

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility Transmission Rate
Changes to Address Accumulated
Deferred Income Taxes

Docket No. RM19-5-000

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

The Transmission Access Policy Study Group (“TAPS”) submits these comments on the Commission’s November 15, 2018 Notice of Proposed Rulemaking captioned Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes.¹ The NOPR recognizes that the Tax Cut and Jobs Act affected the amount of Accumulated Deferred Income Taxes (“ADIT”) that utilities have reflected on their books. The NOPR proposes to require that utilities file changes to their transmission rates to properly reflect the accounting of excess ADIT and provide for the return of excess ADIT.

TAPS appreciates the Commission’s action on this issue that significantly affects the justness and reasonableness of transmission rates. In these comments, TAPS urges the Commission, however, to modify the final rule to ensure that it is consistent with longstanding Commission precedent. While continued application of that precedent may have been implicit in the NOPR, the final rule should require that a utility’s changes to its formula rates related to excess and deficient ADIT include an express commitment to file pursuant to Federal Power Act

¹ *Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (2018) (“NOPR”).

(“FPA”) section 205 to obtain Commission approval *prior* to including in rates the amortization of excess or deficient ADIT following a tax change.

I. INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities in more than 35 states, promoting open and non-discriminatory transmission access.² 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.

Communications regarding these proceedings should be directed to:

Cynthia S. Bogorad
Stephen C. Pearson
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW, Suite 700
Washington, DC 20006
(202) 879-4000
Email: cynthia.bogorad@spiegelmc.com
steve.pearson@spiegelmc.com

John Twitty
Executive Director
TRANSMISSION ACCESS POLICY STUDY
GROUP
PO Box 14364
Springfield, MO 65814
(417) 838-8576
Email: jtwitty@tapsgroup.org

II. COMMENTS

A. Introduction

In this proceeding, the Commission has proposed to require utilities with transmission formula rates to propose revisions to their formula rates that will provide a transparent mechanism to demonstrate the calculation of excess/deficient ADIT following an income tax change, demonstrate that rate base is properly calculated, and provide a mechanism for the return of excess ADIT or collection of deficient ADIT from ratepayers. While TAPS supports the

² 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.

Commission's initiative, the Commission should require one additional change to clarify the Commission's opportunity to exercise its statutory obligation to ensure rates are just, reasonable, and not unduly discriminatory. As it required in its recent *PSE&G*³ Order, the final rule should provide that each utility's proposed formula rate revisions expressly require that the utility file pursuant to FPA section 205 for Commission approval prior to including in rates the amortization of excess or deficient ADIT following a tax change.

B. Commission Policy and Practice Require Prior Commission Approval of a Regulatory Asset or Liability before Inclusion of the Asset or Liability in Rates.

As explained below, the Commission's longstanding precedent requires approval of a regulatory asset or liability before the asset or liability is included in rates. The NOPR does not address this precedent. We are concerned that the NOPR's proposal to require a mechanism in formula rates to account for excess or deficient ADIT and to return excess or collect deficient ADIT in rates, without a stated restriction that the Commission must first approve the regulatory asset or liability, could be interpreted as allowing the utility unrestricted discretion to amortize a regulatory asset or liability over a period of its choosing. The NOPR may have assumed that, consistent with Commission precedent, such an exercise of discretion by utilities would not be permitted. However, to enable the Commission to carry out its obligation to ensure just, reasonable, and not unduly discriminatory rates, TAPS urges the Commission to issue a final rule that expressly requires a utility to file pursuant to FPA section 205 for Commission approval prior to including in rates the amortization of excess or deficient ADIT following a tax change.

³ *PJM Interconnection, L.L.C.*, 165 FERC ¶ 61,275, P 28 (2018) ("*PSE&G*") (approving inclusion of an excess/deficient ADIT mechanism but requiring Public Service Electric and Gas Co. ("*PSE&G*") to include a footnote in its formula rate that it "must submit a FPA section 205 filing to obtain Commission approval prior to reflecting in rates any regulatory assets and liabilities arising from future tax changes").

The TAPS proposal is consistent with very recent Commission precedent. On October 29, 2018, PSE&G filed in Docket No. ER19-204 to, among other things, include a mechanism in its transmission formula rate to account for excess or deficient ADIT and return the excess or collect the deficiency in rates.⁴ The Commission agreed with protests that the formula rate was unjust and unreasonable without a limitation that PSE&G must make an FPA section 205 filing to obtain Commission approval “prior to reflecting in rates any regulatory assets and liabilities arising from future tax changes.”⁵ Accordingly, the Commission required PSE&G to include a footnote that it would not apply its excess/deficient ADIT mechanism to rates without prior Commission approval.⁶ TAPS urges the Commission to follow its *PSE&G* precedent when it issues the final rule in this proceeding.

A clear requirement to obtain Commission approval “prior to reflecting in rates any regulatory assets and liabilities arising from future tax changes”⁷ is firmly rooted in Commission precedent that the Commission must approve the inclusion of regulatory assets and liabilities before those assets or liabilities are included in rates.⁸ In the recent *Piedmont* decision, the Commission ruled summarily that Duke Energy Carolinas (“DEC”) violated the Commission’s accounting instructions for Account No. 182.3⁹ and held that DEC must obtain approval from the

⁴ *PSE&G*, P 3.

⁵ *Id.*, P 28.

⁶ *Id.*

⁷ *Id.*

⁸ *Piedmont Mun. Power Agency v. Duke Energy Carolinas, LLC*, 162 FERC ¶ 61,109, P 32 (2018).

⁹ Although the *Piedmont* case did not address excess or deficient ADIT, deficient ADIT is a regulatory asset recorded in Account No. 182.3 just like the regulatory asset at issue in *Piedmont*.

Commission before including a regulatory asset in customer rates. Specifically, the Commission stated:¹⁰

The accounting instructions for Account 182.3 are clear that a jurisdictional entity, like DEC, may record a regulatory asset if it is probable that such items will be included in a different period for purposes of developing rates that the utility is authorized to charge for its utility services.⁴⁴ However, as DEC concedes in its Answer, approval for accounting purposes does not constitute approval for ratemaking purposes. Moreover, we are not bound by state commission decisions when examining wholesale rates. [footnote omitted] *For a regulatory asset to be included and recovered in Commission-jurisdictional rates, we must be allowed to determine that the charges are just and reasonable.* Since we have exclusive jurisdiction over wholesale sales, it is not enough to have state approval for recovery of costs when the costs include both wholesale and retail amounts. DEC may have the discretion to record a regulatory asset in Account 182.3 based upon those state orders, but the criteria of “probable” recovery does not guarantee recovery with respect to transmission and wholesale rates; for that, Commission approval is necessary.

⁴⁴ 18 C.F.R. pt. 101 (2017), Instructions for Account 182.3(B) and Definition No. 31, Regulatory Assets and Liabilities.

[footnote omitted]

⁴⁶ *See, e.g., Virginia Elec. and Power Co.*, 128 FERC ¶ 61,026, at P 22, 31-34 (2009) (“The treatment of a cost at the wholesale level as a regulatory asset is unrelated to whether a state regulator will or will not permit recovery of a rate that includes such costs in a wholesale customer’s retail rates.”).

The Commission’s reliance in *Piedmont* on its 2009 *Virginia Electric and Power Co.* decision shows its continued adherence to longstanding precedent that a utility must seek Commission approval prior to including a regulatory asset or liability in rates.

The requirement that a utility seek Commission approval before including a regulatory asset or liability in rates, as applied to the calculation and return/recovery of excess/deficient

¹⁰ *Piedmont*, P 32 (emphasis added).

ADIT, provides necessary assurances that rates will be just and reasonable. As the Commission is aware from the many recent utility FPA section 205 filings, customer section 206 complaints, and the responses the Commission received to its Notice of Inquiry in Docket No. RM18-12-000,¹¹ accounting for changes in ADIT balances following a change in income tax rates is complicated. Moreover, as the Commission notes multiple times in the NOPR, the return of excess ADIT or collection of deficient ADIT is not a “one-size-fits-all” proposition for all utilities.¹² The latter observation is true not only across utilities; it is also true for individual tax rate changes at different time periods for a single utility. Depending on the gross amount of excess/deficient ADIT to be returned/recovered from customers, as well as a variety of other external case-specific factors (e.g., one-time litigation settlements, storm damage recovery riders, completion/initiation of cost-recovery for a large plant investment, perceived value of rate stability, etc.), the amortization period for excess or deficient ADIT is best handled on a case-specific basis. Because of these case-specific considerations that go into the determination of the appropriate amortization period of a regulatory asset or liability, the Commission should review proposals to include regulatory assets or liabilities in rates before those assets or liabilities are included in rates so that the Commission can fulfill its statutory obligation to ensure just and reasonable rates.

Failure to provide for Commission review of a regulatory asset or liability before the asset or liability is included in rates would violate the FPA. FPA section 205 places the burden on a utility to file rate changes and obtain Commission approval before reflecting the change in rates. Unlike other inputs to a formula rate which are annually updated but which are objectively

¹¹ *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act of 2017 on Commission-Jurisdictional Rates*, 162 FERC ¶ 61,223 (2018).

¹² NOPR, PP 27, 37.

verifiable and mostly consist of audited data found in the Form 1, an appropriate amortization period is subjective. Demonstrating the need for Commission review of amortization periods, many formula rates expressly require an FPA section 205 filing before an existing depreciation or amortization rate is changed.¹³ Identical treatment is appropriate when a utility files a new amortization rate for a regulatory asset or liability. If a utility could implement a new component to its formula rate, such as a new amortization of excess or deficient ADIT, without prior Commission approval, the Commission or a customer would have the burden under FPA section 206 to show that this change is unjust and unreasonable. Thus, to preserve the statutory framework which requires changes in rates to be filed by a utility and approved by the Commission before taking effect, the Commission should require that formula rates state that, before a utility includes an amortization of excess or deficient ADIT in rates, the utility must file with, and obtain approval from, the Commission.

Consistent with its policy and practice as described above, the Commission's final rule in this proceeding should require that utilities "submit a FPA section 205 filing to obtain Commission approval prior to reflecting in rates any regulatory assets and liabilities arising from future tax changes."¹⁴ This additional requirement is consistent with the Commission's recent *PSE&G* order addressing the utility's transmission formula rate mechanism to address excess or deficient ADIT. It is also consistent with the Commission's well-established policy that requires the Commission to approve the inclusion of a regulatory asset or liability in rates prior to its inclusion in rates. Finally, the additional requirement will, as required by FPA section 205, put the burden on the utility to demonstrate that a proposed rate change is just and reasonable.

¹³ See, e.g., *Am. Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, P 38 (2007).

¹⁴ *PSE&G*, P 28.

CONCLUSION

For the reasons discussed above, the final rule the Commission issues in this proceeding should include a requirement that formula rate changes made in compliance with the final rule include a provision that states that the utility “must submit a FPA section 205 filing to obtain Commission approval prior to reflecting in rates any regulatory assets and liabilities arising from future tax changes.”

Respectfully submitted,

/s/ Cynthia S. Bogorad

Cynthia S. Bogorad

Stephen C. Pearson

SPIEGEL & MCDIARMID LLP

1875 Eye Street, NW, Suite 700

Washington, DC 20006

(202) 879-4000

*Attorneys for Transmission Access Policy
Study Group*

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