

132 FERC ¶ 61,104
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisiana Public Service Commission

v.

Docket No. EL10-65-000

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

ORDER ON COMPLAINT, ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES AND HOLDING PROCEDURES
ON CERTAIN ISSUES IN ABEYANCE

(Issued August 4, 2010)

1. On May 5, 2010, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint pursuant to sections 206 and 306 of the Federal Power Act (FPA)¹ against Entergy Corporation, Entergy Services, Inc. (Entergy), and the Entergy Operating Companies.² The Louisiana Commission seeks to change the rates

¹ 16 U.S.C. § 824e and 825e (2006).

² The Entergy Operating Companies are: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi),

(continued...)

included in Entergy's bandwidth formula in Service Schedule MSS-3 of the Entergy System Agreement (System Agreement). The Louisiana Commission raises six issues regarding the existing bandwidth formula: (1) Little Gypsy 3 Repowering Project cancellation costs; (2) acquisition adjustments for generating plants; (3) Accumulated Deferred Income Taxes (ADIT) direct assignments; (4) Spindletop capital lease accounting; (5) interruptible load; and (6) Waterford 3 capital lease ADIT. The Louisiana Commission contends that two of these issues, those involving interruptible load and Waterford 3 capital lease ADIT, are currently pending before the Commission.³ As discussed below, we will dismiss the first issue raised by the Louisiana Commission, dismiss in part and in part set the second issue for hearing and settlement judge procedures, and set the remaining four issues for hearing and settlement judge procedures. While we establish hearing and settlement judge procedures on these four issues, we will hold those procedures in abeyance pending the outcome of a number of proceedings described below.

I. Background

2. In Opinion No. 480, the Commission found that rough production cost equalization had been disrupted on the Entergy system.⁴ The Commission concluded that if the Entergy system did not maintain rough production cost equalization among its Operating Companies, then an annual bandwidth of +/- 11 percent would be utilized to keep the Entergy system in rough production cost equalization,⁵ i.e., if annual total production costs of one or more Operating Companies deviated from the system average total production cost by more than +/- 11 percent, the bandwidth remedy would restore rough equalization by requiring Operating Companies with low production costs to make payments to Operating Companies with high production costs.

3. In an order accepting Entergy's compliance filing to incorporate the bandwidth remedy into the System Agreement, the Commission required Entergy to comply with the requirements of Opinion Nos. 480 and 480-A, and stated that Entergy may not make in its compliance filing adjustments to the methodology reflected in Exhibits ETR-26 and

Entergy Texas, Inc. (Entergy Texas), and Entergy New Orleans, Inc. (Entergy New Orleans).

³ Complaint at 24.

⁴ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136, *aff'd*, *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005).

⁵ Opinion No. 480, 111 FERC ¶ 61,311 at P 144.

ETR-28.⁶ Exhibits ETR-26 and ETR-28, which were adopted in Opinion Nos. 480 and 480-A, set forth the methodology to be used to calculate the production costs of the Operating Companies for the purpose of determining production cost disparities. The production cost calculation includes production plant investment cost and operation and maintenance expenses reported in various accounts under the Commission's Uniform System of Accounts. The Commission also stated that parties seeking changes to the bandwidth formula adopted in Opinion No. 480 must make separate filings under section 205 or 206 of the FPA in order to implement such changes.⁷

4. In its complaint, the Louisiana Commission seeks to change the bandwidth formula, to be effective no later than the 2010 bandwidth calculation and for future bandwidth filings.⁸ Each of the six issues raised in the complaint is discussed in detail below.

II. Notice of Filing and Responsive Pleadings

5. Notice of the Louisiana Commission's complaint was published in the *Federal Register*, 75 Fed. Reg. 27,337 (2010), with comments due on or before May 25, 2010. The Mississippi Public Service Commission filed a notice of intervention. The Council of the City of New Orleans, Occidental Chemical Corporation, East Texas Cooperatives, Union Electric Company, and NRG Companies filed motions to intervene. Entergy filed an answer to the complaint. The Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention and protest.

III. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

⁶ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203, at P 69 (2006).

⁷ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203 at P 69. *See also Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 173 (2010); *Entergy Services, Inc.*, 130 FERC ¶ 61,170 (2010).

⁸ Complaint at 1.

B. Little Gypsy 3 Repowering Project Cancellation Costs**1. Parties' Arguments**

7. The Louisiana Commission asserts that the bandwidth formula is unjust and unreasonable because it currently does not include costs associated with the cancellation of the Little Gypsy 3 Repowering Project (Little Gypsy). It states that the Little Gypsy project was originally planned by Entergy Louisiana to diversify the Entergy system's fuel requirements and provide base load capacity by converting a natural gas-fired unit used primarily for peaking purposes to a solid-fuel unit that would burn a blend of petroleum coke and coal.⁹ However, in 2009, Entergy Louisiana determined that it would be more economical to cancel the Little Gypsy project because of falling natural gas price forecasts and other factors, and it suspended the project.¹⁰ Entergy Louisiana's application to cancel the repowering project and to recover the abandoned project costs is pending before the Louisiana Commission. The Louisiana Commission contends that the costs of the cancellation of the project, to the extent recoverable from ratepayers, are a system production cost that should be included in the Service Schedule MSS-3 formula to make the bandwidth calculation just and reasonable.¹¹

8. Entergy responds that the Louisiana Commission's claim is premature and unripe because the project has not yet been cancelled.¹² Although the Louisiana Commission issued an order on May 22, 2009 authorizing Entergy Louisiana to suspend the project for three years or more, Entergy asserts that Entergy Louisiana's application to cancel the plant and to recover abandoned plant costs on a levelized basis over five years is currently pending before the Louisiana Commission.¹³ Thus, Entergy argues that the Commission should dismiss the claim as premature or hold it in abeyance until the Louisiana Commission rules on Entergy Louisiana's pending application.¹⁴

9. The Arkansas Commission likewise contends that it is premature for the Commission to consider the Little Gypsy project cancellation costs. It states that the Louisiana Commission has not issued a final order on the cancellation of the repowering

⁹ Complaint at 2, 10.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 12.

¹² Entergy Answer at 9.

¹³ Entergy notes that a hearing on the matter is scheduled to begin in November 2010. *Id.* at 10.

¹⁴ *Id.* at 11.

project. Therefore, it asserts, any ruling on this issue by the Commission would be based on pure speculation.¹⁵ Also, the Arkansas Commission argues that the Louisiana Commission's claim regarding the Little Gypsy project abandonment costs is insufficient to demonstrate that the existing bandwidth formula is unjust and unreasonable. Further, the Arkansas Commission asserts that including the Little Gypsy abandonment costs in Service Schedule MSS-3 will not result in just and reasonable rates, as the Louisiana Commission alleges. Rather, according to the Arkansas Commission, considering such costs would result in unduly preferential treatment because only one plant's abandonment costs would be included in the bandwidth formula. This would, in effect, allow Entergy Louisiana's abandonment costs to be spread among ratepayers of all Operating Companies rather than being borne by ratepayers only on the affected Operating Company.¹⁶

2. Commission Determination

10. We will dismiss the Louisiana Commission's complaint regarding the Little Gypsy project cancellation costs. This issue is premature and not ripe for Commission consideration because the Louisiana Commission has not yet approved the repowering project cancellation. Also, we will not address the issue of whether abandonment costs are production costs that should be included in the bandwidth formula at this time. When the Louisiana Commission issues a final decision on the cancellation of the repowering project, parties will be able to seek a Commission determination as to whether the Little Gypsy project cancellation costs should be included in the bandwidth formula.

C. Acquisition Adjustments for Generating Plants

1. Parties' Arguments

11. The Louisiana Commission contends that the bandwidth formula is unjust and unreasonable because it fails to include certain accounts related to acquisition adjustments for generation unit purchases.¹⁷ The Louisiana Commission states that in recent years Entergy has purchased generating units from prior owners who devoted the units to public service and that Entergy obtained such generating resources through a competitive process designed to ensure that the resources were competitively priced and

¹⁵ Arkansas Commission Protest at 3.

¹⁶ *Id.* at 5-6.

¹⁷ These accounts include Account No. 114, Electric Plant Acquisition Adjustment, and Account No. 406, Amortization of Electric Plant Acquisition Adjustments. Complaint at 3.

economic compared to alternatives and therefore presumptively prudent. The Louisiana Commission contends, however, that under the Commission's accounting regulations, the amounts recorded in accounts currently in the formula do not reflect the actual costs attributable to the acquisitions, which is not just and reasonable.¹⁸

12. The Louisiana Commission argues that to ensure just and reasonable results, the positive or negative acquisition adjustments¹⁹ and annual amortizations for these production-related acquisition adjustments should be included in the formula. According to the Louisiana Commission, the units (i.e., Ouachita and Calcasieu units) with negative acquisition adjustments (purchase price lower than net book value) were properly recorded in Account No. 114 and subsequently transferred to Account No. 108, Accumulated Depreciation, to calculate the return on investments based on actual investment in the units of the owning Operating Companies. However, it argues that the depreciation expense for Ouachita and Calcasieu is not correct because it is based on the original cost and does not take into account the acquisition adjustment.²⁰

13. Also, the Louisiana Commission states that Entergy Louisiana and Entergy Gulf States are purchasing a generating unit, Acadia Power Block Two (Acadia), at a price higher than its net book value.²¹ It states that Entergy Louisiana and Entergy Gulf States filed an application with the Louisiana Commission, on November 13, 2009, to approve the purchase of Acadia. The Acadia acquisition, the Louisiana Commission states, was selected to serve the needs of the Entergy system by adding additional resources to meet the long-term generation supply needs of the system, Entergy Louisiana, and Entergy Gulf States. According to the Louisiana Commission, the positive acquisition adjustment and related amortization associated with the Acadia unit are system production costs that should be included in the bandwidth formula. Specifically, the Louisiana Commission argues that the Fixed Production Cost and Fixed Production Rate Base should be amended to include positive acquisition adjustments for generating units in Account No. 114. Also, Fixed Production Expense should be amended to include the amortization of these positive generator acquisition adjustments in Account No. 425.²² The Louisiana Commission states that Entergy is expected to make a section 205 filing in June to

¹⁸ *Id.*

¹⁹ The difference between the purchase price and the original cost is the "acquisition adjustment," as defined in FERC's Uniform System of Accounts.

²⁰ Complaint at 16.

²¹ On June 4, 2010, the Commission approved the Acadia acquisition under section 203 of the FPA. *Acadia Power Partners, LLC*, 131 FERC ¶ 62,212 (2010).

²² Complaint at 15.

request authorization to reflect the Acadia acquisition adjustment and related amortization in the bandwidth calculation. The Louisiana Commission states, however, that it is raising the Acadia unit issue in this complaint so that the Acadia costs can be included in the 2010 bandwidth calculation.²³

14. Entergy responds that it will, on or about June 30, 2010, initiate a section 205 proceeding “which will present the issue of whether the bandwidth formula should be revised to reflect the Acadia acquisition adjustment.”²⁴ Entergy asserts that it would be confusing, wasteful and inefficient for the Commission to conduct two separate proceedings addressing the same issue. Thus, Entergy argues that the claim regarding the Acadia project should be dismissed without prejudice or held in abeyance pending the resolution of its section 205 filing to allow recovery of the Acadia acquisition adjustment and to revise the bandwidth formula to reflect recovery of the Acadia acquisition adjustment.²⁵

15. Regarding the Ouachita and Calcasieu units, Entergy contends that the Louisiana Commission’s assertion is incorrect and that the depreciation costs for plants with negative acquisition adjustments are based on the lower acquisition price of those plants and not the original costs of the previous owners.²⁶ According to Entergy, depreciation expense is calculated on the Operating Companies’ plant investment, which is the price paid to acquire the generating units, and not the original cost of the previous owners. Entergy also contends that it submitted the relevant accounting entries regarding acquisition of the two plants to the Commission, that the Commission issued orders approving its proposed accounting treatment for both plants, and that the Louisiana Commission presents no evidence that these orders were incorrect or unreasonable.²⁷

²³ Annual bandwidth remedy calculations are made each year at the end of May. Inclusion of the Acadia costs by the May 2010 deadline would result in these costs’ inclusion in the 2010 bandwidth remedy calculation.

²⁴ On June 30, 2010, Entergy submitted a section 205 filing, in Docket No. ER10-1676-000 to amend Service Schedules MSS-3 and MSS-4 of the System Agreement. Among other things, the filing seeks Commission authorization to include the positive acquisition adjustment for Acadia (and related amortization expenses) in Service Schedules MSS-3 and MSS-4.

²⁵ Entergy Answer at 12.

²⁶ *Id.* at 13-14.

²⁷ *Id.* at 14. *See Entergy Corp.*, Docket Nos. AC08-173-000 and 001 (Nov. 25, 2008) (unpublished letter order); *Entergy Services, Inc.*, Docket No. AC09-52-000 (Mar. 31, 2009) (unpublished letter order).

16. The Arkansas Commission contends that the Louisiana Commission's claim regarding the Acadia project should be rejected as premature and unnecessary. Based on the Louisiana Commission's complaint, the Arkansas Commission asserts that there are no Acadia costs to be factored into the bandwidth calculation because the approval for the Acadia acquisition is still pending before the Louisiana Commission.²⁸ Therefore, the Arkansas Commission argues that there are no acquisition-related costs for Acadia to be booked for rate purposes.

17. Also, the Arkansas Commission contends that the Louisiana Commission's request for a change of the depreciation rates for the Ouachita and Calcasieu units is an impermissible collateral attack on the Commission's Opinion No. 505 and the Order Denying Interlocutory Appeal.²⁹ It states that the Louisiana Commission is seeking to include in the bandwidth formula depreciation amounts other than the booked depreciation rates that are based upon the original costs on the books of the Operating Companies. Such a claim, according to the Arkansas Commission, is "yet another attempt at an end-run around the bandwidth formula requirement to use actual depreciation amounts on the Operating Companies' books."³⁰ The Arkansas Commission notes that in Opinion No. 505 the Commission rejected the Louisiana Commission's attempt to use an imputed depreciation amount, rather than what is recorded on the Operating Company's books.³¹ Further, it emphasizes that in both Opinion 505 and in the Order Denying Interlocutory Appeal, the Commission held that the purpose of the annual bandwidth filings is to apply the formula using actual data and not to determine what production costs would have been if different depreciation costs had been in effect.³² Moreover, the Arkansas Commission asserts that the Commission has advised that a comprehensive depreciation study is required to change the per-books depreciation amounts for ratemaking purposes.³³

²⁸ Arkansas Commission Protest at 7 (citing Complaint at 13).

²⁹ *Entergy Services, Inc.*, 130 FERC ¶ 61,170 (2010).

³⁰ *Id.* at 8.

³¹ *Id.* at 9 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 171).

³² *Id.* (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 171, 173; *Entergy Services, Inc.*, 130 FERC ¶61,170 at P 20).

³³ *Id.* (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 172 n.205)

2. Commission Determination

18. We will dismiss the Louisiana Commission's claim regarding the positive acquisition adjustment claim for the Acadia project. As Entergy indicated in its answer, on June 30, 2010, it made a section 205 filing to revise Service Schedules MSS-3 and MSS-4 to include the costs of positive acquisition adjustments for generating plants by an Operating Company (plus the related amortization expenses), including the Acadia project, and we will address the issue in that proceeding.³⁴ The Louisiana Commission states that it is raising this issue notwithstanding that section 205 filing so that the Acadia acquisition costs can be included in the 2010 bandwidth formula. We note, however, that the Commission did not authorize the acquisition of Acadia under section 203 of the FPA until June 4, 2010 (after the May 31, 2010 deadline for the 2010 bandwidth calculation).³⁵ Therefore, such costs would not have been available to be included in the 2010 bandwidth formula.

19. Regarding the Ouachita and Calcasieu units, we find that there are issues of material fact concerning Entergy's proposed treatment of these units that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. In particular, it will be necessary to determine whether the depreciation expenses for the Ouachita and Calcasieu plants are based on original costs or acquisition costs, and what depreciation amounts should be included in the bandwidth formula.

D. Issues Related to Other Proceedings

1. ADIT Direct Assignments

20. The Louisiana Commission argues that the bandwidth formula is unjust and unreasonable because it includes several subaccount balances for ADIT that are functionalized through plant allocators rather than directly assigned to particular functions. It notes that in its earlier complaint in Docket No. EL09-50-000, the Louisiana Commission sought the direct assignment of ADIT for the Waterford 3 capital lease, rather than the functionalization of that ADIT to the production function using plant ratios, because this ADIT is 100 percent related to the production function.³⁶ It states that the initial decision in Docket No. EL09-50-000 recognized that this ADIT is 100 percent production related, but nevertheless held that it would be unjust and unreasonable

³⁴ *Entergy Services, Inc.*, Docket Nos. ER10-1676-000 and AC10-139-000.

³⁵ *See Acadia Power Partners, LLC*, 131 FERC ¶ 62,212 (2010).

³⁶ Complaint at 16.

to directly assign this ADIT without also directly assigning other ADIT amounts that are 100 percent related to particular functions.³⁷ The Louisiana Commission believes that the initial decision applied an incorrect standard to the EL09-50-000 complaint and states that it will take exceptions to that initial decision. In the instant complaint, the Louisiana Commission seeks the direct assignment of ADIT amounts identified by Entergy and other parties in Docket No. EL09-50-000 (and other ADIT amounts that may be identified through discovery) to their particular functions. It also seeks related modifications to the functionalization ratios where direct assignments are made.

21. Entergy argues that the ADIT claim should be dismissed without prejudice or held in abeyance until the Commission resolves a dispositive issue that currently is pending before the Commission on exceptions to the initial decision in Docket No EL09-50-000.³⁸ However, if the Commission should choose to address the merits of this claim, Entergy contends that the Commission should deny the claim because the Louisiana Commission has failed to meet its burden under section 206 to demonstrate that the bandwidth formula is unjust and unreasonable. According to Entergy, the Louisiana Commission fails to meet this burden in three ways: (1) the Louisiana Commission has failed to show any evidence that the bandwidth formula is unjust and unreasonable as a whole; (2) the Louisiana Commission has failed to demonstrate that it is unjust and unreasonable for the bandwidth formula to allocate ADIT accounts using a plant allocator; and (3) the Louisiana Commission has failed to prove that its proposed revisions to the bandwidth formula are just and reasonable.³⁹

22. The Arkansas Commission also argues that the Louisiana Commission's direct assignment ADIT claim should be rejected for failure to meet the section 206 burden. It notes that ADIT in Account Nos. 190, 281, and 282 is currently included in the bandwidth formula. According to the Arkansas Commission, Service Schedule MSS-3, section 30.12, functionalizes the portion of each Operating Company's allowable ADIT that is includable in the bandwidth formula recorded in Account Nos. 190, 281, and 282 to the production function using the ratio of production plant to total plant.⁴⁰ It asserts that the Louisiana Commission makes claims in the instant complaint regarding ADIT direct assignment by requesting unspecified amendments to Service Schedule MSS-3 in order to "cherry-pick" only certain ADIT subaccounts for direct assignment.⁴¹ The

³⁷ *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 131 FERC ¶ 63,009, at P 54 (2010).

³⁸ Entergy Answer at 14.

³⁹ *Id.* at 18-19.

⁴⁰ Arkansas Commission at 10-11.

⁴¹ *Id.* at 11-12.

Arkansas Commission argues that such selective direct assignment is contrary to the Commission's policy.⁴²

2. Spindletop Capital Lease Accounting

23. The Louisiana Commission argues that the bandwidth formula is unjust and unreasonable because it does not include costs associated with the Spindletop Regulatory Asset.⁴³ It notes that the payments for the capital construction costs of the Spindletop facility were applied to reduce the purchase price of the facility, which allowed Entergy Gulf States (predecessor of Entergy Gulf States Louisiana and Entergy Texas) to acquire the facility for one dollar.⁴⁴ Further, the Louisiana Commission explains that

[it] required that the acquisition payments constituting capital costs be treated for ratemaking as capital investment in plant, depreciable over the life of the asset. Because [Entergy Gulf States] expensed the acquisition payments as fuel cost when they were made, and included the costs in fuel adjustment, [the Louisiana Commission] required refunds of the amounts in excess of the annual amortization and permitted the establishment of a regulatory asset for ratemaking purposes for the refunded capital costs, to be amortized over the life of the asset. Subsequently, the acquisition cost portions of lease payments were capitalized in the regulatory asset, to be amortized over the life of the gas storage facility.[⁴⁵]

24. The Louisiana Commission notes that, in Docket No. EL08-51-000, it filed a complaint alleging that the failure to include the costs of the Spindletop Regulatory Asset in the production costs of Entergy Gulf States was unjust and unreasonable. It asserts that the initial decision in that docket rejected the Louisiana Commission's complaint

⁴² *Id.* at 12 (citing *Kern River Gas Transmission Co.*, 117 FERC ¶ 61,077 (2006)).

⁴³ The Spindletop Gas Storage Facility (Spindletop facility) consists of a leached salt storage cavern and related natural gas pipelines and equipment located in Sabine, Texas. The Spindletop facility is used as a physical hedge for reliability and pricing purposes and supplies certain Entergy Gulf States generating units. The Spindletop Regulatory Asset is an asset created to reflect the Louisiana Commission's deferral of capital cost payments from Louisiana retail ratepayers for construction of the Spindletop facility.

⁴⁴ Complaint at 19.

⁴⁵ *Id.* at 19-20 (internal citations omitted).

because the costs were expensed as fuel when incurred and would be “out of period” in the bandwidth calculation, a regulatory asset is not a production cost, and accounting as the Louisiana Commission proposes would result in an inequitable subsidization of some ratepayers by others.⁴⁶

25. Prior to the hearing in that proceeding, the Louisiana Commission states that Entergy maintained that it could find no evidence that the Spindletop lease was accounted for as a capital lease. However, during the hearing, it argues that Entergy revealed for the first time that the Spindletop transaction had been accounted for as a capital lease by Entergy Gulf States.⁴⁷ According to the Louisiana Commission, the purchase option in the Spindletop lease was a “bargain purchase option,” which allowed Entergy Gulf States to acquire the Spindletop facility, valued at over \$92 million, for one dollar. The Louisiana Commission states that under the standards issued by the Financial Accounting Standards Board, capital leases that include a “bargain purchase option” should be amortized over the life of the facility consistent with depreciation accounting for a plant. Further, it maintains that the Spindletop lease transaction provided for indefinite self-renewals and was terminable through a purchase by Entergy Gulf States or at the option of Entergy Gulf States; thus, its related capital costs should have been amortized over the life of the facility.⁴⁸

26. The Louisiana Commission contends, however, that Entergy Gulf States did not account for the capital lease correctly and instead expensed the lease payments as they were made, rather than over the life of the facility. The Louisiana Commission seeks reclassification of the Spindletop Regulatory Asset capital costs, now on the books of Entergy Texas, as a capital lease, with appropriate accounting for payments by Entergy Gulf States to Entergy Texas for that capital lease. It argues that the Commission should direct that capital lease costs be included in the bandwidth formula and that the capital lease costs should include amounts already paid by Texas ratepayers through the fuel adjustment clause. It states that these amounts are not currently included in retail rates.⁴⁹

27. Entergy states that the Spindletop issue has been raised in other bandwidth formula proceedings (Docket Nos. ER07-956-000, EL08-51-000, and ER09-1224-000). With respect to inclusion of the Spindletop costs, Entergy states that the Louisiana Commission raises arguments identical to those raised in its brief on exceptions to the

⁴⁶ *Louisiana Pub. Serv. Comm’n v. Entergy Services, Inc.*, 127 FERC ¶ 63,021 (2009).

⁴⁷ Complaint at 20.

⁴⁸ *Id.*

⁴⁹ *Id.* at 21.

initial decision in Docket No. EL08-51-000 and the Commission's resolution of the same arguments in that docket should be controlling with respect to the treatment of these costs. Entergy notes that the capital lease issue, presented as new in the instant complaint by the Louisiana Commission, was discussed extensively in the Louisiana Commission's brief on exceptions in the Docket No. EL08-51-002 proceeding and in Opinion No. 505. Therefore, Entergy argues that the claim should be dismissed without prejudice or held in abeyance pending the ruling on exceptions in Docket No. EL08-51-002.

28. However, if the Commission should choose to address this issue in the instant complaint, Entergy contends that the Commission should deny it, because it has already been litigated in the dockets referenced above. It also contends that the Louisiana Commission failed to meet its burden of proof under section 206 because the statements regarding the accounting treatment of Spindletop are insufficient to prove that it is unjust and unreasonable to exclude Spindletop costs from the bandwidth formula. Entergy emphasizes that in Opinion No. 505 the Commission stated that accounting treatment of Spindletop does not control whether those costs should be included in the bandwidth formula.⁵⁰ Moreover, Entergy refutes the Louisiana Commission's claim regarding the bargain purchase option. It states that under the Financial Accounting Standards Board, Statement No. 13 "the useful life of a facility and whether a 'bargain purchase option' exists is a function of analyses that are based on facts and circumstances that exist at the inception of the lease."⁵¹ Entergy argues that the Louisiana Commission failed to provide any analyses or evidence that existed at the inception of the lease that would suggest that the Spindletop facility had an expected life of more than twelve years.⁵²

29. The Arkansas Commission argues that the Louisiana Commission's Spindletop claim should be dismissed because it attempts to relitigate an issue pending before the Commission. It contends that the Louisiana Commission presents no new evidence that justifies relitigation.⁵³

3. Interruptible Load

30. The Louisiana Commission contends that the bandwidth formula is unjust and unreasonable because it reverses the equalization cost credit for interruptible load

⁵⁰ *Id.* at 28.

⁵¹ *Id.* at 27.

⁵² *Id.*

⁵³ Arkansas Commission Protest at 16-17.

required by the Commission in Opinion Nos. 468 and 468-A.⁵⁴ It states that this issue was litigated in Docket No. ER09-1224-000 (third annual bandwidth filing) and that Commission staff testimony in that proceeding stated that the inconsistency between the bandwidth formula and Opinion Nos. 468 and 468-A is a problem in the tariff that requires correction, but opposed correcting the problem in a bandwidth proceeding.

31. The Louisiana Commission states that the interruptible load issue “can and should be corrected in Docket No. ER09-1224” but “in an abundance of caution,” it is raising this issue through the instant complaint to ensure that it is resolved in some forum. The Louisiana Commission states that this is not the same issue raised by the Louisiana Commission in Docket No. EL07-52-000.⁵⁵

32. Entergy argues that this claim should be dismissed or held in abeyance because the same issue is currently being litigated in Docket No. ER09-1224-000. It asserts that because the same issue is currently being litigated in another proceeding it would be wasteful, inefficient and unwise to initiate a new proceeding.⁵⁶ Entergy argues that if the Commission chooses to address this claim now, the Commission should deny it, without a hearing, because the Louisiana Commission has not met its burden under section 206 of the FPA.

33. Entergy explains that in Opinion Nos. 468 and 468-A the Commission held that interruptible load should not be included in cost allocations under Service Schedules MSS-1 and MSS-5 of the System Agreement and Joint Account purchases under Service Schedule MSS-3. It states that it has complied with these orders and has excluded interruptible load from the appropriate schedules under the System Agreement. However, Entergy notes that interruptible load is not excluded from the bandwidth calculations. It asserts that in Docket No. EL07-52-000 the Commission ruled that it is appropriate for the bandwidth formula to include interruptible load because the bandwidth formula calculates and equalizes the total production costs of each Operating

⁵⁴ *Louisiana Pub. Serv. Comm’n v. Entergy Corp.*, Opinion No. 468, 106 FERC ¶ 61,228 (2004), *order on reh’g*, Opinion No. 468-A, 111 FERC ¶ 61,080 (2005), *aff’d in part, denied in part and remanded*, *Louisiana Pub. Serv. Comm’n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007).

⁵⁵ Complaint at 5. In Docket No. EL07-52-000, the Louisiana Commission argued that the provisions of Service Schedule MSS-3 that include interruptible load in the system monthly coincident peaks to allocate capacity costs are unjust and unreasonable. *Louisiana Pub. Serv. Comm’n v. Entergy Corp.*, 119 FERC ¶ 61,212 (2007).

⁵⁶ Entergy Answer at 29.

Company.⁵⁷ Therefore, Entergy asserts that it is appropriate and correct to include interruptible load in the bandwidth formula calculations.

34. The Arkansas Commission also contends that the complaint fails to identify any inconsistency in the bandwidth formula that conflicts with the reserve equalization cost credit for interruptible load provided in Opinion Nos. 468 and 468-A. The Louisiana Commission also fails to specify what relief is requested to resolve the alleged problem, according to the Arkansas Commission.⁵⁸ The Arkansas Commission also notes that this issue was raised in Docket No. EL07-52-000 and Docket No. ER09-1224-000 and the Louisiana Commission's claims were denied in the former docket. Therefore, the Arkansas Commission argues that this issue should be summarily dismissed under either *res judicata* or collateral estoppel principles.⁵⁹

4. Waterford 3 Capital Lease ADIT

35. The Louisiana Commission argues that the bandwidth formula is unjust and unreasonable because it excludes the ADIT associated with the Waterford 3 sale-leaseback. It states that the initial decision in Docket No. ER08-1056-000 required Entergy to include ADIT for the Waterford 3 capital lease in the balance functionalized to production.⁶⁰ The Louisiana Commission states that in Docket No. EL09-50-000,⁶¹ information developed through discovery established that the sale-leaseback ADIT was not created exclusively by a tax gain on the sale of the Waterford 3 plant, as previously suggested by Entergy, but primarily by timing differences in the amortization of the capital lease for book and tax purposes.⁶² The Louisiana Commission contends that the ADIT related to tax/book timing difference for a production asset should be includable for Commission cost of service purposes. Additionally, according to the Louisiana Commission, "Entergy revealed that a negative amount included in the Account No. 190 subaccount for the [c]apital [l]ease relates to a regulatory asset arising from retail

⁵⁷ *Id.* at 30-31 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,212 at P 24).

⁵⁸ Arkansas Commission at 17.

⁵⁹ *Id.* at 18.

⁶⁰ *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 128 FERC ¶ 63,105, at P 326 (2009).

⁶¹ As noted above, in Docket No. EL09-50-000, the issue is whether the Waterford 3 sale-leaseback ADIT should be functionalized or directly assigned to production. *See supra* P 20 and note 37.

⁶² Complaint at 18.

ratemaking, which should not be included in the bandwidth calculation.”⁶³ The Louisiana Commission states that it is raising this issue in the instant complaint “out of an abundance of caution” in the event that the initial decision in Docket No. ER08-1056-000 is reversed.

36. Entergy contends that the Commission should dismiss or hold in abeyance this claim until the Commission rules on related and dispositive issues that are pending before the Commission on exceptions to the initial decision in Docket No. ER08-1056-000. It states that the ruling in Docket No. ER08-1056-000 will have a major and likely dispositive impact upon the Louisiana Commission’s claim in the instant complaint.⁶⁴ However, if the Commission should choose to address this claim now, Entergy argues that the claim should be denied because: (1) the claim has already been litigated in two proceedings (Docket Nos. ER07-956-000 and ER08-1056-000), and it cannot be relitigated here; and (2) the Louisiana Commission has not met its burden of proving that the bandwidth formula is unjust and unreasonable because it excludes the Waterford 3 ADIT.⁶⁵

37. The Arkansas Commission argues that this claim should be rejected as impermissible relitigation and a violation of the Presiding Judge’s ruling in Docket No. ER08-1056-000.

5. Commission Determination

38. We find that the four issues discussed above raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. While we establish hearing and settlement judge procedures on these issues, we will hold those procedures in abeyance pending the outcome of ongoing proceedings and further Commission orders. For the ADIT direct assignment issue, we will hold the hearing and settlement judge procedures in abeyance pending the outcome of the proceeding in Docket No. EL09-50-000; for the Spindletop capital lease issue, we will hold the hearing and settlement judge procedures in abeyance pending the outcome of the proceeding in Docket No. EL08-51-002; for the interruptible load issue, we will hold the hearing and settlement judge procedures in abeyance pending the outcome of the proceedings in Docket Nos. EL07-52-000 and ER09-1224-000; and for the Waterford 3 ADIT issue, we

⁶³ *Id.*

⁶⁴ Entergy Answer at 33.

⁶⁵ *Id.*

will hold the hearing and settlement judge procedures in abeyance pending the outcome of the proceeding in Docket No. ER08-1056-000. Once the Commission has acted to address any of these issues in these proceedings, the Louisiana Commission is directed to file with the Commission motions with respect to each issue indicating whether it wants the Commission to reinstitute the hearing and settlement judge procedures that we are holding in abeyance in this order or whether the issue has been resolved by another proceeding and hearing and settlement judge procedures are not needed. Parties may file answers to those motions and the Commission will issue further orders.

6. Hearing and Settlement Judge Procedures

39. While we are setting certain matters for trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearings in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁶⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge. We note that the hearing and settlement judge procedures established for the four issues discussed in the prior paragraph are being held in abeyance pending the outcome of other proceedings and further Commission orders.

40. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005, requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to

⁶⁶ 18 C.F.R. § 385.603 (2010).

⁶⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

customers,⁶⁸ we will set the refund effective date at the earliest date possible, i.e., the date of the filing of the complaint, which is May 5, 2010.

41. Section 206(b) of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. As discussed above, we will be setting certain issues raised in the complaint for hearing and settlement judge procedures. Based on our review of the record, we expect that if this case does not settle, the presiding judge should be able to render a decision within twelve months of the commencement of hearing procedures or, if the case were to go to hearing immediately, August 30, 2011. We thus estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or by April 30, 2012.

The Commission orders:

(A) The Louisiana Commission's complaint with respect to the Little Gypsy cancellation cost and positive acquisition adjustments for generating plants is hereby dismissed, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 205, 206 and 306 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the issues identified in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge

⁶⁸ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Electric Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) The hearing and settlement judge procedures discussed in Ordering Paragraphs (B), (C) and (D) shall be held in abeyance with respect to (1) Accumulated Deferred Income Taxes direct assignments; (2) Spindletop capital lease accounting; (3) interruptible load; and (4) Waterford 3 capital lease Accumulated Deferred Income Taxes, as discussed in the body of this order.

(G) The refund effective date established pursuant to section 206(b) of the FPA, as amended by section 1285 of the Energy Policy Act of 2005, is May 5, 2010.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.