

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Inquiry Regarding the Effect of the Tax
Cuts and Jobs Act on Commission-
Jurisdictional Rates

Docket No. RM18-12-000

**COMMENTS OF THE TRANSMISSION ACCESS POLICY
STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) submits these comments on the Commission’s March 15, 2018 Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdictional Rates (“NOI”).¹ The NOI recognizes that the Tax Cut and Jobs Act (“TCJA”) has substantial impacts on utility costs beyond the simple reduction in the allowance for income taxes that is generally included in rates. In particular, it recognizes (P 13) that, as a result of the decrease in the corporate income tax rate, Accumulated Deferred Income Taxes (“ADIT”) that utilities have reflected on their books now represent ratepayer payment of income taxes that the recipient utilities will no longer have to pay. Therefore, the NOI, correctly, recognizes that this excess ADIT “must be returned to customers in a cost-of-service ratemaking context.”² The NOI asks several questions and requests comments addressing the manner of this return of ratepayer dollars.

TAPS appreciates the Commission’s attention to an issue that can significantly affect the justness and reasonableness of jurisdictional rates. In these comments, TAPS urges the

¹ *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdictional Rates*, 83 Fed. Reg. 12,371 (proposed Mar. 15, 2018), FERC Stats. & Regs. ¶ 35,582 (2018) (“NOI”).

² *Id.* P 13.

Commission to act with speed to ensure that the return of these ratepayer dollars is not delayed, but to do so in a manner that recognizes the case-by-case nature of utility rates and accounting.

I. INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities in more than 35 states, promoting open and non-discriminatory transmission access.³ As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members are transmission customers, paying Commission jurisdictional transmission rates. Because those rates now likely reflect excess ADIT, TAPS members have a direct interest in prompt Commission action to ensure just and reasonable transmission rates.

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II. COMMENTS

A. The Commission should act to ensure that excess ADIT continues to operate as an offset to ratebase

At PP 14-16 of the NOI, the Commission recognizes that the tax rate change in the TCJA will have numerous impacts on utility rate base. Accordingly, the Commission requests comments as to how those impacts should be addressed in rates. Specifically, at P 15, the Commission “seeks comment on whether, and if so how, public utilities, interstate natural gas

³ David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

pipelines, and oil pipelines should make adjustments so that rate base may be appropriately adjusted by excess ADIT and deficient ADIT.” TAPS believes the answer to the question “whether” is an emphatic YES.

As the NOI recognizes (P 12), ADIT is cost-free capital. And as the Commission explains (P 11), ADIT generally is accrued because customers pay the utility, through rates, dollars that the utility will not pay in taxes until future years. Put differently, ADIT is customer money that is appropriately treated as a reduction to rate base. The excess ADIT created by the lowering of the corporate tax rate by the TCJA represents dollars that would never have been collected had the reduction in tax rates been known at the time the rates were charged. Accordingly, so long as a utility holds the excess ADIT, that excess ADIT should continue to serve as a reduction to rate base.

B. The Commission should issue orders prompting filings for return of excess ADIT to customers of utilities with formula rates

The NOI also asks (P 15) how rate base should be adjusted by excess ADIT. By way of example, the Commission asks whether formula rates could be modified with single line items for specific accounts. TAPS believes that there is, unfortunately, no “one size fits all” solution. Some formula rates include many pages of workpapers that are integral parts of the filed rate. These workpapers specify not only accounts within the Uniform System of Accounts (“USoA”), but also sub-accounts and sometimes list individual entries within these accounts and sub-accounts, all in order to enable a transparent process. This transparency is critical because the formula allows a utility to adjust the actual charges in a manner similar to a rate case but without actually filing a rate case. But other formulae, for case-specific reasons, have less detail. The level of detail required to show the calculation of the excess ADIT, and the mechanism to return that excess, will thus vary.

To address the varying needs of utilities and customers that operate under formula rates, TAPS urges the Commission to require utilities with formula rates to propose specific changes to their formula rates. The Commission has already initiated Federal Power Act (“FPA”) Section 206 investigations of certain formula rates. In that order, the Commission stated:⁴

Within 60 days of the date of this order, each Respondent is directed either (1) to propose revisions to its transmission formula rates to reflect the change in the federal corporate income tax rate,¹⁰ or (2) to show cause why it should not be required to do so.¹¹

¹⁰ The Commission generally does not permit single-issue ratemaking. However, given the limited scope of the revisions needed to reflect the change in the federal corporate income tax rate, the Commission will consider proposals to review Respondents’ proposed revisions on a single-issue basis. *See generally Indicated RTO Transmission Owners*, 161 FERC ¶ 61,018, at PP 13-14 (2017). *See also Rates Changes Relating to the Federal Corporate Income Tax Rate for Public Utilities*, Order No. 475, *FERC Statutes and Regulations Preambles 1986-1990* ¶ 30,752, *order on reh’g*, 41 FERC ¶ 61,029 (1987) (allowing public utilities to use a voluntary, abbreviated rate filing procedure to reduce their rates to reflect a reduction in the federal corporate income tax rate on a single-issue basis).

¹¹ For example, Respondents may explain how the reduced tax rate is being addressed in another proceeding pending before the Commission.

A similar directive applicable to all formula rates would provide utilities and their customers a docket in which to negotiate a case-specific solution. Because of the complexity of calculating excess ADIT, however, and given the level of cooperation between utility and customer that is necessary for formula rates to operate (and therefore embodied in formula rate monitoring protocols), the Commission should encourage utilities to work with their customers prior to filing.

⁴ *AEP Appalachian Transmission Co.*, 162 FERC ¶ 61,225, P 5 (2018).

Because formula rates automatically adjust in most other respects, it will generally be appropriate to limit the rate filing to the single issue of revised ADIT. However, where there exists a *prima facie* indication that stated elements of the rate formula have become excessive (or that the utility's proposed flow-back of excess ADIT is insufficient), the Commission's invitation of "single issue" filings should not preclude expansion of the proceeding to encompass a customer-initiated or Commission-initiated investigation under FPA Section 206.

C. The Commission should issue orders prompting filings for return of excess ADIT to customers of utilities with stated rates

The Commission also asks how stated rates should be treated to ensure comparability.⁵ As with formula rates, there is no "one size fits all" solution for stated rates. But while formula rates annually reflect increases and decreases in most utility costs, stated rates do not. This difference can create complexity for both utilities and ratepayers. For example, a cost-based stated rate will be litigated or settled and necessarily rely on USoA balances as they existed at a point in the past. Since that point, existing plant will have depreciated and/or been retired and new plant may have been added. In addition, that newly added plant may have received special tax treatment affecting the ADIT calculation. Moreover, customers of utilities with stated rates do not have the substantial amount of information that is annually provided to customers of utilities with formula rates. Stated-rate customers will therefore find it more challenging to verify their utility's calculation.

⁵ NOI P 15.

The Commission has also opened numerous utility-specific investigations of stated electric transmission rates with respect to the change in the tax rate. In so ordering, the Commission directed:⁶

Within 60 days of the date of this order, each Respondent is directed either (1) to propose revisions to its stated transmission rates to reflect the change in the federal corporate income tax rate and describe the methodology used for making those revisions,⁶ or (2) to show cause why it should not be required to do so.⁷

⁶ The Commission generally does not permit single-issue ratemaking. However, given the limited scope of the revisions needed to reflect the change in the federal corporate income tax rate, the Commission will consider proposals to review Respondents' proposed revisions on a single-issue basis. *See generally Indicated RTO Transmission Owners*, 161 FERC ¶ 61,018, at PP 13-14 (2017). *See also Rates Changes Relating to the Federal Corporate Income Tax Rate for Public Utilities*, Order No. 475, *FERC Statutes and Regulations Preambles 1986-1990* ¶ 30,752, *order on reh'g*, 41 FERC ¶ 61,029 (1987) (allowing public utilities to use a voluntary, abbreviated rate filing procedure to reduce their rates to reflect a reduction in the federal corporate income tax rate on a single-issue basis).

⁷ For example, Respondents may explain how the reduced tax rate is being addressed in another proceeding pending before the Commission.

TAPS supports a similar approach to address excess ADIT in stated rates. Recognizing that the Form 1 may be the only publicly available data for utilities with stated rates (in contrast to the substantially more detailed information provided to customers through the formula rates) and the complexity of the excess ADIT issue, the Commission should encourage utilities with stated rates to provide information about their excess ADIT calculations to customers that request it, respond to customer requests for additional information, and work with their customers towards a mutually acceptable flow-back mechanism. Further, the Commission

⁶ *Alcoa Power Generating Inc.—Long Sault Div.*, 162 FERC ¶ 61,224, P 4 (2018).

should require utilities with stated rates to file the flow-back mechanism and include with their filing detailed documentation and workpapers so that the calculation of excess ADIT can be validated. The Commission should also require utilities with stated rates to report on their outreach to customers.

TAPS does not oppose the use of a single-issue proceeding to address the flow-back of excess ADIT by utilities with stated rates. But TAPS also recognizes that a utility with a stated rate may prefer to “show cause” that no rate change is appropriate. That is, a utility may claim that no flow-back of excess ADIT is required because certain other costs have increased. When faced with such a claim, the Commission must ensure that regulators and customers have all data necessary so that they make an informed evaluation of the utility’s costs. Moreover, where there exists a *prima facie* indication that the utility’s other costs have decreased (or that the utility’s proposed flow-back of excess ADIT is insufficient) the Commission’s invitation of “single issue” filings should not preclude expansion of the proceeding to encompass a customer-initiated or Commission-initiated investigation under FPA Section 206.

D. The time period for flow-back of excess ADIT should be determined on a case-by-case basis

The ADIT NOI also asks (P 19) “how quickly excess or deficient non-plant based ADIT should be flowed back to or recovered from customers.” The Commission specifically asked whether a five-year period would be appropriate for the return of excess ADIT. TAPS maintains that this is a utility-specific issue, and that the need for tailoring reinforces the need to address excess ADIT issues in utility-specific dockets.

Several filings made in the past months have addressed the return of excess ADIT to customers. For example, in Docket No. ER18-1182, System Entergy Resources, Inc. (“SERI”) seeks the Commission’s acceptance of its proposal to flow back nearly \$60 million of excess

non-plant ADIT over seven months.⁷ While two intervenors have raised other issues in that proceeding, the intervenors have not contested the flow-back period, even though, for other utilities, such a short flow-back period could lead to cash flow issues as well as rate instability.

In individual cases, the Commission, the utility, and customers can consider all relevant factors. For example, there are intergenerational equity concerns because the customers that receive the flow-back likely will not be the same customers that paid the dollars. Because excess ADIT is an offset to ratebase, the flow-back may cause volatility in rates, depending on the amounts at issue and the flow-back period. That is, if excess ADIT is returned in one year, in the next year not only will that credit disappear, but the utility will have a larger ratebase on which it will earn a return. Some customers and utilities may prefer a longer flow-back period to minimize that volatility. In other cases, there could be non-recurring expenses or credits with a rate impact that could be mitigated by thoughtful return of excess ADIT. Still other utilities and customers might prefer the prompt flow-back of ratepayer dollars rather than minimizing rate volatility.

The SERI proposal identified above illustrates that the Commission's suggestion that a five year flow-back period to return excess ADIT, although potentially shorter than the flow-back period for plant-related ADIT, may still be too long for a particular utility and its customers. To be clear, TAPS takes no opinion on the SERI (or any other utility-specific) proposal. Rather, if the participants in a Commission proceeding agree, the Commission should accept the proposal in the absence of evidence that a proposal is unjust, unreasonable, or unduly

⁷ Sys. Energy Res., Inc. Limited Amendments to the Unit Power Sales Agreement, *Sys. Energy Res., Inc.*, Docket No. ER18-1182-000 (Mar. 27, 2018), eLibrary No. 20180327-5074.

discriminatory. Alternatively, if the participants do not agree, the Commission should determine a reasonable flow-back period for excess ADIT based on the facts of an individual case.

E. Non-public utilities should not be required to make a TCJA-related filing with the Commission

The Commission “seeks comments on effects of the Tax Cuts and Jobs Act on Commission-jurisdictional rates of non-public utilities.”⁸ TAPS includes many members that are municipally owned utilities, associations of municipal utilities, not-for-profit cooperatives, and other organizations that are “non-public utilities” under the FPA. A number of these members are transmission owners whose revenue requirements are recovered through a regional transmission organization’s jurisdictional rates. These TAPS members do not pay federal, state, or local income taxes. As a result, the TCJA’s reduction of federal income tax rates did not and will not reduce the costs of these tax-exempt utilities. Moreover, because these entities are tax-exempt, they cannot and do not take advantage of special tax depreciation rules that create ADIT balances. As a result, these tax-exempt entities that collect a portion of their costs by means of Commission-jurisdictional rates should not be required to make additional filings with the Commission to justify their current rates.

CONCLUSION

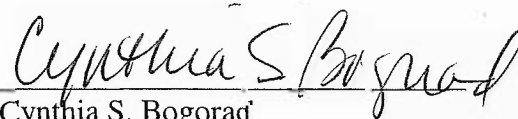
For the reasons discussed above, the Commission should act promptly in recognition that utilities nationwide are holding ratepayer dollars, to which those utilities have no just and reasonable claim because the utilities will not have to pay the taxes for which the dollars were collected. However, the calculation of the amount and the determination of the appropriate period to return ratepayer dollars cannot be determined in a “one size fits all” proceeding.

⁸ NOI P 29.

Accordingly, the Commission should require utilities to file a proposal to flow back excess ADIT, or show cause why no rate change is necessary, as quickly as reasonably possible, and rule that all excess ADIT should be flowed back to ratepayers over a period that is found to be reasonable on a case-specific basis. The case-specific issues should take it as established that all excess ADIT should be treated as a rate base offset and flowed back to ratepayers, and instead should focus on (a) the calculation of the amount of excess ADIT, and (b) the length and starting date of the flow-back period (or periods, as it may vary by asset).

Finally, the Commission should make clear that tax exempt non-public utilities are not required to make a TCJA-related filing with this Commission to justify their existing rates.

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