

130 FERC ¶ 61,026  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer and Philip D. Moeller.

Entergy Services, Inc.

Docket No. ER07-682-002

OPINION NO. 506

OPINION AND ORDER ON INITIAL DECISION

(Issued January 11, 2010)

1. This case is before the Commission on exceptions to an Initial Decision issued on June 27, 2008.<sup>1</sup> The central issue is whether the four amendments proposed by Entergy Services, Inc. (Entergy Services), on behalf of the Entergy Operating Companies (Operating Companies),<sup>2</sup> in a March 30, 2007 filing under section 205 of the Federal Power Act (FPA) to a formula rate contained in Service Schedule MSS-3 to the Entergy System Agreement (System Agreement) are just, reasonable and not unduly discriminatory. In this order, we will affirm the Administrative Law Judge's (Presiding Judge) findings on these issues for the reasons discussed below.

**I. Background and Procedural History**

2. Entergy Corporation (Entergy) is an energy company with two subsidiary service companies: Entergy Operations, Inc. (Entergy Operations) and Entergy Services. Entergy Operations and Entergy Services were established to provide services to the Operating Companies. The Entergy System consists of a number of Operating Companies which provide generation, transmission, and distribution services to electrical loads located throughout Louisiana, Texas, Mississippi, and Arkansas. Each Operating Company owns generation, transmission, and distribution assets and is itself owned by Entergy. Entergy Operations provides the majority of maintenance and operation services required by certain Operating Company-owned nuclear units. Entergy formed

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<sup>1</sup> *Entergy Services, Inc.*, 123 FERC ¶ 63,020 (2008) (Initial Decision).

<sup>2</sup> The Entergy Operating Companies are: Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy Texas, Inc.; and Entergy New Orleans, Inc.

Entergy Operations as a centralized subsidiary service company to generate services and efficiencies from consolidating the nuclear management functions across the Entergy System. Entergy Operations also maintains the Grand Gulf nuclear plant, which produces electric output purchased by all Operating Companies except Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States).<sup>3</sup> Entergy Services provides general executive, management, advisory, administrative, accounting, legal, regulatory, and engineering services required by the Operating Companies.<sup>4</sup>

3. The System Agreement provides the terms and conditions under which the costs and benefits of the coordinated operation of the Entergy System generation and bulk transmission assets are allocated among Operating Companies. The System Agreement comprises seven Service Schedules, MSS-1<sup>5</sup> through MSS-7. Each schedule specifies the rates at which costs associated with a specific utility function are allocated among the Operating Companies.

4. In Opinion No. 480,<sup>6</sup> the Commission found that rough production cost equalization had been disrupted on the Entergy System, and established a numerical bandwidth of +/- 11 percent of the Entergy System average production cost in order to maintain the rough equalization of production costs among the Operating Companies. The Commission relied on Exhibits ETR-26 and ETR-28 as the basis for the bandwidth calculations. The Commission required annual filings beginning in June 2007, and stated

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<sup>3</sup> Entergy Operations has operating agreements with the Operating Companies on file with the Commission that provide for it to operate and manage the nuclear plants of the plant owners and the Operating Companies have agreed to provide funds to Entergy Operations to cover any costs Entergy incurs that are not paid directly by the plant owners. Costs of operations charged by Entergy Operations consist almost entirely of employee salaries, benefits and related expenses.

<sup>4</sup> Entergy Services has agreements on file with the Commission that provide for costs associated with providing such services are allocated and charged to the Operating Companies using a project based billing system and various allocation methods.

<sup>5</sup> Service Schedule MSS-1 allocates the costs of equalizing the reserve capacity on the System among the operating companies. Entergy Services, Inc. System Agreement, Second Revised Rate Schedule, FERC No. 94, First Revised Sheet No. 30, section 10.01.

<sup>6</sup> *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480, 111 FERC ¶ 61,311 (2005) (Opinion No. 480), *aff'd*, *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005) (Opinion No. 480-A), *aff'd in part and remanded in part*, *Louisiana Public Service Comm'n v. Entergy Servs., Inc.*, 522 F.3d 378 (D.C. Cir. 2008).

that the bandwidth would be implemented prospectively and would be effective for calendar year 2006, and that any equalization payments would be made in 2007 after a full calendar year of data became available.

5. On April 10, 2006, Entergy submitted a compliance filing to implement the directives of Opinion Nos. 480 and 480-A. In this filing, Entergy proposed establishing a formula in Service Schedule MSS-3 to determine bandwidth payments and receipts. The compliance filing also included proposed revisions to ETR-26 and ETR-28 that had not been ordered by the Commission in Opinion Nos. 480 and 480-A. The Commission rejected these non-compliant amendments and denied, as beyond the scope of the compliance filing, Entergy's request to make non-compliant adjustments to the methodology reflected in Exhibits ETR-26 and ETR-28.<sup>7</sup> The Commission explained that Entergy should make a section 205 filing if it desired to make any changes to the methodology in Exhibits ETR-26 and ETR-28.<sup>8</sup>

6. On March 30, 2007, Entergy filed, pursuant to section 205 of the FPA, four revisions to the bandwidth formula included in Service Schedule MSS-3:

(1) to revise Service Schedule MSS-3 section 30.12 to provide that net general and intangible plant (G&I Plant costs)<sup>9</sup> and related depreciation and amortization expenses be allocated on the basis of Production Labor Ratios (labor ratios), not Production Plant Ratios (plant ratios) as initially calculated in Exhibit ETR-26;

(2) to revise Service Schedule MSS-3 section 30.12 and footnote 5 to include payroll costs charged to each Operating Company by Entergy Operations and Entergy Services (collectively, affiliate labor costs) as part of each Operating Company's labor costs; i.e. Under Entergy's proposal, the proposed labor ratio reflects not only the direct payroll of each Operating Company, but also the payroll expenses billed to each Operating Company by Entergy Services and Entergy Operations;

(3) to change the applicable state income tax rate for Entergy Gulf States in Service Schedule MSS-3 from the Louisiana state income tax rate to a rate

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<sup>7</sup> *Louisiana Public Service Comm'n v. Entergy Services, Inc.*, 117 FERC ¶ 61,203 (2006).

<sup>8</sup> *Id.* P 69.

<sup>9</sup> G&I Plant costs are common, indirect costs and consist, primarily, of the administrative offices, software, services, desks and other equipment used by Operating Company and service company employees in performance of their duties. Entergy's Brief Opposing Exceptions at 11.

calculated as the arithmetic average of Texas and Louisiana state income tax rates; and

(4) to allocate Account No. 923 (Outside Services) costs on the basis of labor ratios, not plant ratios as initially calculated in Exhibit ETR-26.

7. The Commission found that Entergy's proposed amendments raised issues of material fact that were more appropriately addressed in hearing and/or settlement.<sup>10</sup> Therefore, the Commission accepted and suspended the proposed amendments for a nominal period, made them effective May 30, 2007, subject to refund, and established hearing and settlement judge procedures.<sup>11</sup>

8. Despite extensive negotiations, settlement procedures ultimately did not result in settlement, and the Chief Judge, on recommendation of the settlement judge, subsequently terminated settlement procedures and set the matter for hearing. The participants filed a proposed joint statement of issues on September 10, 2007 with five issues agreed to by all participants and six additional issues proposed by the Louisiana Commission. The Presiding Judge issued an order on the joint statement of issues on January 24, 2008.<sup>12</sup>

9. On March 7, 2008, the participants filed a joint witness list and final joint statement of issues, agreeing that five issues would be litigated at hearing:

(1) whether Entergy's proposal to functionalize G&I Plant costs based on labor ratios is just and reasonable;

(2) whether Entergy's proposal to include affiliate labor costs in the calculation of Operating Companies labor ratios is just and reasonable;

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<sup>10</sup>*Entergy Services, Inc.*, 119 FERC ¶ 61,190, at P 22 (2007) (May 2007 Order).

<sup>11</sup> *Id.* P 23. Additionally, the Commission explained that it disagreed with the Louisiana Commission's argument that, to be consistent with the bandwidth remedy adopted in Opinion No. 480, the proposed revisions should not be permitted to take effect until a future calendar year. The Commission stated that Opinion Nos. 480 and 480-A did not change the fundamental tenets of section 205 of the FPA, i.e., public utilities have a statutory right to amend their rates and charges and to propose that, absent waiver, the amendments be made effective after 60 days notice. Therefore, because Entergy Services made its filing consistent with section 205 of the FPA (with the 60 days notice), the Commission found that the appropriate effective date for the proposed amendments is May 30, 2007.

<sup>12</sup> Initial Decision, 123 FERC ¶ 63,020 at P 6.

- (3) whether Entergy's proposal to compute the effective income tax rate for Entergy Gulf States to reflect a simple arithmetic average of the state income tax rates for Texas and Louisiana is just and reasonable;
- (4) whether Entergy's proposal to functionalize Account No. 923 based on labor ratios is just and reasonable; and
- (5) whether Entergy's proposal to functionalize all Administrative and General (A&G)<sup>13</sup> expenses based solely on labor ratios is just and reasonable.

The Louisiana Commission, supported by the Mississippi Public Service Commission (Mississippi Commission) and Occidental Chemical Corporation (Occidental), filed a separate set of additional issues for hearing, for which the other participants did not consent to the language, substance or propriety of litigating those issues. Those issues were:

- (1) has Entergy shown changed circumstances, or presented new evidence that was not available during the litigation in Docket No. EL01-88-001 to justify changing the functionalization ratios that were litigated and approved in Docket No. EL01-88-001;
- (2) has Entergy shown that the use of direct labor for the functionalization of A&G expenses is unreasonable in its circumstances, as required by the Commission's decision in *Alamito Co.*, 41 FERC ¶ 61,312 (1987) (*Alamito*) and other Commission precedent; and
- (3) has Entergy shown that, if labor ratios are used to functionalize G&I Plant costs, the use of direct labor is unreasonable in its circumstances, as required by Commission precedent?

10. The Presiding Judge issued her Initial Decision on June 27, 2008, and found that Entergy's proposal was just and reasonable as to all respects listed in issues one through four of the final joint statement of issues. With respect to the fifth issue, the Presiding Judge stated that it was not properly before her because no participant proposed modifying any A&G account except Account No. 923, which is the only A&G account for which Entergy proposed to change from a plant ratio to a labor ratio. In response to the issues filed by the Louisiana Commission, the Presiding Judge first determined that Entergy is only required to prove that its proposed revisions to Service Schedule MSS-3 are just and reasonable and not unduly discriminatory. She explained that Opinion Nos.

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<sup>13</sup> A&G costs are those incurred directly by the Operating Company, as well as those incurred on their behalf by Entergy Services and Entergy Operations. Entergy's Brief Opposing Exceptions at 11.

480 and 480-A do not impose a higher burden of proof on Entergy than that codified in section 205. Additionally, the Presiding Judge held that Entergy is not required to demonstrate that its existing rate terms are no longer just and reasonable, or that the proposed rate revisions are superior to the existing or any other potential rate revisions, or that it has “changed circumstances.”

11. With respect to the provision for G&I Plant and related depreciation and amortization expenses, the Presiding Judge found Entergy’s revisions are just and reasonable and that no showing was made that the use of labor ratios is not reasonable. The Presiding Judge also found that Entergy’s proposed revisions to include payroll costs charged to each Operating Company by Entergy Services and Entergy Operations is just and reasonable, and noted that other operating companies that belong to a public utility company system similar to Entergy’s are reporting affiliate labor on their FERC Form No. 1. Additionally, the Presiding Judge found that Entergy’s proposal to compute the effective income tax rate for Entergy Gulf States’ production costs using a simple average of the state income tax rates for Texas and Louisiana comports with Commission policy, is just and reasonable, and not unduly discriminatory. Lastly, the Presiding Judge found that Entergy’s proposal to allocate Account No. 923 expenses on the basis of labor ratios is just and reasonable and that a labor ratio is a reasonable method to approximate that portion of the common, indirect costs caused by the production function and that these costs have customarily been functionalized on the basis of labor ratios.

12. A Brief on Exceptions was filed jointly on July 28, 2008 by the Louisiana Commission, the Council of the City of New Orleans, the Mississippi Commission, Occidental, and the Louisiana Energy Users Group (collectively, Joint Parties). Joint Parties argue that Commission precedent establishes that a party must show a change of circumstances to change the result on an issue previously litigated. Joint Parties also argue that Entergy’s proposal to use an affiliate labor ratio for functionalizing G&I Plant costs and A&G expenses departs from settled Commission policy that labor ratios include only direct labor. Joint Parties also argue that the Initial Decision improperly permitted the functionalization of Account No. 923 and Account No. 924 expenses based on affiliate labor ratios. Additionally, Joint Parties contend that Entergy’s proposal is unjust and unreasonable because, while G&I Plant investment would be functionalized to production based on the affiliate labor ratios, Accumulated Deferred Income Taxes related to the G&I Plant would be functionalized using plant ratios, creating an overallocation of costs to the production function. Joint Parties did not raise exceptions regarding hearing issues 1, 3 or 4.

13. Briefs Opposing Exceptions were filed by Entergy, the Arkansas Public Service Commission (Arkansas Commission), Union Electric Company (Union Electric) and Commission Trial Staff (Staff). These parties take issue with each of the exceptions filed by Joint Parties and ask that the Commission affirm the Initial Decision in its entirety.

## II. Discussion

14. As discussed below, we deny the exceptions raised by Joint Parties and affirm the Presiding Judge's findings on the issues in the Initial Decision. To the extent not specifically addressed below, we summarily affirm the Presiding Judge's findings.

15. Thus, what remains before us and what we will discuss in further detail below are two primary issues: (1) what is the appropriate standard of review to apply to Entergy's section 205 filing; and (2) whether the labor expenses of Entergy's two affiliated service companies – Entergy Operations and Entergy Services – should be included in the labor ratios used to functionalize Entergy's G&I Plant costs and Account No. 923 (Outside Services) costs to Entergy's Operating Companies.<sup>14</sup>

### A. Standard of Review

#### 1. Initial Decision

16. The Presiding Judge finds that Entergy's proposed revisions to Service Schedule MSS-3 are subject to the statutory requirements set forth in section 205.<sup>15</sup> Specifically, the Presiding Judge states that Entergy must demonstrate that its proposed revisions are just and reasonable and not unduly discriminatory. According to the Presiding Judge, Entergy's proposed revisions are not subject to any of the various heightened or alternative standards of review posited by the Louisiana Commission or Occidental, but are subject to section 205, which requires only that a utility demonstrate that its proposed rate changes are "just and reasonable." She adds that the Commission has not interpreted the statute to require anything more than a *prima facie* demonstration of reasonableness.<sup>16</sup>

17. Specifically, the Presiding Judge takes issue with the Louisiana Commission's and Occidental's contention that Commission policy requires Entergy to demonstrate a change in circumstance or the existence of new evidence not previously available before its proposed Service Schedule MSS-3 revisions may be adopted.<sup>17</sup> She asserts that while

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<sup>14</sup> Several other issues will also be discussed, but each is related to and will follow from our conclusions with respect to the use of Entergy's affiliated service companies' labor expenses in the determination of the labor ratios to be used in this proceeding.

<sup>15</sup> Initial Decision, 123 FERC ¶ 63,020 at P 164-65.

<sup>16</sup> *Id.* P 158 (citing *American Electric Power Service Corp.*, 116 FERC ¶ 61,179, at 61,757 (2006) and explaining that the inquiry under section 205 is whether the filing meets the statutory standard, not whether alternatives offered by intervenors are better).

<sup>17</sup> *Id.* P 160 (citing *Alamito*, 41 FERC ¶ 61,312 at 61,829).

*Alamito* and its progeny are valid precedent with regard to the Commission's doctrine on relitigation of issues, application of that precedent to this proceeding is inappropriate.<sup>18</sup>

18. The Presiding Judge states that in *Alamito*, unlike in this case, the Commission was confronted with a clear case of issue-relitigation. In *Alamito*, the Presiding Judge asserts, a party sought after a fully-litigated proceeding to relitigate certain issues already ruled on by the Commission in a previous proceeding, on the grounds that it was not, by its own choice, a party to that proceeding. The Presiding Judge explains that the Commission determined that it was inappropriate, in light of the Commission's policy against relitigation of issues as a matter of judicial efficiency, to allow a party, absent changed conditions, to relitigate an issue simply because it chose not to participate in the proceeding in which the issue was first litigated.

19. In contrast, in this proceeding, the Presiding Judge explains, the Louisiana Commission's contention that the issue of the appropriate G&I Plant expense allocator was fully litigated by virtue of Opinion Nos. 480 and 480-A is a mischaracterization of Entergy's conduct and the Commission's decision in those Opinions. Rather, she points out, "[t]he issue of G&I Plant allocation was neither fully litigated nor explicitly ruled on by the Commission in Opinion Nos. 480 and 480-A."<sup>19</sup> The Presiding Judge explains that Entergy did not file exhibits from which the Commission derived the current Service Schedule MSS-3 G&I Plant costs allocation methodology – Exhibits ETR-26 and ETR-28 – with the intent that the exhibits would be construed as proposed tariffs. She notes that the author of those exhibits testified that the exhibits were drafted to serve as historical and current-at-the-time representations of Operating Companies deviations from average System production costs.<sup>20</sup>

20. The Presiding Judge concludes:

When weighed against such explicit Commission guidance, [the Louisiana Commission's] repeated arguments in favor of an alternative standard of

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<sup>18</sup> *Id.* P 161.

<sup>19</sup> *Id.* P 163.

<sup>20</sup> *Id.* (citing Ex. ETR-1 at 12). The Presiding Judge further explains that the Commission, in its May 2007 Order, made clear that:

[t]he Commission's holding in Opinion Nos. 480 and 480-A did not change the fundamental tenets of section 205 of the FPA. Public utilities have a statutory right to amend their rates and charges and to propose that, absent waiver, the amendments be made effective after 60 days' notice. We cannot and did not change that basic right accorded by the FPA.

*Id.* P 165 (citing May 2007 Order, 119 FERC ¶ 61,190 at P 19).

review for [Entergy's] proposed MSS-3 revisions ring hollow. [Entergy's] proposed MSS-3 revisions will be considered against the just and reasonable standard set forth in section 205, not the "changed circumstances" standard derived from the Commission's holding in *Alamito*, nor any other alternative standard of review.<sup>21</sup>

21. The Presiding Judge also finds that the Louisiana Commission and Occidental have misinterpreted the just and reasonable standard as it applies to tariff revisions proposed under section 205. Specifically, the Presiding Judge states that the Louisiana Commission's interpretation is not a correct interpretation of the FPA section 205 just and reasonable standard, but rather, reflects the Commission's interpretation of the just and reasonable standard under NGA section 4. However, the Presiding Judge states that this interpretation is incorrect because the NGA and FPA are distinct statutes governing two entirely different utility sectors – the natural gas industry and the electric industry.<sup>22</sup>

## **2. Joint Parties' Exceptions**

22. Joint Parties assert that Commission precedent requires "changed circumstances" to alter the determination made in Opinion Nos. 480 and 480-A, and that no party in this proceeding contends that there has been a change in circumstances.<sup>23</sup> They argue that in Docket No. EL01-88 the Commission adopted plant ratios as the basis to functionalize G&I Plant costs and direct labor to functionalize all A&G expense accounts except Account No. 923. Thus, they maintain, under the Commission's policy against relitigation of issues, the methods used in Exhibits ETR-26 and ETR-28 can only be changed if a party shows that changed circumstances make the method unreasonable.<sup>24</sup>

23. Joint Parties contend that Entergy historically used direct labor to functionalize G&I Plant costs in its production cost comparisons, but that in Docket No. EL01-88 Entergy's witness Louiselle changed to plant ratios because he thought it was a better allocation method.<sup>25</sup> Joint Parties also state that in that proceeding Commission Staff raised the issue of how G&I Plant costs should be allocated, calling attention to the Commission's general policy to use direct labor. However, Joint Parties state, the Commission adopted Entergy's plant ratios as the basis to functionalize G&I Plant costs and direct labor to functionalize all A&G expense accounts except Account No. 923.

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<sup>21</sup> *Id.* P 166.

<sup>22</sup> *Id.* P 157 and P 159.

<sup>23</sup> Joint Parties' Brief on Exceptions at 49.

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

<sup>25</sup> *Id.* at 49-50 (citing Tr. 202-03).

24. Joint Parties, citing *Alamito*,<sup>26</sup> maintain that Entergy's proposal conflicts with the Commission's policy to preclude relitigation of issues. They contend that that policy requires that, after the Commission has determined an issue, a party must show new or changed circumstances justifying any deviation from the rule. Joint Parties state that this policy was followed in *Pacific Gas & Electric Co.*, where the Commission cited *Alamito* and other precedents establishing that a party must show a change of circumstances to change the result on an issue previously litigated.<sup>27</sup> Joint Parties point out that in *Pacific Gas & Electric*, the Commission held that the proponent of the change would have to make a "significant" showing, and stated that "Commission policy favors the avoidance of relitigating the same issues in a company's successive rate cases."<sup>28</sup> According to Joint Parties, the Commission has repeatedly placed a burden to show changed circumstances on a party seeking to relitigate an issue already determined.<sup>29</sup> Joint Parties add that the policy against relitigation of issues applies to section 205 rulings as well as section 206 complaint cases.<sup>30</sup>

25. Joint Parties argue that neither Entergy nor any other party sought to introduce evidence of changed circumstances, nor did any other party offer other new evidence to support the changes in functionalization ratios. They further contend that Entergy's witness Louiselle readily conceded that there has been no change in circumstances regarding the extent to which affiliated labor causes the Operating Companies to incur indirect costs.<sup>31</sup> Further, Joint Parties take issue with the argument that the Commission

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<sup>26</sup> *Id.* at 50.

<sup>27</sup> *Id.* at 51 (citing *Pacific Gas & Electric Co.*, 121 FERC ¶ 61,065, at P 40 (2007) (*Pacific Gas & Electric*)).

<sup>28</sup> *Id.* (quoting *Pacific Gas & Electric*, 121 FERC ¶ 61,065 at P 46-47).

<sup>29</sup> *Id.* at 52-53 (citing *Central Kansas Power Co., Inc.*, 5 FERC ¶ 61,291, at 61,621 (1978)). The other cases cited by Joint Parties are findings by administrative law judges, not by the Commission. Joint Parties also cite to *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286 (D.C. Cir. 2000) for the court's suggestion that substantial new evidence might be sufficient to relitigate an issue, as well as to an Entergy pleading in another proceeding in which Entergy asserted that issues raised in a previous case could not be relitigated.

<sup>30</sup> Joint Parties cite two section 205 cases, *Central Vermont Public Service Corp.*, 123 FERC ¶ 61,128, at P 35 (2008) and *NSTAR Electric Co.*, 123 FERC ¶ 61,094, at P 35 (2008), where the Commission held that the parties had not presented materially changed circumstances to merit revisiting the previous Commission orders.

<sup>31</sup> Joint Parties' Brief on Exceptions at 54. Joint Parties also contend that a Louisiana Commission's witness Kollen also conceded that there were no changed circumstances or new evidence.

did not directly determine the issue of how to functionalize overhead costs in Opinion Nos. 480 and 480-A. They argue that this is not the test under *Alamito*, which they maintain requires only that the issue be litigated and determined. They add that in *Alamito* the focus is on the opportunity to litigate an issue already determined by the Commission, and assert that Entergy and others had a full opportunity to litigate the functionalization issues in Docket No. EL01-88.<sup>32</sup> Joint Parties also contend that even if the functionalization issues were not directly addressed in Docket No. EL01-88, those issues were determined because under the law, all issues actually litigated and decided either directly or implicitly in a prior decision are binding.<sup>33</sup>

26. Joint Parties also maintain that findings that are necessarily implied by a judgment are also considered to have preclusive effects for purposes of collateral estoppel and res judicata, notwithstanding the fact that these findings are not directly stated in the judgment.<sup>34</sup> They further maintain that, even in the total absence of a written opinion a judgment bars relitigation of an issue necessary to the judgment.<sup>35</sup> Thus, they contend, the Commission determined the functionalization issues in Opinion Nos. 480 and 480-A.

27. Next, Joint Parties assert that the Presiding Judge mischaracterized the Louisiana Commission's position and misstated the law in concluding that the standards under the FPA and NGA are different. Citing a Supreme Court case, they assert that the Supreme Court has ruled that the statutes in all material respects are the same.<sup>36</sup> Joint Parties further take issue with the Presiding Judge's suggestion that the Commission would not

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<sup>32</sup> *Id.* at 55-56 (citing *Entergy Louisiana, Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49 (2003) for the proposition that a Commission decision is binding whether or not it actually determined an issue).

<sup>33</sup> *Id.* at 55 (citing *Entergy Louisiana, Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49 (2003)). Joint Parties also cite two other cases – one cites to the dissenting opinion and one that was a state appellate court case.

<sup>34</sup> *Id.* at 56 (citing *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, at 364-65 (D.C. Cir. 1990); *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, at 397 (D.C. Cir. 1989)).

<sup>35</sup> *Id.* (citing *National Classification Committee v. Interstate Commerce Commission*, 765 F.2d 164, at 171 (D.C. Cir. 1985)).

<sup>36</sup> *Id.* at 57 (citing *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, at 352-53 (1956)).

have set the issue for hearing if *Alamito* applied. It argues that this makes no sense because a hearing was appropriate to permit Entergy to present evidence of changed circumstances.<sup>37</sup>

**3. Briefs Opposing Exceptions (Entergy, Arkansas Commission, Union Electric, and Staff)**

28. All of the parties filing briefs opposing exceptions assert that the Presiding Judge properly found that the just and reasonable standard under section 205 is the appropriate standard to apply in this proceeding. They assert that the “changed circumstances” standard of *Alamito* is inapplicable to this proceeding and take issue with Joint Parties’ contention that Opinion Nos. 480 and 480-A are dispositive of the functionalization issues in this proceeding.<sup>38</sup> They all contend that the proceeding now before us is distinguishable from the facts in *Alamito*.

29. For example, the Arkansas Commission explains that in *Alamito* an intervenor argued that it should be permitted to litigate its issues in the compliance filing, notwithstanding the fact that the issues had been addressed by the Commission in the underlying proceeding. The Arkansas Commission further explains that, in rejecting the intervenor’s request for rehearing, the Commission stated that “finality could never be achieved if a single party could avoid litigation of an issue by not actively participating in the development of a record and thereby preserve its right to litigate the issues in subsequent proceedings.”<sup>39</sup> Here, in contrast, the Arkansas Commission explains, Entergy is the applicant and not an inactive intervenor as was the party in *Alamito*.<sup>40</sup> Thus, as the Commission stated in the May 2007 Order, Entergy is a public utility that, notwithstanding the rulings in Opinion Nos. 480 and 480-A, has a statutory right to amend its rates under section 205 of the FPA. Moreover, it emphasizes, unlike the circumstances in *Alamito*, the issue of labor ratios was not even addressed in Opinion Nos. 480 and 480-A, much less fully determined. Thus, there can be no relitigation bar in this proceeding for issues that have never been litigated in the first instance. In a nutshell, the Arkansas Commission asserts that Joint Parties’ “argument that a public utility must demonstrate changed circumstances in order to propose changes to its Commission-approved rate schedule would render section 205 of the FPA a nullity and is not supported by the cases cited by the Joint Parties.

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

<sup>38</sup> Entergy’s Brief Opposing Exceptions at 56; Trial Staff’s Brief Opposing Exceptions at 29.

<sup>39</sup> Arkansas Commission’s Brief Opposing Exceptions at 10.

<sup>40</sup> *See also* Union Electric’s Brief Opposing Exceptions at 21.

30. Likewise, Entergy asserts that in *Alamito* the reasonableness of the fuel cost issue that Tucson Electric Company attempted to relitigate was the main focus of a prior litigated rate proceeding.<sup>41</sup> According to Entergy, Tucson sought to litigate the reasonableness of fuel costs relating to the Tucson system power sold through Alamito to San Diego Gas & Electric Company, but that very same issue had been previously litigated and decided by the Commission. The whole point of the litigation in *Alamito* was to establish Alamito's cost of service, including the fuel rates charged to San Diego Gas & Electric Company by Alamito for the system power supplied by Tucson. Thus, Entergy asserts, Tucson sought to raise the exact same fuel issue that was the main focus of the litigation in the earlier proceeding.

31. In contrast, Entergy explains, one of the issues in Opinion Nos. 480 and 480-A (Docket No. EL01-88) was the extent to which there had been disparities in bus bar production costs. To address that issue, Entergy's witness Louiselle calculated the bus bar production costs for each of the Operating Companies. In making those calculations, Entergy explains, Entergy's witness Louiselle used the functionalization methods discussed by Joint Parties, but emphasizes that no party submitted any testimony directed at the functionalization factors used by Entergy's witness Louiselle. Entergy concludes that there was no record evidence in Docket No. EL01-88 that any issue with regard to the functionalization methods for G&I Plant costs was raised or addressed in that proceeding.

32. Staff adds that the Presiding Judge correctly found that the issue of the correct allocation methodology was neither fully litigated nor explicitly ruled upon by the Commission in Docket No. EL01-88.<sup>42</sup> Further, Staff asserts that whether a plant or a labor ratio should be used to functionalize G&I Plant (or any other costs for that matter) as part of the bandwidth calculations was neither briefed separately nor addressed separately by either the presiding judge or the Commission in that proceeding. In fact, it notes, no participant proposed that Exhibits ETR-26 and ETR-28 be used to calculate a formula rate remedy.<sup>43</sup>

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<sup>41</sup> See also Trial Staff's Brief Opposing Exceptions at 33.

<sup>42</sup> *Id.* at 31 (citing Initial Decision, 123 FERC ¶ 63,020 at P 163).

<sup>43</sup> Staff also notes that in *Pacific Gas and Electric Co.*, 121 FERC ¶ 61,065, at P 15-22 (2007), a case relied on by Joint Parties, the Commission specifically affirmed or addressed the methodology and elements of PG&E's rate design both in its initial order and on rehearing. In contrast, in Opinion Nos. 480 and 480-A, the Commission prescribed a broad remedy but did not address all the details of implementation. *Id.* Staff also takes issue with Joint Parties' assertion that Staff raised the functionalization issue in Docket No. EL01-88. Staff explains that the purpose of its testimony in that proceeding was "to address the Louisiana [Commission's] proposed revised schedules MSS-1 and

(continued...)

33. Entergy further argues that the Commission order establishing the hearing in this proceeding is consistent with the view that the functionalization methodology used in Exhibits ETR-26 and ETR-28 was never litigated in the sense contemplated by *Alamito*. Entergy notes that its witness Louiselle in this proceeding, who was the author of Exhibits ETR-26 and ETR-28, explains that it was not his “expectation or understanding at the time that methodology and calculations contained therein would become formalized into a tariff.”<sup>44</sup> Entergy highlights that the functionalization of common, indirect costs was not one of the issues litigated in Docket No. EL01-88. Staff adds that the Commission used Exhibits ETR-26 and ETR-28 in Opinion Nos. 480 and 480-A because it is likely that these were the only exhibits available that contained straightforward production cost and disparity information.

34. Entergy also argues that Joint Parties did not timely raise the relitigation claim in their protests to Entergy’s section 205 filing that initiated this proceeding. Nor did Joint Parties raise the relitigation issue in their request for rehearing of the Commission’s May 25 Order. It adds that nowhere in the May 25 Order did the Commission indicate that Entergy would need to justify its proposal under the changed circumstances standard. Entergy concludes that the Commission has already decided the appropriate standard of review (just and reasonable standard) and Joint Parties cannot now claim that a higher standard of review (changed circumstances) applies.<sup>45</sup>

35. Entergy further asserts that Joint Parties inappropriately rely on Entergy’s answer filed in Docket No. ER08-1056 to support their claim that the changed circumstances standard applies in this proceeding. It argues that the context of the two cases is very different – Docket No. ER08-1056 involves the second annual bandwidth implementation filing and this proceeding involves proposed modifications to the bandwidth formula.<sup>46</sup> It explains that unlike in this proceeding, the majority of the issues raised by the Louisiana Commission in its protest in Docket No. ER08-1056 were being litigated in

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MSS-3 in the event the Commission adopts full production cost equalization.” (emphasis added by Staff). Staff explains that its raising the issue was in the context of responding to the Louisiana Commission’s full production cost equalization proposal and it did not refute Entergy’s Exhibits ETR-26 and ETR-28. In any event, it notes, the Commission did not adopt full production cost equalization. *Id.*

<sup>44</sup> Joint Parties’ Brief on Exceptions at 59. Staff also asserts that Entergy’s Exhibits ETR-26 and ETR-28 were not filed in support of any bandwidth remedy, noting that this was logical because Entergy opposed any type of production cost equalization in Docket No. EL01-88. *Id.* at 30.

<sup>45</sup> *Id.* at 60-61. See also Trial Staff’s Brief Opposing Exceptions at 34-35.

<sup>46</sup> Joint Parties’ Brief on Exceptions at 62-63.

Docket No. ER07-956 and in other proceedings. Here, it explains, the issue of the appropriate allocator to functionalize G&I Plant costs was not litigated in Docket No. EL01-88.

#### 4. Commission Determination

36. We affirm the Presiding Judge's rejection of Joint Parties' request that Entergy be subject to a "changed circumstances" standard. In arguing that Entergy should be subject to a "changed circumstances" standard for rate changes, Joint Parties rely on prior Commission orders involving parties' attempts to relitigate issues that were previously litigated and decided by the Commission. However, as found by the Presiding Judge and as discussed further below, none of those cases are applicable to the circumstances before us in this proceeding.

37. In *Alamito*, the primary case relied upon by Joint Parties in support of their "changed circumstances" argument, a party sought relitigation of a fuel charge issue that was litigated in a previous proceeding, on the grounds that the party was not, by its own choice, a party to that previous proceeding and thus had a right in the proceeding at issue in *Alamito* to litigate the issue even though it had previously been litigated. In that previous proceeding, the issue – reasonableness of fuel charges – was the focus. That issue was contested in testimony presented by the parties, was addressed in an initial decision, and was expressly ruled upon by the Commission in its opinion. Thus, finding that the fuel charge issue had already been fully litigated and the party had chosen not to participate in that litigation, the Commission determined not to allow that party to relitigate the issue in *Alamito*.<sup>47</sup>

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<sup>47</sup> The other cases cited by Joint Parties are also inapplicable to the facts in this proceeding. *See Pacific Gas & Electric Co.*, 121 FERC ¶ 61,065 (2007) (party sought to relitigate Pacific Gas & Electric Company's (PG&E) standby rate design that was recently fully litigated and decided in a prior proceeding; Commission found that party, in prior proceeding, had opportunity to litigate PG&E's standby rate design methodology, but chose instead to focus on its own alternative methodology, which the Commission rejected); *Central Kansas Power Co., Inc.*, 5 FERC ¶ 61,291 (1978) (Commission affirmed presiding judge's finding that certain issues raised in Central Kansas Power Company, Inc.'s (Central Kansas) proposed wholesale rate increase proceeding were recently raised and accorded a full hearing in Central Kansas' earlier wholesale rate proceeding and that the Commission's decision in that proceeding should control the outcome of the same issues in Central Kansas' proposed wholesale rate increase proceeding); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286 (D.C. Cir. 2000) (court found that petitioners offered new evidence that had not been before the Commission in its earlier determination that was sufficiently compelling to require

(continued...)

38. In contrast, here, the issue of a proper labor ratio was never litigated in Docket No. EL01-88. The proceeding in Docket No. EL01-88 addressed a specific concern, initiated by a complaint filed by the Louisiana Commission, that Entergy's System was no longer in rough production cost equalization and that a remedy was needed. Evidence on those issues was submitted by several parties and Commission Trial Staff, a hearing was held, the Presiding Judge issued an initial decision, and the Commission issued Opinion Nos. 480 and 480-A.<sup>48</sup> Notably, at no time during that proceeding did any party raise an issue concerning the composition of the labor ratio.<sup>49</sup> Indeed, it is noteworthy that neither the

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reconsideration of that earlier determination). As we have distinguished the cases cited by Joint Parties, we need not address the Presiding Judge's discussion concerning any differences between the NGA and FPA.

Finally, we reject Joint Parties' reliance on two ALJ orders on procedural motions. Such ALJ orders are not binding on the Commission and therefore are not precedent that the Commission must follow. *See generally Southern California Edison Co.*, 55 FERC ¶ 61,497, at 62,759 (1991) (once briefs on exceptions were filed, Initial Decision became an interlocutory, recommended decision, subject to Commission review, rather than final Commission decision); *Enron Power Marketing, Inc.*, 126 FERC ¶ 61,230, at 62,291 (2009) (Initial Decision is not a Commission decision and does not constitute precedent with respect to any legal or factual issue).

<sup>48</sup> We agree with Joint Parties that the policy against relitigation of issues (or requiring changed circumstances) applies to section 205 filings as well as section 206 complaints. We disagree, however, with Joint Parties' assertion that the cases it cites are applicable to the facts before us in this proceeding. In both *Central Vermont Public Service Corp.*, 123 FERC ¶ 61,128 (2008), and *NSTAR Electric Co.*, 123 FERC ¶ 61,094 (2008), the Commission found that the filings were collateral attacks on prior Commission orders approving a settlement agreement and transition rules because the filing parties participated in and had the opportunity to raise their concerns with respect to the matter at issue when it was filed as part of the settlement proceeding and when a section 205 filing was made to implement the transition rules, but chose not to. The Commission explained that the settlement proceeding involved difficult compromises among the diverse parties to the settlement.

<sup>49</sup> Trial Staff did mention labor ratios, but only to address the Louisiana Commission's proposed revised schedules MSS-1 and MSS-3 in the event the Commission adopted full production cost equalization; it was not intended to refute Entergy's Exhibits ETR-26 and ETR-28. As Trial Staff further points out, the Trial Staff witness did not reference or discuss a Commission policy requiring "direct labor" and, in any event, the Commission did not adopt full production cost equalization. Trial Staff Brief Opposing Exceptions at 32.

word “labor” nor the term “labor ratio” are anywhere to be found in the Initial Decision or Opinion Nos. 480 and 480-A.<sup>50</sup>

39. In addition, unlike in *Alamito*, where the party had a prior opportunity to address its issue of concern, the issue of labor ratios was not a matter before the Commission in Docket No. EL01-88, and it cannot be said that Entergy had the opportunity to litigate that issue in Docket No. EL01-88. If Joint Parties’ position on “opportunity to litigate” were accepted, then Entergy arguably could never make a section 205 rate filing again because, as Joint Parties would have it, every issue related to rates could have been raised in Docket No. EL01-88. This same logic, if accepted, would apply equally to any section 206 complaint that Joint Parties, or any other party, might ever file. This broad interpretation of “opportunity to litigate” is unsupported by the facts of *Alamito*, in which the very matter at issue had been previously litigated and the party chose not to participate in that previous litigation. The labor ratio at issue here was not the focus of a prior proceeding and it cannot be said that Entergy, in Docket No. EL01-88, had an opportunity to address the matter. Indeed, in Docket No. EL01-88, there simply was no finding, explicit or implicit, concerning labor ratios.<sup>51</sup>

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<sup>50</sup> See *Webster v. Fall*, 226 U.S. 507, 512 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”); *Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (“FERC’s acceptance of a pipeline’s tariff sheets does not turn every provision of the tariff into ‘policy’ or ‘precedent.’”).

<sup>51</sup> We also find that the cases cited by Joint Parties in support of the argument that “[f]indings that are necessarily implied by a judgment are also considered to have preclusive effects for purposes of collateral estoppel and res judicata, notwithstanding the fact that these findings are not directly stated in the judgment,” are unavailing. In *Securities Indus. Ass’n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990), the court found that the issue of the interpretation and implementation of the term “engaged principally” was precluded because “the Second Circuit in agreeing with the banks declared the market share limitation invalid and did not remand the case to the Board even though the Board itself had originally thought a revenue test alone was inadequate. Apparently, petitioner did not seek rehearing on that question. But petitioners certainly could have presented the arguments raised here to the Second Circuit in response to the bank holding companies, either in its brief or on a petition for rehearing.” The court concluded that “[w]hether petitioner actually argued that position is irrelevant, however, since preclusion because of a prior adjudication results from the resolution of a question *in issue*, not from the litigation of specific *arguments* directed at the issue.” Similarly, Joint Parties’ reliance on *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989) is unavailing. In that case, the court explained that, while the comment was

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40. Further, contrary to Joint Parties' assertion, it cannot be said that the issue of labor ratios was necessary to the overall judgment reached, i.e., that the Entergy System was no longer in rough production cost equalization and that a remedy was necessary. All that Opinion Nos. 480 and 480-A did with respect to labor ratios was to accept, without any discussion, those contained in Exhibits ETR-26 and ETR-28. The Presiding Judge correctly points out that those exhibits were sponsored by Entergy's witness Louiselle solely to serve as historical and current-at-the-time representations of deviations from average system production costs. Acceptance of those exhibits and the numbers underlying them was necessary to permit the Commission to calculate payments under the bandwidth.<sup>52</sup> Significantly, however, no findings whatsoever were made with respect to labor ratios. At best, the issue of labor ratios was merely a matter that lurked in the record, "neither brought to the attention of the court nor ruled upon," and thus cannot "be considered as having been so decided as to constitute precedents."<sup>53</sup>

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brief in the earlier court decision, "the outcome of the case – denial of all relief except as to a clearly unrelated issue – necessarily constituted a rejection of the claims as to both post-closure permits and permits by rule. Even in the absence of *any* opinion a judgment bars relitigation of an issue necessary to the judgment, so it is plain that the adjudicator's silence on the issue is relevant only insofar as it may tend to obscure whether the issue was truly litigated. Thus the American Iron and Steel Institute and the American Petroleum Institute have had their day in court on both issues." *See also National Classification Committee v. Interstate Commerce Commission*, 765 F.2d 164 (D.C. Cir. 1985) (Court affirmed previous court's holding that the parties had previously litigated the issues of the statutory validity of their procedures in a direct challenge to a prior decision and lost. Therefore the parties were precluded from raising the same issues in another proceeding.).

Unlike in those cases, it cannot be said that labor ratios were ever *at issue* at Docket No. EL01-88. As discussed in more detail in the body of this order, the matter at issue was a proper remedy for the Entergy system no longer being in rough production cost equalization; the issue of labor ratios was not addressed nor ruled upon and was not necessary to the findings in that proceeding. No party had its day in court with respect to such issue.

<sup>52</sup> *See* Trial Staff's Brief Opposing Exceptions at 33 ("[T]hese were the only exhibits available which contained relatively straightforward production cost and disparity information. The [Louisiana Commission's] exhibits in Docket No. EL01-88-001 could not be used since they were predicated on adoption of [Full Production Cost Equalization].").

<sup>53</sup> *See Webster v. Fall*, 226 U.S. 507 at 511.

41. In sum, *Alamito*, as well as the other cases cited by Joint Parties, are inapplicable to the facts here and we reject Joint Parties' argument that Entergy must demonstrate "changed circumstances" before it can go forward with its proposed tariff changes. Accordingly, we affirm the Presiding Judge's determination that Entergy need not demonstrate "changed circumstance" in order to proceed with its section 205 filing.

42. Given our affirmance of the Presiding Judge's determination that "changed circumstances" is not the proper standard, we turn to the proper standard to apply. In this regard, we affirm the Presiding Judge's determination that the proper standard to be applied in this proceeding is the "just and reasonable" standard of section 205 of the FPA.<sup>54</sup> As the Presiding Judge points out, "the appropriate inquiry in reviewing rate changes proposed pursuant to section 205 is whether '[t]he filing meets the statutory standard, not whether alternatives offered by intervenors are better . . . [t]he proposed provisions need be neither perfect nor even the most desirable; they need only be just and reasonable and not unduly discriminatory or preferential.'"<sup>55</sup>

**B. Use of Labor Ratios and Entergy Operations and Entergy Services Costs Included in Labor Ratios**

**1. Initial Decision**

43. The Presiding Judge finds that it is well settled that the use of labor ratios is the appropriate methodology for functionalizing G&I Plant costs.<sup>56</sup> The Presiding Judge states that, in Opinion No. 20-A, the Commission reviewed past rate cases on this issue of functionalizing G&I Plant costs and had found that in every instance in which the issue was presented, it and its predecessor, the Federal Power Commission, had held in favor of using labor ratios. Further, the Presiding Judge states that, to avoid using labor ratios, the Commission held that a utility would have to prove not only that its proposed method is just and reasonable, but that use of labor ratios is unreasonable when applied to that

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<sup>54</sup> See 16 U.S.C. § 824d(a) (2006).

<sup>55</sup> Initial Decision, 123 FERC ¶ 63,020 at P 158 (quoting *American Elec. Power Serv. Corp. v. FERC*, 116 FERC ¶ 61,179, at 61,757 (2006)). The Presiding Judge also explained that under section 205 "the filing utility only bore the burden of demonstrating that its proposed rate changes were reasonable, not more reasonable than the existing rate terms." *Id.* P 159 (citing *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984)).

<sup>56</sup> *Id.* P 204 (citing *Minnesota Power & Light Co.*, Opinion No. 12, 3 FERC ¶ 61,045, *Minnesota Power & Light Co.*, Opinion No. 20, 4 FERC ¶ 61,116, at 61,150-52, *aff'd*, Opinion No. 20-A, 5 FERC ¶ 61,091, at 61,150 (1978)).

utility. Therefore, the Presiding Judge concludes that Commission policy is that G&I Plant costs are appropriately functionalized on the basis of labor ratios.

44. The Presiding Judge also finds that including payroll costs charged to each Operating Company by Entergy Services and Entergy Operations (i.e., affiliate labor costs) in the calculation of each Operating Company's labor costs for the purpose of establishing labor ratio comports with Commission policy and is just and reasonable and not unduly discriminatory.

45. The Presiding Judge notes that the prevailing opinion expressed by participants, except for Union Electric, is that the Commission had never been presented with, nor ruled on, the issue of inclusion of affiliate labor costs in the calculation of an operating utility's labor ratio. The Presiding Judge states that Union Electric found a case, *Northeast Utilities Service Co.*, in which the Commission affirmed a presiding administrative law judge's finding that including affiliate labor costs in labor ratio calculations was appropriate.<sup>57</sup> The Presiding Judge explains that, in *Northeast Utilities*, the presiding judge there considered the justness and reasonableness of the rates prescribed by the utility's transmission service agreements, which functionalized both G&I Plant costs and A&G expenses on the basis of the ratio of transmission plant to total plant costs. Northeast Utilities Service Co. (Northeast Utilities) had argued that, while its proposal did not conform to the Commission's policy favoring the use of labor ratios to functionalize costs, the use of labor ratios was not practical and would lead to unreasonable results because it would not reflect the labor from its affiliated service company. The Presiding Judge points out that the judge in *Northeast Utilities* was not persuaded by the stated reason for departing from Commission policy, and found that under a holding company structure, a utility should be able to keep its books and records so that it could account for and include labor costs of its affiliate service companies in the functional accounts of its operating companies. Therefore, the Presiding Judge asserts, the judge there directed Northeast Utilities to comply with the Commission's requirement of using labor ratios, which included affiliate labor costs. The Presiding Judge adds that the Commission affirmed the presiding judge's determination.

46. Additionally, the Presiding Judge notes that, of the total payroll costs recorded on the books of the Operating Companies under the Uniform System of Accounts in 2006, 36 percent is direct labor, while 64 percent is affiliate labor (34 percent provided by Entergy Services and 30 percent provided by Entergy Operations). Further, the Presiding Judge states that of the 2,040 total employees working at the nuclear sites, only two are direct employees of the Operating Companies who receive their paychecks from the

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<sup>57</sup> *Id.* P 277 (citing *Northeast Utilities Service Co.*, 62 FERC ¶ 63,013 (1993) (*Northeast Utilities*)).

Operating Companies.<sup>58</sup> The Presiding Judge concludes that despite the arguments of the Louisiana Commission for excluding Entergy Operations employee costs from the determination of labor ratios, the direct Operating Companies employees are only 0.1 percent of the labor force needed to operate and maintain the nuclear production facilities.<sup>59</sup>

47. The Presiding Judge finds that although Louisiana Commission-generated figures show that the inclusion of Entergy Operations' labor in labor ratios impacts only three Operating Companies and that Entergy Arkansas' A&G expenses functionalized to production increase as a result, the Louisiana Commission does not prove undue discrimination. The Presiding Judge explains that functionalizing under either a plant or labor ratio under the Service Schedule MSS-3 bandwidth formula involves a relatively small dollar amount because over 90 percent of 2006 production costs were directly assigned – \$6.2 of \$6.6 billion – and not all of the remaining costs that are functionalized to production are functionalized on the basis of labor. The Presiding Judge determines that Entergy has not changed its direct assignment to the various functions from that specified in Exhibit ETR-28. The Presiding Judge concludes that it would not make sense to functionalize on the basis of labor and not include all indirect or common (overhead costs – G&I Plant costs and A&G expenses) labor costs.

48. The Presiding Judge notes that every section 205 tariff change affects the resulting rates, which may cause some companies to pay more, and some to pay less. However, the Presiding Judge states that the Commission has held on a number of occasions that the fact that a rate change might increase rates or have an adverse financial impact on some customers does not make the change unjust and unreasonable or unduly discriminatory.<sup>60</sup> Therefore, the Presiding Judge finds that the financial impact of accurately reflecting affiliate labor costs is not determinative of justness and reasonableness or undue discrimination.

49. The Presiding Judge further notes that, even without consideration of *Northeast Utilities*, a credible case has been made for including affiliate labor costs in the labor ratios in this proceeding. The Presiding Judge finds that uncontradicted evidence shows that other companies such as Union Electric and Duke Energy belong to holding company systems similar to Entergy's and that those companies include affiliate labor in

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<sup>58</sup> *Id.* P 282 (citing Ex. ETR-1 at 20-21).

<sup>59</sup> *Id.* (citing Louisiana Commission Initial Brief at 26-34).

<sup>60</sup> *Id.* P 287 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,067, at n.23 (2008); *New Dominion Electric Cooperative*, 118 FERC ¶ 63,024, at P 24 (2007); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,323, at P 12 (2006)).

the costs reported in their FERC Forms No. 1. Additionally, she notes that the American Electric Power Company includes affiliate labor in the labor ratio used for functionalization. The Presiding Judge also states that the affiliate labor costs are used in the calculation of the labor ratios used to functionalize costs under Commission-approved tariffs.<sup>61</sup>

50. The Presiding Judge states that Commission regulations provide that accounting data is to be kept so that labor charged directly to accounts will easily allow a reasonably accurate distribution to be made of the costs of labor initially charged to clearing accounts, allowing labor costs to be classified among the various utility functions as required by FERC Form No. 1.<sup>62</sup> She points out that Entergy has included Entergy Services and Entergy Operations' payroll costs charged to each Operating Company in a separate footnote to pages 354-55 of each Operating Company's FERC Form No. 1 since 2005. The Presiding Judge notes that those costs were not entered there before because they were not then included in the labor ratio used in the Service Schedule MSS-3 bandwidth formula. Entergy enters this information on page 450 of its FERC Form No. 1, the page reserved for footnotes. The Presiding Judge finds that this practice is consistent with the practice of other utilities, which also enter the data in a footnote.<sup>63</sup>

## **2. Joint Parties' Exceptions**

51. Joint Parties state that the Commission has a general policy to use labor ratios to functionalize G&I Plant and most A&G expenses that cannot be directly assigned to functions. Joint Parties, however, argue that this policy calls for the use of direct labor only – the labor payroll for Operating Company employees.<sup>64</sup> Joint Parties assert that Staff witness Sammon testified that neither he nor any trial staff with whom he discussed

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<sup>61</sup> *Id.* P 279 (citing Ex. ETR-7 at 45, Ex. ETR-12, and Ex. ETR-23; Ex. AMN-1 at 4-6 and Ex. AMN-2 at 2-4; Tr. 739-40).

<sup>62</sup> 18 C.F.R. Part 101 General Instruction No. 10 (2008). Also, Uniform System of Accounts General Instruction No. 14, "Transactions with Associated Companies (Major Utility)," provides that the accounting treatment for transactions with associated companies is to be recorded in the appropriate accounts for similar transactions. The Presiding Judge concludes that affiliate labor costs are labor costs that are charged to the operating utility by the affiliated service company and that have to be reflected in the appropriate labor accounts of the operating utility.

<sup>63</sup> Initial Decision, 123 FERC ¶ 63,020 at P 280 (citing Ex. LC-52; Ex. ETR-12 at 1; Ex. AMN-1 at 4-5; and Ex. ETR-23 at 2).

<sup>64</sup> Joint Parties' Brief on Exceptions at 14.

the matter has ever intentionally developed a labor ratio that included the labor costs of affiliates, and that what Entergy proposes is a departure from settled Commission policy.<sup>65</sup>

52. Joint Parties contend that this policy has been stated and reiterated in numerous cases, such as *Kern River Gas Transmission Company*.<sup>66</sup> Joint Parties argue that Commission precedent has found that A&G expenses relate primarily to the expenditure of direct labor,<sup>67</sup> and that most A&G expenses should be functionalized using only direct labor.<sup>68</sup> Joint Parties argue that there is not a single litigated case in which the Commission ever approved the use of affiliate labor ratios to functionalize costs.<sup>69</sup> Joint Parties argue that Entergy's proposed labor ratio deviates dramatically from Commission policy and does so in a disparate fashion. Joint Parties contend that to justify such a change, Entergy should have been required to demonstrate that using direct labor is unreasonable.<sup>70</sup> Joint Parties argue that the Commission's policy, as stated in Opinion No. 20-A, is that a utility may use some basis for functionalization other than labor ratios only if it can show that labor ratios are unreasonable in its situation.<sup>71</sup> Joint Parties contend that this policy is applied to both G&I Plant and to most A&G expenses.<sup>72</sup>

53. Joint Parties assert that the Initial Decision approves the use of affiliate labor for G&I Plant and A&G expenses as consistent with Commission policy even though the proposed ratios are a huge departure from the ratios using direct labor. Joint Parties contend that the Presiding Judge required no showing by Entergy of cost causation to justify the departure from the "direct" labor policy.<sup>73</sup> They state that Entergy's witness Louiselle testified that it is reasonable to reflect the labor costs of Entergy Services and

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<sup>65</sup> *Id.* at 15 (citing Tr. 741-42).

<sup>66</sup> *Kern River Gas Transmission Co.*, 117 FERC ¶ 61,077, at P 289 (2006) (*Kern River*).

<sup>67</sup> Joint Parties' Brief on Exceptions at 16-17 (citing *Kansas-Nebraska Natural Gas Co.*, Opinion No. 731, 53 FPC 1691 at 1721 (1975); *Panhandle Eastern Pipe Line Co.*, 74 FERC ¶ 61,109 (1996)).

<sup>68</sup> *Id.* at 17 (citing *Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299 (2004)). *See also Missouri Power & Light*, 5 FERC ¶ 63,003 (1978); *Boston Edison Co.*, 8 FERC ¶ 63,007 (1979).

<sup>69</sup> Joint Parties' Brief on Exceptions at 18.

<sup>70</sup> *Id.* at 21.

<sup>71</sup> *Id.* at 20 (citing Opinion No. 20-A, 5 FERC ¶ 61,091 at 61,150).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 23.

Energy Operations, but made no analysis to determine whether the service company labor cause the Operating Companies to incur these indirect costs.<sup>74</sup> Joint Parties argue that in order for an expert witness conclusion to have any weight, it must be based on substantive evidence.<sup>75</sup> They argue that this type of reasoning does not fulfill the requirements of federal law, and the Commission should overturn the Presiding Judge's acceptance of Entergy's proposal.<sup>76</sup>

54. Moreover, Joint Parties state that the evidence that would be necessary to include affiliate labor in a labor ratio would be a showing that the labor of affiliates causes the Operating Companies to incur G&I Plant costs and A&G expenses. Joint Parties contend that the evidence shows the opposite. Joint Parties state that Entergy's own records and the testimony of its chief witness show that there are virtually no G&I Plant costs that are billed to the Operating Companies by Entergy Operations, and that the same is true of A&G expenses for every account but one, as discussed below. Joint Parties state that indeed, the evidence establishes that the use of Entergy Operations labor in functionalizing these costs produces a distorted, discriminatory impact.

55. Additionally, Joint Parties argue that Entergy did not attempt to demonstrate that affiliate labor causes the Operating Companies to incur A&G expenses. Joint Parties state that Entergy bills a significant amount of A&G expenses that are included in the Operating Companies' accounts, but the impact on the allocation is minimal. Joint Parties note that Entergy Operations, however, bills little A&G expenses to the Operating Companies in Account Nos. 920 through 924 and 928 through 935. Therefore, Joint Parties contend, there is no causal relationship between Entergy Operations' labor and the A&G expenses incurred by the Operating Companies.<sup>77</sup>

56. Joint Parties argue that Entergy Operations' overhead costs can easily be assigned directly to production, but the use of Entergy Operations labor substantially over allocates costs to production as compared to a direct assignment. Joint Parties argue that Commission policy and the parties' testimony establish that a direct assignment of costs is appropriate when feasible.<sup>78</sup> Joint Parties further state that Staff's witness Sammon,

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<sup>74</sup> *Id.* at 24.

<sup>75</sup> *Id.* at 25-26 (citing *Town of Norwood v. FERC*, 80 F.3d 526, at 534-35 (D.C. Ct. App. 1996); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, at 188 (D.C. Ct. App. 1986)).

<sup>76</sup> *Id.* at 27.

<sup>77</sup> *Id.* at 37.

<sup>78</sup> *Id.* at 43 (citing Tr. 547). Mr. Kollen's testimony shows that direct assignment should be used "where possible and then an appropriate allocator for the residual amount."

the Arkansas Commission's witness Tibbetts, the Louisiana Commission's witness Baron, and Entergy's witness Louiselle gave supporting testimony that direct assignment should be used when the costs can practically be directly assigned.<sup>79</sup>

57. Joint Parties state that Entergy never attempted to demonstrate cost causation as a basis for using its proposed adjusted labor ratio. Joint Parties further argue that including Entergy Operations labor in the functionalization ratio produces an overallocation of overhead costs to production. They argue that there is a mismatch because the use of Entergy Operations' labor to functionalize G&I Plant cost allocates a large proportion of these costs to production for some companies, but not others, creating discriminatory results.<sup>80</sup> Joint Parties argue that the problem with Entergy's matching principle is that there is no matching of the amount of Entergy Operations' G&I Plant costs and A&G expenses on the Operating Companies' books and the amount of Entergy Operations labor that would be factored into the labor ratio.<sup>81</sup> Joint Parties maintain that Entergy conceded that only a small portion of G&I Plant costs and A&G expenses come from Entergy Operations' books.<sup>82</sup> Thus, Joint Parties argue that the fact that a few thousand dollars of overhead costs of Entergy Operations does not justify employing all Entergy Operations' labor to functionalize tens of millions of dollars in G&I Plant costs and A&G expenses to production.

58. Joint Parties state that when Entergy Operations' labor is included in Entergy Arkansas' functionalization ratio, Entergy Arkansas' production costs increase by \$28.1 million or more. Joint Parties maintain that this \$28.1 million bears no relation to the amount of G&I Plant expense that Entergy Operations bills to Entergy Arkansas, which amounts to only about \$80,000. Additionally, Joint Parties contend that using Entergy Operations' labor expense in the labor ratios produces a gross over allocation of A&G expenses to production. For example, Joint Parties state that including Entergy Operations' labor in Entergy Arkansas' labor ratio produces an allocation of 53.6 percent of Entergy Arkansas' A&G expenses to production, although less than 1 percent of the A&G expenses coming into Entergy Arkansas comes from Entergy Operations.<sup>83</sup>

59. Joint Parties argue that the proposal produces a huge shift in the allocations of overhead costs to production and has a highly disparate impact:<sup>84</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 31.

<sup>81</sup> *Id.* at 30.

<sup>82</sup> *Id.* at 31 (citing Entergy's Initial Brief at 33).

<sup>83</sup> *Id.* at 37 (citing Tr. 345-47 (testimony of Entergy's witness Louiselle)).

<sup>84</sup> *See* Ex. LC-60 and Tr. 285-87.

<b>Labor Ratio (\$000)</b>			
<b>Company</b>	<b>Direct</b>	<b>Direct + ESI</b>	<b>Direct + ESI + EOI</b>
Entergy Arkansas	23.33%	30.48%	67.75%
Entergy Gulf States	34.68%	35.13%	54.79%
Entergy Louisiana	42.00%	39.02%	65.92%
Entergy Mississippi	34.26%	32.98%	32.98%
Entergy New Orleans	34.03%	29.07%	29.07%

60. Joint Parties state that to justify the changes, Entergy should have been required to show that using direct labor in the labor ratio is unjust and unreasonable. Joint Parties argue that a case might be made to include Entergy's affiliate labor in the labor ratios, but Entergy did not attempt to do so in this proceeding. Joint Parties argue that no justification can be argued for including Entergy Operations' labor, which, it asserts is a single function company. Joint Parties argue that because Entergy Operations performs a single function, most of its administrative and overhead costs are billed directly to the production function rather than indirect accounts. Joint Parties state that almost none of the Operating Companies' G&I Plant costs, or A&G expenses except for one account, come from Entergy Operations.<sup>85</sup>

61. Joint Parties argue that the only argument Entergy gives for including Entergy Operations' labor in the labor ratio is that Entergy Operations' labor would be included in the labor ratio if Entergy Operations had not been created and the employees were still with their respective Operating Companies. Joint Parties contend that the problem with this argument is that it ignores the fact that the transfer of administrative employees and costs to Entergy Operations, a single function company, allowed the booking of these costs directly to production accounts. Accordingly, Joint Parties argue that the use of Entergy Operations' labor to functionalize the A&G expenses of the Operating Companies creates a large overallocation to production.<sup>86</sup>

62. Joint Parties further assert that the Presiding Judge accepted Union Electric's misinterpretation of *Northeast Utilities*, which Union Electric cited as an example of the Commission's approval of affiliate labor costs in labor ratios.<sup>87</sup> Joint Parties maintain that the presiding judge in *Northeast Utilities* did not approve the inclusion of affiliate labor, but rather rejected the utility's arguments that compliance with the Commission's policy of using "total company labor" would produce unreasonable results, and also rejected the argument that the utility would have difficulty keeping records to comply

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<sup>85</sup> Joint Parties' Brief on Exceptions at 30.

<sup>86</sup> *Id.* at 42.

<sup>87</sup> *Id.* at 21 (quoting Initial Decision, 123 FERC ¶ 63,020 at 83).

with Commission policy.<sup>88</sup> Joint Parties also point out that when the utility in *Northeast Utilities* made a compliance filing, it stated that the labor ratio was calculated for each individual company by dividing the company's transmission-related wages and salaries by the company's total direct wages and salaries (excluding A&G wages and salaries).<sup>89</sup>

63. Joint Parties also contend that the Initial Decision relied on Entergy's data response that stated that Union Electric and Duke Energy operating companies include affiliate labor data they report in their respective FERC Forms No. 1.<sup>90</sup> However, Joint Parties argue that this information could not be validated by Louisiana Commission's witness Kollen or by Staff's witness Sammon.<sup>91</sup> They maintain that the Initial Decision avoids the issue by pretending that a conflict does not exist between Entergy's proposal and Commission policy. Joint Parties further state that Staff's witness Sammon testified that the Commission was unaware of any misreporting of labor expenses.<sup>92</sup> Joint Parties state that the fact that some utilities may not report labor costs in conformance with Commission policy, without the Commission's knowledge, does not change that policy.

64. Joint Parties further argue that the Commission prescribes the accounting for its Uniform System of Accounts in part to ensure proper implementation of its cost-of-service policies. They cite General Instruction No. 10 to the Uniform System of Accounts, which provides that labor costs classified by function be the "cost of labor, *charged direct* to the various accounts."<sup>93</sup> Joint Parties argue that there is no evidentiary basis for a dispute as to the meaning of the terms "direct labor" and "direct payroll distribution." Joint Parties contend that the Commission's decisions and its accounting instructions establish that it intends to promote uniformity in the functionalization of costs used by the Commission to set rates. They maintain that utilities are supposed to report their own direct payroll costs – the costs of the respondent utility – and those costs in turn provide the basis for functionalizing administrative overheads in cost-of-service studies. They argue that a deviation from that policy would promote uncertainty and the use of inconsistent methods to functionalize costs, which would conflict with the Commission's policy of promoting consistency.

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<sup>88</sup> *Id.* (quoting *Northeast Utilities*, 62 FERC ¶ 63,013 at 65,032).

<sup>89</sup> *Id.* at 21-22 (quoting *Northeast Utilities Service Co. Compliance Filing*, Docket No. ER88-463-000, *et al.*, Ex. 1 to App. 1, at 4 (Aug. 19, 1998)).

<sup>90</sup> *Id.* at 22 (citing Initial Decision, 123 FERC ¶ 63,020 at P 279).

<sup>91</sup> *Id.* (citing Tr. 639-40; 739-40; and 742).

<sup>92</sup> *Id.* at 23 (quoting Tr. 740).

<sup>93</sup> *Id.* at 18 (quoting 18 C.F.R. Pt. 101, General Instruction No. 10 (emphasis added)).

65. Joint Parties argue that despite Entergy's claims to the contrary, Entergy's proposed revision to Service Schedule MSS-3 does not include the same procedure as that used in the Commission-approved Service Schedule MSS-4.<sup>94</sup> Joint Parties state that when proposing Service Schedule MSS-4 in Docket No. ER03-753, Entergy told the Commission that Entergy Operations' costs can be directly assigned to specific nuclear units and billed to the owing Operating Company.<sup>95</sup> Joint Parties state that Service Schedule MSS-4, unlike Entergy's proposal, uses direct assignment of nuclear A&G expenses to production and excludes all Entergy Operations' labor from the allocator that functionalizes A&G production. Joint Parties state that Entergy's witness Louiselle was forced to concede that Entergy already directly assigns all Entergy Operations' costs to production for Service Schedule MSS-4.<sup>96</sup> Joint Parties also note that Entergy's witness Louiselle asserted that the Entergy proposal for G&I Plant costs is similar to the method used in Service Schedule MSS-4 but he conceded that the labor ratios allocate a larger amount of A&G expenses than G&I Plant costs.<sup>97</sup> Therefore, Joint Parties argue that Entergy's representation was inaccurate for most of the costs at issue in this case.

66. Joint Parties argue that Entergy's proposed revision to Service Schedule MSS-3 also conflicts with Service Schedule MSS-2,<sup>98</sup> which functionalizes A&G expenses to transmission using direct labor.<sup>99</sup> Entergy's proposal to use a functionalization method for Service Schedule MSS-3 that is inconsistent with the method used in Service Schedule MSS-2 would create an unjust overallocation of A&G expenses to the

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<sup>94</sup> Service Schedule MSS-4 includes formulas for calculating the payment by one Operating Company to another for the sale of capacity and energy from designated system generation resources. During the term of a Service Schedule MSS-4 transaction, the resource is considered to be under the control of the purchasing Operating Company for purposes of cost responsibility and allocation of energy under the System Agreement. In cases where the Operating Committee decides that one Operating Company should sell a portion of its capability to another Operating Company, the transaction is conducted pursuant to Service Schedule MSS-4. Entergy Services, Inc. System Agreement, Second Revised Rate Schedule, FERC No. 94, First Revised Sheet No. 50, section 40.01.

<sup>95</sup> Joint Parties' Brief on Exceptions at 45 (citing Ex. LC-57 at 12).

<sup>96</sup> *Id.* at 44 (citing Tr. 254-55).

<sup>97</sup> *Id.* at 47 (citing Tr. 244, 246).

<sup>98</sup> Service Schedule MSS-2 provides "the basis for equalizing among the [Operating] Companies the ownership costs associated with Inter-Transmission Investment..." Entergy Services, Inc. System Agreement, Second Revised Rate Schedule, FERC No. 94, First Revised Sheet No. 38, section 20.01.

<sup>99</sup> Joint Parties also argue that Entergy's proposal is inconsistent with MSS-1 which functionalizes A&G expenses for Reserve Equalization using direct labor costs.

combined wholesale production and transmission functions. Joint Parties cite testimony from the Louisiana Commission's witness Kollen who cited Entergy Arkansas as an example, showing that direct labor ratio allocates 23.33 percent of A&G expense to production and 13.51 percent to transmission or a total of 36.84 percent. They argue that the inclusion of affiliate labor allocates 67.75 percent of A&G expenses to production and 7.88 percent to transmission or a total of 75.43 percent. Joint Parties contend that when direct labor is used for Service Schedule MSS-2 and affiliate labor is included for MSS-3, the combined allocation is 81.26 percent.<sup>100</sup>

67. Joint Parties state that Entergy conceded on cross-examination that the combination of the differing methods used in Service Schedules MSS-2 and MSS-3 allocates a larger dollar amount to production and transmission.<sup>101</sup> They maintain that using only direct labor for both Service Schedules MSS-2 and MSS-3 would allocate \$46.3 million to the combined production and transmission functions; including affiliate labor would allocate \$103.5 million to production and transmission; using the direct labor and affiliate labor allocates \$109.2 million to the combined functions.<sup>102</sup>

68. Joint Parties also argue that employing inconsistent methods to functionalize A&G expenses in the same wholesale tariff is not just and reasonable. The combination of inconsistent methods over allocates A&G expenses to the combined production and transmission functions and is inconsistent with Service Schedules MSS-1, MSS-2, and MSS-4.

69. Joint Parties argue that Entergy's proposed labor ratio creates a gross overallocation of G&I Plant costs to the production function, as opposed to using a labor ratio with only direct labor expenses. They state that Entergy failed to justify the inclusion of affiliate labor in the functionalization ratio on any basis, much less a cost causation basis. Joint Parties also contend that Entergy's proposal would functionalize G&I Plant investment to production based on the affiliate-augmented labor ratios, but would functionalize the Accumulated Deferred Income Taxes related to the G&I Plant using plant ratios. They maintain that this inconsistency creates a mismatch of the investment for G&I Plant and causes an overallocation of costs to the production function.

70. Joint Parties also point out that the Louisiana Commission presented witness testimony that Entergy's proposal includes inconsistent methods to functionalize the G&I

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<sup>100</sup> Joint Parties' Brief on Exceptions at 47-48 (citing Ex. LC-21 at 20-21).

<sup>101</sup> *Id.* at 48 (citing Tr. 389-90).

<sup>102</sup> *Id.* (citing Tr. 389-90; Ex. LC-71).

Plant investment and the related Accumulated Deferred Income Taxes.<sup>103</sup> They also note that several witnesses from other parties testified that Entergy's proposal creates a mismatch because Entergy changed only one item of the formula but did not make changes necessary for consistency.<sup>104</sup> Joint Parties argue that despite these testimonies, the Presiding Judge did not discuss it in her finding. Joint Parties argue that because the Initial Decision fails to address these points, it should be overruled.

**3. Briefs Opposing Exceptions (Entergy, Arkansas Commission, Union Electric and Staff)**

71. Entergy argues that it is longstanding Commission policy to use direct labor to functionalize costs and that the Commission has never been presented with the question of whether a labor ratio should include affiliate labor.<sup>105</sup> Entergy contends that when witnesses for Staff, the Arkansas Commission, the Louisiana Commission and Entergy testified on the issue of direct assignment, there was a caveat that direct assignment of costs be used only when they can practically be directly assigned.<sup>106</sup> Entergy argues that the use of labor ratios to functionalize A&G expenses to the production function is administratively efficient while any attempt to directly assign A&G expenses is not. Entergy states that because the bandwidth remedy is a formula rate that requires annual filings, a line item review must be conducted to obtain the data necessary to make a determination as to what function or functions caused those costs. Entergy argues that this is burdensome, because there are 4.6 million line items for all the A&G Account Nos. 920-935. Entergy asserts that it would take 77,000 hours to review each line item and that this annual determination would be the subject of litigation where parties dispute the item-by-item direct assignment. Additionally, Entergy argues that the record evidence shows that there are common, indirect costs that are not directly assignable to a particular function. Therefore it would not be an administratively efficient process to analyze each cost incurred by each Operating Company to directly assign each one to the production function.<sup>107</sup>

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<sup>103</sup> *Id.* at 35-36 (quoting Ex. LC-4 at 30-31).

<sup>104</sup> *Id.* at 36 (quoting Ex. S-1 at 17; Ex. AC-1 at 6; and Ex. ETR-7 at 26).

<sup>105</sup> Entergy's Brief Opposing Exceptions at 5. Staff also makes this argument. Trial Staff's Brief Opposing Exceptions at 5.

<sup>106</sup> Entergy refers to Staff witness Sammon, Arkansas Commission witness Tibbetts, Louisiana Commission witness Baron, and Entergy witness Louiselle. Entergy's Brief Opposing Exceptions at 51. *See also* Joint Parties' Brief on Exceptions at 43.

<sup>107</sup> Entergy's Brief Opposing Exceptions at 11.

72. Entergy argues that the gas cases cited by Joint Parties do not support the argument that the Commission rejected the use of affiliate labor in a labor ratio.<sup>108</sup> Entergy argues that in the most recent case cited, *Kern River*, the term “direct labor” appears but in the context of some A&G expenses being directly assigned with the rest allocated using the Kansas-Nebraska method. Entergy contends that there is no evidence that Kern River Gas Transmission Company had an affiliate service company. Entergy asserts that the reason for the lack of discussion may be that no party has before objected to the inclusion of affiliate labor in such labor ratios and therefore there has been no issue in controversy for the Commission to decide. Additionally, Entergy states that there was no discussion in *Kern River* about the correct calculation of the labor ratio, nor was there any discussion about whether it would be proper to include affiliate labor in the calculation of a labor ratio to functionalize costs.<sup>109</sup> Moreover, Entergy argues that none of the cases cited by Joint Parties for the Commission’s “direct” labor policy address the issue of inclusion of affiliate labor in the calculation of a labor ratio. For example, Entergy contends that Opinion No. 20-A, which Joint Parties argue promotes uniform application of the direct-labor method, does not discuss the difference between “direct” labor and any other kind of labor.<sup>110</sup>

73. Entergy argues that expert testimony in this case made clear that, in functionalizing overhead costs to the production function, the question is what costs are caused by the production function, not what costs are caused by affiliate labor, direct labor, or any other proxy used to approximate the costs caused by the production function.<sup>111</sup> The Arkansas Commission cites Opinion Nos. 20 and 20-A to support the fact that there is a causal relationship between labor and G&I Plant costs. It argues that because the Commission has recognized that the nature of G&I Plant costs and A&G expenses is that they are “peculiarly related to labor costs,” it would unreasonably elevate form over substance to ignore the evidence in this proceeding that establishes that the accurate labor ratio is one that includes Entergy Services and Entergy Operations’ labor.<sup>112</sup> The Arkansas Commission also contends that the Presiding Judge specifically

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<sup>108</sup> *Id.* at 24-25. Trial Staff and the Arkansas Commission also make this argument. Staff argues that all the orders cited by Joint Parties were natural gas pipeline cases under the Natural Gas Act. Trial Staff’s Brief Opposing Exceptions at 17 (citing Joint Parties’ Brief on Exceptions at 16-17, 20). *See also* Arkansas Commission’s Brief Opposing Exceptions at 20.

<sup>109</sup> Entergy’s Brief Opposing Exceptions at 25. The Arkansas Commission also makes this argument. Arkansas Commission’s Brief Opposing Exceptions at 21-22.

<sup>110</sup> Entergy’s Brief Opposing Exceptions at 26-27.

<sup>111</sup> *Id.* at 30.

<sup>112</sup> Arkansas Commission’s Brief Opposing Exceptions at 26.

notes in the Initial Decision that uncontroverted credible evidence demonstrates that when Entergy Services and Entergy Operations employees perform work at Operating Companies locations they use the G&I Plant assets of those Operating Companies.<sup>113</sup>

74. Entergy contends that the Joint Parties mischaracterize the cost causation issue by referring to the “cost-causation” relationship between affiliate labor and the overhead costs of the Operating Companies. Entergy states that the functionalization process contained in Service Schedule MSS-3 assigns costs to the production function of the Operating Companies. Entergy provides data to show that more than 90 percent of the production costs on the Entergy System are directly assigned to the production function and less than 10 percent are functionalized to the production function.<sup>114</sup> Entergy states that for the remaining 10 percent there is no direct measure of the cost causation that can be used to functionalize these costs to the production function.

75. Entergy argues that the evidence presented leaves no doubt that affiliate labor bears a rational relationship to the G&I Plant being functionalized. Entergy states that Entergy Services’ and Entergy Operations’ labor uses the G&I Plant of the Operating Companies. Entergy cites several examples, including that the personnel responsible for regulatory affairs at Entergy Louisiana and Entergy Gulf States are Entergy Services employees and use the G&I Plant of those Operating Companies, and that the computer equipment at a nuclear plant is recorded as General Plant on the Operating Companies’ books.<sup>115</sup> Entergy explains that, like Operating Companies’ employees, Entergy Services’ employees and Entergy Operations’ employees use the Operating Companies’ General Plant. Therefore, Entergy concludes that there is no reason to exclude affiliate labor from the calculation of labor ratios to be used to functionalize costs to the production function.

76. Entergy also argues that the relationship between affiliate labor and the A&G expenses that are functionalized is clear. Entergy states that project codes are used to assign Entergy Services’ and Entergy Operations’ costs to the A&G expense accounts of the Operating Companies. For example, Entergy states that its employees administer the employee payroll and benefits programs for all employees of the Operating Companies as well as those of Entergy Operations. Entergy explains that the costs of the employees who administer these programs are appropriately charged to FERC A&G expense accounts of the Operating Companies because they are not, by definition, directly

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<sup>113</sup> *Id.* at 26-27 (quoting Initial Decision, 123 FERC ¶ 63,020 at P 288).

<sup>114</sup> Entergy’s Brief Opposing Exceptions at 31. Entergy states that there were \$6.6 billion of production costs in 2006 on the Entergy System, and of that \$6.2 billion were directly assigned.

<sup>115</sup> *Id.* at 35.

assignable to a specific function. Entergy notes that, in this instance, service company employees contribute to the very costs on the Operating Companies' books that are then functionalized.

77. Entergy points out that the Louisiana Commission's witness Kollen acknowledged that the exclusion of Entergy Services' and Entergy Operations' labor costs from the labor ratios mathematically means that little or no common, indirect costs would be functionalized to the nuclear production function.<sup>116</sup> However, Entergy asserts that the record evidence shows that the Operating Companies are responsible for significant indirect overhead costs relating to the nuclear facilities.<sup>117</sup>

78. Entergy further maintains that the inclusion of affiliate labor costs in the calculation of the labor ratio also improves the accuracy of labor ratios of the Operating Companies. As illustrated above, only a small number of employees working at the Operating Companies' nuclear plants are Operating Company employees, and the majority are employees of Entergy Services and Entergy Operations.<sup>118</sup> Furthermore, Staff, Entergy, and the Arkansas Commission argue that had Entergy Operations never been formed, the labor costs of the employees operating the nuclear plants would have been included in the labor ratio anyway.<sup>119</sup> Staff points out that the current arrangement simply reflects that, over time, Entergy has not eliminated any jobs, but rather transferred certain jobs from the Operating Companies to the two service companies. Therefore, Entergy argues that if Entergy Operations' labor is excluded from the determination of the labor ratio, no overhead costs would be functionalized to the nuclear portion of the production plant because there would be barely any Operating Company employee costs to allocate to the production function.<sup>120</sup>

79. Entergy also opposes Joint Parties' argument that the use of labor ratios with affiliate labor results in gross overallocation of administrative costs. Entergy asserts that,

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<sup>116</sup> *Id.* at 36.

<sup>117</sup> *Id.* at 44.

<sup>118</sup> Arkansas Commission's Brief Opposing Exceptions at 24-25 (citing Ex. AC-1 at 8-9; Ex. ETR-7 at 34-35).

<sup>119</sup> Trial Staff's Brief Opposing Exceptions at 24; Entergy's Brief Opposing Exceptions at 37; Arkansas Commission's Brief Opposing Exceptions at 25.

<sup>120</sup> Entergy's Brief Opposing Exceptions at 37. Staff also makes this argument, stating that the costs functionalized to production would be significantly understated solely due to corporate restructuring, and not due to any change in work requirements. Trial Staff's Brief Opposing Exceptions at 24-25. The Arkansas Commission makes a similar argument. Arkansas Commission's Brief Opposing Exceptions at 30.

if one labor ratio causes more administrative costs to be functionalized to the production function than another labor ratio, that does not prove that an “overallocation” of costs occurs.<sup>121</sup> Entergy argues that Joint Parties’ argument is flawed because the exact amount of costs that should be functionalized or allocated to the production function is not known. Entergy asserts that if that amount were known, there would be no need for a proxy factor, which Entergy states all agree is necessary for the A&G expenses and G&I Plant costs at issue. Additionally, Staff contends that the Initial Decision correctly rejected Joint Parties’ contention that the use of affiliate labor would be unduly discriminatory because it increases the rates of some Operating Companies but not others. Staff points out that the Presiding Judge noted that the Commission has held on a number of occasions that the fact that a rate change might increase rates or have an adverse financial impact on some customers, but not others, does not make the change unjust and unreasonable or unduly discriminatory.<sup>122</sup>

80. Additionally, Entergy disagrees with Joint Parties’ claim that the Presiding Judge ignored evidence regarding the disproportion between costs attributable to Entergy Operations and the costs allocated to production using Entergy Operations’ labor. Entergy asserts that the evidence that was “ignored” consists of numerous numbers that no witness supported as being relevant to any issues in this proceeding.

81. The Arkansas Commission argues that Joint Parties ignore several of the bases for the Presiding Judge’s decision while completely mischaracterizing others. The Arkansas Commission cite as an example Joint Parties’ argument that the Presiding Judge accepted a misportrayal of a single case as an indication that the Commission does not apply a direct labor policy and an assertion that some utilities may include affiliate labor in their labor ratios without the Commission’s knowledge. The Arkansas Commission contends that the single case referenced is *Northeast Utilities*, which was not a basis for the Presiding Judge’s decision.<sup>123</sup> The Arkansas Commission notes that the Presiding Judge found relevant that several operating companies belonging to a public utility holding company system like Entergy’s include affiliate labor in the labor costs reported on their FERC Forms No. 1.<sup>124</sup> Entergy states that while Joint Parties point to Staff witness

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<sup>121</sup> For example, Entergy also points out that nuclear generating facilities are more labor intensive than non-nuclear facilities. Entergy’s Brief Opposing Exceptions at 42.

<sup>122</sup> Trial Staff’s Brief Opposing Exceptions at 25 (citing Initial Decision, 123 FERC ¶ 63,020 at P 287. *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,067, at n.23 (2008); *New Dominion Electric Cooperative*, 118 FERC ¶ 63,024, at P 24 (2007)).

<sup>123</sup> Arkansas Commission’s Brief Opposing Exceptions at 17 (quoting Initial Decision, 123 FERC ¶ 63,020 at P 279).

<sup>124</sup> *Id.* at 18 (citing Initial Decision, 123 FERC ¶ 63,020 at P 279).

Sammon's and Louisiana Commission witness Kollen's testimony to support their assertion that Commission policy directs the use of direct labor only, Joint Parties miss the uncontradicted evidence that the Commission has accepted rates as just and reasonable that relied on labor functionalization factors that include service company labor.<sup>125</sup> For example, Entergy points out that both Union Electric and Duke Energy include affiliate labor in their Open Access Transmission Tariffs (OATTs).<sup>126</sup> Therefore, Entergy maintains that there is no basis for Joint Parties' argument that the Commission has adopted a rule excluding affiliate labor, and there is no conflict between the findings of the Initial Decision and Commission precedent.

82. Union Electric also disagrees with Joint Parties' interpretation of the tariff language in Northeast Utilities' compliance filing that explains the calculation of the Northeast Utilities System Companies' labor ratios. Union Electric points out that Joint Parties focus on Northeast Utilities' explanation that each company's labor ratio is developed by dividing the company's transmission related wages and salaries by the company's total direct wages and salaries, which Joint Parties claim shows that each Operating Company's labor costs were used without including the labor costs of an affiliated service company.<sup>127</sup> Union Electric contends that the reference to the company's wages and salaries is not as limiting as Joint Parties claim because the *Northeast Utilities* decision contemplated that a utility can maintain its books and records to include affiliated labor costs.<sup>128</sup>

83. Entergy also argues that Joint Parties' reliance on General Instruction No. 10 is misplaced because both General Instruction No. 10 and General Instruction No. 14 support the inclusion of affiliate labor costs.<sup>129</sup> Entergy states that General Instruction No. 10 provides, in part, that the "total labor cost" "be classified among...operating functions (steam generation, nuclear generation, hydraulic generation, transmission, distribution, etc.)..."<sup>130</sup> Union Electric also argues that this instruction requires a utility to report the distribution of total salaries and wages for the year, which includes not only

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<sup>125</sup> Entergy's Brief Opposing Exceptions at 28-29.

<sup>126</sup> *Id.* at 29. Staff also points out that both companies routinely include the labor costs of service companies in their FERC Forms No. 1 without separately identifying it in any manner. Trial Staff's Brief Opposing Exceptions at 21-22.

<sup>127</sup> Union Electric's Brief Opposing Exceptions at 19 (citing Joint Parties' Brief on Exceptions at 21).

<sup>128</sup> *Id.* (citing Initial Decision, 123 FERC ¶ 63,020 at P 278).

<sup>129</sup> Union Electric also makes this argument. *See id.* at 13-14.

<sup>130</sup> Entergy's Brief Opposing Exceptions at 27 (quoting 18 C.F.R. Pt. 101 (2008) (emphasis added)).

the Operating Company's labor costs, but also those labor costs charged to the Operating Company by an affiliated service company that incurred those labor costs when it performed the services on behalf of the Operating Company.<sup>131</sup> Additionally, Entergy states that Generation Instruction No. 14 (Transactions With Associated Companies (Major Utilities)) provides, in part, that "[t]he statements may be required to show the general nature of the transactions, the amounts included therein and the amounts included in each account prescribed herein with respect to such transactions."<sup>132</sup> Entergy states that uncontradicted evidence shows that both direct labor and affiliated labor are recorded in the accounts as prescribed by the Uniform System of Accounts, and that these labor costs, direct and affiliated, should be used to functionalize the Operating Companies' G&I Plant costs and A&G expenses.<sup>133</sup> Entergy further argues that none of the other cases Joint Parties cite address the issue of service company labor in the calculation of labor ratio.<sup>134</sup>

84. Entergy argues that neither Service Schedule MSS-1 nor Service Schedule MSS-2 bolster Joint Parties' position because Service Schedule MSS-1 pertains to only gas and oil-fired generating units having heat rates exceeding 10,000 Btus, and Service Schedule

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<sup>131</sup> Union Electric's Brief Opposing Exceptions at 11.

<sup>132</sup> Entergy's Brief Opposing Exceptions at 27-28 (quoting 18 C.F.R. Pt. 101 (2008)).

<sup>133</sup> Union Electric likewise argues that Joint Parties are mistaken in contending that General Instruction No. 10 supports their position because Joint Parties focus on the wording that the functionalization of labor costs will reflect only the costs "*charged direct* to the various accounts." Union Electric's Brief Opposing Exceptions at 12 (quoting Joint Parties' Brief on Exceptions at 18 (emphasis in original)). Union Electric explains that the language of General Instruction No. 10 distinguishes between labor costs that are charged direct to a specific account as opposed to a "clearing account." Union Electric maintains that the labor costs charged direct to various accounts are not limited to labor costs directly incurred by an operating utility, but only those not charged to clearing accounts. Therefore, Union Electric states that General Instruction No. 10 does not limit the inclusion of affiliated service company labor costs to a utility's payroll distribution, but rather considers affiliated service company labor costs "charged direct" to an operating utility's accounts to ensure a reasonably accurate distribution. Union Electric's Brief Opposing Exceptions at 12-13.

<sup>134</sup> Entergy's Brief Opposing Exceptions 25-27. Union Electric and the Arkansas Commission also make this argument. Union Electric's Brief Opposing Exceptions at 8; Arkansas Commission's Brief Opposing Exceptions at 21-22 (citing *Kansas Power and Light Co.*, 7 FERC ¶ 63,003 (1979); *Missouri Power & Light Co.*, 5 FERC ¶ 63,003 (1978); *Boston Edison Co.*, 8 FERC ¶ 63,007 (1979)).

MSS-2 pertains only to certain transmission costs. Entergy argues that these issues are not relevant to this proceeding.<sup>135</sup>

85. Entergy further maintains that the Louisiana Commission contradicted its own evidence by attempting to present an alternative functionalization of A&G expenses during cross-examination of Entergy's witness Louiselle. Entergy states that when the Louisiana Commission asked Entergy's witness Louiselle to make or confirm the mathematical calculations that emulated the functionalization procedures in Service Schedule MSS-4, Mr. Louiselle testified that the values that the Louisiana Commission asked him to rely on were not correct and were not consistent with how Service Schedule MSS-4 is calculated.<sup>136</sup> Entergy asserts that when Mr. Louiselle was asked why the Service Schedule MSS-4 methodology was not used, Mr. Louiselle pointed out that to directly assign costs instead of functionalizing, the entire process must be exhausted, which Mr. Louiselle testified was inefficient.<sup>137</sup> Entergy points out that Mr. Louiselle also stated that it is not Commission policy to directly assign some times and not others, but rather to adopt a reasonable, rational functionalization factor and apply it to the category of costs that need to be functionalized.<sup>138</sup> Therefore, Entergy contends that the Commission should find that the record evidence and Commission precedent demonstrate that the functionalization of all A&G expenses based on a relative labor ratio is just and reasonable and not unduly discriminatory. Entergy also maintains that the Commission should find that there is no credible evidence to support the direct assignment of a sub-set of these A&G expenses.

86. Entergy notes Joint Parties' contention that Entergy's proposal would functionalize G&I Plant investment to production based on the affiliate-augmented labor ratios, but would functionalize the Accumulated Deferred Income Taxes related to the G&I Plant using plant ratios. Entergy states that its proposal to functionalize the Accumulated Deferred Income Taxes related to using plant ratios was not part of

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<sup>135</sup> Entergy's Brief Opposing Exceptions at 53. Union Electric makes the same argument, stating that while Joint Parties have presented arguments to show Entergy's proposal is unreasonable, including arguments on cost causation, overallocation, and that the proposal is inconsistent with the functionalization methods in Service Schedule MSS-2 and Service Schedule MSS-4, Joint Parties have not met their burden in this case. Union Electric points out that the Initial Decision adequately addresses these arguments and determines that substantial record evidence supports a finding in favor of Entergy's proposal. Union Electric's Brief Opposing Exceptions at 25 (citing Initial Decision, 123 FERC ¶ 63,020 at P 282-88).

<sup>136</sup> Entergy's Brief Opposing Exceptions at 52 (citing Tr. 421-22).

<sup>137</sup> *Id.* at 52 (citing Tr. 423).

<sup>138</sup> *Id.* at 52-53 (citing Tr. 423-24).

Entergy's section 205 proceeding that initiated this one. Entergy notes that this change, if adopted, would cause Entergy Arkansas' bandwidth payment to increase by only \$200,000. Staff states that currently G&I Plant Accumulated Deferred Income Tax is functionalized using the plant ratio originally adopted in Docket No. EL01-88-001. Staff's witness Sammon also testified that General Plant depreciation expense and General Plant Accumulated Deferred Income Tax must be functionalized consistently.<sup>139</sup> Additionally, Staff's witness Sammon stated that it would not be reasonable to change the functionalization for one item, such as G&I Plant, without also changing other items in the production cost formula which are directly affected by that change, such as the Accumulated Deferred Income Tax accounts.<sup>140</sup> Staff also points out that other parties in this proceeding either supported or did not oppose this method.<sup>141</sup> Staff contends that Entergy simply needs to be directed to functionalize Accumulated Deferred Income Tax on the basis of a labor ratio.

87. Staff, Entergy, and the Arkansas Commission argue that the failure of the Presiding Judge to adopt this change does not undermine the validity of the approved functionalization methodology.<sup>142</sup> Staff states that, in not addressing this issue, the Presiding Judge may have been concerned that the Accumulated Deferred Income Tax issue was not properly before her for decision. However, Staff notes that, in cost of service ratemaking, the General Plant accounts are always analyzed and allocated in concert with their associated depreciation and Accumulated Deferred Income Tax accounts. Staff argues that it would not conflict with procedural or substantive precedent to conform the treatment of these accounts now, and that the Commission should direct Entergy to do so.

#### **4. Commission Determination**

88. We affirm the Presiding Judge's finding that the use of labor ratios for functionalizing G&I Plant costs and A&G expenses is well-settled Commission policy.<sup>143</sup> As the Commission noted in Opinion No. 20-A, the Federal Power Commission and the Commission have consistently held in favor of using labor ratios to functionalize G&I Plant costs.

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<sup>139</sup> Trial Staff's Brief Opposing Exceptions at 26 (citing Ex. S-1 at 17).

<sup>140</sup> *Id.* at 26-27.

<sup>141</sup> *Id.* at 27 (citing Ex. LC-4 at 30-31; Ex. LC-21 at 6; Ex. AC-1 at 6).

<sup>142</sup> Entergy's Brief Opposing Exceptions at 47; Arkansas Commission's Brief Opposing Exceptions at 31.

<sup>143</sup> No party filed a brief on exceptions with respect to this matter.

89. The central issue before us is whether the labor costs of Entergy's affiliated service companies – Entergy Operations and Entergy Services – should be included in the labor ratio used for functionalizing G&I Plant costs and A&G expenses to the production function of each Operating Company. We agree with the Presiding Judge and the parties filing briefs opposing exceptions that this matter has never been previously litigated.<sup>144</sup> As Entergy points out, “[w]hile there is no decision of the [Commission] where the inclusion of service company labor ratios used to functionalize costs is expressly addressed, there likewise is no basis on which to assert that the use of service company labor has been rejected by the Commission.”<sup>145</sup> In this regard, we conclude that there is no Commission precedent for functionalizing costs to utility functions that requires the labor ratio to be based on so-called direct labor, i.e., without the inclusion of labor from Entergy Operations and Entergy Services, as argued by Joint Parties.<sup>146</sup> Indeed, as Entergy and the Arkansas Commission point out, not one of the cases cited by Joint Parties support their assertion that only direct labor must be used in the relevant labor

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<sup>144</sup> Trial Staff's Brief Opposing Exceptions at 16; Arkansas Commission's Brief Opposing Exceptions at 16; Entergy's Brief Opposing Exceptions at 24-29.

<sup>145</sup> Entergy's Brief Opposing Exceptions at 28. We also find that Joint Parties' reliance on statements by witnesses in this proceeding that they are only aware of cases in which the Commission has limited the labor ratio to the direct labor costs of the utility is to no avail. Evidence in this record demonstrates that some companies do include affiliate labor in functionalizing G&I Plant costs and A&G expenses. See Entergy's Brief Opposing Exceptions at 29 (citing Ex. ETR-12; Ex. AMN-2; and Ex. ETR-23). It does not demonstrate, however, that Commission precedent requires that only “direct labor,” as defined by Joint Parties, be included in the calculation of labor ratios.

<sup>146</sup> We also disagree with Union Electric's assertion that “the Commission has previously ruled in a litigated case that the inclusion of affiliated service company labor costs in the calculation of an Operating Company's labor ratio is appropriate.” Union Electric's Brief Opposing Exceptions at 16-17 (citing *Northeast Utilities Service Co.*, 83 FERC ¶ 61,184, at 61,763 (1998)). While there is language that hints at Union Electric's assertion, the Commission, in fact, never ordered Northeast Utilities to include the labor costs of its affiliated service company in the labor ratios to functionalize the Operating Companies' indirect costs.

Further, the fact that some other utility operating companies that belong to a holding company system may include affiliated service company labor in the total labor costs reported in their FERC Form No. 1 fails to demonstrate that Commission precedent or policy supports the inclusion of affiliate labor in the calculation of labor ratios. See Union Electric's Brief Opposing Exceptions at 14-16. Such an observation does not control the outcome of this proceeding.

ratio.<sup>147</sup> While Joint Parties cite several gas cases that use the term “direct labor” in discussing the use of labor ratios,<sup>148</sup> none of the cases defined the term nor was the use of “affiliate labor” in the calculation of a labor ratio even considered by the Commission.<sup>149</sup> Joint Parties have simply taken the term “direct labor” as used in those cases and provided their own interpretation of what the term should mean; the cases themselves never provided such an interpretation. Indeed, there is no evidence that the gas companies in those proceedings even had affiliate service companies. Moreover, the three electric cases Joint Parties cite for the proposition that “electric cases make it clear that the ‘labor’ ratios employed to functionalize costs are ‘direct labor’ ratios” are not Commission orders, but rather are initial decisions by administrative law judges.<sup>150</sup> In any event, in these cases the term “direct labor” was never defined, its determination was not at issue and there was no evidence that any of the public utilities had an affiliate service company. Finally, Joint Parties’ reliance on the Commission’s Uniform System of Accounts to support their position is also unavailing. As the Commission has explained on a number of occasions, accounting does not control ratemaking.<sup>151</sup>

90. As discussed further below, we affirm the Presiding Judge’s finding that Entergy’s proposal to revise section 30.12 of Service Schedule MSS-3 to provide that labor ratios will be determined based on the payroll expense for each Operating Company, including payroll expenses billed by Entergy Services and Entergy Operations, is just and reasonable and not unduly discriminatory.

91. Before we specifically address this issue, we will discuss in general the concept of functionalization and the impact production costs have in determining the bandwidth remedy. This will provide the context necessary for understanding the dispute concerning the calculation of production labor ratios and our determination below. In Opinion No. 480, the Commission required Entergy to make annual filings in order to determine whether rough production cost equalization, within a +/- 11 percent bandwidth, exists among the Entergy Operating Companies. Service Schedule MSS-3 to the System Agreement sets forth the bandwidth formula necessary to make this determination. The formula provides for Entergy to calculate the actual production costs of each Operating Company and the overall Entergy System average production cost, and to perform a cost comparison of the actual production costs against the system average production costs, to

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<sup>147</sup> Trial Staff’s Brief Opposing Exceptions at 17; Entergy’s Brief Opposing Exceptions at 25; Arkansas Commission’s Brief Opposing Exceptions at 20.

<sup>148</sup> Joint Parties’ Brief on Exceptions at 16-17, 20.

<sup>149</sup> See, e.g., Entergy’s Brief Opposing Exceptions at 24-27.

<sup>150</sup> See *supra* note 47.

<sup>151</sup> E.g., *Southern Co. Services, Inc.*, 116 FERC ¶ 61,247, at P 23 (2006).

determine if each of the Operating Companies actual production costs are within +/- 11 percent of the Entergy System average production costs. If not, payment/receipts are made among the Operating Companies until they all fall within the +/- 11 percent bandwidth and thus rough production cost equalization is achieved.

92. For ratemaking purposes, functionalization (one of the steps involved in the allocation of costs) involves assigning or apportioning costs among the various operating functions of a company, such as the production, transmission, and distribution functions. As relevant to this proceeding, the functionalization issue before the Commission is how the Operating Companies' overhead costs (G&I Plant costs and A&G expenses) are functionalized. Specifically, Entergy proposes to functionalize those overhead costs that cannot be directly assigned using a labor ratio that is calculated based on the sum of the payroll expense for each Operating Company plus the payroll expenses billed to each Operating Company by Entergy Services and Entergy Operations.

93. The evidence in this proceeding is that Entergy directly assigned \$6.2 billion of total production costs to the Operating Companies.<sup>152</sup> Entergy uses either a labor ratio or a plant ratio to functionalize other costs not directly assignable, with the labor ratio being used to functionalize G&I Plant costs and A&G expenses.

94. As shown in the following chart, Entergy's proposal to include in the labor ratio calculations Entergy Services' and Entergy Operations' payroll expenses as opposed to only the direct labor expenses of the Operating Companies results in a much higher production labor ratio for three of the Operating Companies – Entergy Arkansas, Entergy Gulf States, and Entergy Louisiana.

Labor Ratio by Labor Type <sup>153</sup>			
Company	Direct	Direct + Entergy Services	Direct + Entergy Services + Entergy Operations
Entergy Arkansas	23.33%	30.48%	67.65%
Entergy Gulf States	34.68%	35.13%	54.79%
Entergy Louisiana	42.00%	39.02%	65.92%
Entergy Mississippi	34.26%	32.98%	32.98%
Entergy New Orleans	34.03%	29.07%	29.07%

95. The significance of Entergy's proposal to include affiliate labor costs is that it alters the calculation of each Operating Company's actual production costs, increasing it

<sup>152</sup> Entergy's Brief Opposing Exceptions at 10 (citing Ex. ETR-7 at 2).

<sup>153</sup> Joint Parties' Brief on Exceptions at 29 (citing Ex. LC-60; Tr. 285-287). The labor ratios in this chart reflect production labor ratios.

for some and decreasing it for others, and thus alters the resulting payments/receipts among the Operating Companies that are necessary to achieve rough production cost equalization. Under the first three annual bandwidth filings Entergy Arkansas' actual production costs have been substantially less than the Entergy system average, outside the +/-11 percent bandwidth and, as a result, it has been required to make bandwidth payments while the remaining Operating Companies receive payments.<sup>154</sup> Although the change in how the labor ratio is calculated impacts each of the Operating Company's labor ratios and resulting actual production cost calculations, Entergy Arkansas will experience a much larger relative increase in its labor ratio and actual production costs and thereby reduce the bandwidth payments it must make to the other Operating Companies to achieve rough production cost equalization. Thus, Entergy Arkansas would benefit from the change to the formula while Entergy Louisiana would not.

96. In this context, 36 percent of the total labor costs incurred by the Operating Companies is direct labor, and the remaining 64 percent consists of labor costs that were billed to the Operating Companies by Entergy Services and Entergy Operations.<sup>155</sup> The question before us is whether or not to include 64 percent of the labor costs, which are associated with the employees that operate the nuclear facilities and provide other services to the Operating Companies, in the ratio used to functionalize among the Operating Companies 100 percent of the G&I Plant costs and A&G expenses of the Operating Companies.

97. We disagree with Joint Parties' argument that Entergy failed to demonstrate cost causation in support of its proposal to include affiliate labor costs in the calculation of labor ratios.<sup>156</sup> As Entergy's witness Louise testified, the functionalization of

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<sup>154</sup> Entergy's bandwidth implementation filings are in Docket Nos. ER07-956-000, ER08-1056-000 and ER09-1224-000.

<sup>155</sup> Entergy's Brief Opposing Exceptions at 12 (citing Ex. ETR-4).

<sup>156</sup> Roughly \$0.4 billion of costs are common, indirect costs that cannot be directly assigned to the production function but are functionalized to the production function using an allocation ratio. As Entergy explains, allocation is necessary because these common, indirect costs are not directly assignable and "it would be administratively inefficient to undertake the task of analyzing each and every one of the costs incurred by each Operating Company on an annual basis to attempt to directly assign each of them to the production function for purposes of computing a formula rate, when a rational, reasonable factor could be used to functionalize such costs." Entergy's Brief on Exceptions at 11. In this regard, Entergy points out that "with respect to A&G costs for example, (FERC Accounts 920 through 935), the General Ledger for 2006 for the Operating Companies contains 4.6 million line items. The evidence showed that to attempt to directly assign each of them to a function by reviewing each one for just one

(continued...)

common, indirect G&I Plant costs and A&G expenses should be reasonable, rational and should bear a reasonable, rational relationship to the portion of common costs that were caused by the production function.<sup>157</sup> We find that a labor ratio that includes affiliate labor costs bears a rational relationship to the G&I Plant costs and A&G expenses to be functionalized to the production function. For example, the employees in charge of regulatory affairs at Entergy Louisiana and Entergy Gulf States are Entergy Services employees that use the G&I Plant of the Operating Companies;<sup>158</sup> when service company personnel perform work at an Operating Company location they use the G&I Plant of that Operating Company.<sup>159</sup> Further, for example, computer equipment at a nuclear power plant is recorded as general plant on that Operating Company's books and the software running that computer equipment is recorded as intangible plant of that Operating Company, and both are used by Entergy Services and Entergy Operations employees. Moreover, as Entergy's witness Bunting testified, Entergy Services and Entergy Operations use project codes to assign costs to the A&G accounts of the Operating Companies.<sup>160</sup> He also testified that Entergy Services' employees administer the payroll and benefit programs for all employees of the Operating Companies. Accordingly the evidence demonstrates that, when Entergy Services' and Entergy Operations' employees perform work for Operating Companies they use the G&I Plant of those Operating Companies and assign costs to their A&G accounts, and it is reasonable and rational that they do so.

98. It is also significant to note that of the 2040 employees working at the Operating Companies' nuclear power plants only two are direct employees of the Operating Companies themselves. Thus, approximately 99.9 percent of the employees operating the Operating Companies' nuclear facilities are actually Entergy Services' and Entergy Operations' employees.<sup>161</sup> As Trial Staff points out, if Entergy Services and Entergy Operations had not been created and the employees were the employees of the Operating Companies, their labor costs would have been direct costs of the Operating Companies themselves; the current arrangement simply reflects that Entergy has transferred certain jobs from the Operating Companies to the two service companies, not that it has

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minute would take 77,000 person hours or 37 person years assuming 40 hours per week and 52 weeks per year." Ex. ETR-7 (Louiselle Rebuttal) at 37. Other than arguing that these common, indirect costs should be directly assigned, Joint Parties have failed to demonstrate that there is any reasonable way to do so.

<sup>157</sup> Entergy's Brief Opposing Exceptions at 33 (citing Ex. ETR-7 at 72).

<sup>158</sup> *See id.* at 35.

<sup>159</sup> *Id.* (citing Ex. ETR-7 at 29).

<sup>160</sup> *Id.* at 36 (citing Ex. ETR-6 at 13-15).

<sup>161</sup> *Id.* at 36-37 (citing Ex. ETR-7 at 34).

eliminated them.<sup>162</sup> Excluding these costs would result in nuclear production being assigned no overhead costs (G&I Plant costs and A&G expenses). Accordingly, the exclusion of the affiliate labor costs would understate the actual level of labor costs and under allocate G&I Plant costs and A&G expenses to the production function. Thus, it is reasonable and rational to include these service company labor costs in the calculation of the labor ratios.

99. We also disagree with Joint Parties' argument that including affiliate labor costs in the labor ratio will result in an "overallocation" of G&I Plant costs and A&G expenses to the production function. Joint Parties never indicate what this so-called overallocation is in relation to. It appears that they are simply arguing that more costs are allocated to Entergy Arkansas' production function when including affiliate labor than when only using "direct" labor. We find that argument unavailing. As stated earlier, the issue before the Presiding Judge in this proceeding was whether 36 percent of the total labor costs incurred by the Operating Companies would be used to functionalize 100 percent of the G&I Plant costs and A&G expenses of the Operating Companies, or whether the remaining 64 percent of the labor costs that are billed to the Operating Companies by Entergy Services and Entergy Operations also would be included in calculating the labor ratio to functionalize 100 percent of the Operating Companies' G&I Plant costs and A&G expenses. Adopting Joint Parties' position and excluding Entergy Services' and Entergy Operations' labor costs from the labor ratios would mean that little indirect costs associated with nuclear production would be functionalized properly. We find that it would be unreasonable to not take nuclear production into consideration in functionalizing overhead costs. Accordingly, based on the evidence before us, we affirm the Presiding Judge and conclude that the inclusion of affiliate labor costs in the functionalization process achieves a proper allocation of production costs to the Operating Companies for bandwidth payment/receipt purposes.

100. Joint Parties also raise a number of concerns that Entergy's proposal is at odds with how it calculates rates under Service Schedules MSS-1, MSS-2, and MSS-4. These Service Schedules, however, provide for different kinds of services than the bandwidth calculations performed under Service Schedule MSS-3 and are not a basis to determine how rates under Service Schedule MSS-3 should be determined. If Joint Parties have concerns with the calculations performed under Service Schedules MSS-1, MSS-2, or MSS-4, they can raise their concerns in a more appropriate proceeding.

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<sup>162</sup> Trial Staff's Brief Opposing Exceptions at 24.

**C. Additional Issues**

**1. Account No. 924**

101. The Presiding Judge determines that Joint Parties' proposal to change from labor ratios to plant ratios with respect to Account No. 924 is not an issue before her.

102. The Joint Parties argue that Commission policy requires the use of plant ratios for Account No. 924 (Property Insurance Expense). However, the Joint Parties maintain that the Initial Decision approved Entergy's proposal based on a determination that Entergy was not proposing any change in the functionalization method approved in Opinion Nos. 480 and 480-A, even though Entergy proposed to change from direct labor to affiliate-augmented labor. Joint Parties argue that the Presiding Judge was required to rule on the reasonableness of that proposal. Joint Parties contend that the Presiding Judge's ruling that Entergy's proposal to functionalize all A&G expenses was not properly before her fails to acknowledge that Entergy proposed a significant change in the allocation factor.<sup>163</sup> Joint Parties assert that since Entergy proposed a change that did not conform to Commission policy, and provided no justification for the deviation, the proposal should have been rejected.

103. The Arkansas Commission also states that it is not clear what the Joint Parties' position is with respect to Account No. 924. They state that while Joint Parties argue that Commission policy requires use of plant ratios for functionalization of Account No. 924, they do not argue for use of plant ratios for functionalization of Account No. 924. The Arkansas Commission points out that, instead, Joint Parties argue that the Presiding Judge erred in finding that the proposal to functionalize all A&G expenses based solely on the labor ratios is not properly before the Presiding Judge because Entergy only proposed to modify the current functionalization of Account No. 923 and not any other A&G account.<sup>164</sup> Staff asserts that the Presiding Judge properly found that Joint Parties' issue regarding Account No. 924 was not properly before her, and while the Presiding Judge did not explicitly rule on this point, the Initial Decision implicitly approved the inclusion of service company labor in the labor ratio.

104. We affirm the Presiding Judge's holding that a change from labor ratios to plant ratios with respect to, as relevant here, Account No. 924 was an issue not before her.<sup>165</sup> We note, in this regard, that the parties had an opportunity prior to the start of the hearing

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<sup>163</sup> Joint Parties' Brief on Exceptions at 59 (citing Initial Decision, 123 FERC ¶ 63,020 at P 328).

<sup>164</sup> Arkansas Commission's Brief Opposing Exceptions at 33 (citing Initial Decision, 123 FERC ¶ 63,020 at P 341).

<sup>165</sup> Initial Decision, 123 FERC ¶ 63,020 at P 320-28.

to put each other and the Presiding Judge on notice of what issues they considered needed to be litigated in the hearing and decided by the Presiding Judge – through a joint statement of issues.<sup>166</sup> And where parties wanted to pursue issues not included in the joint statement of issues, those parties filed their own supplemental statement of issues prior to the hearing to ensure that they be heard.<sup>167</sup> It appears that the Joint Parties neither identified the issue of labor ratios versus plant ratios with regard to, in particular, Account No. 924 for inclusion in the agreed-upon joint statement of issues, nor did they include this issue in their own supplemental statement of issues.<sup>168</sup> In these circumstances, we affirm the Presiding Judge’s holding that a change from labor ratios to plant ratios with respect to, as relevant here, Account No. 924 was not before her.

## 2. Accumulated Deferred Income Tax

105. Joint Parties contend that Entergy’s proposal would functionalize G&I Plant investment to production based on affiliate labor ratios, but would functionalize the Accumulated Deferred Income Taxes related to the G&I Plant using plant ratios. They maintain that this inconsistency creates a mismatch of the investment for G&I Plant and causes an overallocation of costs to the production function.

106. Entergy recognizes that it proposed to functionalize G&I Plant investment to production based on affiliate labor ratios and left unchanged its existing functionalization of Accumulated Deferred Income Taxes related to the G&I Plant based on plant ratios.<sup>169</sup> Entergy states that it does not oppose the change.<sup>170</sup>

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<sup>166</sup> *Id.* P 6, 8. On August 15, 2007, the Presiding Judge issued an order adopting an “agreed upon” procedural schedule that expressly provided for the submission of both preliminary and final joint statements of issues. The preliminary statement of issues was to be filed (and was, in fact, filed) roughly a month later, on September 10, 2007. The final joint statement of issues was to be filed (and was, in fact, filed) after the submission of pre-filed testimony and exhibits, on March 7, 2008 – three days before the trial-type evidentiary hearing was to begin (March 10, 2008). *Id.* P 6, 8-9; *Entergy Services, Inc.*, Docket No. ER07-682-002 (August 15, 2007) (Presiding Judge’s “Order Adopting Procedural Schedule”).

<sup>167</sup> Initial Decision, 123 FERC ¶ 63,020 at P 6, 9.

<sup>168</sup> *Id.* P 8-9.

<sup>169</sup> Entergy notes that a change for the functionalization of Accumulated Deferred Income Taxes would cause Entergy Arkansas’ bandwidth payment to increase by \$200,000.

<sup>170</sup> Entergy’s Brief Opposing Exceptions at 47.

107. Staff states that Entergy's current G&I Plant Accumulated Deferred Income Taxes are functionalized using the plant ratio originally adopted in Docket No. EL01-88-001.<sup>171</sup> Staff maintains that General Plant depreciation expense and General Plant Accumulated Deferred Income Taxes must be functionalized consistently.<sup>172</sup> Staff also points out that other parties in this proceeding either supported or did not oppose this method.<sup>173</sup> Staff contends that Entergy simply needs to be directed to functionalize Accumulated Deferred Income Tax on the basis of a labor ratio.

108. Because Entergy agrees to make the conforming change with respect to the functionalization of Accumulated Deferred Income Taxes, we direct Entergy to submit a compliance filing, within 60 days of the date of this order, that functionalizes Accumulated Deferred Income Taxes on the basis of the affiliate labor ratio found appropriate in this order.

The Commission orders:

(A) The Initial Decision is hereby affirmed, as discussed in the body of this order.

(B) Entergy is directed to make a compliance filing, within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>171</sup> Trial Staff's Brief Opposing Exceptions at 26.

<sup>172</sup> *Id.* (citing Ex. S-1 at 17).

<sup>173</sup> *Id.* at 27 (citing Ex. LC-4 at 30-31; Ex. LC-21 at 6; Ex. AC-1 at 6).