

137 FERC ¶ 61,101  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Louisiana Public Service Commission

Docket No. EL08-51-003

v.

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

ORDER DENYING REHEARING

(Issued May 7, 2012)

1. The Arkansas Public Service Commission (Arkansas Commission) filed a request for rehearing of the Commission's order<sup>1</sup> finding that costs associated with the Spindletop Regulatory Asset (Spindletop Regulatory Asset or Regulatory Asset) should be properly included in the Commission's bandwidth remedy calculation for Entergy Corporation's Operating Companies,<sup>2</sup> as provided for in Opinion Nos. 480 and 480-A.<sup>3</sup>

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<sup>1</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 509, 132 FERC ¶ 61,253 (2010).

<sup>2</sup> Entergy Corporation (Entergy Corp.) is a public utility holding company that provides electric service through its Operating Companies (Operating Companies). At the relevant times pursuant to the first bandwidth calculation, the five Operating Companies involved in the proceeding were: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States, Inc. (Entergy Gulf States), Entergy Louisiana LLC (Entergy

(continued...)

For the reasons discussed below, we deny the Arkansas Commission's request for rehearing.

## **I. Background**

2. Pursuant to Opinion Nos. 480 and 480-A, which required rough production cost equalization among the Operating Companies, the Commission requires Entergy in an annual filing to determine if the production costs of the Operating Companies are within +/- 11 percent of the System average production costs and, if they are not, to calculate payments among the Operating Companies that will restore production costs to within the 11 percent bandwidth. After the first such annual bandwidth remedy filing was made in Docket No. ER07-956-000, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint in the instant docket seeking, *inter alia*, inclusion in the bandwidth remedy calculations of the costs of the Spindletop Regulatory Asset, a regulatory asset created by the Louisiana Commission to defer recovery of capital costs associated with Entergy's Spindletop Gas Storage Facility (Spindletop Facility). On July 2, 2008, the Commission issued an order setting the complaint for hearing and settlement judge procedures.<sup>4</sup>

3. On June 3, 2009, the Presiding Administrative Law Judge (Presiding Judge) issued an Initial Decision<sup>5</sup> finding that the Spindletop Regulatory Asset costs had been properly excluded from the bandwidth remedy calculation by Entergy. In Opinion No. 509, the Commission reversed that finding and required Entergy to include Spindletop Regulatory Asset costs in the bandwidth remedy calculation. The Commission explained that its reversal was in large part determined by the Commission's finding in Opinion No. 505,

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Louisiana), Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (Entergy New Orleans). In 2007, Entergy Texas, Inc. (Entergy Texas) and Entergy Gulf States Louisiana (Entergy Gulf States Louisiana) were created from Entergy Gulf States and subsequently served load in their respective states.

<sup>3</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

<sup>4</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010 (2008) (July 2, 2008 Order).

<sup>5</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 127 FERC ¶ 63,021 (2009).

which pertained to Entergy's first annual bandwidth filing as required by Opinion No. 480 and issued subsequent to the Initial Decision in this proceeding, that Entergy should have accounted for the annual amortization expense of the Spindletop Regulatory Asset in Account 501, an account included in the bandwidth calculation as set forth in Service Schedule MSS-3.<sup>6</sup> The Commission held that the fact that the annual amortization of the Spindletop Regulatory Asset is booked to Account 501 is critical because Account 501 is expressly included in the bandwidth formula. The Commission accordingly found that Spindletop Regulatory Asset costs are production costs that are properly reflected in the bandwidth calculation.

4. The Commission further held in Opinion No. 509 that costs associated with the Spindletop Regulatory Asset are actual deferred costs that may be included in the bandwidth calculation, overruling the Presiding Judge's finding that the costs are an accounting construct that does not represent actual costs. The Commission also disagreed with the Presiding Judge's finding that Spindletop Regulatory Asset costs are out-of-period costs, finding instead that they represent actual incurred costs that have been deferred over the useful life of the facility. The Commission also rejected arguments that including the Spindletop Regulatory Asset costs in the bandwidth calculation would be unfair to customers in Texas, requiring them to subsidize Louisiana Commission-jurisdictional customers.<sup>7</sup>

## **II. Request for Rehearing**

5. The Arkansas Commission requests rehearing of the Commission's determination that the Spindletop Regulatory Asset costs are production costs.<sup>8</sup> It contends that a regulatory asset is an accounting construct and is in no way a production facility. It argues that this is because the Spindletop Regulatory Asset does not provide any production service whatsoever, and represents nothing more than a right to recover deferred costs. The Arkansas Commission reasons that because the Spindletop Regulatory Asset is not a production facility, by definition it cannot be included in the bandwidth formula production cost calculation. It also argues that regulatory assets were

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<sup>6</sup> Opinion No. 505, 130 FERC ¶ 61,023 at P 261-263 (2010); *see* Entergy System Agreement at 53-54, Third Revised Rate Schedule FERC No. 94, Original Sheet No. 53 (November 22, 2008), First Revised Sheet No. 54 (May 31, 2009) (the calculation of Variable Production Expense includes Fuel Expense defined as "Production O&M Fuel Expense recorded in FERC Accounts 501, 518, and 547").

<sup>7</sup> Opinion No. 509, 132 FERC ¶ 61,253 at P 40.

<sup>8</sup> Arkansas Commission Request for Rehearing at 4.

not included in the bandwidth formula in Service Schedule MSS-3, nor were they included in Exhibits ETR-26 and ETR-28 in Docket No. EL01-88-000, which provided the basis for the bandwidth formula adopted by the Commission.

6. The Arkansas Commission also argues that the Commission erred in finding that the Spindletop Regulatory Asset costs are not out-of-period costs that should be excluded from the formula.<sup>9</sup> It disagrees with the Commission's statement that the Louisiana Commission-created deferred recovery method appropriately matches the capital cost recovery with the period during which the Spindletop Regulatory Asset provides a service. It likewise rejects the Commission's analogy of Spindletop Regulatory Asset costs with the current collection of capital costs for Entergy Gulf States' River Bend nuclear plant. The Arkansas Commission contends that this rationale ignores the fact that, unlike the accounting treatment of such plant costs, the Spindletop capital costs were incurred, expensed and paid by Entergy Gulf States and Entergy Gulf States' predecessor, Gulf States Utilities, over the period 1992-2004, well prior to the first bandwidth year (2006).

7. The Arkansas Commission also contends that the Commission's determination in Opinion No. 509 to allow the Louisiana Commission to spread Spindletop costs over the 40-year life of the facility is inconsistent with both the Public Utility Commission of Texas' (Texas Commission) and this Commission's treatment of Texas retail and wholesale Spindletop Regulatory Asset costs, and that the Commission did not explain how two inconsistent methods can both be just and reasonable.<sup>10</sup> Specifically, the Arkansas Commission notes that the Texas Commission approved Entergy's recovery of the Spindletop credit payment costs from Texas retail customers on an as-billed basis over the 12-year period ending in 2004, and that Gulf States Utilities/Entergy Gulf States' Commission-jurisdictional wholesale customers fully paid their share of the Spindletop credit payment costs through their wholesale fuel adjustment clause on an as-billed basis over the same 12-year period. It contends that the Commission has offered no reason why the Texas Commission and Commission-jurisdictional treatment is not appropriate for Louisiana retail costs. It notes that the Initial Decision found that Gulf States Utilities/Entergy Gulf States' recovery of the credit payments over the twelve-year life of the contract on an as-billed basis through the fuel adjustment clause was required absent waiver of the Commission's regulations.<sup>11</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* (citing Initial Decision, 127 FERC ¶ 63,021 at P 123).

8. The Arkansas Commission further contends that the Commission does not explain or justify treating the Spindletop Regulatory Asset costs differently from other Operating Companies' prior-period costs for purposes of the bandwidth formula.<sup>12</sup> It argues that the Commission has created discriminatory treatment of the capital payment costs, whereby the other Operating Companies that have paid their share of the capital payments on an as-incurred basis as required do not receive any bandwidth recognition for those payments, while the Louisiana Commission profits from its decision to defer the Louisiana payments through the creation of a regulatory asset.

9. The Arkansas Commission argues that by directing Entergy to include the Spindletop Regulatory Asset costs in the bandwidth formula calculation, the Commission is forcing Texas retail and wholesale customers to unreasonably subsidize Louisiana retail ratepayers for the Spindletop credit payments.<sup>13</sup> Specifically, it contends that the inclusion of the Spindletop Regulatory Asset costs will cause an increase in the bandwidth production costs for Entergy Gulf States Louisiana, but not for Entergy Texas. The Arkansas Commission reasons that, therefore, Texas customers will not receive any bandwidth production cost benefit from the inclusion of the Spindletop Regulatory Asset costs in the bandwidth calculation, although they have already paid their fair share for construction of the facility. In other words, the Arkansas Commission contends that Opinion No. 509 would require Texas customers to effectively pay, at least in part, for the same facilities twice.

10. The Arkansas Commission further contends that the Commission erred in failing to apply the requisite burden of proof.<sup>14</sup> It argues that the Louisiana Commission, as the complainant in this proceeding, has the dual burden of establishing first that exclusion of the Spindletop Regulatory Asset costs from the bandwidth formula is unjust and unreasonable, and second that its alternate rate proposal is just and reasonable. By recognizing the discriminatory impact of the Louisiana Commission's alternate proposal yet approving it because the intervenors did not offer a cure, the Arkansas Commission contends that the Commission has not only unreasonably shifted the burden of proof to intervenors and Trial Staff, but has also unreasonably adopted one discriminatory effect (forcing Texas retail and certain wholesale customers to subsidize Louisiana ratepayers) in order to remedy what it perceives to be a different unreasonable or discriminatory effect (exclusion of the Spindletop Regulatory Asset costs from the Entergy Gulf States

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<sup>12</sup> *Id.* at 6-7.

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 9.

Louisiana bandwidth cost calculation). It argues that the Commission's decision that it should grant the Louisiana Commission's complaint and adopt an admittedly discriminatory remedy violates the burden of proof under FPA section 206 and the Commission's own statutory obligation to ensure rates that are just, reasonable and not unduly discriminatory or preferential and, therefore, is in error.<sup>15</sup>

11. The Arkansas Commission argues that Opinion No. 509 fails to address how, if the Spindletop Regulatory Asset costs are to be included in the bandwidth formula, Service Schedule MSS-3 should be modified.<sup>16</sup> The Arkansas Commission contends that, earlier in the proceeding, parties disagreed with components of three proposed modifications by the Louisiana Commission to reflect inclusion of the Spindletop Regulatory Asset costs in the bandwidth formula. The Arkansas Commission states that, given these disagreements, the Commission should have provided guidance to Entergy on this issue.

12. Similarly, the Arkansas Commission contends that Opinion No. 509 fails to address issues of possible double recovery of costs for the Spindletop Regulatory Asset. It contends that Louisiana Commission staff has filed a motion in a proceeding before the Louisiana Commission seeking to have Spindletop costs included in the bandwidth formula through an entirely different means, Account 555.<sup>17</sup> The Arkansas Commission urges that if the Commission determines that inclusion of Spindletop Regulatory Asset costs is appropriate, then the Commission should ensure that no double recovery occurs.<sup>18</sup> Alternatively, it contends that the Commission should at least clarify that parties will be permitted to respond to Entergy's compliance filing to raise concerns with bandwidth formula modifications proposed by Entergy.

### **III. Commission Determination**

13. We will deny the Arkansas Commission's request for rehearing. The Arkansas Commission has presented no arguments that persuade us to reconsider our finding in Opinion No. 509 that the Spindletop Regulatory Assets costs should be reflected in the bandwidth formula. First, as the Commission previously determined in Opinion No. 505, the annual amortization of the Spindletop Regulatory Asset is appropriately recorded in

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<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.* at 12. *See also* Louisiana Commission Docket No. U-21453.

<sup>18</sup> *Id.* at 12-13.

Account 501, an account included in the bandwidth formula as set forth in Service Schedule MSS-3.<sup>19</sup> As the Commission noted in Opinion No. 509, accounting plays a role when the bandwidth remedy is involved.<sup>20</sup> The bandwidth formula is the filed rate, and it is stated in terms of actual costs recorded in Commission accounts. In general, if an amount is properly recorded in an account that is included in the bandwidth formula, that cost is reflected as recorded. Even the Arkansas Commission recognized in this proceeding that “[t]he inclusion or exclusion of costs in the production cost bandwidth formula is based on how the costs are accounted.”<sup>21</sup> Moreover, as we found in Opinion No. 509, it is unjust and unreasonable not to reflect the Spindletop Regulatory Asset in production costs in the bandwidth formula, because not doing so would create a mismatch between capital cost recovery and the period during which the asset provides service.<sup>22</sup> Accordingly, the bandwidth formula should be modified to fully reflect the costs of the Spindletop Regulatory Asset.

14. With respect to the Arkansas Commission’s contention that the bandwidth calculation does not otherwise include regulatory assets, the Commission has never addressed whether such regulatory assets must be excluded from the bandwidth formula. In any event, because we have found here that the Spindletop Regulatory Asset costs are production costs that are properly included in Service Schedule MSS-3, it is irrelevant how the Commission might treat other regulatory assets. In addition, we disagree with the Arkansas Commission’s contention that the Spindletop Regulatory Asset is merely an accounting construct and should accordingly not be considered an actual production cost. As the Commission explained in Opinion No. 509, the Spindletop Regulatory Asset represents “*actual* costs of production storage and transportation services necessary for the production of electricity.”<sup>23</sup> Therefore, because Spindletop provides a production function, its costs are appropriately included in the bandwidth formula.

15. We also disagree with the Arkansas Commission’s arguments that the Spindletop Regulatory Asset costs are out-of-period costs, and thus not includable in the bandwidth calculation. Although incurred in a prior period, the Spindletop Regulatory Asset costs represent actual costs incurred to acquire the Spindletop Facility, which continues to be

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<sup>19</sup> Opinion No. 509, 132 FERC ¶ 61,253 at P 34.

<sup>20</sup> *Id.*

<sup>21</sup> Arkansas Commission Brief Opposing Exceptions at 9.

<sup>22</sup> Opinion No. 509, 132 FERC ¶ 61,253 at P 38.

<sup>23</sup> *Id.* P 37 (emphasis in original).

used to provide storage and transportation services for the production of electricity.<sup>24</sup> As the Commission emphasized in Opinion No. 509, by reflecting such costs in rates over the useful life of the Spindletop Facility, the Spindletop Regulatory Asset matches capital cost recovery with the period of service that is provided by the Spindletop Facility for the production of electricity. In this regard, we agree with Trial Staff witness Sammon that to refer to the Spindletop Regulatory Asset costs as out-of-period is as incorrect as calling the current collection of capital costs for Entergy Gulf States' River Bend nuclear plant "out-of-period" costs.<sup>25</sup> In both instances, costs were incurred prior to the implementation of the bandwidth formula but were included in a bandwidth calendar year as actual production costs.

16. Further, we deny the Arkansas Commission's argument that it is unjust and unreasonable to allow different jurisdictions to recover costs over different time periods or that inclusion of Spindletop Regulatory Asset costs in the bandwidth formula is unduly discriminatory or will result in a subsidization of Louisiana retail ratepayers by Texas wholesale and retail customers. In Opinion No. 509, the Commission found that allowing the Louisiana Commission to spread Spindletop costs over a 40-year life was just and reasonable. However, this finding does not preclude other jurisdictions from using different time periods to recover costs. In Opinion No. 509, the Commission explained that parties with concerns regarding rate treatment conflicts could seek to change the bandwidth formula to address the differences between the rate recovery treatments that the Arkansas Commission identifies.<sup>26</sup> Significantly, however, none of the parties, including the Arkansas or Texas Commission, has chosen to do so.

17. Inclusion of the Spindletop Regulatory Asset costs is also consistent with the treatment of other production-related capital costs. As the Louisiana Commission noted, the costs of flexibility and reliability are recognized in the bandwidth formula for Operating Companies that do not own a storage facility such as the Spindletop Facility, including costs paid to third-party suppliers for such flexibility and reliability.<sup>27</sup> We agree with the Louisiana Commission that since the costs actually incurred by other Operating Companies in bandwidth test periods for reliability and flexibility in the

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<sup>24</sup> *Id.* P 38.

<sup>25</sup> Exh. S-1 at 24.

<sup>26</sup> Opinion No. 509, 132 FERC ¶ 61,253 at P 40.

<sup>27</sup> See Louisiana Commission Brief On Exceptions at 35 (citing LC-12 at 27 (Testimony of Entergy deposition witness Michelle Thiry); Tr. 451 (Testimony of Entergy witness Phillip R. May)).

provision of gas are included in the bandwidth calculation, it is unjust and unreasonable and unduly discriminatory to exclude the costs actually incurred by Entergy Gulf States Louisiana.<sup>28</sup> Inclusion of the Spindletop Regulatory Asset costs in the bandwidth remedy thus helps remedy discrimination between treatment of Entergy Gulf States Louisiana's Spindletop Facility costs and other similar production costs. With respect to alleged undue discrimination due to the exclusion of other jurisdictions' Spindletop Facility costs, we note that this issue is outside the scope of this proceeding because no party sought to address the treatment of those costs. The fact that the parties did not seek to address this issue with respect to the treatment of the Spindletop Facility costs in other jurisdictions is not a reason to deny our finding taking steps to eliminate the discrimination issue raised by the Louisiana Commission in this proceeding.

18. We deny the Arkansas Commission's arguments that the Commission should have specified how Spindletop Regulatory Asset costs should be included in the bandwidth formula. Because we determined in Opinion No. 505 that costs associated with the annual amortization of the Spindletop Regulatory Asset are already included in Account 501, an account included in the bandwidth formula, there was no need to evaluate the Louisiana Commission's alternate proposal for reflecting the annual amortization of the Spindletop Regulatory Asset in the bandwidth formula. Entergy has submitted its filing in compliance with Opinion No. 509 to reflect the return on the Spindletop Regulatory Asset in the bandwidth formula, and any issues regarding compliance will be addressed in that proceeding.

19. The Arkansas Commission argues that the Commission erred in failing to apply the requisite section 206 burden of proof to the Louisiana Commission's complaint. It contends that while section 206 requires the Louisiana Commission to demonstrate that its alternate rate proposal is just and reasonable, the Commission instead has improperly shifted the burden of proof to opposing parties to cure deficiencies in the Louisiana Commission's rate proposal.<sup>29</sup> In particular, it contends that the Commission adopted "an admittedly discriminatory remedy," i.e., by including the Spindletop Regulatory Asset costs in the bandwidth formula and "forcing Texas retail and wholesale customers to unreasonably subsidize Louisiana ratepayers for the Spindletop credit payments," in violation of the burden of proof under section 206 and the Commission's own statutory obligation to ensure just and reasonable rates. Contrary to the Arkansas Commission's contention that the Commission failed to determine if the Louisiana Commission's rate proposal was just and reasonable under section 206 given its impacts upon Texas retail

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<sup>28</sup> *Id.*

<sup>29</sup> Arkansas Commission Request for Rehearing at 9.

and wholesale customers, the Commission did consider that issue as part of its just and reasonable determination. In Opinion No. 509, the Commission explicitly rejected arguments that including Spindletop Regulatory Asset costs in the bandwidth formula would result in a “ ‘subsidization’ of the Louisiana Commission-jurisdictional customers that would be unfair to wholesale customers and retail customers in Texas.”<sup>30</sup> The Commission explained that the “wholesale customers do not take service or make payments directly under Service Schedule MSS-3, and any impact on them due to the allocation of bandwidth payments/receipts in their rates is outside the scope of this proceeding.”<sup>31</sup>

20. As to different ratemaking treatment at the retail level, the Commission noted that no party to this proceeding had proposed a mechanism to reflect the costs of the Spindletop Facility incurred on behalf of Texas retail customers in the bandwidth formula. Significantly, however, the Commission noted that “the failure to seek to include such costs is not a reason to deny the proper reflection of the Spindletop Regulatory Asset in production costs that the Louisiana Commission seeks in this proceeding.”<sup>32</sup> The Commission added that Entergy or the Texas Commission is free to seek changes to the bandwidth formula that would address this situation.<sup>33</sup> Thus, contrary to the Arkansas Commission’s argument, the Commission never adopted “an admittedly discriminatory remedy.” Rather, the Commission made a determination that the Louisiana Commission’s rate proposal was just and reasonable, finding that “the amortization of Spindletop Regulatory Asset costs included in Account 501, as well as the balance of the unamortized amount of the asset, are production costs that are properly reflected in the bandwidth calculation.”<sup>34</sup>

21. Lastly, we disagree with the Arkansas Commission’s argument that the Louisiana Commission could possibly obtain double recovery of Spindletop Regulatory Asset costs in the bandwidth formula due to a proceeding currently before the Louisiana Commission. This argument is speculative and not based on any evidence in this proceeding. In Opinion No. 505, the Commission found that costs associated with the Spindletop Regulatory Asset must be included in Account 501 for purposes of the

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<sup>30</sup> Opinion No. 509, 132 FERC ¶ 61,253 at P 40.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* P 36.

bandwidth formula. In future bandwidth proceedings, any attempt to recover these costs in any account other than Account 501 will be addressed at that time.

The Commission orders:

The Arkansas Commission's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.