

132 FERC ¶ 61,253  
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

Docket No. EL08-51-002

v.

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

OPINION NO. 509

ORDER ON INITIAL DECISION

(Issued September 22, 2010)

1. This case is before the Commission on exceptions to an Initial Decision<sup>1</sup> issued on June 3, 2009; at issue is whether costs associated with the Spindletop Regulatory Asset (Spindletop Regulatory Asset or Regulatory Asset) are properly included in the Commission's bandwidth remedy as provided for in Opinion Nos. 480 and 480-A.<sup>2</sup> We find that they are properly included.

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<sup>1</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 127 FERC ¶ 63,021 (2009) (Initial Decision).

<sup>2</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, *order on reh'g*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005),

(continued...)

2. On July 2, 2008, the Commission issued an order setting a complaint filed by the Louisiana Public Service Commission (Louisiana Commission) for hearing and settlement judge procedures.<sup>3</sup> The Louisiana Commission alleged in its complaint that there were errors in the methodology used by Entergy Services, Inc. (Entergy)<sup>4</sup> to calculate production costs among the Operating Companies<sup>5</sup> for purposes of implementing the bandwidth remedy for maintaining rough production cost equalization on the Entergy System (System). Among the issues set for hearing was the Louisiana Commission's contention that the methodology of Exhibits ETR-26 and ETR-28 erroneously fails to recognize the Spindletop Regulatory Asset costs in the production cost comparison.<sup>6</sup> As discussed below, we reverse the Presiding Administrative Law Judge's (ALJ) finding that costs associated with the Spindletop Regulatory Asset should be excluded from the bandwidth calculation.

## **I. Background**

### **A. The Bandwidth Remedy**

3. Entergy's System includes six Operating Companies governed by the System Agreement, which includes a series of service schedules, MSS-1 through MSS-7. Service Schedule MSS-3 governs the allocation of production costs among the Operating

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*order on compliance*, 117 FERC ¶ 61,203 (2006), *order on reh'g and compliance*, 119 FERC ¶ 61,095 (2007), *aff'd in part and remanded in part*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008).

<sup>3</sup> *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010 (2008) (July 2, 2008 Order).

<sup>4</sup> Entergy, a wholly owned subsidiary of Entergy Corporation, provides operating services to Entergy's six operating companies (Operating Companies). Entergy Corporation is a public utility holding company that provides electric service through the Operating Companies.

<sup>5</sup> At the relevant times pursuant to the first bandwidth calculation, the five Operating Companies involved in the proceeding were: Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States, Inc. (Entergy Gulf States), Entergy Louisiana LLC (Entergy Louisiana), Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (Entergy New Orleans). In 2007, Entergy Texas, Inc. (Entergy Texas) and Entergy Gulf States Louisiana were created and subsequently served load in their respective states.

<sup>6</sup> July 2, 2008 Order, 124 FERC ¶ 61,010 at P 16.

Companies. In 2005, in Opinion Nos. 480 and 480-A, the Commission found that the rough production cost equalization, required under earlier Commission orders addressing costs on the Entergy System, had been disrupted on the System. In those two orders, the Commission established a numerical bandwidth for Operating Companies of +/- 11 percent of the System average production cost in order to maintain the rough equalization of production costs among the Operating Companies.

**B. Spindletop Gas Storage Facility and the Regulatory Asset**

4. The Spindletop Gas Storage Facility (Spindletop Facility) is a natural gas storage facility consisting of two leached salt storage caverns, eight active pipeline interconnects and related facilities constructed in 1991 by Sabine Gas Transportation Company (Sabine) and located in Sabine, Texas. From its in-service date in 1992 through December 31, 2007, the Spindletop Facility provided gas storage services to customers in two jurisdictions – Texas and Louisiana – through only one operating company: Gulf States Utilities/Entergy Gulf States,<sup>7</sup> which was subject to the jurisdiction of the Texas Commission and the Louisiana Commission. On December 31, 2007, pursuant to a Louisiana Commission order, Entergy Gulf States split into two separate, vertically-integrated Operating Companies (Jurisdictional Separation): Entergy Gulf States Louisiana, which oversaw operations in Louisiana; and Entergy Texas, which oversaw operations in Texas.

5. Operation of the Spindletop Facility is governed by a 1991 Amended and Restated Gas Transportation Agreement (Transportation Agreement) and an Amended and Restated Optional Purchase and Amortization Agreement (Purchase and Amortization Agreement) between Sabine and Gulf States Utilities/Entergy Gulf States, which provides for the storage and delivery of gas. Under the Transportation Agreement, Gulf States Utilities/Entergy Gulf States paid Sabine a monthly transportation fee per MMBtu of gas delivered to Sabine's Spindletop pipeline, a portion of which Sabine designated as a "Credit Payment." The Credit Payment is based on the cost of the Spindletop Facility as originally constructed, i.e., capital costs. The Credit Payment was applied by Sabine against the "Payoff Amount," that consisted of Sabine's unamortized construction costs for the Spindletop Facility, including interest. The Payoff Amount was reduced each month by an amount equal to the Credit Payment and accrued interest. When the Payoff Amount equaled zero, the Credit Payment portion of the transportation fee would be

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<sup>7</sup> Gulf States Utilities is the corporate predecessor to Entergy Gulf States. Entergy completed its merger with Gulf States Utilities in 1993.

eliminated, which under the Purchase and Amortization Agreement would occur by 2004.<sup>8</sup>

6. Gulf States Utilities/Entergy Gulf States passed through the costs of the Credit Payment to its retail and wholesale customers in Louisiana and Texas through retail fuel adjustment clauses (FAC). Importantly, the Louisiana Commission and Texas Commission eventually opted for different methods and different time periods for passing through the Credit Payment. The Texas Commission determined in 1993 that it was reasonable for Gulf States Utilities/Entergy Gulf States to pass through to Texas retail ratepayers the Credit Payments it made to Sabine over the same 12-year period that Sabine billed Gulf States Utilities/Entergy Gulf States for those costs. The Texas Commission's ruling effectively permitted Gulf States Utilities/Entergy Gulf States to treat the Credit Payment like monthly gas transportation costs billed by any other pipeline or gas storage company.<sup>9</sup> Similarly, for wholesale customers, Gulf States Utilities/Entergy Gulf States passed these costs on to its wholesale customers through a FAC.

7. Prior to 1996, the Louisiana Commission permitted recovery of the costs through the FAC in the same manner as the Texas Commission. However, in 1996, the Louisiana Commission directed Gulf States Utilities/Entergy Gulf States to defer recovery of the Credit Payments from Louisiana retail ratepayers and permitted Gulf States Utilities/Entergy Gulf States to collect those costs over a 40-year period, which the Louisiana Commission determined to be the useful life of the Spindletop Facility. The Louisiana Commission directed Gulf States Utilities/Entergy Gulf States to refund some of the monies already collected through the FAC. Subsequently, Gulf States Utilities/Entergy Gulf States recorded the unamortized portion of the deferred Credit Payments as a regulatory asset in Account 182.3 (Other Regulatory Assets), which created the Spindletop Regulatory Asset.

8. The consequence of the different treatments by different regulatory agencies is that Texas retail and both states' wholesale customers have already paid 100 percent of their share of capital costs associated with the construction of the Spindletop Facility, while Louisiana retail customers have only paid a portion of their share of those costs. Louisiana customers have the remainder of the 40-year amortization period ordered by

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<sup>8</sup> During the period 1992-2004, Gulf States Utilities/Entergy Gulf States incurred and paid to Sabine the total construction costs associated with the Spindletop Facility. Entergy Brief on Exceptions at 11.

<sup>9</sup> Exh. S-1 at 15-16.

the Louisiana Commission in 1996 to pay off the balance of their share of the Regulatory Asset costs.

### **C. Procedural Background**

9. In May 2007, in Docket No. ER07-956-000, Entergy filed, on behalf of the Operating Companies, pursuant to Service Schedule MSS-3 of the System Agreement for calendar year 2006, to implement for the first time the Commission's bandwidth remedy as provided for in Opinion Nos. 480 and 480-A.

10. On March 31, 2008, the Louisiana Commission filed in Docket No. EL08-51-000 a complaint against Entergy related to bandwidth issues. The Louisiana Commission raised a number of issues, including as relevant here, that the Spindletop Facility costs are production costs and that the methodology in Exhibits ETR-26 and ETR-28<sup>10</sup> erroneously fails to recognize them in the production cost comparison. The Commission dismissed most of the issues raised by the Louisiana Commission but set two issues, including the Spindletop Facility issue, for hearing.<sup>11</sup>

11. On June 3, 2009, the Presiding Judge issued an Initial Decision on the Spindletop Facility issue, as described further below. Subsequent to the issuance of the Initial Decision in this proceeding, the Commission issued Opinion No. 505 in Docket No. ER07-956-001, which addressed the proper accounting of the Spindletop Regulatory Asset. In Opinion No. 505, the Commission held that costs associated with the Spindletop Regulatory Asset should be accounted for in Account 501 (Fuel), an account that generally is eligible for inclusion in the bandwidth calculation. However, the Commission emphasized that its finding was "for accounting purposes only and is not dispositive of whether the amounts of the regulatory asset amortized to expense during 2006 are production costs properly included in the 2006 bandwidth calculation."<sup>12</sup>

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<sup>10</sup> ETR-26 and ETR-28 reflect the historical production costs on the Entergy system and were used to develop the formula for determining the actual annual production costs for each Operating Company.

<sup>11</sup> July 2, 2008 Order at P 22-23. The second issue, concerning the accumulated deferred income tax for the River Bend nuclear facility, ultimately became moot. Initial Decision, 127 FERC ¶ 63,021 at n.6.

<sup>12</sup> Opinion No. 505, 130 FERC ¶ 61,023 at P 261 (2010). All parties agreed that the issue of including Spindletop Regulatory Asset costs in the bandwidth calculation would be addressed in this proceeding. *See, e.g.*, Entergy Initial Brief, Docket No. ER07-

(continued...)

## II. Initial Decision

12. The Presiding Judge finds that the costs associated with the Spindletop Regulatory Asset are not production costs and, in any event, were incurred exclusively during pre-bandwidth years and therefore are not properly included in the bandwidth formula. Therefore, she finds, exclusion of these costs was not unjust or unreasonable. The Presiding Judge also finds that the Louisiana Commission has failed to prove that its proposed methodology to include the Spindletop Regulatory Asset costs in the bandwidth remedy formula is just, reasonable and not unduly discriminatory.

13. The Presiding Judge states that the Spindletop Regulatory Asset is merely an accounting construct created by the Louisiana Commission that exists solely as a deferred right to recover previously incurred costs and that does not produce electricity. She distinguishes the Spindletop Regulatory Asset from the Spindletop Facility itself, which is the tangible, physical asset that provides gas and storage services and incurs costs in the production of electricity. In addition, she states that only costs properly booked to production-related accounts in section 30.12 of Service Schedule MSS-3 in a given bandwidth remedy test year can legitimately be included in the bandwidth formula.<sup>13</sup>

14. The Presiding Judge also finds that, because the Spindletop Regulatory Asset costs were incurred before the establishment of the bandwidth remedy and were accounted for on the books of Entergy Gulf States and paid to Sabine before any bandwidth year, the Spindletop Regulatory Asset costs are not eligible for inclusion in the bandwidth remedy.<sup>14</sup> She states that no other regulatory asset costs are included in the bandwidth calculation.

15. The Presiding Judge further finds that the accounting treatment for the Spindletop Regulatory Asset's costs also suggests that they should be excluded from the bandwidth formula. The Presiding Judge notes that the Credit Payments were never recorded as capital costs by Gulf States Utilities or Entergy Gulf States, but rather were included in Account No. 501, which is included in the bandwidth remedy. She notes that the original refund amount to Louisiana retail customers was debited to Account No. 182.3 (Other Regulatory Assets), while additional credit payments to Sabine that were allocable to Louisiana ratepayers through December 2004 were also debited to Account No. 182.3

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956-001 at 27; Louisiana Commission Initial Brief, Docket No. ER07-956-001 at 61; Trial Staff Initial Brief, Docket No. ER07-956-001 at 50.

<sup>13</sup> Initial Decision, 127 FERC ¶ 63,021 at P 130.

<sup>14</sup> *Id.* P 131-32.

and credited to Account No. 407.4 (Regulatory Credits), and the amortization of the Regulatory Asset was recorded as an expense in Account No. 407.3 (Regulatory Debits). She states that none of these accounts is included in the bandwidth remedy formula's calculation of actual production costs.<sup>15</sup>

16. In rejecting the Louisiana Commission's alternative treatment of the Spindletop Regulatory Asset costs, the Presiding Judge states that Commission FAC regulation requires that Spindletop Facility fuel and transportation costs be recovered over the life of the contract as they were billed to Gulf States Utilities/Entergy Gulf States by Sabine. She states that alternative treatments, such as deferring and amortizing the costs of the Spindletop fuel storage and transportation services contract billings over the estimated useful life of the facility, would have required waiver of the FAC regulation and the Louisiana Commission did not seek such waiver. She states that the 12-year flow-through of those costs through the wholesale FAC that occurred for Commission-jurisdictional purposes could not be superseded by the Louisiana Commission-determined 40-year period for purposes of the bandwidth remedy calculation.<sup>16</sup>

17. The Presiding Judge further notes that increases in Entergy Gulf States Louisiana's production costs, as used in bandwidth remedy calculations and as proposed by the Louisiana Commission, would result in a shift in bandwidth payment receipts from Texas ratepayers to Louisiana ratepayers, which she termed subsidization of the latter by the former, and that the Louisiana Commission had offered no evidence to the contrary. She contends that the approach the Louisiana Commission argues for would cause customers among the various jurisdictions covered by the System Agreement to pay more or less than their fair share of production costs and that such results are contrary to the express purpose of the Commission in implementing the bandwidth remedy.<sup>17</sup>

18. Because the Presiding Judge determined that the Spindletop Regulatory Asset costs should not be included in the bandwidth remedy formula, she did not make findings regarding how to modify the formula to accommodate Spindletop Regulatory Asset costs if they were included in the 2006 bandwidth calculation.<sup>18</sup>

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<sup>15</sup> *Id.* P 121.

<sup>16</sup> *Id.* P 122.

<sup>17</sup> *Id.* P 127.

<sup>18</sup> *Id.* P 138.

### III. Exceptions

#### A. Brief on Exceptions

19. The Louisiana Commission argues that there is no basis for finding that costs associated with the Spindletop Regulatory Asset are not production costs. It contends that the Spindletop Regulatory Asset costs are production costs allocated systematically and rationally over the service life of the property and that they therefore should be included in the bandwidth formula. It further argues that the Initial Decision errs in determining that investment purchase costs of a production facility, capitalized into a regulatory asset, are converted into something other than production costs.<sup>19</sup>

20. The Louisiana Commission contends that the recovery period for the Spindletop Regulatory Asset should spread the capital costs over the life of the storage facility, consistent with the treatment required by Commission accounting regulations. The Louisiana Commission contends that the Initial Decision erred in determining that expensing purchase costs over 12 years was proper, as the asset has a 40-year life. The Louisiana Commission states that its accounting treatment for the Spindletop Regulatory Asset is consistent with Commission accounting regulations.<sup>20</sup> It argues that because the Spindletop Regulatory Asset was a capital lease, Commission accounting regulations require that the lease be amortized over the “lease term.” The Louisiana Commission maintains that Statement of Financial Accounting Standard (FAS Statement) 13 provides that the applicable lease term for capital leases with bargain renewal options includes “all periods, if any, covered by bargain renewal options,” and that because the Transportation Agreement contains an evergreen provision allowing extension of the Agreement with no additional charge, the Transportation Agreement’s lease term is “indefinite.”<sup>21</sup>

21. The Louisiana Commission also states that the Transportation Agreement had a bargain purchase option<sup>22</sup> because it allowed Gulf States Utilities/Entergy Gulf States to purchase the Spindletop Facility for \$1 and that FAS Statement 13 provides that capital leases with bargain purchase options should be amortized consistent with the lessee’s

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<sup>19</sup> Louisiana Commission Brief on Exceptions at 8.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> Louisiana Commission Brief on Exceptions at 26.

<sup>22</sup> *See* FAS Statement 13 at Paragraph 5(D). A “bargain purchase option” gives a lessee the option to purchase leased property at a bargain price, sufficiently lower than the fair market value of the property at the date the option becomes exercisable.

normal depreciation policy for owned assets. It contends that, in accordance with Commission depreciation policy, the cost of an asset must be spread over the useful life of that asset.<sup>23</sup>

22. The Louisiana Commission asserts that the Presiding Judge erred in determining that Spindletop Regulatory Asset costs are not “a current cost of producing electricity.”<sup>24</sup> It argues that because the costs associated with the Spindletop Regulatory Asset are capital costs, they should be recovered even for amounts acquired prior to 1992, and notes that all the Operating Companies receive credit for amounts expended to acquire capital assets for years well prior to 1992.<sup>25</sup> The Louisiana Commission maintains that the Presiding Judge erred in rejecting its argument that Spindletop Regulatory Asset costs are capital investments.

23. The Louisiana Commission next argues that the Initial Decision erred in determining that the wholesale flow-through of the investment purchase cost as a fuel cost prohibits its contrary approach toward the costs of the Spindletop Regulatory Asset. The Louisiana Commission contends that Entergy Gulf States flowed the investment purchase costs through its wholesale fuel tariffs without ever notifying the Commission of the nature of the costs or requesting authorization to depart from Commission policy. It also contends that the Texas Commission’s similar treatment of Spindletop Facility costs was based on little analysis and failed to match capital cost recovery with the useful life of the asset.

24. Finally, the Louisiana Commission contends that the Presiding Judge incorrectly determined that investment purchase costs spread by a retail regulator over the service life of a facility may not be recognized if other regulators permitted the recovery of the costs over an accelerated life. It contends that the Initial Decision in Docket No. EL01-88-000 held that past depreciation and amortization differences do not preclude recognition of asset costs on the books at later times.<sup>26</sup> The Louisiana Commission states that the fact that Texas and wholesale customers already paid a share of the costs of the Spindletop Facility should not preclude the recognition of the Louisiana costs in the

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<sup>23</sup> Louisiana Commission Brief on Exceptions at 27.

<sup>24</sup> *Id.* at 32 (citing Initial Decision, 127 FERC ¶ 63,021 at P 120).

<sup>25</sup> *Id.* at 33.

<sup>26</sup> *Id.* at 38 (citing *Louisiana Pub. Serv. Comm’n v. Entergy Services, Inc.*, 106 FERC ¶ 63,012, at P 88 (2004)).

bandwidth tariff.<sup>27</sup> It also contends that the legal principles of *res judicata* and collateral estoppel were mistakenly applied by the Presiding Judge to block the Louisiana Commission's preferred bandwidth treatment of the costs. The Louisiana Commission states that application of these doctrines was incorrect because the relevant issues were not fully litigated and decided on the merits.<sup>28</sup>

25. The Louisiana Commission requests that the Commission direct Entergy to amend its Tariff so that the Spindletop Regulatory Asset costs are included in the bandwidth remedy calculation.<sup>29</sup>

### **B. Briefs Opposing Exceptions**

26. Entergy, the Arkansas Commission and Trial Staff oppose the Louisiana Commission's exceptions. They assert that Spindletop Regulatory Asset costs are not production costs and that inclusion of such costs in the calculation of the bandwidth production costs would be unjust, unreasonable, and unduly discriminatory. The Arkansas Commission states that the Spindletop Regulatory Asset costs were properly excluded because they were booked to accounts not included in the bandwidth formula's calculation of production costs.<sup>30</sup>

27. Entergy and Trial Staff contend that inclusion of the Spindletop Regulatory Asset costs in the bandwidth calculation would cause ratepayers of other Operating Companies to pay costs that should be borne by Entergy's Louisiana retail customers and that the Louisiana Commission's proposal would cause Texas ratepayers to pay in excess of their fully allocated share.<sup>31</sup>

28. Entergy, the Arkansas Commission and Trial Staff agree with the Initial Decision's distinction between costs for the Spindletop Facility and credit payments and

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<sup>27</sup> *Id.* at 38-39.

<sup>28</sup> *Id.* at 37.

<sup>29</sup> *Id.* at 39.

<sup>30</sup> Arkansas Commission Brief Opposing Exceptions at 10.

<sup>31</sup> Entergy Brief Opposing Exceptions at 31; Trial Staff Brief Opposing Exceptions at 9.

revenue collections pertaining to the Spindletop Regulatory Asset.<sup>32</sup> They argue that the former are production costs properly included in the bandwidth formula, whereas the latter are costs pertaining to an asset that does not produce anything and that therefore should be excluded. Trial Staff states that, while the Commission's Uniform System of Accounts (USofA) requires capital utility plant to be capitalized and depreciated over its useful service life, that is not the case for a regulatory asset, which reflects a regulator's promise of future rate recovery.<sup>33</sup>

29. Entergy and Trial Staff contend that the Louisiana Commission's argument that the Transportation Agreement is a capital lease whose Credit Payments should be accounted for as a production cost is improperly raised for the first time in the Louisiana Commission's Brief on Exceptions.<sup>34</sup> Trial Staff argues that the parties agree that the Transportation Agreement was accounted for as a capital lease, but contends that the Louisiana Commission's reliance on capital lease accounting is misplaced and that the Louisiana Commission is "attempting to create a fictional argument out of thin air." Trial Staff argues that because the Spindletop capital lease ended in 2004, there were no Spindletop lease costs to include in the bandwidth formula.<sup>35</sup>

30. Entergy, the Arkansas Commission, and Trial Staff agree that, because the Spindletop Credit Payments were incurred, expensed and paid by Gulf States Utilities/Entergy Gulf States from 1992 through 2004, they are not current production costs that can or should be reflected in the production cost calculation for year 2006, the first production cost year of the bandwidth remedy calculation, or in subsequent years.<sup>36</sup> Entergy and Trial Staff state that costs are included in the production cost comparison

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<sup>32</sup> Entergy Brief Opposing Exceptions at 12-13; Arkansas Commission Brief Opposing Exceptions at 15-17; Trial Staff Brief Opposing Exceptions at 10-11.

<sup>33</sup> Trial Staff Brief Opposing Exceptions at 12 (citing 18 C.F.R. Part 101 at 362 (Definition No. 31, Regulatory Assets and Liabilities)).

<sup>34</sup> Entergy Brief Opposing Exceptions at 29-30; Trial Staff Brief Opposing Exceptions at 14-15.

<sup>35</sup> Trial Staff Brief Opposing Exceptions at 18.

<sup>36</sup> Entergy Brief Opposing Exceptions at 13; Arkansas Commission Brief Opposing Exceptions at 5-6; Trial Staff Brief Opposing Exceptions at 18-19.

when incurred, not when the retail regulator decides that those incurred costs should be recovered from retail customers.<sup>37</sup>

31. Entergy, the Arkansas Commission, and Trial Staff also agree with the Initial Decision that inclusion of Spindletop Regulatory Asset costs in the bandwidth formula would result in Texas retail and Commission-jurisdictional wholesale customers paying a portion of the costs properly accruing to Louisiana retail customers.<sup>38</sup>

32. The Arkansas Commission and Trial Staff state that the Louisiana Commission's approach would unfairly result in using inconsistent recovery periods for the same costs.<sup>39</sup> Trial Staff agrees with the Presiding Judge that the Commission has exclusive plenary jurisdiction to set interstate wholesale electric rates and that the Louisiana Commission's proposed 40-year period would conflict with the 12-year period employed by the Commission and the Texas Commission.<sup>40</sup> The Arkansas Commission also contends that inclusion of Spindletop Regulatory Asset costs in the bandwidth formula calculation is not just and reasonable because it would create an incentive for regulators to manipulate the bandwidth remedy by establishing regulatory assets to convert out-of-period costs into in-period costs, thereby shifting costs among ratepayers.<sup>41</sup> Trial Staff states that the Louisiana Commission's *res judicata* and collateral estoppel claims are not the bases being employed to exclude the Spindletop Regulatory Asset costs; rather, such bases include excluding a superseding, contrary 40-year amortization period.<sup>42</sup>

33. The Arkansas Commission requests that the Commission (1) ensure that any remedy protects against inclusion of the Spindletop Regulatory Asset costs in the

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<sup>37</sup> Entergy Brief Opposing Exceptions at 16; Trial Staff Brief Opposing Exceptions at 13-14.

<sup>38</sup> Entergy Brief Opposing Exceptions at 31; Arkansas Commission Brief Opposing Exceptions at 6; Trial Staff Brief Opposing Exceptions at 9.

<sup>39</sup> Arkansas Commission Brief Opposing Exceptions at 28-31; Trial Staff Brief Opposing Exceptions at 9.

<sup>40</sup> Trial Staff Brief Opposing Exceptions at 21-22.

<sup>41</sup> Arkansas Commission Brief Opposing Exceptions at 27.

<sup>42</sup> Trial Staff Brief Opposing Exceptions at 28.

bandwidth formula calculation more than once; and (2) address the potential for discriminatory and inconsistent impacts.<sup>43</sup>

#### **IV. Commission Determination**

34. We reverse the Presiding Judge's finding that costs associated with the Spindletop Regulatory Asset are not production costs and so should not be included in the bandwidth calculation; we find that such costs must be included in the bandwidth calculation. In large part, our finding here is determined by the finding in Opinion No. 505 – issued subsequent to the Initial Decision in this proceeding – that Entergy should have accounted for the annual amortization expense of the Spindletop Regulatory Asset in Account 501, an account included in the bandwidth calculation as set forth in Service Schedule MSS-3.<sup>44</sup> In that order, the Commission held that Commission accounting regulations did not allow Entergy Gulf States to amortize the Spindletop Regulatory Asset to Account 407.4, finding instead that it must amortize the Spindletop Regulatory Asset to Account 501 (Fuel).<sup>45</sup>

35. In this proceeding, the Presiding Judge and the parties note the importance of the manner of accounting for costs with respect to their inclusion or exclusion from the bandwidth calculation. As the Presiding Judge in this proceeding recognizes:

there is credible testimony that accounting plays a paramount role when the bandwidth remedy is involved. The bandwidth remedy is a formula rate. It is stated in terms of actual costs recorded in FERC accounts. Generally if an amount is properly recorded in a FERC account that is captured by the formula, that cost is reflected as recorded. The USofA sets forth the accounts that make up the FERC

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<sup>43</sup> Arkansas Commission Brief Opposing Exceptions at 30-31.

<sup>44</sup> Opinion No. 505, 130 FERC ¶ 61,023 at P 261-63; *see* Entergy System Agreement at 53-54, Entergy Arkansas, Inc., Third Revised Rate Schedule FERC No. 94, Original Sheet No. 53 (November 22, 2008), First Revised Sheet No. 54 (May 31, 2009) (the calculation of Variable Production Expense includes Fuel Expense defined as “Production O&M Fuel Expense recorded in FERC Accounts 501, 518, and 547”).

<sup>45</sup> Opinion No. 505, 130 FERC ¶ 61,023 at P 261-63. The Commission acknowledges, however, that its finding was an accounting finding and was not necessarily dispositive of whether these amounts of the Spindletop Regulatory Asset amortized to expense during 2006 were production costs that should be included in the bandwidth calculation. *Id.* That issue is addressed here.

Form 1. Production costs, as the Commission recognized in the July 2, 2008 Order, are critical: “the production cost calculation includes production investment and operation and maintenance expenses reported in various accounts under the FERC Uniform System of Accounts.”<sup>46]</sup>

The Arkansas Commission also explicitly states that “[t]he inclusion or exclusion of costs in the production cost bandwidth formula is based on how the costs are accounted.”<sup>47</sup>

36. The production cost calculation formula found in section 30.12 of Service Schedule MSS-3 sets forth the costs that are properly included in Entergy’s annual bandwidth calculation by setting forth the specific accounts that are to be included in the calculation. The fact that the annual amortization of the Spindletop Regulatory Asset is booked to Account 501 is critical because Account 501 is expressly included in the bandwidth formula.<sup>48</sup> However, the Commission in Opinion No. 505 left unanswered whether those amounts of the Spindletop Regulatory Asset amortized to expense are production costs that should be included in the bandwidth calculation. As discussed further below, we find that the amortization of Spindletop Regulatory Asset costs included in Account 501, as well as the balance of the unamortized amount of the asset, are production costs that are properly reflected in the bandwidth calculation.<sup>49</sup>

37. First, we disagree with the Presiding Judge’s finding that costs associated with the Spindletop Regulatory Asset should not be included in the bandwidth calculation because the Spindletop Regulatory Asset is an accounting construct that does not represent actual production costs.<sup>50</sup> The Spindletop Regulatory Asset represents deferred *actual* costs of providing storage and transportation services necessary for the production of electricity.

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<sup>46</sup> Initial Decision, 127 FERC ¶ 63,021 at P 118 (citing July 2, 2008 Order, 124 FERC ¶ 61,010 at P 3).

<sup>47</sup> Arkansas Commission Brief Opposing Exceptions at 9.

<sup>48</sup> See Exh. S-1 at 8. As Trial Staff notes, if Trial Staff’s recommendation that the Regulatory Asset be accounted for in Account 501 were to prevail, the Regulatory Asset would already be in the bandwidth calculation.

<sup>49</sup> Our decision that costs associated with the Spindletop Regulatory Asset must be included in the bandwidth calculation makes it unnecessary to address the Louisiana Commission’s argument that the Spindletop Regulatory Asset was a capital lease.

<sup>50</sup> Initial Decision, 127 FERC ¶ 63,021 at P 120.

Accordingly, because the Spindletop Regulatory Asset reflects costs associated with actual service for the production of electricity, we find that it is just and reasonable to allow these costs to be included in the bandwidth calculation, as more fully discussed below.

38. Second, we disagree with arguments that the Spindletop Regulatory Asset costs are inadmissible because they represent out-of-period costs. Although incurred in a prior period, the Spindletop Regulatory Asset costs represent actual costs incurred to acquire the Spindletop Facility, which continues to be used to provide storage and transportation services for the production of electricity. By reflecting such costs in rates ratably over the useful life of the Spindletop Facility, the Spindletop Regulatory Asset matches capital cost recovery with the period service is provided by the Spindletop Facility for the production of electricity. We see no reason to exclude these actual production costs because they have been deferred by the Louisiana Commission. To the contrary, we find it is unjust and unreasonable not to reflect the Spindletop Regulatory Asset in production costs in the bandwidth formula, because not doing so would create a mismatch between capital cost recovery and the period during which the asset provides service. Thus, we agree with Trial Staff witness Sammon that to refer to the Spindletop Regulatory Asset as “out-of-period costs” is as incorrect as calling the current collection of capital costs of Entergy Gulf States’ River Bend nuclear plant “out-of-period costs.”<sup>51</sup> Accordingly, we find no credible argument in this proceeding that would justify excluding Spindletop Regulatory Asset costs from the bandwidth calculation on the basis that they are out-of-period costs.

39. We also reject arguments that the Spindletop Regulatory Asset costs should not be included in the bandwidth formula because such action would provide an incentive to manipulate the bandwidth calculations. In the case of the Spindletop Regulatory Asset at issue here, the establishment of the Spindletop Regulatory Asset preceded the creation of the bandwidth remedy in Opinion No. 480, and there is simply no evidence of efforts to manipulate the bandwidth calculation. Moreover, the arguments as to potential future manipulation are speculative and can form no basis for any action in this proceeding.

40. Lastly, we reject the arguments that including Spindletop Regulatory Asset costs in the bandwidth formula would result in a “subsidization” of the Louisiana Commission-jurisdictional customers that would be unfair to wholesale customers and retail customers in Texas. The wholesale customers do not take service or make payments directly under Service Schedule MSS-3, and any impact on them due to the allocation of bandwidth

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<sup>51</sup> Exh. S-1 at 24.

payments/receipts in their rates is outside the scope of this proceeding. We recognize that different ratemaking treatment at the retail level may lead to Texas ratepayers contributing to bandwidth payments resulting in part from costs associated with the Spindletop Facility due to inclusion of the Spindletop Regulatory Asset in the bandwidth formula, even though Spindletop Facility costs have already been flowed through to Texas ratepayers. However, neither Entergy, nor the Arkansas Commission, nor Trial Staff proposed a mechanism to reflect the costs of the Spindletop Facility incurred on behalf of Texas retail customers in the bandwidth formula, and the failure to seek to include such costs is not a reason to deny the proper reflection of the Spindletop Regulatory Asset in production costs that the Louisiana Commission seeks in this proceeding. Entergy and/or the Texas Commission are of course free to seek changes to the bandwidth formula that would address this situation through an appropriate section 205 or 206 filing.

41. In light of our finding in Opinion No. 505 with respect to the appropriate accounting of the Spindlteop Regulatory Asset costs and our discussion above, we conclude that the Spindletop Regulatory Asset costs should be reflected in the bandwidth formula. Such costs must be reflected beginning March 31, 2008, the refund effective date established for this proceeding.<sup>52</sup> In addition to accounting for the amortization costs of the Spindletop Regulatory Asset, Entergy must include the Spindletop Regulatory Asset in the rate base component of the bandwidth formula to ensure a return on the Spindletop Regulatory Asset. Accordingly, we direct Entergy to submit a filing, within 30 days of the date of this order, to reflect the inclusion of the Spindletop Regulatory Asset in the rate base complement of the bandwidth formula, effective March 31, 2008.

The Commission orders:

(A) The Initial Decision is hereby reversed, with an effective date of March 31, 2008, as discussed in the body of this order.

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<sup>52</sup> July 2, 2008 Order, 124 FERC ¶ 61,010 at P 31. See *Pepco Energy Services, Inc. v. PJM Interconnection, LLC*, 128 FERC ¶ 61,051, at P 24 (2009) (“As the Commission has found, we have no discretion to waive the provisions of section 206(b) and provide refunds with respect to activities occurring prior to the refund effective date.”).

(B) Entergy is hereby directed to submit a compliance filing, within 30 days of the date of this order, to reflect the inclusion of the Spindletop Regulatory Asset in the rate base component of the bandwidth formula, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.