145 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc. Docket No. ER09-1224-003

ORDER ON REHEARING AND CLARIFICATION

(Issued October 16, 2013)

1. This case is before the Commission on rehearing and clarification of an opinion[1] issued on May 7, 2012, and involves rates filed by Entergy Services, Inc. (Entergy)[2] on behalf of the Entergy Operating Companies (Operating Companies)[3] pursuant to Service Schedule MSS-3 of the Entergy System Agreement (System Agreement), implementing the Commission's bandwidth remedy based on calendar year 2008 data as provided for in Opinion Nos. 480 and 480-A (third annual bandwidth proceeding).[4] On August 5, 2010,

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[1] *Entergy Services, Inc.*, Opinion No. 518, 139 FERC ¶ 61,105 (2012).

[2] Entergy is a wholly-owned subsidiary of Entergy Corporation that provides operating services to six operating companies (Operating Companies). Entergy Corporation is a public utility holding company that provides electric service through the Operating Companies.

[3] At the time the Commission issued Opinion Nos. 480 and 480-A, the Operating Companies were Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Louisiana, Inc. (Entergy Louisiana), Entergy Mississippi, Inc. (Entergy Mississippi), Entergy New Orleans, Inc. (Entergy New Orleans), and Entergy Gulf States, Inc. (Entergy Gulf States). At the end of 2007, Entergy Gulf States was split into Entergy Texas, Inc. (Entergy Texas) and Entergy Gulf States Louisiana, LLC (Entergy Gulf States Louisiana). Accordingly, the Operating Companies involved with this proceeding are Entergy Arkansas, Entergy Gulf States Louisiana, Entergy Louisiana, Entergy Mississippi, Entergy New Orleans and Entergy Texas.

[4] *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),

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an initial decision[5] was issued in this proceeding, which was affirmed in part and reversed in part in Opinion No. 518. In this order, as discussed below, we deny rehearing in part and grant rehearing in part. We also deny a request for clarification regarding accumulated deferred income taxes (ADIT), but provide further clarification on that issue.

I. Background

2. In Opinion No. 518, the Commission affirmed the Presiding Judge's findings that: (1) Service Schedule MSS-3 should not include out-of-period costs; (2) Service Schedule MSS-3 does not permit partial-year accounting for acquisitions that took place during the test year calculation; (3) the bandwidth calculation regarding ADIT begins with the inclusion of all ADIT generally and properly includable for cost-of-service purposes, and the product of that total and the production plant ratio is the portion of the ADIT which is production related; and (4) casualty loss ADIT should be included in the bandwidth calculation.[6] The Commission also found that two issues decided by the Presiding Judge – whether the actual total cost calculation for each Operating Company in the bandwidth calculation should include interruptible load in the costs attributable to Service Schedules MSS-1, MSS-3, MSS-5 and section 4.02 allocations, and the proper treatment of Spindletop Regulatory Asset – had been rendered moot by Commission orders issued subsequent to the Initial Decision.[7]

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order on compliance, 117 FERC ¶ 61,203 (2006) (Compliance Order), *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), *order on remand*, 137 FERC ¶ 61,047 (2011), *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011).

[5] *Entergy Services, Inc.*, 132 FERC ¶ 63,005 (2010) (Initial Decision).

[6] *Id*. PP 12-14.

[7] Opinion No. 518, 139 FERC ¶ 61,105 at PP 12-13 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,100 (2012) (Interruptible Load Rehearing Order) and *Louisiana Pub Serv. Comm'n v. Entergy Corp.*, Opinion No. 509, 132 FERC ¶ 61,253 (2010)).

II. Requests for Rehearing

A. Statement of Principles

1. Background

3. In Opinion No. 518, the Commission found that the Statement of Principles articulated by the Presiding Judge in the Initial Decision was generally consistent with the Service Schedule MSS-3 bandwidth formula and prior Commission orders that addressed the scope of the annual bandwidth filings. The Commission found that the Presiding Judge was correct to find that the word "actual" refers to data as reported in the FERC Form 1 as of December 31 of the test year where the formula specifies end-of-year values, and that this data reported in the FERC Form 1 as of December 31 of the test year must be applied to the bandwidth formula.[8] The Commission rejected arguments that its interpretation was overly-restrictive and did not allow the Commission to correct inputs where the formula was not correctly applied.[9] The Commission reiterated that in determining whether Entergy has properly implemented the bandwidth formula using the required data inputs in a bandwidth filing, parties in a bandwidth implementation proceeding may challenge:

> (1) whether the inputs were calculated consistent with the formula and the applicable accounting rules; (2) conformance with retail regulatory approvals to the extent the formula requires use of values approved by retail regulators; and, (3) in instances where there are details omitted from the accepted Service Schedule MSS-3 formula, [whether] the underlying details [were] included in the methodology used in Exhibit Nos. ETR-26 and ETR-28. Further, with respect to whether or not particular costs were prudently incurred, consistent with Opinion No. 505, the Louisiana Commission and other parties may challenge the prudence of cost inputs to the bandwidth formula in this bandwidth proceeding.[10]

4. The Commission also agreed with the Presiding Judge that the language in footnote 1 of Service Schedule MSS-3 that actual amounts recorded in the FERC Form 1s or "such other supporting data as may be appropriate for each company" should not be

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[8] Opinion No. 518, 139 FERC ¶ 61,105 at P 26.

[9] *Id*.

[10] *Id*. (quoting *Entergy Services, Inc*., 137 FERC ¶ 61,019, at P 13 (2011).

given an expansive interpretation that would allow parties to ignore the requirements of the bandwidth formula.[11]

2. Request for Rehearing

5. The Louisiana Commission contends that the Commission's rulings in Opinion No. 518 and Opinion No. 519,[12] when taken together, cut off any consumer remedy for just and reasonable rates.[13] The Louisiana Commission argues that in Opinion No. 518 the Commission ruled that issues relating to the justness and reasonableness of cost inputs into the bandwidth formula may not be litigated in a bandwidth proceeding. It argues that the determination that unjust and unreasonable cost inputs can only be corrected through an FPA section 206 filing cuts off any consumer remedy for unjust and unreasonable rates.[14]

6. The Louisiana Commission states that the Commission for decades has approved the use of formula rates, which avoid the need for utilities to provide notice and filing of new stated rates under FPA section 205, while making it clear that costs entered into the formula rate are always subject to review if the utility has not been required to demonstrate their reasonableness when the rates change.

7. The Louisiana Commission notes that in *Louisiana Public Service Comm'n v. FERC*,[15] the court approved the adoption of formula rates relying on thCommission's assurance that inappropriate cost inputs could be corrected in section 206 cases.[16] The

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[11] *Id*. P 27.

[12] *Louisiana Pub. Serv. Comm'n v. Entergy Corp*., Opinion No. 519, 139 FERC ¶ 61,107 (2012).

[13] Louisiana Commission Request for Rehearing at 14. The Louisiana Commission notes that the Commission ruled in Opinion No. 519, that, inter alia, "a section 206 filing can produce only prospective relief for unjust and unreasonable inputs into the formula." Louisiana Commission Request for Rehearing at 14 (citing Opinion No. 519, 139 FERC ¶ 61,107 at P 26). However, rehearing of Opinion No. 519 is currently pending before the Commission, and, accordingly, requests for rehearing of Opinion No. 519 will not be considered here.

[14] Louisiana Commission Request for Rehearing at 14 (citing 16 U.S.C. §§ 824d, 824e).

[15] *Louisiana Pub. Serv. Comm'n v. FERC*, 688 F.2d 357 (5th Cir. 1982).

[16] *Id*. at 257.

Louisiana Commission states that the Commission ruled in *AEP* that parties have the right to challenge inputs to a formula rate at whatever time they discover errors to the implementation of the formula.[17] The Louisiana Commission adds that numerous Commission decisions establish not only that unreasonable inputs may be corrected, but that they may be corrected back to the time that they were introduced into the formula.[18] It further adds that because the inputs were never subject to regulatory review in the first place, the retroactive correction does not implicate the rule against retroactive ratemaking.

3. Commission Determination

8. We deny the request for rehearing. The Louisiana Commission's argument that the Commission's holding in Opinion No. 518 does not provide a vehicle to effectively challenge unjust and unreasonable bandwidth formula cost inputs is in error. In Opinion No. 518, the Commission reiterated that, in determining whether Entergy has properly implemented the bandwidth formula using the required data inputs in a bandwidth filing, parties in a bandwidth implementation proceeding may challenge whether the inputs were calculated consistent with the formula and applicable accounting rules and conformance with retail regulatory approvals to the extent the formula requires use of values approved by retail regulators.[19] The Commission further noted that, with respect to whether or not particular costs were prudently incurred, the Louisiana Commission and other parties may challenge the prudence of cost inputs to the bandwidth formula in a bandwidth proceeding.[20]As the Commission further explained in an order in Docket No. EL09-43-002 issued after Opinion No. 518 in response to similar arguments by the Louisiana Commission,[21] and as the Commission reiterates in an order in Docket No. ER10-

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[17] Louisiana Commission Request for Rehearing at 16 (citing *American Electric Power Service Corp.*, 124 FERC ¶ 61,306, at P 35 (2008) (*AEP*)).

[18] *Id*. (citing, e.g., *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 (2009)).

[19] Opinion No. 518, 139 FERC ¶ 61,105 at P 26 (citing *Entergy Services, Inc*., 137 FERC ¶ 61,019, at P 13 (2011)).

[20] *Id.*

[21] In Docket No. EL09-43-002, the Commission noted that "the Louisiana Commission raises concerns that the Commission's clarification [in that proceeding] does not provide a vehicle to effectively challenge potentially unjust and unreasonable bandwidth formula cost inputs. It argues that a section 206 complaint only applies prospectively to future bandwidth filings and does not provide a remedy, or at most, provides an inadequate remedy for unjust and unreasonable costs being passed through the formula. Principally, the Louisiana Commission seeks assurance from the

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1350-004 being issued concurrently with this order in response to similar arguments by the Louisiana Commission, [22] Commission precedent concerning the right to challenge the misapplication of a formula rate or the charging of rates other than a filed rate and the resulting receipt of refunds would apply where erroneous data, incorrect calculations or imprudent costs are used in the bandwidth formula.[23]

9. The Commission has held that it may order refunds for past periods where a utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate.[24] In *AEP*, the Commission found that public utility protocols that imposed time limits for raising preliminary and formal challenges to the application of the formula rate improperly precluded challenges to inputs in the formula. The Commission explained that, "in approving any formula rate, the Commission approves the formula itself, the algebraic equation used to calculate the rates. It does not approve the inputs into the formula or the charges resulting from the application of the inputs to the algebraic equation."[25] The Commission added that, "[t]he Commission's long-standing precedent is that, under formula rates, parties have the right to challenge the inputs to or the implementation of the formula at whatever time they discover errors in the inputs to or implementation of the formula."[26]

Commission that it may correct cost inputs, and obtain refunds, in a section 206 complaint that will relate back to the date that the alleged improper inputs were first used. The Louisiana Commission contends that this treatment is consistent with Commission precedent." *Arkansas Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,012, at P 26 (2013) (Docket No. EL09-43-002 Rehearing Order).

[22] *Entergy Services, Inc.*, 145 FERC ¶ 61,049 at P 14 (2013) (clarifying that challenges that may be raised in a bandwidth implementation proceeding to the "inputs" used in the bandwidth formula include misapplication of the formula rate (such as use of erroneous data or incorrect calculations), which includes the prudence of a cost input, as well as whether the formula was misapplied or miscalculated because the inputs were unjust and unreasonable.).

[23] Docket No. EL09-43-002 Rehearing Order, 142 FERC ¶ 61,012 at P 26.

[24] *See AEP*, 124 FERC ¶ 61,306 at P 35 n.50. *See also Appalachian Power Co.*, 23 FERC ¶ 61,032, at 61,088 (1983); *DTE Energy Trading, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,062, at P 28 (2005).

[25] *Id.* P 34.

[26] *Id*. P 35.

10. The Commission has also previously noted its authority to order refunds for imprudent costs charged to customers through an existing formula rate.[27] As with challenges premised upon misapplication of formula rates, the Commission has rejected attempts to limit the timeframe for prudence inquiries.[28] The rationale for permitting such challenges, and related refunds, is clear. In *AEP*, for example, the Commission noted that "customers may not uncover errors in data or imprudent or otherwise inappropriate costs until well after the challenge period."[29]

11. In sum, parties can challenge in a bandwidth proceeding erroneous inputs, implementation errors, or prudence of cost inputs. However, modifications to the bandwidth formula itself must be raised in an FPA section 206 complaint, or proposed by Entergy in a section 205 filing.

B. Interruptible Load

1. Background

12. In Opinion No. 518, the Commission found that the interruptible load issue, i.e., whether the actual cost calculation for each Operating Company should include interruptible load in the costs attributable to various provisions of the Entergy System Agreement, had been rendered moot by the Interruptible Load Rehearing Order, which granted rehearing of an order on complaint concerning the treatment of interruptible load

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[27] *See Midwest Independent Transmission System Operator*, 139 FERC ¶ 61,127, at P 15 n.14 (2012) (citing *Yankee Atomic Elec. Co*., 60 FERC ¶ 61,316, at 62,096-97 (1992)).

[28] *See, e.g., North Carolina Electric Membership Corp. v. CPL*, 57 FERC ¶ 61,332, at 62,065 (1991) (citing *Pub. Serv. Co. of New Hampshire*, 6 FERC ¶ 61,299 at 61,710 (stating that the principle against retroactive rulemaking does not prohibit refunds of unjust and unreasonable expenditures booked to FERC accounts that are flowed through a formula and thereby constitute an improper application of the Commission's accounting rules and improper computation of the formula rate), *reh'g denied*, 9 FERC ¶ 61,202 (1979)).

[29] *AEP*, 124 FERC ¶ 61,306 at P 36 and n.51 (citing *Yankee Atomic Electric Co.*, 60 FERC ¶ 61,316, at 62,096-97 (1992) (allowing review of potentially imprudent costs charged to customers in the prior-year formula rates)).

in allocating system costs in the bandwidth formula.[30] In that order, the Commission found, *inter alia*, that interruptible load should be removed from the System 12 coincident peak (CP) ratio to allocate system average production costs in section 30.13 of the Service Schedule MSS-3 bandwidth formula.[31]

2. Request for Rehearing

13. The Louisiana Commission argues that the Commission erred by finding that the interruptible load issue had been rendered moot by the Interruptible Load Rehearing Order. The Louisiana Commission contends that the Interruptible Load Rehearing Order's directive to exclude interruptible loads from the demand ratios in the bandwidth calculation is effective only for the refund period of April 3, 2008 through July 3, 2008 and presumably governs the bandwidth filings in 2007 and 2008, and will be effective prospectively. However, the Louisiana Commission explains that because the filing in this case was made in 2009 the Interruptible Load Rehearing Order will not render this case moot. The Louisiana Commission argues that if the Interruptible Load Rehearing Order were effective at the time of the 2009 bandwidth filing (i.e., the third annual bandwidth proceeding at issue here), the interruptible load issue here would be moot. However, the Louisiana Commission notes that in Entergy's compliance filing in the interruptible load proceeding, Entergy revised the tariff only for the refund period and then for a prospective period commencing May 7, 2012.[32]

14. The Louisiana Commission contends that Entergy's compliance filing means that the mismatch will not be rendered moot for the 2009 bandwidth case. The Louisiana Commission argues that the Commission could not have intended for Opinion No. 518 to cancel out the effects of its own order. The Louisiana Commission argues that the Commission must address the interruptible load issue for the 2009 bandwidth filing, or provide an explanation of why the issue is moot.[33]

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[30] Opinion No. 518, 139 FERC ¶ 61,105 at P 12 (citing Interruptible Load Rehearing Order, 139 FERC ¶ 61,100 at PP 23-27). The Interruptible Load Rehearing Order was issued concurrently with Opinion No. 518.

[31] Interruptible Load Rehearing Order, 139 FERC ¶ 61,100 at PP 23-27.

[32] Louisiana Commission Request for Rehearing at 5 (citing Entergy, Compliance Filing, Docket No. ER12-1881-000, at 4).

[33] *Id*. at 7.

3. Commission Determination

15. We grant the request for rehearing. Upon further consideration, we agree with the Louisiana Commission that because the Interruptible Load Rehearing Order is only effective prospectively (commencing May 7, 2012) and for the refund effective period, April 3, 2007 through July 3, 2008, the findings in the Interruptible Load Rehearing Order do not render the interruptible load issue moot in this proceeding. Nevertheless, we are unable to provide the Louisiana Commission with its requested relief in this case.

16. In an annual bandwidth proceeding, the focus is on whether Entergy correctly applied the FERC Form 1 data required by the formula to be used in the bandwidth calculation.[34] As the Presiding Judge noted, the Louisiana Commission's proposed adjustment in this case would have required the use of inputs other than those used in the FERC Form 1 and required by the formula to be used, which would have been contrary to the provisions of Service Schedule MSS-3.[35] This ruling was supported by Trial Staff, who agreed that the Louisiana Commission's proposed adjustment is not consistent with the definitions set forth in Service Schedule MSS-3 related to the inputs that are required to be used in the bandwidth formula.[36] We note that the Louisiana Commission has not provided any explanation in the record of this case as to why the Initial Decision was wrong when it held that the Louisiana Commission's proposed remedy would require the use of data other than data recorded in the FERC Form 1s that are required to be used in the bandwidth calculation. Accordingly, the Louisiana Commission's proposed adjustments regarding the interruptible load issue would require a modification to the bandwidth formula and thus are outside the scope of this proceeding; instead, they must be sought by the Louisiana Commission in an FPA section 206 proceeding.[37]

C. ADIT

17. In Opinion No. 518, the Commission affirmed the Presiding Judge's findings with regard to ADIT. The Commission found that the Presiding Judge was correct in stating that the bandwidth calculation begins with the inclusion of all ADIT generally and

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[34] *Entergy Services, Inc.*, 130 FERC ¶ 61,170 at P 19.

[35] Initial Decision, 132 FERC ¶ 63,005 at P 76.

[36] Trial Staff Initial Brief at 10.

[37] We note that Louisiana Commission brought this issue to the Commission in a pending section 206 complaint that is being held in abeyance pending the outcome of this case. *See Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,104 (2010).

properly includable for cost-of-service purposes, and the product of that total and the production plant ratio is the portion of the ADIT which is production related. The Commission also affirmed the Presiding Judge's finding that casualty loss ADIT should be included in the bandwidth calculation.[38]

1. Casualty Loss ADIT

a. Request for Clarification

18. The Louisiana Commission asks the Commission to clarify that only casualty loss ADIT that is properly includable for FERC cost-of-service purposes may be included in the bandwidth calculation. It notes that the Commission explained in Opinion No. 518 that casualty loss ADIT recorded in Account No. 282 should be included in bandwidth formula calculations.[39] The Louisiana Commission further notes that in Opinion No. 518, the Commission stated that:

> Amounts recorded in Account Nos. 190 and 282 that are generally and properly includable for Commission cost-of-service purposes are included in rate base in the bandwidth formula. In Opinion No. 505, the Commission found that to the extent that storm damage costs are included in expense accounts that are included in the bandwidth formula (production storm damage expense), ADIT for net operating loss carry-forwards associated with storm damages should also be included. For these reasons, both the ADIT related to the calculated net operating loss carry-forward balance recorded in Account No. 190 and the casualty loss ADIT recorded in Account No. 282 are to be included. We find this approach consistent with the findings of Opinion No. 505 summarized above.[40]

19. The Louisiana Commission adds that the Commission explained how Entergy should calculate the amount of ADIT that is includable for cost-of-service purposes. It argues that the Commission ruled that Entergy should determine what portion of the ADIT relates to expenses includable for cost-of-service purposes.[41] It contends that in an

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[38] Opinion No. 518, 139 FERC ¶ 61,105 at P 84.

[39] Louisiana Commission Request for Rehearing at 7 (citing Opinion No. 518, 139 FERC ¶ 61,105 at P 88).

[40] *Id*.

[41] *Id*.

order on compliance in the second annual bandwidth proceeding, the Commission directed that:

> [to] properly include Net Operating Loss ADIT amounts in bandwidth calculations, Entergy must multiply its Net Operating Loss carry-forward balance by the ratio of incurred expenses includable for Commission cost-of-service purposes to total expense incurred during the period the Net Operating Loss was recognized. ADIT related to the calculated Net Operating Loss carry-forward balance to be included in the bandwidth calculations must then be allocated to the production function in the bandwidth formula using the plant ratios as prescribed by Service Schedule MSS-3.[42]

20. The Louisiana Commission argues that despite this clear guidance to determine the proportion of expenses attributable to FERC cost-of-service and include the associated proportion of ADIT, Entergy included all casualty loss ADIT in its 2012 bandwidth calculation. The Louisiana Commission notes that Entergy included the proportion of net operating loss ADIT that is associated with expenses that are includable in FERC cost-of-service, but did not use the same method for casualty loss ADIT. The Louisiana Commission contends that the Commission should clarify that Entergy must use the same method for determining includable casualty loss ADIT as it uses for net operating loss ADIT.

b. <u>Commission Determination</u>

21. The Louisiana Commission's request for clarification is denied. The Louisiana Commission seeks clarification of whether the Commission intended that Entergy use the net operating loss ADIT ratio discussed in Opinion No. 505-A to determine the amount of casualty loss ADIT to include in bandwidth calculations.[43] The Louisiana Commission contends that Entergy did not use the ratio and as a result inappropriately included casualty loss ADIT amounts in the bandwidth calculation that should be excluded.

22. We disagree with the Louisiana Commission's contention that Entergy must use the net operating loss ADIT ratio. To the contrary, we clarify that Entergy is not required to use the net operating loss ADIT ratio to determine the amount of casualty loss ADIT to include in bandwidth calculations. Instead, Entergy must include all the casualty loss

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[42] *Id*. at 8 (citing *Entergy Services, Inc.*, 139 FERC ¶ 61,104 at P 22).

[43] Opinion No. 505-A, 139 FERC ¶ 61,103 at P 60.

ADIT amounts in bandwidth calculations without applying the net operating loss ADIT ratio, and Entergy must functionalize the casualty loss ADIT amounts to production based on plant ratios, in accordance with the provisions of the bandwidth formula.[44] The bandwidth formula provides for the inclusion of certain ADIT amounts, and, axiomatically, the exclusion of others, based on whether the ADIT is generally and properly includable in bandwidth calculations for Commission cost-of-service purposes.

23. In Opinion No. 505, the Commission determined that net operating loss ADIT should be included in the bandwidth formula to the extent expenses associated with the ADIT are in accounts that are included in the bandwidth formula.[45] The Commission clarified this decision in Opinion No. 505-A,[46] stating that the net operating loss is the result of a calculation that combines all the revenues and expenses of Entergy during the period the net operating loss was recognized.[47] Moreover, the Commission acknowledged that the net operating loss is made up of many expenses, none of which, in isolation, can be considered the singular cause of the net operating loss. Thus, the Commission found that attributing ADIT related to the net operating loss to a particular expense or function in isolation is arbitrary because the net operating loss is not created by any single category of expenses. Due to the inability to attribute the cause of the net operating loss to any particular expense, and because certain expenses associated with the net operating loss are not costs includable for Commission cost-of-service purposes, the Commission developed the net operating loss ADIT ratio to assist Entergy in determining the amount of net operating loss ADIT to include in bandwidth calculations.

24. In comparison to the inability to attribute specific expenses to the cause of the net operating loss, the cause of the casualty loss is directly attributable to expenses incurred due to storm damages. Neither the Louisiana Commission nor Entergy contest that the casualty loss is not the result of storm damages. During questioning by the Louisiana Commission counsel and Entergy counsel in hearing proceedings before the Presiding Judge, for example, Entergy witness Louiselle indicated that the entire casualty loss

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[44] *See* § 30.12 of Service Schedule MSS-3.

[45] Opinion No. 505, 130 FERC ¶ 61,023.

[46] Opinion No. 505-A, 139 FERC ¶ 61,103 at P 59.

[47] In an order on rehearing of Opinion No. 505-A being issued concurrently with this order, we further clarify that the net operating loss is the result of a calculation that combines all Entergy's *taxable* revenues and *tax deductible* expenses. *Entergy Services, Inc.*, 145 FERC ¶ 61,045 (2013).

amount is the result of storm damages.[48] Consequently, we agree with the Louisiana Commission's assertion made earlier in this proceeding that casualty loss ADIT and net operating loss ADIT are not equivalent.[49]

25. Given the inability to attribute the cause of the net operating loss to any particular expenses and given that certain expenses associated with the net operating loss are not costs includable in bandwidth calculations, Entergy is required to use the net operating loss ADIT ratio to determine the proportional amount of the net operating loss ADIT that should be included in bandwidth calculations. However, we find that it is unnecessary for Entergy to use the net operating loss ADIT ratio to determine casualty loss ADIT amounts to include in bandwidth calculations because the expenses associated with the casualty loss are directly attributable to storm damage costs, which are costs that were recorded in accounts included in the bandwidth formula. Consistent with our determination in Opinion No. 505 regarding the inclusion of net operating loss ADIT in the bandwidth formula, to the extent the expenses associated with the casualty loss are recorded in accounts included in the bandwidth formula, Entergy should include ADIT associated with the casualty loss in the bandwidth formula.

2. Effective Date

a. Request for Clarification

26. The Louisiana Commission argues that the Commission should clarify that casualty loss ADIT can only be included in the bandwidth calculation prospectively from the date of issuance of Opinion No. 518. The Louisiana Commission contends that Entergy did not include casualty loss ADIT in the rates it filed with the Commission in this case, and did not suggest the inclusion of casualty loss ADIT until months after the Commission ruled in Opinion No. 505 that net operating loss ADIT should be included in the bandwidth calculation.[50] The Louisiana Commission explains that Entergy first proposed to include casualty loss ADIT, assuming net operating loss ADIT is included, at the hearing. The Louisiana Commission explains that in Opinion No. 518, the Commission accepted Entergy's proposal to include casualty loss ADIT. The Louisiana

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[48] Tr. 345-350, Docket No. ER09-1224-001.

[49] Louisiana Commission Brief on Exceptions at 50-52.

[50] Louisiana Commission Request for Rehearing at 9 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 234).

Commission argues that this adjustment cannot have retroactive effect for any period prior to the issuance of the Commission's order.[51]

27. The Louisiana Commission argues that under section 205(d) of the FPA, a change in rates may be effective only after the change is filed by the utility and public notice provided.[52] It notes that the Commission has required Entergy to make a new section 205 filing each year to establish the annual rates for the bandwidth formula. It notes that in this case, Entergy made a filing on May 29, 2009 and showed casualty loss ADIT as excluded from the bandwidth calculation. The Louisiana Commission explains that Entergy's proposal to include casualty loss ADIT resulted from the Commission's decision in Opinion No. 505, where the Commission ruled that net operating loss ADIT should be included in the bandwidth calculation. The Louisiana Commission explains that Entergy proposed including casualty loss ADIT as well after that ruling was issued.

28. The Louisiana Commission argues that including casualty loss ADIT from the date of Entergy's filing, when Entergy failed to notice the request, would violate the rule against retroactive ratemaking. The Louisiana Commission contends that while the Commission may determine that it is unjust and unreasonable to exclude casualty loss ADIT from the bandwidth calculation, the Commission's ruling can only have prospective effect from the date the order is issued.[53]

b. <u>Commission Determination</u>

29. We deny the request for rehearing. The Louisiana Commission is mistaken in asserting that Entergy was required to make a section 205 filing regarding the inclusion of casualty loss ADIT. As the Commission explained in Opinion No. 518, casualty loss ADIT that is recorded in Account No 282 is to be included in the bandwidth calculation.[54] Because the bandwidth formula provides that this casualty loss ADIT is to be included in the bandwidth calculation, the Louisiana Commission's claim of retroactive ratemaking is unfounded, and, accordingly, there is no reason for Entergy to make a section 205 filing.

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[51] *Id*. at 11.

[52] *Id*. (citing 16 U.S.C. § 824(d)).

[53] *Id*. at 14.

[54] Opinion No. 518, 139 FERC ¶ 61,105 at P 88 ("Amounts recorded in Account Nos. 190 and 282 that are generally and properly includable for Commission cost-of-service purposes are included in rate base in the bandwidth formula.").

D. Out-of-Period Costs

1. Background

30. In Opinion No. 518, the Commission affirmed the Presiding Judge's finding that Service Schedule MSS-3 does not provide for the exclusion of out-of-period revenues and expenses.[55] The Commission ruled that in this proceeding, the costs properly recorded on the Operating Company's FERC Form 1 and required by the formula to be used in the bandwidth calculation include out-of-period expenses and revenues. The Commission found that contrary to the arguments of the Louisiana Commission and Trial Staff, there is no provision in the tariff that would allow for an adjustment to remove out-of-period amounts, including the "other supporting data" provision of footnote 1 of Service Schedule MSS-3. Footnote 1 provides in relevant part as follows:

> 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.[56]

31. The Commission rejected arguments that exclusion of out-of-period costs would lead to a more equitable result, finding that an annual bandwidth proceeding is not the proper place to argue the justness and reasonableness of bandwidth formula provisions.[57]

2. Request for Rehearing

32. The Louisiana Commission argues that the Commission should reconsider its ruling that out-of-period costs may be included in a calculation designed to compare test year production costs. It contends that while the Commission ruled that the bandwidth proceeding is not the proper place to argue the justness and reasonableness of bandwidth formula provisions, the Commission did not disclose what type of proceeding would be the proper place to exclude unjust and unreasonable inputs for the 2008 calendar year.[58]

33. The Louisiana Commission explains that the largest out-of-period category at issue relates to revenues and expenses recorded in 2008 to implement a recalculation of

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[55] *Id*. P 43.

[56] Exh. No. ESI-3 at 52-3 n.1.

[57] Opinion No. 518, 139 FERC ¶ 61,105 at P 44.

[58] Louisiana Commission Request for Rehearing at 17.

Service Schedule MSS-1, MSS-5 and Joint Account Purchase revenues and receipts for a period in 1995-96, pursuant to a prior Commission order.[59] The Louisiana Commission further adds that other, smaller out-of-period items include a transmission reserve write-off, insurance reimbursements for prior years, and a mutual assistance credit related to costs incurred in 2004 for Hurricane Jean.

34. The Louisiana Commission argues that the inclusion of out-of-period costs in the bandwidth calculation distorts the results and undermines the purpose of the tariff. It notes that Service Schedule MSS-3 provides that the bandwidth calculation shall be "based on the actual amounts on the Company's books for the twelve months ended December 31 of the previous year …."[60] The Louisiana Commission explains that all of the amounts in question are "for" a period previous to the test year. The Louisiana Commission adds that the bandwidth formula provides that the FERC Form 1 numbers may be adjusted with "such other supporting data as may be appropriate."[61] It explains that when the inclusion of costs or revenues in a bandwidth account renders the annual calculation inaccurate, the use of "other supporting data" to remove the out-of-period items is "appropriate."

35. The Louisiana Commission argues that including out-of-period costs conflicts with a prior Commission compliance order filed in response to Opinion No. 480, in which the Commission stated that:

> If an Operating Company's bandwidth payments are added to its costs in the following year, that Company's obligation to make any payments in that second year would be correspondingly reduced or perhaps cancelled out entirely. Such a scenario would defeat the purpose of rough cost equalization espoused in Opinion Nos. 480 and 480-A.[62]

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[59] *Id*. at 18-19 (citing *Louisiana Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp*., 120 FERC ¶ 61,241 (2007)).

[60] *Id*. at 19 (citing Exh. No. ESI-3 at 52 n.1).

[61] *Id*.

[62] Compliance Order, 117 FERC ¶ 61,203 at P 42.

36. The Louisiana Commission notes that the Commission determined that bandwidth payments/receipts from 2006 should not be reflected in the 2007 production costs.[63]

37. The Louisiana Commission argues that Service Schedule MSS-3 must be interpreted consistent with its purpose, which is to bring Operating Company production costs within +/-11 percent of system average on a calendar year basis. It contends that the inclusion of prior period costs and revenues distorts the calculation and frustrates the tariff's purpose. The Louisiana Commission also argues that out-of-period costs may distort the result for the test year in question, causing calendar year deviations in excess of the +/-11 percent required by the bandwidth formula.[64]

38. The Louisiana Commission contends that including out-of-period costs conflicts with the methodology contained in Exhibit Nos. ETR-26 and ETR-28.[65] It notes that in developing Exhibit Nos. ETR-26 and ETR-28, Entergy witness Louiselle adjusted for out-of-period items that came to his attention. The Louisiana Commission maintains that while Exhibit Nos. ETR-26 and ETR-28 did not explicitly provide for the removal of out-of-period costs, Entergy's methodology adjusted for out-of-period items to ensure that comparisons were correct for the calendar year. The Louisiana Commission notes that the Commission has previously held that when Service Schedule MSS-3 is silent, the methodology in Exhibit Nos. ETR-26 and ETR-28 should control.[66] It argues that, therefore, because Service Schedule MSS-3 does not contain detail regarding the treatment of out-of-period items, the methodology in Exhibit Nos. ETR-26 and ETR-28 should control.

39. Lastly, the Louisiana Commission argues that the Commission's decision reverses the effect of a prior order concerning the removal of interruptible loads with regard to the

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[63] Louisiana Commission Request for Rehearing at 20 (citing Compliance Order, 117 FERC ¶ 61203 at P 41).

[64] *Id*. at 21.

[65] Exhibit Nos. ETR-26 and ETR-28 are exhibits prepared by Entergy in Docket No. EL01-88-001 (the underlying docket in Opinion Nos. 480 and 480-A) that formed the basis for the bandwidth formula.

[66] Louisiana Commission Request for Rehearing at 21 (citing *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 134 (2010) (Interruptible Load Refund Order)).

refund period for 1995-96.[67] The Louisiana Commission contends that because the Order on Remand regarding interruptible loads was issued to make rates just and reasonable for the refund period in 1995-96, the application of the bandwidth formula to reverse that refund cannot be just and reasonable.

3. Commission Determination

40. We deny the request for rehearing. The bandwidth formula as contained in Service Schedule MSS-3 requires the use of revenues and expenses recorded in the FERC Form 1's applicable accounts for the applicable test year, which in this proceeding is 2008. The bandwidth formula does not provide for the exclusion of out-of-period costs and expenses. Because the amounts at issue were properly recorded in accounts used in the bandwidth formula, Entergy was required to use them when making the annual bandwidth calculation. The Louisiana Commission, which is unable to point to any provision of the bandwidth formula that excludes out-of-period costs, instead focuses on the "other supporting data" phrase in footnote 1, which provides in relevant part:

> 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.[68]

41. The Louisiana Commission contends that the "other supporting data" language in footnote 1 should permit the exclusion of out-of-period revenues and expenses. However, this interpretation of footnote 1 ignores the part of the footnote requiring use of "actual amounts on the Company's books," which is what Entergy has done to populate the bandwidth formula. Interpreting the "other supporting data" as requested by the Louisiana Commission would allow deviations from use of data in the FERC Form 1 required by the formula to be used in the bandwidth calculation in order to achieve what any particular party may think is a more reasonable result, which would make the tariff language superfluous.

42. In addition, the Louisiana Commission incorrectly contends that the Compliance Order provides support for the exclusion of out-of-period costs. In that proceeding, the Commission rejected the Arkansas Commission's argument that an individual Operating Company's bandwidth payments for a particular year should be included in that Operating Companies' production cost calculations in the next year's calculation. The

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[67] *Id*. at 22 (citing *Louisiana Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp*., 120 FERC ¶ 61,241 (2007) (Order on Remand)).

[68] Exh. No. ESI-3 at 52-3 n.1.

Commission found that such an approach would lead to the possibility that payments could be skipped in every other year.[69] The Commission found that an Operating Company's bandwidth payment obligation in the second year could be "reduced or perhaps canceled out entirely," which would "defeat the purpose of rough production cost equalization."[70] We find that this holding was limited to the issue of how to treat an Operating Company's bandwidth payments and does not address out-of-period costs. Further, the bandwidth formula expressly excludes prior-year bandwidth payments and receipts from being included in the bandwidth calculation, unlike the out-of-period revenues/expenses at issue here.[71]

43. Further, the Louisiana Commission's contention that the Commission should rely on Exhibit Nos. ETR-26 and ETR-28 because the bandwidth formula is silent with regard to out-of-period costs is unfounded. As we explained in Opinion No. 518, the fact that the bandwidth formula is silent with regard to out-of-period revenues and expenses does not mean that the formula is ambiguous with regard to out-of-period expenses; instead it simply means "that the formula does not provide for any adjustments for out-of-period revenues and expenses."[72] Also, contrary to claims made by the Louisiana Commission, testimony by Entergy witness Louiselle does not support the exclusion of out-of-period costs. Mr. Louiselle, who was the person who prepared Exhibit Nos. ETR-26 and ETR-28, testified that "[t]here were numerous out-of-period items booked to expenses" in Exhibit ETR-26, and "[n]one of those were adjusted out."[73] Thus, even if Exhibit Nos. ETR-26 and ETR-28 were relevant to a discussion of out-of-period costs and Service Schedule MSS-3, they do not support the Louisiana Commission's contention that such revenues and expenses should be excluded from the bandwidth calculation.

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[69] Compliance Order, 117 FERC ¶ 61,203 at P 42.

[70] *Id*.

[71] *See* Entergy System Agreement, § 30.l2, variable PURP (purchased power expense) and variable RC (revenue credits).

[72] Opinion No. 518, 139 ¶ 61,105 at P 46.

[73] Exh. No. ESI-29 at 38. Mr. Louiselle acknowledged that two adjustments were made in Exh. No. ETR-26 that could be characterized as out-of-period adjustments, although "there are other ways of referring to both of those adjustments." Tr. at 304-05 (Louiselle). However, he again reiterated that "there were numerous out-of-period adjustments not made to ETR-26 and ETR-28." *Id*. at 304.

44. We also reject the Louisiana Commission's argument that Opinion No. 518 reverses a prior Commission order regarding refunds in a proceeding concerning interruptible loads. In annual bandwidth proceedings, the Commission is concerned only with determining whether the formula has been properly implemented. The Louisiana Commission's argument goes beyond the scope of this proceeding and accordingly will not be considered here.

E. Return on Associated Income Taxes for Ouachita and Calcasieu Plants

1. Background

45. During the 2008 test year, two of the Operating Companies purchased two different generation facilities from unaffiliated independent power producers. Entergy Gulf States Louisiana purchased the Calcasieu Generating Facility on March 31, 2008, and Entergy Arkansas purchased the Ouachita Power Facilities on September 30, 2008. Footnote 2 of section 30.12 of Service Schedule MSS-3 requires that "Rate Base values shall 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."[74] The Louisiana Commission argued that Entergy should account for Entergy Arkansas' and Entergy Gulf States Louisiana's respective holdings of Ouachita and Calcasieu on a partial rather than full-year basis for the purpose of the bandwidth calculation for Service Schedule MSS-3, because Entergy Arkansas and Entergy Gulf States Louisiana did not hold the Ouachita and Calcasieu assets for the entirety of bandwidth test year 2008.[75]

46. In Opinion No. 518, the Commission found that the bandwidth formula only allows for assets on the books at the end of the calendar-year to be reflected in the bandwidth calculation as though they had existed for a full year and that Entergy is required to use the FERC Form 1 data for the applicable accounts in performing the Service Schedule MSS-3 calculations.[76] The Commission further found that footnote 2 in Service Schedule MSS-3 requires that data recorded on the Operating Company's books as of the end of the year be used.[77] The Commission noted that the bandwidth formula does not provide Entergy with the discretion to do anything other than use the end-of-year rate balances for the Operating Company's generation plants.

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[74] Entergy System Agreement, Service Schedule MSS-3, footnote 2.

[75] *See* Opinion No. 518, 139 FERC ¶ 61,105 at P 49.

[76] *Id*. P 61.

[77] *Id*.

47. In addition, the Commission ruled that a section 206 proceeding is the proper forum for the Louisiana Commission to make an argument for applying partial year accounting of assets held in less than 12 months of a bandwidth test year, because such a change would require a change to the bandwidth formula. The Commission upheld the Presiding Judge's determination that returns on rate base and the associated income taxes are properly includable in the bandwidth calculation if they are derived appropriately from the end-of-year FERC Form 1 balances for the applicable test year.[78]

2. Request for Rehearing

48. The Louisiana Commission argues that the Commission should reconsider its ruling that Service Schedule MSS-3 requires the inclusion of costs for acquisitions that it contends were not actually incurred during the test year. It explains that Entergy included an annual return requirement for the investment of Entergy Arkansas in Ouachita and the investment of Entergy Gulf States Louisiana in Calcasieu even though neither company owned its facility for the entire year. The Louisiana Commission contends that this approach overstates the investment costs in the bandwidth calculation and double-counts certain costs for the facilities.[79]

49. The Louisiana Commission notes that Service Schedule MSS-3 specifies that "actual" costs "shall be determined for each company."[80] It further notes that footnote 1 of the tariff requires determining the "actual amounts on the Company's books for the twelve months ended December 31 of the previous year …."[81] The Louisiana Commission notes that for the first three months of 2008, Calcasieu was not on the books of Entergy Gulf States Louisiana, and for the next six months, Ouachita was not on the books of Entergy Arkansas. The Louisiana Commission further argues that Service Schedule MSS-3 permits the use of "such other supporting data as may be appropriate"[82] to supplement data from the Form 1. The Louisiana Commission contends that the use of actual ownership data is "appropriate" because it avoids an inaccurate result.

50. The Louisiana Commission argues that while the Commission's only basis for approving Entergy's treatment of Ouachita and Calcasieu appears to be that the tariff

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[78] *Id*. P 86.

[79] Louisiana Commission Request for Rehearing at 23.

[80] *Id*. at 24 (citing Exh. No. ESI-3 at 52, § 30.12).

[81] *Id*. (citing Exh. No. ESI-3 at 52, n.1).

[82] *Id*. (citing Exh. No. ESI-3 at 52, n.1).

calls for the use of year-end rate base values, the tariff terms are ambiguous. The Louisiana Commission contends that the Commission should interpret Service Schedule MSS-3's terms to achieve, rather than avoid, a just and reasonable result by allowing for a partial-year accounting for Ouachita and Calcasieu.[83]

3. Commission Determination

51. We deny the request for rehearing. In its request for rehearing, the Louisiana Commission reiterates its arguments that Entergy's treatment of Ouachita and Calcasieu in the 2008 bandwidth calculation overstates investment costs for those two facilities. However, as we explained in Opinion No. 518, the bandwidth formula only allows for assets on the books at the end of the calendar-year to be reflected in the bandwidth calculation as though they had existed for a full year and that Entergy is required to use such end-of-year FERC Form 1 data for the applicable accounts in performing the bandwidth calculation.[84] Specifically, Footnote 2 to section 30.12 of Service Schedule MSS-3 requires that:

> [r]ate Base values shall 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 actual balances on the Company's book.[85]

52. Entergy was accordingly required to include the balances for the Calcasieu and Ouachita plants as of December 31, 2008 in the bandwidth formula, because Entergy Gulf States Louisiana and Entergy Arkansas each owned their newly-purchased plant on December 31, 2008.

53. A bandwidth proceeding is "not the proper place to argue the justness and reasonableness of bandwidth formula provisions."[86] As we stated in Opinion No. 518, a section 206 proceeding is the appropriate forum for the Louisiana Commission to make an argument for applying partial year accounting of assets held in less than 12 months of a bandwidth test year, because such a change would require a change to the bandwidth formula.

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[83] *Id*.

[84] Opinion No. 518, 139 FERC ¶ 61,105 at P 61.

[85] Exh. No. ESI-3 at 52 n.2.

[86] Opinion No. 518, 139 FERC ¶ 61,105 at P 44.

The Commission orders:

(A) The requests for rehearing are granted in part and denied in part, as discussed in the body of this order.

(B) The request for clarification is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.