

145 FERC ¶ 61,048
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. ER09-1224-004

ORDER ON COMPLIANCE

(Issued October 16, 2013)

1. On July 6, 2012, Entergy Services, Inc. (Entergy) filed a compliance filing as required by Opinion No. 518.¹ Opinion No. 518 addressed rates filed by Entergy on behalf of the Entergy Operating Companies (Operating Companies),² implementing for the third time the Commission's annual bandwidth remedy as provided for in Opinion Nos. 480 and 480-A.³ That order affirmed in part the Initial Decision⁴ and required that

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

² 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.

³ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005), *order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008), *order on remand*, 137 FERC ¶ 61,047 (2011), *order dismissing reh'g*, 137 FERC ¶ 61,048 (2011).

Entergy submit a compliance filing. As discussed below, in this order we accept Entergy's compliance filing in part, reject it in part, and require a subsequent compliance filing.

I. Background

2. On May 29, 2009, Entergy submitted its third annual bandwidth filing, implementing the bandwidth remedy for calendar year 2008. On July 27, 2009, the Commission accepted the proposed rates for filing and suspended them for a nominal period, to become effective June 1, 2009, subject to refund. The Commission also established hearing and settlement judge procedures.⁵ The hearing was held in April 2010, and the Presiding Judge issued an Initial Decision on August 5, 2010. On May 7, 2012, the Commission issued Opinion No. 518. The Commission affirmed the Initial Decision on out-of-period expenses, the rate of return on acquisitions made during the 2008 test year, and accumulated deferred income taxes (ADIT).⁶ Opinion No. 518 also found that certain issues pertaining to the inclusion of interruptible load and the proper treatment of the costs associated with the Spindletop Regulatory Asset had been rendered moot by Commission orders issued concurrently or subsequent to Opinion No. 518.⁷

II. Entergy's Compliance Filing

3. Entergy states that, as required by Opinion No. 518, it provides its compliance filing regarding two issues: (1) the ADIT recorded in FERC Account No. 190, Accumulated Deferred Income Taxes, associated with net operating loss carry-forward balances and (2) ADIT recorded in FERC Account No. 282, Accumulated Deferred Income Taxes-Other Property, associated with casualty loss balances, by submitting workpapers that replace and revise those formula inputs in accordance with Opinion No. 518.

III. Notice of Filing and Responsive Pleadings

4. Notice of Entergy's filing was published in the *Federal Register*, 78 Fed. Reg. 3412 (2013), with comments, protests, and interventions due on or before February 3,

⁴ *Entergy Services, Inc.*, 132 FERC ¶ 63,005 (2010).

⁵ *Entergy Services, Inc.*, 128 FERC ¶ 61,091 (2009).

⁶ Opinion No. 518, 139 FERC ¶ 61,105 at PP 12, 14.

⁷ *Id.* PP 12-13.

2012. The Louisiana Public Service Commission (Louisiana Commission) filed a notice of intervention and a protest. Entergy filed an answer.

IV. Discussion

A. Procedural Matters

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention serves to make the Louisiana Commission a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answer to the protest because it has assisted us in our decision-making process.

B. Compliance Filing

6. As discussed below, the Louisiana Commission's protest and Entergy's answer addressed two areas of the compliance filing: ADIT associated with casualty losses and the effective date for inclusion of casualty loss ADIT in bandwidth calculations. Although the Louisiana Commission did not protest Entergy's compliance filing with regard to net operating loss ADIT, Entergy sought clarification of the calculation of the amount of net operating loss ADIT to include in bandwidth calculations in a separate proceeding in Docket No. ER07-956-004, and the issue is discussed as necessary below.⁸

1. Net Operating Loss ADIT

7. In Opinion No. 505-A, in response to requests for clarification from Entergy and the Louisiana Commission, the Commission clarified that ADIT associated with net operating loss must be functionalized in the bandwidth calculation and not directly assigned to production.⁹ The Commission also provided guidance on how the ADIT should be functionalized. The Commission explained that the net operating loss carry-forwards are the result of a calculation that combines all the revenues and expenses of Entergy. The Commission further explained 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. The Commission stated that, therefore, attributing ADIT related to the

⁸ The Commission is addressing Entergy's request for clarification in Docket No. ER07-956-004 in an order being issued concurrently with this one. *See Entergy Services, Inc.* 145 FERC ¶ 61,045 (2013).

⁹ Opinion No. 505-A, 139 FERC ¶ 61,103 at P 58.

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.¹⁰ Consequently, the Commission developed a ratio for establishing the amount of the total net operating loss ADIT that should be functionalized in the bandwidth calculation (net operating loss ADIT ratio):

Accordingly, 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 expenses incurred during the period the Net Operating Loss was recognized.¹¹

8. The Commission concluded that 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-3.¹²

a. Entergy's Filing

9. Entergy explains that it has attempted to follow the guidance provided in Opinion No. 505-A to calculate the amount of net operating loss ADIT to be functionalized in the bandwidth calculation. It states that pursuant to the Opinion No. 518 ruling affirming the treatment of net operating loss ADIT and the Commission's guidance on this issue as described in Opinion No. 505-A, Attachment 1 of its compliance filing shows the amount of the ADIT related to the net operating loss carry-forward to be included in the bandwidth calculation. Entergy calculated the amount by using the Net Utility Operating expenses to Total Expenses incurred during the period the net operating loss was recognized, reflecting Entergy's understanding of the Commission's guidance in Opinion No. 505-A. Entergy calculated the amount of net operating loss ADIT to include in bandwidth calculations by using a ratio of net utility operating expenses to total expenses incurred during the period the net operating loss was recognized.¹³ Entergy included the product of this ratio and net operating loss ADIT in bandwidth calculations. Entergy

¹⁰ *Id.* P 59.

¹¹ *Id.* P 60.

¹² *Id.*

¹³ Entergy Compliance Filing at Attachment 1.

indicates that this ratio and resulting calculation reflects its understanding of the Commission's guidance in Opinion No. 505-A. Entergy also notes that it has filed a request for clarification of the derivation of the inputs to the net operating loss ADIT Ratio in Opinion No. 505-A.

b. Commission Determination

10. Consistent with our order on clarification in Docket No. ER07-956-004¹⁴ that is being issued concurrently with this order, we find that Entergy's derivation of the inputs to the numerator and denominator of the net operating loss ADIT ratio does not result in the appropriate amount of net operating loss ADIT being included in the bandwidth calculation. As discussed more fully in that order, Entergy must include in the numerator of the net operating loss ADIT ratio all utility operating expenses incurred and included in taxable income determinations during the period the net operating loss was recognized. Furthermore, Entergy must include in the denominator of the ratio the sum of all utility operating expenses and below-the-line expenses (excluding income taxes) charged against book income as reported in the Form No. 1 at pages 115 and 117, respectively, that were included in taxable income determinations during the period the net operating loss was recognized. Entergy must also include deductions on the tax return not charged against book income as reported in the Form No. 1 at page 261. Accordingly, Entergy must recalculate net operating loss ADIT amounts to include in bandwidth calculations using these inputs to the net operating loss ADIT Ratio and file a subsequent compliance filing indicating Entergy's recalculations.

2. Casualty Loss ADIT

11. 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 (1) the bandwidth calculation begins with the inclusion of all ADIT generally and properly includable for cost-of-service purposes, and (2) the product of that total and the production plant ratio is the portion of the ADIT which is production related.¹⁵ The Commission also affirmed the Presiding Judge's finding that casualty loss ADIT should be included in the bandwidth calculation.¹⁶

¹⁴ *Entergy Services Inc.*, 145 FERC ¶ 61,045 (2013).

¹⁵ Entergy Compliance Filing at 4 (citing Opinion No. 518, 139 FERC ¶ 61,105 at P 84).

¹⁶ Opinion No. 518, 139 FERC ¶ 61,105 at P 84.

a. Entergy's Filing

12. Entergy included 100 percent of ADIT recorded in Account No. 282 associated with casualty losses in the bandwidth calculation.¹⁷ Entergy notes that in this proceeding, the parties addressed whether the Commission intended that net operating loss ADIT associated with storm damage expenses attributable to production should be the only amount of net operating loss ADIT included in the bandwidth calculation. Entergy notes that in Opinion No. 518, the Commission found that casualty loss ADIT, recorded in Account No. 282, should be included in the bandwidth calculation. In its compliance filing, Entergy provides a worksheet showing the amount of the ADIT related to the casualty loss in Account No. 282 to be included in the bandwidth calculation.¹⁸

b. Louisiana Commission's Protest

13. The Louisiana Commission argues that Entergy's compliance filing violates Opinion No. 518's directive by including all casualty loss ADIT. 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 notes that Opinion No. 518 finds that "with regard to casualty loss ADIT . . . there are ADIT amounts recorded in Account No. 282 that Entergy should include in the bandwidth formula calculations."¹⁹ The Louisiana Commission further notes that the Commission added:

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

¹⁷ Entergy Compliance Filing at Attachment 1.

¹⁸ *Id.*

¹⁹ *Id.* (citing Opinion No. 518, 139 FERC ¶ 61,105 at P 88).

in Account No. 282 are to be included. We find this approach consistent with the findings of Opinion No. 505 summarized above.²⁰

14. The Louisiana Commission further notes that the Commission has explained how Entergy should calculate the amount of ADIT that is includable for FERC cost-of-service purposes. It explains that in an order on compliance in the second annual bandwidth proceeding, the Commission directed:

[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-3.²¹

15. The Louisiana Commission argues that despite this 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 compliance filing. The Louisiana Commission argues that this is inconsistent with the Commission's directive and with Entergy's partial inclusion of net operating loss ADIT. The Louisiana Commission argues that the Commission should direct Entergy to use the same method for determining includable casualty loss ADIT as it uses for net operating loss ADIT.²²

c. Entergy Answer

16. Entergy argues that the Louisiana Commission does not provide a substantive basis to warrant rejection of the compliance filing. Entergy contends that the Louisiana Commission is incorrect in asserting that Entergy erred by including 100 percent of the casualty loss ADIT. Entergy explains that it followed the Commission's direction as provided in Opinion No. 518 for providing net operating loss ADIT carry-forwards to be included in the bandwidth calculation, using the ratio of Net Utility Operating expenses

²⁰ *Id.*

²¹ *Id.* at 3 (citing *Entergy Services, Inc.* 139 FERC ¶ 61,104 at P 22).

²² *Id.* at 4.

to Total Expenses incurred during the period the net operating loss was recognized.²³ Entergy further explains that the Commission did not require, and Entergy did not apply, this treatment to casualty loss ADIT, and, accordingly, the Commission's findings relating to net operating loss ADIT are simply not applicable to the casualty loss ADIT. Entergy contends that it has provided the calculation in compliance with Opinion No. 518, using the required production plant ratio to determine the portion of the ADIT, which includes casualty loss ADIT, that is production related. Entergy adds that, in any event, the Louisiana Commission should not be permitted to relitigate issues that have been fully addressed in orders in past annual bandwidth proceedings.²⁴

d. Commission Determination

17. We accept Entergy's inclusion of casualty loss ADIT in the bandwidth formula as in compliance with Opinion No. 518. Entergy included 100 percent of casualty loss ADIT recorded in Account 282 in the bandwidth formula and it must functionalize the casualty loss ADIT to production based on plant ratios, in accordance with the provisions of the bandwidth formula.²⁵

18. With regard to the Louisiana Commission's argument that our ruling in Opinion No. 518 required Entergy to apply the net operating loss ADIT Ratio to casualty loss ADIT prior to including it in bandwidth calculations, as we more fully explain in our response to the Louisiana Commission's request for clarification on this issue in a separate order, Entergy is not required to apply the net operating loss ADIT Ratio to casualty loss ADIT to determine the amount of casualty loss ADIT to include in bandwidth calculations.²⁶ In Opinion No. 505, the Commission determined that ADIT should be included in the bandwidth formula to the extent expenses associated with the ADIT are generally and properly includable in cost of service and recorded in accounts included in the bandwidth formula. The casualty losses are represented to be the result of

²³ Entergy Answer at 5 (citing *Entergy Services, Inc.*, Opinion No. 518, 139 FERC ¶ 61,105 (2012)).

²⁴ *Id.* at 6.

²⁵ *See*, Sec. 30.12 of Service Schedule MSS-3.

²⁶ *Entergy Services, Inc.*, 145 FERC ¶ 61,045 (2013).

storm damage expenses,²⁷ which are costs that are generally and properly includable in cost of service and are recorded in accounts included in the bandwidth formula. In contrast, the net operating loss cannot be attributed to any particular expenses other than all tax deductible expenses incurred during the period the net operating loss was recognized, which includes expenses both includable and excludable from cost of service and expenses recorded in accounts included in the bandwidth formula and other expenses not recorded in such accounts. Consequently, casualty loss ADIT and net operating loss ADIT are not equivalent.

19. Due to the inability to attribute the cause of the net operating loss to any particular expenses other than all tax deductible expenses incurred during the period the net operating loss was recognized, and given that certain expenses associated with the net operating loss are not costs includable in bandwidth calculations, we find that Entergy has 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 there is no need 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 are generally and properly included in cost-of-service and recorded in accounts included in the bandwidth formula. Accordingly, the net operating loss ADIT Ratio is not applicable to casualty loss ADIT.

3. Effective Date

a. Entergy's Filing

20. Entergy included the revision calculations effective for bandwidth payments and receipts based on calendar year 2008.

b. Louisiana Commission's Protest

21. 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

²⁷ 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 amount is the result of storm damages. *See* Tr. 345-350, Docket No. ER09-1224-001.

this case, and did not suggest the inclusion of casualty loss ADIT until months after the Commission ruled that net operating loss ADIT should be included in the bandwidth calculation in Opinion No. 505.²⁸ The Louisiana Commission explains that Entergy first proposed to include casualty loss ADIT, assuming net operating loss ADIT is included, at the hearing in the instant proceeding. The Louisiana Commission explains that in Opinion No. 518, the Commission accepted Entergy's proposal to include casualty loss ADIT that was not included when Entergy's annual bandwidth filing was made in this case. The Louisiana Commission argues that this adjustment cannot have retroactive effect for any period prior to the issuance of the Commission's order.²⁹

22. The Louisiana Commission argues that under section 205(d) of the Federal Power Act, a change in rates may be effective only after the change is filed by the utility and public notice provided.³⁰ 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 it was only after that ruling was issued that Entergy proposed including casualty loss ADIT as well.

23. 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.³¹

²⁸ Louisiana Commission Protest at 9 (citing Opinion No. 505, 130 FERC ¶ 61,023 at P 234).

²⁹ *Id.* at 11.

³⁰ *Id.* (citing 16 U.S.C. § 824(d)).

³¹ *Id.* at 14.

c. Entergy Answer

24. Entergy disagrees with the Louisiana Commission's argument that casualty loss ADIT may only be included prospectively from the date of Opinion No. 518. Entergy contends that it has included casualty loss ADIT in the 2008 bandwidth calculation in accordance with the findings of the Presiding Judge as affirmed by the Commission. Entergy notes that these findings have not required a change to the bandwidth formula, and accordingly prospective application is not required.³²

d. Commission Determination

25. In an order on rehearing of Opinion No. 518 being issued concurrently with this order, the Commission rejects the Louisiana Commission's arguments – which are identical to the arguments raised in its protest here – that casualty loss ADIT may only be included in the bandwidth calculation prospectively from Opinion No. 518.³³ Because this exact issue has been addressed on rehearing, we decline to address it further here.

The Commission orders:

(A) Entergy's compliance filing is hereby accepted in part and rejected in part as discussed in the body of this order.

(B) Entergy is hereby required to make a subsequent compliance filing within 30 days of the issuance of this order as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³² Entergy Answer at 6.

³³ See, *Entergy Services, Inc.*, 145 FERC ¶ 61,047, at PP 26-29.