the Louisiana Commission is wrong to assert that Entergy's accounting for interim storm recoveries is a departure from historical practice. It contends that the Louisiana Commission offers nothing to refute the Presiding Judge's determination that Account 924 cannot be used to amortize losses deferred to Account 228.1.

211. As it relates to Staff's suggested use of O&M accounts to defer storm costs as a regulatory asset, Entergy argues that it is not appropriate. Entergy argues that the suggested use of O&M accounts prior to receiving the interim recovery would have no effect on the bandwidth calculation because Entergy would have to debit and credit to the same O&M accounts with the same amount and create a regulatory asset in Account 182.3. It contends that this would result in offsetting amounts and result in a net effect of zero.

212. The Louisiana Commission also disputes Staff's position that storm damages exceeding the balance in Account 228.1 should be charged to functional O&M Accounts. It contends that Staff's recommendation cannot be practically implemented. It further contends that the change advocated by Staff could not be made without a section 205 or 206 filing. The Louisiana Commission argues that Entergy has never before used the method of accounting recommended by Staff for storm damage recoveries.[252]

213. Entergy and the Arkansas Commission further argue that it is inappropriate to amortize the interim recoveries against the regulatory asset, as suggested by Staff and New Orleans, because the interim recoveries include estimated recoveries for future costs. They note that the interim recoveries were based on total estimated costs incurred through 2007 and beyond, not just costs prior to 2006, and as such did not in their entirety represent the amortization of a regulatory asset, and this can be the case only for

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[250] *Id*. at 21.

[251] Staff Brief Opposing Exceptions at 34-35.

[252] Louisiana Commission Brief Opposing Exceptions at 57.

costs that have been incurred. Accordingly, Entergy contends that Staff's request that the Commission require Entergy to submit revised FERC Form 1s should be rejected because there is no accounting error and because the accounting revision sought by Staff would have no effect on the bandwidth calculation.[253]

214. The Mississippi Commission argues that the Louisiana Commission places false reliance on the fact that the bandwidth formula functionalizes a portion of the Account 924 expense to the production function. It contends that these storm damage costs should not be included in the bandwidth calculation unless the storm damage costs can be fairly functionalized to the production function.

5. Commission Determination

215. We affirm the Presiding Judge's findings on the proper accounting for accruing storm damage reserves and the subsequent accounting for actual storm damage costs. We however disagree with the Presiding Judge's finding that Entergy properly accounted for interim storm damage recoveries and his assertion that Entergy should exclude from Account 924 any portion previously included in the bandwidth calculation, which relates to Account 228.1, and which does not relate to a production function.

216. First, the Presiding Judge is correct to find that it was appropriate for Entergy to record property insurance reserve funds collected in the rates by debiting Account 924 and crediting Account 228.1. In the event of a covered loss, Account 228.1 is debited for the amount of the loss not exceeding the amount of the balance.[254] Storm damage costs in excess of the balance in Account 228.1 are to be expensed as incurred or deferred as a regulatory asset if it is probable that the costs will be recovered in future rates.[255] However, the Presiding Judge failed to address the Operating Companies' accounting error regarding the excess storm damage cost in Account 228.1, as argued by Staff and New Orleans. On page 232 of 2006 Form 1, the Operating Companies reported $570 million of storm damage costs in excess of the balance in Account 228.1 as a regulatory asset titled "Accumulated Provision for Property Insurance."[256] The Operating Companies, however, erroneously recorded these storm damage costs to Account 228.1 in their accounting ledgers. As explained by Staff, this is in error because Louisiana

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[253] *Id*. at 23.

[254] 18 C.F.R. Part 101, Account 228.1.

[255] 18 C.F.R. Part 101, Account 228.1 and Account 182.3.

[256] *See* Exhibit S-15. *See also* page 232 of the 2006 FERC Form 1 of Entergy Gulf States, LLC, Entergy Louisiana, and Entergy New Orleans.

Commission Order No. U-29203 and prior retail rate decisions allowing rate recovery of other excess storm losses provided a probability of future rate recovery for excess non-capital storm damage costs.[257] Accordingly, storm damage costs in excess of the insurance reserves recorded in Account 228.1 should have been recorded on the Louisiana Operating Companies' books as a regulatory asset in Account 182.3, instead of Account 228.1, because they were probable of future rate recovery.

217. We also agree with Staff and New Orleans that the interim recoveries should have been used to amortize the regulatory asset, contrary to the Presiding Judge's determination[258] and Entergy's arguments that those recoveries were appropriately recorded as a regulatory liability in Account 254. The Presiding Judge and Entergy misinterpret the requirements of regulatory assets and liabilities. As discussed above, the excess storm damage costs should have been recorded as a regulatory asset because they were amounts that would have been included in the net income determination in the current period, i.e., expensed as incurred, but for it being probable to be included in a different period for purposes of developing rates. The storm damage costs were then included in rates under the Louisiana Commission's Order No. U-29203 which approved the interim recoveries to allow the Louisiana Operating Companies to begin recovering the costs associated with Hurricanes Katrina and Rita on an expedited basis. The USofA states that amounts recorded as a regulatory asset are to be charged to expense concurrently with the recovery of the amount in rates.[259] Therefore, the hurricane damage costs that were appropriate to be deferred as a regulatory asset should have been amortized concurrent with the interim recoveries.

218. We also agree with Staff's conclusion that the regulatory asset should have been established and amortized using the O&M expense accounts that would have been used had the costs been expensed when incurred. The Operating Companies are required under the Commission's regulations to keep their books of account, and all other books, records, and memoranda which support the entries in such books of account so as to be able to furnish readily full information as to any item included in any account.[260] Entergy argues incorrectly that the interim recoveries were based on total estimated costs incurred through 2007 and beyond and as such did not in their entirety represent the amortization of a regulatory asset.[261] Also, Entergy and the Arkansas Commission claim that it was

[257] Staff October 23, 2008 Brief on Exceptions at 12-13.

[258] Initial Decision, 124 FERC ¶ 63,026 at P 575-85.

[259] 18 C.F.R. Part 101, Account 182.3 (2009).

[260] 18 C.F.R. Part 101, General Instruction No. 2 (2009).

[261] Entergy Brief Opposing Exceptions at 24.

not possible to ascertain what portion of the interim recovery was applicable to the various functions and therefore the use of a specific O&M account was not practicable. However, we find it appropriate for Entergy Gulf States and Entergy Louisiana to amortize the regulatory asset by applying the interim recoveries against the deferred expenses in the order in which the expenditures were incurred. We also find it reasonable for Entergy Gulf States and Entergy Louisiana to determine the type of storm damage costs that were deferred and the order in which such expenditures were incurred.[262] Thus, it is possible to amortize the deferred costs, once recovered, to the appropriate expense that would have been charged had the expenditure not been deferred.

219. Furthermore, we find that the interim recoveries do not represent a liability and do not meet the definition of a regulatory liability. In 2006, the interim recoveries provided for the recovery of storm damage costs of $28 million, an amount much less than the $496 million low end range of estimated restoration costs at the time of the filing.[263] As such, we find the interim recoveries in no way represented an amount that would become payable to customers or a liability to the Louisiana Operating Companies; rather it represents the beginning recovery of the total storm restoration costs.

220. We also find that the Louisiana Commission argues mistakenly that Account 228.1 is essentially self-balancing because it tracks recoveries through the Account 924 expense amounts against actual storm damage costs. According to the Louisiana Commission, Account 228.1 has a liability balance if it is over-recovered and an asset balance if it is under-recovered, and the interim recoveries should have been recorded by debiting Account 924 and crediting Account 228.1.[264] However, as previously discussed, the USofA explicitly prohibits maintaining a debit balance in Account 228.1. Also, as explained by Staff, Account 924 is used to record a reserve provision for future potential storm losses when authorized for recovery by a regulatory authority. The USofA requires the recovery of past storm losses in excess of reserve provisions to be accounted for as a

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[262] 18 C.F.R. Part 101, General Instruction No. 2 states that each utility shall keep its books of account, and all other books, records, and memoranda which support the entries in such books of account so as to be able to furnish readily full information as to any item included in any account. Each entry shall be supported by such detailed information as will permit ready identification, analysis, and verification of all facts relevant thereto.

[263] Louisiana Commission Order No. U-29203.

[264] Louisiana Commission Brief Opposing Exceptions at 47.

regulatory asset and for the regulatory asset to be amortized to the appropriate O&M accounts as the losses are recovered in rates.[265]

221. Accordingly, we direct Entergy to correct its accounting for the interim storm damage costs and the interim recoveries, as discussed above, and submit a compliance filing correcting the 2006 bandwidth calculation.

222. Lastly, we disagree with the Presiding Judge that Entergy must exclude from Account 924 any portion previously included in the bandwidth calculation, which relates to Account 228.1, and which does not relate to a production function. Adopting the Presiding Judge's proposal would require an amendment to the bandwidth formula, which cannot be implemented in this proceeding. In fact, as a result of a section 205 filing in Docket No. ER07-985-000, the bandwidth formula was revised to exclude the storm damage accruals booked to Account 924 from the bandwidth formula entirely. That amendment was applicable for the first time to the 2008 bandwidth filing, which is currently under review in Docket No. ER08-1056-000.[266]

H. Accumulated Deferred Income Taxes Used in Bandwidth Calculations

223. This issue addresses whether it was appropriate to exclude certain accumulated deferred income tax (ADIT) amounts, other than SFAS 109 ADIT amounts, from the bandwidth calculation.

1. Background

224. The bandwidth formula, as contained in Service Schedule MSS-3, defines ADIT in full:

> Net Accumulated Deferred Income Taxes (ADIT) recorded in FERC Accounts 190, 281 and 282 (as reduced by amounts not generally and properly includable for FERC cost of service purposes, *including but not limited to,* SFAS 109 ADIT amounts and ADIT amounts arising from retail ratemaking decisions) plus Accumulated

[265] Staff Brief Opposing Exceptions at 34-35.

[266] *Entergy Servs., Inc.*, 122 FERC ¶ 61,059 at P 20 (2008) (holding that Account 924 bandwidth formula amendment "will apply for the first time to the computation of bandwidth payments" filed in May/June 2008).

> Deferred Income Tax Credit – 3% portion only recorded in FERC Account 255.[[267]]

Following the tariff language of Service Schedule MSS-3, Entergy Arkansas, Entergy Gulf States, and Entergy Louisiana excluded from the bandwidth calculation certain ADIT amounts recorded in Account 190 (Accumulated Deferred Income Taxes), not includable for FERC cost of service purposes. The Louisiana Commission argued that these ADIT amounts were improperly excluded from the bandwidth calculations and removal of these ADIT amounts does not comply with the methodology used in Exhibits ETR-26 and ETR-28. The Presiding Judge was asked to determine the amounts of ADIT that should have been included for the 2006 bandwidth calculation. During the hearing, Entergy provided a data response explaining each ADIT amount exclusion.[268]

2. Initial Decision

225. The Presiding Judge finds that Entergy properly excluded ADIT amounts recorded in Account 190 from the bandwidth calculation. The Presiding Judge cites testimony by Entergy's witnesses Louiselle and Bunting, and Mississippi Commission's witness Larkin as being probative on the issue. The Presiding Judge determined that the testimony provided by Entergy witnesses Louiselle and Bunting clarified the exclusion of ADIT amounts complies with the requirements of section 30.12 of Service Schedule MSS-3. The Presiding Judge determined that since, according to section 30.12, the ADIT amounts are to be excluded from the bandwidth calculation, this is the controlling methodology for this issue.[269] The Presiding Judge notes Entergy's criticism that Louisiana Commission witness Kollen failed to provide any specific ADIT amount he believes was improperly calculated.[270] The Presiding Judge found Entergy's arguments to be persuasive.

226. The Presiding Judge also cites to the testimony of Mississippi Commission's witness Larkin that the express language of the tariff found in Service Schedule MSS-3 extends the exclusions to other balances of a similar nature, and that Entergy's exclusions here followed proper accounting practices and were in compliance with Commission

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[267] Exh. ESI-4 at 48D (emphasis added).

[268] Exhibits MC-4 and MC-5.

[269] Initial Decision, 124 FERC ¶ 63,026 at P 590 (citing Exh. Nos. ESI-50 at 41-47; ESI-6 at 56-59; ESI-44 at 18-19).

[270] *Id*. P 589 (citing Entergy Initial Brief at 9).

directives. He notes that Mr. Larkin points out that some of the excluded ADIT balances did not even exist when Exhibits ETR-26 and ETR-28 were drafted.[271]

227. Further, the Presiding Judge cites Mr. Larkin's testimony that he reviewed the major balances that make up the debits that the Louisiana Commission seeks to include for production cost purposes in the bandwidth calculation. The Presiding Judge cites Mr. Larkin's testimony that none of the balances that he reviewed are production-related costs, and were properly excluded by Entergy.[272] In addition, the Presiding Judge specifically notes that Entergy criticized the Louisiana Commission's primary witness, Mr. Kollen, for not describing any specific ADIT amount he believes was improperly calculated.[273]

3. Briefs on Exceptions

228. The Louisiana Commission argues that Entergy's removal of ADIT balances from Account 190 conflicts with the methodology in Exhibits ETR-26 and ETR-28. It contends that those exhibits require the inclusion of all ADIT balances in the bandwidth calculation except for FAS 109 ADIT. It argues that Exhibit ETR-28 explicitly provides for this one exclusion only.[274] The Louisiana Commission contends that the removal of numerous other ADIT balances in this case, based on interpretations of imprecise language in the Service Schedule MSS-3 tariff, violates the Commission's orders. It contends that, according to Entergy, the company authorized itself to make selective reduction to the ADIT balances in Account 190 by including language in the Service Schedule MSS-3 that ADIT be "reduced by amounts not generally and properly includable for FERC cost of service purposes," including amounts arising from retail ratemaking decisions.[275] The Louisiana Commission argues that the Service Schedule

[271] *Id*. P 594.

[272] *Id*. P 595 (citing Exh. No. MC-1 at 14-18).

[273] The Mississippi Commission estimated that if the Commission were to accept the proposed Louisiana Commission adjustment, it would eliminate approximately 26 percent of the total bandwidth payment of $40.6 million, calculated for Mississippi for 2006. The Mississippi Commission also estimated that an amount of $10.4 million would be readjusted, largely to the benefit of the State of Louisiana. Initial Decision, 124 FERC ¶ 63,026 at 588 (citing Exh. No. MC-1).

[274] Louisiana Commission Brief on Exceptions at 32 (citing Exh. ESI-10 at 6).

[275] *Id*. at 33 (citing Exh. ESI-50 at 45).

MSS-3 tariff language provides no certainty as to what amounts can be excluded from the FERC Form 1 values.

229. The Louisiana Commission further contends that Entergy did not provide authority demonstrating which ADIT balances are "generally and properly includable for FERC ratemaking." The Louisiana Commission specifically takes issue with Entergy's justification for excluding ADIT amounts related to NOL (net operating loss) carryforwards. It also takes issue with the exclusion of ADIT related to SFAS 158, stating that a section 205 filing should be required for this item since the Exhibit ETR-28 methodology specifically provides for only one exclusion.

230. The Louisiana Commission further argues that the Presiding Judge provided little explanation of his decision concerning the ADIT balances, and contends that the Presiding Judge failed to provide any rationale for deviating from the methodology in Exhibits ETR-26 and ETR-28. It contends that Entergy should not have the authority to pick and choose subaccounts to exclude from the formula and that, therefore, all exclusions except for SFAS 109 amounts should be disallowed.

4. Briefs Opposing Exceptions

231. Entergy and the Mississippi Commission argue that the Presiding Judge's finding that the ADIT amounts were properly excluded from the bandwidth calculation by Entergy is supported by a wealth of record evidence. They dispute the Louisiana Commission's exceptions, arguing that Entergy's ADIT exclusions are fully consistent with the bandwidth formula ADIT definition. Entergy and the Mississippi Commission contend that the bandwidth formula in Service Schedule MSS-3 is controlling in this proceeding and requires Entergy to remove amounts not generally and properly includable for cost-of-service purposes. They contend that the Louisiana Commission's arguments that Entergy may exclude only those ADIT amounts that were excluded in Exhibits ETR-26 and ETR-28 must therefore be rejected as a matter of law.[276] Additionally, Entergy and the Mississippi Commission assert that all of the ADIT exclusions made by Entergy fall within the tariff language and that Entergy provided data responses explaining in detail the ADIT exclusions.[277]

232. Entergy and the Mississippi Commission argue that they have provided evidence to show why the major amounts of ADIT were properly excluded and that the Louisiana Commission has provided no evidence as to why the excluded ADIT amounts are inconsistent with the bandwidth formula. They also argue that the ADIT amounts related

[276] Entergy Brief Opposing Exceptions at 26.

[277] *Id.* (citing Exh. MC-4 and MC-5).

to SFAS 158 are not used in determining either wholesale or retail rates. Accordingly, Entergy and the Mississippi Commission claim that the Commission should affirm the Presiding Judge's decision that these amounts were properly excluded from the bandwidth calculation.

5. **Commission Determination**

233. We affirm, in part, the Presiding Judge's finding that Entergy properly excluded the ADIT amounts that are not includable for Commission cost of service purposes from the bandwidth calculation. The tariff language of section 30.12 instructs Entergy to remove "amounts not generally and properly includable for FERC cost of service purposes."[278] Accordingly, we find that Entergy's exclusion of ADIT amounts is fully consistent with the bandwidth formula. The Louisiana Commission does not dispute this finding except to argue that only ADIT amounts related to SFAS 109 may be excluded from the bandwidth calculations, consistent with Exhibits ETR-26 and ETR-28. However, as we have previously explained, Service Schedule MSS-3 is the controlling methodology under these circumstances, and Exhibits ETR-26 and ETR-28 are only applicable where Service Schedule MSS-3 does not address an issue, which is not the case here.[279] Amounts other than SFAS 109 ADIT may therefore be excluded from the calculation if it is an amount that is not properly includable for Commission cost of service purposes. Moreover, the Louisiana Commission has not attempted to rebut the detailed testimony provided by Entergy in this proceeding with any specific determinations regarding the exclusion of ADIT amounts.

234. We reverse the Presiding Judge and agree with the Louisiana Commission that ADIT amounts related to NOL carry forwards should be included in the bandwidth calculation. The NOL carryforwards are related to storm damage losses from Hurricanes Katrina and Rita and, as determined above,[280] these storm damage costs are properly recorded in Account 182.3 and must be amortized to the appropriate functional O&M expense accounts as the costs are recovered in rates. To the extent storm damage costs are amortized to expense accounts included in the bandwidth calculation (production storm damage expense), such costs are included in a Commission costofservice rate. Therefore, consistent with Service Schedule MSS-3, ADIT for NOL carryforwards associated with production storm damage expenses may not be excluded from the bandwidth calculation.

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[278] *Id*.

[279] *Supra* P 133-34.

[280] *Supra* P 215-22.

235. We affirm the Presiding Judge's finding that $246 million of ADIT related to SFAS 158 should not be included in the bandwidth calculation.[281] The above-quoted definition of ADIT in Service Schedule MSS-3 provides for the exclusion of ADIT amounts not properly includable for FERC cost of service. SFAS 158 requires an employer to recognize the overfunded or underfunded status of a single employer defined benefit postretirement plan as an asset or liability in its statement of financial position and to recognize changes in that funded status in the year in which the changes occur through comprehensive income of a business entity. For tax purposes, taxable net income is not affected by changes in the funded status and, as a result, SFAS 158 ADIT arises. However, the FERC cost of service does not include the funded status of a single employer defined benefit postretirement plan, the related changes in the funded status, or the associated ADIT as a component of rate recovery.[282] Although the Louisiana Commission argues that this exclusion should not be allowed because it is not allowed by Exhibits ETR-26 and ETR-28, as deferred income taxes not related to cost recovery, we find that this exclusion fits within definition of ADIT in Service Schedule MSS-3, and we accordingly affirm the Presiding Judge.

236. Moreover, we reject the Louisiana Commission's assertion that a section 205 filing is required for the exclusion of SFAS 158 amounts. Specifically, this finding follows the as-filed definition of ADIT in Service Schedule MSS-3 that provides for the exclusion of ADIT amounts not properly includable for a Commission cost of service. Although the Louisiana Commission argues that this exclusion should not be allowed because it is not explicitly allowed by Exhibits ETR-26 and ETR-28, as ADIT amounts not related to Commission cost recovery, we find that this exclusion fits within the Commission-approved definition of ADIT in Service Schedule MSS-3, and we accordingly affirm the Presiding Judge.

I. River Bend A&G

237. This issue addresses what method should be used to properly remove the administrative and general expenses (A&G) and other taxes associated with the 30 percent share of the capacity of the River Bend nuclear facility prior to functionalization of such costs in the 2006 bandwidth calculation.

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[281] SFAS 158, Employer's Accounting for Pension and Other Post-retirement Plans, is not a component of rate recovery. Instead, SFAS 158 is a recognition on the Balance Sheet of the funded status of the pension plan measured as the difference between plan assets at fair value and the benefit obligation.

[282] Exh. MC-5 at 5.

1. Background

238. The River Bend Nuclear Unit was owned by Entergy Gulf States and operated by Entergy Operations, Inc. during 2006. At hearing, the parties agreed that A&G expenses and other taxes associated with the 30 percent of the River Bend which is unregulated (River Bend 30 percent) were inadvertently twice excluded from Entergy Gulf States' production costs.[283] The River Bend 30 percent is not included in Entergy Gulf States' regulated rate base and, thus, should not be included in the determination of production costs under the bandwidth formula.[284] At hearing, parties disagreed over how to fix the error.

2. Initial Decision

239. The Presiding Judge finds, and Entergy agrees, that Entergy erroneously calculated the production costs for Entergy Gulf States pertaining to the River Bend 30 percent, specifically relating to the A&G expenses. The Presiding Judge also finds that he prefers Entergy's proposed remedy to correct the problem to that offered by the Louisiana Commission. He explains that Entergy's proposed remedy of subtracting the A&G expense associated with the River Bend 30 percent from the total Entergy Gulf States A&G and then functionalizing the remaining A&G expense is consistent with the bandwidth remedy and based on sound accounting practice.[285] He notes that under the erroneous calculation the total A&G was first functionalized using labor ratios, and then the River Bend 30 percent A&G was subtracted. Since the labor ratio did not include the River Bend 30 labor, this is what caused the double reduction. He notes that Entergy's recalculation will result in an increase in Entergy Arkansas' total payments under the bandwidth formula of $252,534.[286] The Presiding Judge also finds that he prefers Entergy's proposed remedy to that offered by the Louisiana Commission, which would multiply all A&G expenses times an unadjusted labor ratio and then reduce the net by the amount of the specifically-identified River Bend A&G.

3. Briefs on Exceptions

240. The Louisiana Commission contends that while the Presiding Judge correctly ruled that Entergy's double count in removing A&G expenses for the River Bend 30

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[283] Exh. ESI-50 at 54.

[284] Entergy Initial Brief at 26.

[285] Initial Decision, 124 FERC ¶ 63,026 at P 612.

[286] *Id*. (citing Exh. No. ESI-50 at 55).

percent from the costs functionalized to production was an error, the Presiding Judge erred in approving Entergy's substitute proposal, which it alleges also produces a double count. It contends that subtracting the A&G expenses once is enough. It further contends that adjusting the labor ratio for the River Bend 30 percent removes expenses a second time, taking out expenses that are not related to the River Bend 30 percent.[287]

241. The Louisiana Commission contends that the Presiding Judge offered no explanation for his approval of the double removal of the A&G expenses. It argues that instead he adopted his adjustment in conclusory language that implied the adjustment depended on some "accounting practice."[288] The Louisiana Commission argues that its approach follows the Exhibits ETR-26 and ETR-28 methodology, multiplying all A&G times an unadjusted labor ratio and then reducing the net by the amount of specifically-identified A&G.

4. Briefs Opposing Exceptions

242. Entergy argues that the Louisiana Commission's approach would multiply the total A&G expense using a new, previously unused labor ratio, which does not remove the River Bend 30 percent labor. Entergy contends that the Louisiana Commission would then subtract the River Bend 30 percent A&G expenses. Entergy argues that this proposed method is inconsistent with the bandwidth methodology because it requires the use of two labor ratios for Entergy Gulf States – one labor ratio for allocating A&G costs, including the costs associated with the River Bend 30 percent, and a second labor ratio for other cost allocations in the formula. Entergy contends that its method for correcting the error is consistent with the as-filed bandwidth formula, which uses one labor ratio for A&G functionalization. It argues that, by contrast, the Louisiana Commission's proposed method would require an amendment to the Service Schedule MSS-3 bandwidth formula to add an additional labor ratio solely to be used to functionalize the A&G costs associated with River Bend 30 percent.[289]

243. The Arkansas Commission argues that the Commission should affirm the Presiding Judge's finding that Entergy erroneously twice excluded from Entergy Gulf States' nuclear production expenses the A&G expenses associated with the unregulated

[287] Louisiana Commission Brief on Exceptions at 39.

[288] *Id.* at 40.

[289] Entergy Brief Opposing Exceptions at 31.

30 percent portion of the River Bend unit. It contends that the Commission should correct the error by using Entergy's proposed correction method.[290]

5. Commission Determination

244. We affirm the decision of the Presiding Judge that Entergy erroneously included the A&G costs associated with the unregulated portion of the River Bend nuclear unit, and uphold the Presiding Judge's finding that Entergy has appropriately corrected the error.[291] Entergy's proposed remedy is straightforward: first, A&G costs for the River Bend 30 percent are subtracted from the total A&G costs for Entergy Gulf States (the company that owns River Bend). Then, Entergy Gulf States' residual A&G amount, i.e., the A&G that does not include River Bend 30 percent is functionalized to production using a labor ratio that does not include the River Bend 30 percent labor.[292] Entergy made a similar adjustment to the variable other taxes, which had a similar error.[293] This re-calculation solves the problem in a manner consistent with how the A&G functionalization process works under the as-filed bandwidth calculation, with a resulting proposed increase in Entergy Arkansas' total payments under the bandwidth formula of $252,534.00.[294]

245. By contrast, the Louisiana Commission's proposal is inconsistent with the bandwidth methodology because it requires the use of two labor ratios for Entergy Gulf States – one labor ratio for allocating A&G costs, including the costs associated with the River Bend 30 percent, and a second labor ratio for other cost allocations in the formula. This is inconsistent with the as-filed bandwidth formula which uses one labor ratio for cost allocation.[295] Use of this method would require an amendment to the Service Schedule MSS-3 bandwidth formula to add an additional labor ratio solely to be used to functionalize the A&G costs associated with the River Bend 30 percent.[296] As discussed above, any modifications to the currently effective formula must be made through a

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[290] Arkansas Commission Brief Opposing Exceptions at 35.

[291] Entergy Initial Brief at 26.

[292] *Id*.

[293] Exh. Nos. ESI-50 at 55.

[294] *Id*.

[295] *Id*.

[296] Entergy Brief Opposing Exceptions at 31.

section 205 or section 206 filing.[297] This would include any amendments to correct errors or deficiencies that are discovered in the underlying methodology of Exhibits ETR-26 and ETR-28. Accordingly, we direct Entergy to file a compliance filing with the Commission within 60 days of date of this order to adopt the exclusion.

J. Accounting for the Spindletop Gas Storage Facility

246. This issue concerns whether Entergy properly accounted for the annual amortization expense of the Spindletop regulatory asset, and whether Entergy should have amortized the Spindletop regulatory asset to Account 501 (Fuel), rather than Account 407.3 (Regulatory Debits).

1. Background

247. Prior to its merger with Entergy, Gulf States Utilities, Inc., the predecessor to Entergy Gulf States, entered into a contract with a third party to finance and build the Spindletop Gas Storage Facility (Spindletop). Entergy Gulf States purchased natural gas transportation and storage services from Spindletop pursuant to a Gas Transportation Agreement and an Optional Purchase and Amortization Agreement.[298] These agreements required the pay off of Spindletop's capital costs through an identifiable component of the bundled gas transportation rate over an accelerated time period compared to the useful life of the facility.[299] Once the capital costs were fully paid, this component of the transportation rate was eliminated and Entergy Gulf States could exercise its right to purchase Spindletop for one dollar. Entergy Gulf States exercised its option to purchase Spindletop for one dollar in 2004.[300]

248. Entergy Gulf States expensed its bundled gas transportation costs to Account 501.[301] In 1996, the Louisiana Commission ordered Entergy Gulf States to refund previously recovered capital costs and record those amounts as a regulatory asset.[302]

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[297] *Supra* n.167.

[298] Exh. S-17 at 3.

[299] Exh. LC-26 at 31.

[300] Exh. ESI-50 at 23. Entergy Gulf States had expenses associated with the acquisition of Spindletop, i.e., $1,127,778. These expenses consisted of closing costs of $211,209 and legal and internal costs of $916, 568. Staff Brief on Exceptions at 31.

[301] Exh. LC-26 at 31.

[302] Exh. S-17 at 3.

Similarly, future capital costs paid through the bundled gas transportation rate were recorded as a regulatory asset. A total of $63.7 million was deferred as a regulatory asset and amortized over 40 years to Account 407.3.

249. At hearing, two issues were raised regarding Spindletop: (1) how should Entergy Gulf States' costs of acquiring Spindletop and the Spindletop regulatory asset have been accounted for; and (2) how should Entergy Gulf States' costs of acquiring Spindletop and the Spindletop regulatory asset-related costs have been reflected in the 2006 bandwidth calculation.

2. Initial Decision

250. The Presiding Judge finds, and all parties agree, that the issue of how Entergy Gulf States' costs of acquiring Spindletop and the Spindletop regulatory asset-related costs have been reflected in the 2006 bandwidth calculation is rendered moot by the Commission's order in Docket No. EL08-51-000, setting this issue for separate settlement and hearing proceedings, and for further decision as to whether or not the investment in the Spindletop regulatory asset should be included in Entergy Gulf States' production costs.[303] The Presiding Judge stated that he will decide only the Spindletop accounting issues.[304] Therefore, the issues remaining for decision concern the accounting treatment of the annual amortization expense of the Spindletop regulatory asset and the accounting treatment of the costs of acquiring Spindletop.

251. The Presiding Judge was silent and never ruled on the accounting treatment of the costs of acquiring Spindletop. With regard to the accounting treatment of the annual amortization expense of the Spindletop regulatory asset, the Presiding Judge finds that Entergy properly accounted for the annual amortization expense.[305] The Presiding Judge finds that Entergy satisfactorily rebutted assertions made at hearing that the amortization of regulatory assets in Account 407.3 should be recorded in Account 501. Specifically, the Presiding Judge cites testimony by Entergy witness Louiselle, who argued that it is inappropriate to reflect costs that were incurred in a prior period in Account 501.[306]

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[303] Initial Decision, 124 FERC ¶ 63,026 at P 628.

[304] *Id.*

[305] The Spindletop regulatory asset costs are included in Account 182.3 (Regulatory Assets) and the amortization expense is included in Account 407.3. Exh. LC-26 at 30.

[306] Initial Decision, 124 FERC ¶ 63,026 at P 633 (citing Exh. No. ESI-50 at 25-26).

252. The Presiding Judge also finds that the testimony of Entergy witness Bunting is probative on the issue. Mr. Bunting testified that the Louisiana Commission had ordered Entergy Gulf States to refund to the Louisiana rate-payers certain costs associated with the Spindletop facility that the Louisiana Commission had determined were capital related and previously recovered through the fuel adjustment clause from Louisiana rate-payers. Mr. Bunting testified that the refunds were determined by the Louisiana Commission to be a regulatory asset and amortized over forty years. He argued that Account 501 does not allow for inclusion of regulatory assets. He also argued that because the Spindletop regulatory asset was established through the use of Account 407.3, this was the most appropriate account to use to amortize the asset.[307] Taking Mr. Bunting's testimony into account, the Presiding Judge finds that Entergy utilized reasonable judgment in accordance with sound accounting practice.

3. Briefs on Exceptions

253. The Louisiana Commission argues that the Presiding Judge incorrectly approved Entergy's accounting for the annual amortization expense of Spindletop, which removed the costs from the bandwidth calculation. It contends that the Presiding Judge did not explain why Mr. Bunting's view that Account 501 does not allow for the inclusion of regulatory assets should be accepted.[308] The Louisiana Commission argues that Entergy's own accounting for the initial expensing of the Spindletop capital costs shows that Account 501 is the appropriate account. It contends that the Presiding Judge's ruling should be overruled and the expense amount included in the bandwidth calculation for 2006.

254. Staff argues that the Presiding Judge erred in finding that there was no error in how Entergy Gulf States accounted for the regulatory asset associated with Spindletop. Staff contends that the Presiding Judge erred in relying on Mr. Louiselle's opinion that it is not appropriate to reflect in Account 501 costs that were incurred in a prior period because it would result in confusion. It contends that Mr. Louiselle is not an accountant and that his opinion is inconsistent with the USofA. Staff argues that the Commission's accounting regulations do not allow Entergy Gulf States to use Account 407.4 (Regulatory Credits) instead of Account 501. Staff argues that the Presiding Judge misstated Mr. Bunting's testimony as stating that "since the Spindletop regulatory asset was established through the use of Account 407.3, this was the most appropriate account to use to amortize the asset."[309] Staff contends that Mr. Bunting actually testified that

[307] *Id*. P 635 (citing Exhibit No. ESI-44 at 17).

[308] Louisiana Commission Brief on Exceptions at 57.

[309] Staff Brief on Exceptions at 27 (citing Exh. ESI-44 at 17).

"the Spindletop regulatory asset was established through the use of Account 407.4," not 407.3.[310]

255. Staff maintains that there is no mention in the initial decision of the Presiding Judge's determination regarding Entergy Gulf States' accounting for the acquisition of Spindletop. Staff states that it presumes that the Presiding Judge found that Entergy Gulf States correctly accounted for it based on the Presiding Judge's general summation that he finds no error in how Entergy accounted for the Spindletop costs.[311] Staff argues that the Presiding Judge erred in not finding that Entergy Gulf States failed to properly account for the Spindletop acquisition costs and that Entergy's accounting violated the requirements of the USofA. Staff contends that Entergy Gulf States should have recorded the costs of acquiring Spindletop in Account 114, (Electric Plant Acquisition Adjustments), rather than Account 101, (Electric Plant in Service). Staff explains that using the Commission's accounting rules, any plant costs incurred in excess of the depreciated original cost of the facility must be recorded in Account 114, as clearly specified in the text of Account 114.[312]

256. Staff states that the only exception would be if the facility had not previously been devoted to public service, which Staff argues is not the case with Spindletop. Staff contends that in *Montana Power,*[313] a similar case, the court affirmed that a facility need not have been a Commission-jurisdictional facility to qualify as being previously devoted to public service. Staff contends that in the instant case there is no question that the facility was dedicated to public service before it was purchased by Entergy Gulf States.

4. Briefs Opposing Exceptions

257. Entergy notes that its witness Mr. Bunting explained that Staff's recommended use of Account 501 is not consistent with the USofA, because the definition of Account 501 does not provide for the inclusion of capital-related costs, such as those included in the Spindletop regulatory asset. It contends that Staff provides no witness testimony to support its claim that Account 501 includes capital-related costs. It further contends that the instruction in the USofA for Account 501 limits the inclusion of capital costs to costs of facilities owned by the utilities. Entergy argues that during the period when the costs

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[310] *Id.*

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

[312] *Id*. at 30 (citing 18 C.F.R. Part 101 (2008)).

[313] *Id.* (*citing Montana Power Co. v. FERC*, 599 F.2d 295 (9th Cir. 1979) (*Montana Power*)).

booked to the regulatory asset were incurred, Spindletop was not owned by Entergy Gulf States, but by an independent third party.[314]

258. Entergy disputes Staff's assertion that Spindletop acquisition costs should have been recorded in Account 114. Entergy contends that Staff argues, without citing any record support, that the Commission's original cost rules apply to the Spindletop acquisition because the facility previously was devoted to public service.[315]

259. The Arkansas Commission argues that Staff and the Louisiana Commission err in suggesting that Entergy Gulf States' accounting treatment for Spindletop under Accounts 407.3 and 407.4 did not comport with the requirements of the USofA and Commission accounting practice. It contends that in arguing for new and different accounting treatment of the Spindletop asset amortization, Staff is proposing a change to the Exhibits ETR-26 and ETR-28 methodology in the absence of a section 206 complaint filing, directly contrary to the Commission's direction.

260. The Arkansas Commission argues that Staff's recommended accounting treatment fails to consider the economic substance underlying the Louisiana Commission's creation of the Spindletop regulatory asset. It contends that the regulatory asset was created by the Louisiana Commission to recognize Entergy Gulf States' economic interest in the facilities. It contends that it is inappropriate to charge the amortization of the economic interest in Spindletop to fuel expense. The Arkansas Commission further argues that Staff fails to consider the impact of its proposal on wholesale and retail rates, and contends that to the extent Staff's recommendation is accepted, adjustments to wholesale and retail base rates and the fuel adjustment clause inputs may be required.

5. **<u>Commission Determination</u>**

261. We disagree with the Presiding Judge's finding that Entergy properly accounted for the annual amortization expense of the Spindletop regulatory asset.[316] As discussed

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[314] Entergy Brief Opposing Exceptions at 33.

[315] *Id* at 34.

[316] We will grant the Louisiana Commission's unopposed motion to lodge a data response prepared by Entergy in Docket No. EL08-51-000. The response stated that "ESI has found journal entries that reflect a capital lease offset by an obligation under capital lease recorded on the books of Entergy Gulf States pursuant to Statement of Financial Standards No. 13. The payments made to Sabine Gas Transportation, including installation costs, were expensed via Account 501." The lodging of this response is appropriate because it directly relates to an issue litigated in this docket and the

(continued…)

below, we find that Entergy should have amortized the Spindletop regulatory asset to Account 501, rather than Account 407.3. We emphasize, however, that this finding is for accounting purposes only and is not dispositive of whether the amounts of the regulatory asset amortized to expense during 2006 are production expenses properly included in the 2006 bandwidth calculation. As the Presiding Judge ruled, the issue of whether or not the investment in the Spindletop regulatory asset should be included in Entergy Gulf States' production costs, and reflected in the 2006 bandwidth calculation will be decided in Docket No. EL08-51-000.[317]

262. We also disagree with the Presiding Judge's finding that Entergy Gulf States correctly established and amortized the Spindletop regulatory asset using Account Nos. 407.4 and 407.3, respectively. The text to Account 182.3 provides that:

> When specific identification of the particular source of a regulatory asset cannot be made, such as in plant phase-ins, rate moderation plans, or rate levelization plans, account 407.4, regulatory credits, shall be credited. The amounts recorded in this account are generally to be charged, concurrently with the recovery of the amounts in rates, to the same account that would have been charged if included in income when incurred, except all regulatory assets established through the use of account 407.4 shall be charged to account 407.3, regulatory debits, concurrent with the recovery in rates.

263. According to the text of Account 182.3, Account 407.4 can only be credited when the particular source of a regulatory asset cannot be specifically identified. The source of the Spindletop regulatory asset was known and identifiable at the time of its creation as the amount previously expensed to Account 501 and future amounts that would otherwise be expensed to Account 501 as incurred. Therefore, the Commission's accounting regulations do not allow Entergy Gulf States to use Account 407.4 to establish the regulatory asset – Account 501 is appropriate. Additionally, it is appropriate for Entergy Gulf States to amortize the regulatory asset to Account 501 concurrently with the recovery of the amounts in rates. Only the limited circumstances as set forth in the text to Account 182.3 allow the use of Accounts 407.3 or 407.4. Those limited circumstances are not present here. Therefore, the costs of the Spindletop regulatory asset must be amortized to Account 501.

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information was not made available to the Louisiana Commission until after the briefs on and opposing exceptions were filed in this docket.

[317] Initial Decision, 124 FERC ¶ 63,026 at P 624-25.

264. The Presiding Judge did not make a specific finding as to the accounting treatment for the acquisition costs of Spindletop. As pointed out by Staff, it is unclear whether the Presiding Judge accepted Entergy's accounting treatment for the acquisition of Spindletop. As discussed below, we find that Entergy should have booked Spindletop's acquisition costs to Account 114, and not to Account 101. Again, this finding is for accounting purposes only and is not dispositive of whether the acquisition costs of Spindletop are production expenses properly included in the 2006 bandwidth calculation.

265. Regarding the acquisition costs of the Spindletop facility, the record shows that Entergy Gulf States purchased the facility for $1 and incurred closing costs of $211,209 and legal and internal costs of $916,568. Entergy Gulf States recorded the total of these purchase costs of $1,127,778 in Account 101.[318] The Commission's regulations require plant assets acquired as an operating unit or system be recorded at the depreciated original cost if they have previously been devoted to utility service (original cost rules).[319] We find that the Spindletop facility is an operating unit or system, and the costs of operations and construction have been included as a component of retail rates. Consequently, the Spindletop facility was previously devoted to public service, and the accounting for the transaction should follow the Commission's original cost rules. We also find that Entergy Gulf States has previously expensed the cost of the Spindletop facility and it should be recorded as a fully depreciated utility asset. The Spindletop facility should be recorded in Account 101 at its original cost and the related accumulated depreciation should be recorded in Account 108 (Accumulated Provision for Depreciation of Electric Utility Plant). The difference between the purchase price of $1,127,778 and the depreciated original cost of the facility must be recorded in Account 114, Electric Plant Acquisition Adjustments. Finally, the amount recorded in Account 114 must be amortized to Account 425 (Miscellaneous Amortization), over a period not longer than the remaining life of the assets to which such amounts relate.

<u>The Commission orders</u>:

(A) The Initial Decision is hereby affirmed in part and reversed in part, as discussed in the body of this order.

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[318] Tr. at 893-96.

[319] Electric Plant Instruction No. 2, Electric Plant to be Recorded at Cost, 18 C.F.R. Part 101 (2009).

(B) Within 60 days of date of this order, Entergy is hereby directed to file a compliance filing, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.