

171 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM19-5-001; Order No. 864-A]

Public Utility Transmission Rate Changes to Address Accumulated Deferred
Income Taxes

(Issued April 16, 2020)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on rehearing and clarification.

SUMMARY: The Federal Energy Regulatory Commission (Commission) addresses requests for rehearing and clarification and reaffirms its determinations in Order No. 864. In Order No. 864, the Commission required public utilities with transmission formula rates to propose tariff revisions to implement certain excess and deficient accumulated deferred income taxes (ADIT)-related mechanisms in their transmission formula rates as a result of the Tax Cuts and Jobs Act of 2017 (Tax Cuts and Jobs Act). The Commission continued to require public utilities with transmission stated rates to address excess and deficient ADIT resulting from the Tax Cuts and Jobs Act in their next rate cases.

DATES: The effective date of the document published on November 27, 2019 (84 FR 65,281), is confirmed: January 27, 2020.

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Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

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ORDER ON REHEARING AND CLARIFICATION

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I. Introduction

1. On November 21, 2019, the Federal Energy Regulatory Commission (Commission) issued Order No. 864, which is a final rule addressing accumulated deferred income taxes (ADIT) for public utilities.¹ On December 23, 2019, American Public Power Association (APPA) requested clarification, or in the alternative, rehearing, and Exelon Corporation and its public utility subsidiaries (collectively, Exelon Companies)² requested rehearing of Order No. 864. For the reasons discussed below, we deny the requests for rehearing and grant APPA's request for clarification in part.

A. Background

2. On December 22, 2017, the President signed into law the Tax Cuts and Jobs Act of 2017.³ The Tax Cuts and Jobs Act, among other things, reduced the federal corporate income tax rate from 35 percent to 21 percent, effective January 1, 2018. This means that, beginning January 1, 2018, companies subject to the Commission's jurisdiction must compute income taxes owed to the Internal Revenue Service (IRS) based on a 21% tax

¹ *Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 864, 84 FR 65,281, 169 FERC ¶ 61,139 (2019).

² Exelon Corporation's public utility subsidiaries include Commonwealth Edison Co., Delmarva Power & Light Co., Atlantic City Electric Co., Baltimore Gas and Electric Co., and Potomac Electric Power Co.

³ An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (Tax Cuts and Jobs Act).

rate. This tax rate reduction will result in a reduction in ADIT liabilities and ADIT assets on the books of public utilities.⁴ As a result of the tax rate reduction, a portion of an ADIT liability that was collected from customers will no longer be due from public utilities to the IRS and is considered excess ADIT, which must be returned to customers in a cost of service ratemaking context.⁵ Consistent with the Commission's regulations, public utilities are required to adjust their ADIT assets and ADIT liabilities to reflect the effect of the change in tax rates in the period the change is enacted.⁶

B. Notice of Proposed Rulemaking

3. In response to the Tax Cuts and Jobs Act, on November 15, 2018, the Commission issued a notice of proposed rulemaking (NOPR) to address excess and deficient ADIT for

⁴ ADIT balances are accumulated on the regulated books and records of public utilities based on the requirements of the Uniform System of Accounts. ADIT arises from timing differences between the method of computing taxable income for reporting to the IRS and the method of computing income for regulatory accounting and ratemaking purposes. *See* 18 CFR 35.24(d)(2) (“Timing differences means differences between the amounts of expenses or revenues recognized for income tax purposes and amounts of expenses or revenues recognized for ratemaking purposes, which differences arise in one time period and reverse in one or more other time periods so that the total amounts of expenses or revenues recognized for income tax purposes and for ratemaking purposes are equal.”).

⁵ The converse is true for public utilities that have ADIT assets.

⁶ *See* 18 CFR 35.24 and 18 CFR 154.305; *see also Regulations Implementing Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes*, Order No. 144, FERC Stats. & Regs. ¶ 30,254 (1981) (cross-referenced at 18 FERC ¶ 61,163), *order on reh'g*, Order No. 144-A, FERC Stats. & Regs. ¶ 30,340 (1982) (cross referenced at 15 FERC ¶ 61,142).

public utility transmission providers with transmission rates under an Open Access Transmission Tariff, a transmission owner tariff, or a rate schedule. For public utilities with transmission formula rates, the Commission found that many, if not most, transmission formula rates do not contain provisions to fully reflect excess or deficient ADIT following a change in tax rates, as required by the Commission's regulations. The Commission explained that a public utility's transmission formula rate should include certain mechanisms that accurately reflect excess or deficient ADIT in a public utility's cost of transmission service during the annual updates of the rest of the revenue requirement, along with a worksheet that tracks excess and deficient ADIT. The Commission proposed to require public utilities to revise their tariffs accordingly.⁷

4. For public utilities with transmission stated rates, the Commission proposed to maintain Order No. 144's requirement that such public utilities reflect any adjustments made to their ADIT balances as a result of the Tax Cuts and Jobs Act in their next rate case.⁸ However, to increase the likelihood that the customers that contributed to the related ADIT accounts receive the benefit of the reduced tax rate, the Commission proposed to require public utilities with transmission stated rates to calculate the excess

⁷ Order No. 864, 169 FERC ¶ 61,139 at PP 15-16.

⁸ See Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,519, 31,560 (requiring public utilities to file adjustments to recover deferred tax amounts in their next rate case following the order, and to begin the process of making up deficiencies or eliminating excesses in their ADIT reserves so that they will be operating under a full normalization policy within a reasonable period of time).

or deficient ADIT as a result of the Tax Cuts and Jobs Act using the ADIT approved in their last rate cases and return or recover this amount to or from customers.⁹

C. Order No. 864

5. In Order No. 864, the Commission required public utilities with transmission formula rates to propose tariff revisions to implement certain excess and deficient ADIT-related mechanisms. Specifically, the Commission required public utilities to include the following in their transmission formula rates: (1) a mechanism to deduct any excess ADIT from or add any deficient ADIT to their rate bases;¹⁰ (2) a mechanism to decrease or increase their income tax allowances by any amortized excess or deficient ADIT, respectively;¹¹ and (3) a new permanent worksheet that will annually track information related to excess or deficient ADIT.¹² The Commission also required that public utilities with transmission formula rates return the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act to customers.¹³

⁹ *Id.* P 17.

¹⁰ *Id.* P 28.

¹¹ *Id.* P 42.

¹² *Id.* P 62.

¹³ *Id.* P 45.

6. The Commission did not adopt the proposals in the NOPR that were applicable to public utilities with transmission stated rates.¹⁴ Instead, the Commission maintained the status quo that public utilities with transmission stated rates should address any excess or deficient ADIT resulting from the Tax Cuts and Jobs Act in their next rate cases.¹⁵

Recognizing that the Commission will take a case-by-case approach in addressing excess and deficient ADIT for a public utility with a transmission stated rate, the Commission provided guidance that for those public utilities with a prior Commission-approved methodology for returning excess ADIT, they should have begun reducing excess ADIT pursuant to that approved method.¹⁶ For those public utilities that lack a prior-Commission approved methodology for returning excess ADIT, they should use some ratemaking method for returning excess ADIT and accordingly should begin reducing excess ADIT immediately upon a tax rate change.¹⁷

¹⁴ *Id.* P 86.

¹⁵ *Id.*

¹⁶ *Id.* P 91.

¹⁷ *Id.* PP 92-93.

II. Discussion

A. Transmission Stated Rates

1. Order No. 864

7. As discussed above, the Commission did not adopt any of the proposals in the NOPR for public utilities with transmission stated rates. Rather, the Commission maintained the status quo under Order No. 144, Order No. 475¹⁸ and 18 CFR 35.24, under which public utilities with transmission stated rates should address any excess or deficient ADIT caused by the Tax Cuts and Jobs Act in their next rate case.¹⁹ The Commission explained that, consistent with prior precedent and the Commission's regulations, the question of how to properly handle excess and deficient ADIT for public utilities with transmission stated rates following a tax rate change continues to raise complex questions that are more properly addressed in a rate case.²⁰

8. Because excess and deficient ADIT for a public utility with a transmission stated rate will be addressed in that public utility's next rate case, the Commission provided guidance as to how excess and deficient ADIT should be treated between rate cases. For

¹⁸ *Rate Changes Relating to Federal Corporate Income Tax Rate for Public Utilities*, Order No. 475, FERC Stats. & Regs. ¶ 30,752 (cross-referenced at 39 FERC ¶ 61,357), *order on reh'g*, 41 FERC ¶ 61,029 (1987) (cross-referenced at 41 FERC ¶ 61,029).

¹⁹ Order No. 864, 169 FERC ¶ 61,139 at P 86.

²⁰ *Id.* PP 87-90.

public utilities with transmission stated rates that have a Commission-approved ratemaking method made specifically applicable to them for returning excess ADIT, the Commission stated that those public utilities should have begun reducing excess ADIT pursuant to that previously Commission-approved method.²¹ For public utilities with transmission stated rates that do not have a Commission-approved ratemaking method, the Commission explained that, in accordance with the Commission's regulations, those public utilities must "use some ratemaking method" for making a provision for returning excess ADIT and that "the appropriateness of such method will be subject to a case-by-case determination" by the Commission.²²

9. As a general course of action, the Commission provided guidance that public utilities with transmission stated rates that do not have a Commission-approved ratemaking method will begin reducing excess ADIT immediately upon a tax rate change. The Commission noted that its expectation is "merely intended to provide guidance" to such public utilities and that the Commission will address issues related to a public utility's method for amortizing excess ADIT based on the specific facts and circumstances in each proceeding.²³ The Commission also stated that nothing in Order No. 864 prevents a public utility with a transmission stated rate that does not have a

²¹ *Id.* P 91.

²² *Id.* P 92 (quoting 18 CFR 35.24(c)(3)).

²³ *Id.* P 93.

Commission-approved ratemaking method from proposing to delay amortization of excess ADIT until its next rate case.²⁴

10. In providing guidance to public utilities with transmission stated rates, the Commission explained why it is reasonable to treat excess ADIT differently for public utilities with transmission stated rates and those with transmission formula rates. The Commission stated that the primary consideration in doing so was the two unique circumstances of transmission formula rates at the time the Tax Cuts and Jobs Act became law. First, the Commission identified that most transmission formula rates lack a mechanism to make provision for excess ADIT in computing the income tax component of a public utility's cost of service as required under the Commission's regulations. The Commission found that it is therefore inappropriate to treat excess ADIT resulting from the Tax Cuts and Jobs Act as reducing immediately as of January 1, 2018, when the transmission formula rate itself lacks a mechanism to accomplish this task. Second, the Commission stated that the rates of public utilities with transmission formula rates increased upon the enactment of the Tax Cuts and Jobs Act (unlike transmission stated rates, which are fixed between rate cases) because transmission formula rates excluded excess ADIT from the calculation of the rates. That is, the excess ADIT resulting from the Tax Cuts and Jobs Act no longer served as a reduction to rate base as it did prior to the tax rate change when it was part of ADIT because the transmission formula rate did

²⁴ *Id.*

not have a mechanism that allowed excess ADIT to reduce rate base. The Commission reasoned that, therefore, it is appropriate to treat excess ADIT as wholly preserved in Account 254 (Other Regulatory Liabilities) until it can be addressed and reinserted into the transmission formula rate.²⁵ The Commission also noted that the Commission's policy prior to Order No. 864 required a public utility with a transmission formula rate to seek Commission approval prior to returning excess ADIT, which further distinguishes transmission formula rates from transmission stated rates.²⁶

2. APPA's Request for Clarification or Rehearing

11. APPA requests that the Commission clarify that public utilities with transmission stated rates must return the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act to customers.²⁷ APPA asserts that Order No. 864 creates ambiguity regarding whether customers of public utilities with transmission stated rates will receive the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act. Specifically, APPA points to the Commission's guidance in Order No. 864 that the Commission "will generally apply a policy that public utilities begin reducing excess ADIT immediately upon a tax rate change and not at a later date, such as at the time of a future rate case."²⁸

²⁵ *Id.* PP 93-94.

²⁶ *Id.* n.137.

²⁷ APPA Rehearing at 2.

²⁸ *Id.* at 4 (quoting Order No. 864, 169 FERC ¶ 61,139 at P 93).

APPA claims that the Commission's guidance, among other aspects of Order No. 864, potentially raises a concern that the portion of excess ADIT amortized between January 1, 2018, and a public utility's next rate case might not be returned to customers.²⁹ For example, APPA argues that a public utility might seek to adopt a brief amortization period for unprotected excess ADIT amounts that would amortize fully before that public utility's next rate case, therefore depriving customers of that excess ADIT being returned.³⁰

12. APPA contends that failing to require public utilities with transmission stated rates to return excess ADIT would depart from Commission precedent. APPA argues that the Commission acknowledged in Order No. 864 that, under tax normalization, excess ADIT “must be returned to customers in a cost of service ratemaking context.”³¹ Further, according to APPA, in Order No. 144, the Commission found that “[a]ny excess or deficiency in [ADIT] does not . . . result in a windfall to either shareholders or ratepayers since the balances will systematically be subject to a reconciliation in future rates.”³² APPA argues that excusing public utilities from returning excess ADIT to customers

²⁹ *Id.* at 4-5.

³⁰ *Id.*

³¹ *Id.* at 5 (quoting Order No. 864, 169 FERC ¶ 61,139 at P 8).

³² *Id.* at 6 (quoting Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,554).

could result in a windfall to public utilities, which contravenes the Commission's findings in Order No. 144.³³

13. APPA also asserts that the Commission required public utilities with transmission stated rates to "establish a plan to return any excess [ADIT] in rate applications" in Order No. 475.³⁴ APPA claims that Order No. 475 did not contemplate that customers would be deprived of the return of excess ADIT.³⁵ Finally, APPA contends that the Commission acknowledged in Order No. 864 that public utilities are generally required to obtain specific ratemaking authority prior to amortizing a regulatory asset or liability in rates.³⁶ APPA argues that public utilities with transmission stated rates should not be allowed to deprive customers of the full excess ADIT regulatory liability by amortizing the excess ADIT in that regulatory liability between rate cases.³⁷

14. In the alternative, APPA requests rehearing of Order No. 864. APPA argues that, to the extent the Commission's guidance provided in Order No. 864 would result in any portion of excess ADIT not being returned to customers, the Commission departed from prior Commission policy without adequate explanation by permitting public utilities with

³³ *Id.*

³⁴ *Id.* (quoting Order No. 475, FERC Stats. & Regs. ¶ FERC Stats. & Regs. ¶ 30,752 at 30,736).

³⁵ *Id.*

³⁶ *Id.* at 7.

³⁷ *Id.*

transmission stated rates to amortize excess ADIT immediately as of the effective date of the Tax Cuts and Jobs Act. In support of its rehearing request, APPA reiterates its arguments that excess ADIT must be returned to customers in a cost of service ratemaking context and that the Commission's tax normalization regulations are meant to ensure that public utility shareholders do not receive a windfall from excess ADIT. APPA also reiterates its argument that the Commission's accounting guidance prohibits the amortization of regulatory assets or liabilities relating to excess or deficient ADIT until they are included in ratemaking.³⁸

15. While APPA does not dispute the unique circumstances surrounding transmission formula rates at the time of the enactment of the Tax Cuts and Jobs Act, APPA claims that such circumstances provide no basis for depriving customers of public utilities with transmission stated rates of the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act. Further, APPA argues that the requirement for public utilities to seek Commission approval prior to including a regulatory asset or liability in rates applies to the Commission's cost-of-service ratemaking generally and is not limited to only transmission formula rates.

3. Commission Determination

16. We grant APPA's request for clarification in part and deny its request for rehearing. APPA requests that the Commission clarify that a public utility with a

³⁸ *Id.* at 9.

transmission stated rate must return the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act to customers. APPA quotes the guidance provided in Order No. 864 that the Commission “will generally apply a policy that public utilities begin reducing excess ADIT immediately upon a tax rate change and not at a later date, such as at the time of a future rate case.”³⁹ APPA argues that generally applying such a policy for transmission stated rates while requiring public utilities with transmission formula rates to return the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act potentially raises concerns that, for public utilities with transmission stated rates, the portion of excess ADIT amortized between January 1, 2018 and a public utility’s next rate case might not be returned to customers. We take this opportunity to further clarify the Commission’s guidance in Order No. 864, which addresses the return of excess ADIT resulting from the Tax Cuts and Jobs Act for public utilities with transmission stated rates.

17. We emphasize that there is a critical distinction in applying the Commission’s guidance and language quoted by APPA, which turns on whether a public utility with a transmission stated rate has a Commission-approved ratemaking method for addressing excess and deficient ADIT. In Order No. 144, the Commission required public utilities to file adjustments to recover deferred tax amounts in their next rate case following the order, and to begin the process of making up deficiencies or eliminating excesses in their

³⁹ Order No. 864, 169 FERC ¶ 61,139 at P 93.

ADIT reserves so that they will be operating under a full normalization policy within a reasonable period of time.⁴⁰ To the extent that a public utility with a transmission stated rate complied with Order No. 144 and has a Commission-approved ratemaking method made specifically applicable to it for addressing excess and deficient ADIT, then such a public utility should return excess ADIT or recover deficient ADIT in accordance with that prior Commission-approved method.⁴¹ That is, such a public utility should begin amortizing excess or deficient ADIT immediately upon a tax rate change in accordance with its prior Commission-approved method for doing so.

18. A public utility's transmission stated rate is presumed to recover all its costs during the time the rate is in effect, even if some of those costs change between rate cases.⁴² Federal income taxes, including ADIT, are a cost of providing service. If a

⁴⁰ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,519, 31,560.

⁴¹ Order No. 864, 169 FERC ¶ 61,139 at P 91. *See also* 18 CFR 35.24.

⁴² For example, between rate cases, a public utility's operating costs, billing determinants, and cost of capital may increase or decrease. *See SFPP*, Opinion No. 511-B, 150 FERC ¶ 61,096, at P 19 (2015) (As with other items in a pipeline's cost of service, the Commission does not "track" or "true-up" the difference between the pipeline's actual taxes and the "income tax allowance" used in a pipeline's most recent cost-of-service rate case. Although a pipeline's costs may change in the years following a rate case, the pipeline is assumed to recover its costs (including its tax costs) via the rates in effect at the time the cost is incurred. There is no subsequent adjustment for under- or over-recoveries.); *see also Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031, at PP 136-150 (2018) (providing guidance that natural gas pipelines should begin amortizing excess ADIT immediately as of the date the Tax Cuts and Jobs Act was enacted for purposes of the FERC Form No. 501-G informational filing, consistent with section 154.305 of the Commission's regulations).

public utility with a transmission stated rate has a Commission-approved ratemaking method for addressing excess and deficient ADIT, it is presumed that the appropriate amount of excess ADIT is being returned and deficient ADIT is being recovered as part of that transmission stated rate. We therefore clarify, consistent with the presumption discussed in this paragraph, that public utilities with transmission stated rates that have a Commission-approved ratemaking method for addressing excess and deficient ADIT return the appropriate amount of excess ADIT resulting from the Tax Cuts and Jobs Act to customers through their transmission stated rates.⁴³

19. For public utilities with transmission stated rates that lack a Commission-approved ratemaking method, the Commission's regulations require that such a public utility use some ratemaking method to make provision for excess and deficient ADIT, and the appropriateness of this method will be subject to case-by-case determination in a later rate proceeding.⁴⁴ The Commission provided guidance that a public utility with a transmission stated rate that lacks a Commission-approved ratemaking method for addressing excess and deficient ADIT could begin employing a ratemaking method to amortize excess and deficient ADIT balances immediately upon a tax rate change, subject to the Commission's review of the appropriateness of that method in the public utility's

⁴³ We note that the Commission has the opportunity to review in the next rate case whether a public utility with a transmission stated rate that has a Commission-approved ratemaking method has correctly applied that approved ratemaking method.

⁴⁴ See 18 CFR 35.24(c)(3).

next rate case.⁴⁵ This guidance is similarly based on our discussion above that a public utility's transmission stated rate is presumed to recover all its costs during the time the rate is in effect, even if some of those costs change between rate cases.⁴⁶

20. We reiterate, however, that this is merely guidance and that the Commission will address issues related to a public utility's method for amortizing excess ADIT based on the specific facts and circumstances in each proceeding. For this reason, we are unpersuaded by APPA's argument that a public utility with a transmission stated rate might seek to adopt a brief amortization period for unprotected excess ADIT that would amortize fully before that public utility's next rate case.⁴⁷ A public utility with transmission stated rates that does not have a Commission-approved ratemaking method is required to support and justify all of its proposed amortization periods for excess and deficient ADIT, including unprotected excess ADIT, in its next rate proceeding. At that time, the Commission has an opportunity to determine whether the amortization of excess and deficient ADIT is just and reasonable.

⁴⁵ Order No. 864, 169 FERC ¶ 61,139 at P 93; *see also Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031, at PP 136-150 (2018) (providing guidance that natural gas pipelines should begin amortizing excess ADIT immediately as of the date the Tax Cuts and Jobs Act was enacted for purposes of the FERC Form No. 501-G informational filing, consistent with section 154.305 of the Commission's regulations).

⁴⁶ *See supra* discussion at P 18 and n.42.

⁴⁷ *See* APPA Rehearing at 4.

21. We disagree with APPA that failing to require public utilities with transmission stated rates to return excess ADIT departs from Commission precedent and results in a windfall to public utilities.⁴⁸ We are not failing to require public utilities to return excess ADIT resulting from the Tax Cuts and Jobs Act. Rather, consistent with Commission precedent, we are maintaining the status quo that excess and deficient ADIT for a public utility will be addressed in that public utility's next rate case.⁴⁹ In doing so, the Commission provided guidance that public utilities with transmission stated rates that have a Commission-approved ratemaking method should begin reducing excess ADIT in accordance with that approved method. Public utilities with transmission stated rates that lack a Commission-approved ratemaking method could begin reducing excess ADIT immediately upon a tax rate change, subject to the Commission's review of the appropriateness of that method in the public utility's next rate case.⁵⁰ We therefore find that the Commission's rationale in Order No. 144—that “any excess or deficiency in

⁴⁸ To the extent that an entity believes that a public utility's stated transmission rate is unjust and unreasonable as it pertains to excess or deficient ADIT resulting from the Tax Cuts and Jobs Act, it may file a complaint under section 206 of the FPA. 16 U.S.C. 824e.

⁴⁹ *See* 18 CFR 35.24(c)(3) (“If no Commission-approved ratemaking method has been made specifically applicable to the public utility, then the public utility must use some ratemaking method for making such provision, and the appropriateness of this method will be subject to case-by-case determination.”); *see also* 18 CFR 35.24(c)(1)(ii) and (2).

⁵⁰ Nothing here precludes a public utility with transmission stated rates from proposing to delay amortization of excess ADIT to its next rate case.

[ADIT] does not . . . result in a windfall to either shareholders or ratepayers since the balances will systematically be subject to a reconciliation in future rates”—still applies.⁵¹

22. Finally, we are unpersuaded by APPA’s argument that the Commission’s accounting guidance prohibits the amortization of regulatory assets or liabilities relating to excess or deficient ADIT prior to approval by the Commission. Public utilities with transmission stated rates that have a Commission-approved method for returning excess ADIT by definition already have prior Commission approval to begin reducing excess ADIT. For public utilities with transmission stated rates that do not have a Commission-approved method for returning excess ADIT, the Commission’s regulations require that such public utilities must use some ratemaking method for reducing excess ADIT, and the appropriateness of this method will be subject to case-by-case determination.⁵² The appropriateness of that method is ultimately approved by the Commission, which happens in the public utility’s next rate case. Customers also have an opportunity to intervene, comment, and protest the method for amortizing excess and deficient ADIT at that time.

⁵¹ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,554.

⁵² See 18 CFR 35.24(c)(3).

B. Transmission Formula Rates**1. Order No. 864**

23. As discussed above, the Commission required public utilities with transmission formula rates to propose tariff revisions to implement certain excess and deficient ADIT-related mechanisms in their transmission formula rates. The Commission stated that, on compliance, the Commission expects public utilities with transmission formula rates to make their proposed tariff revisions effective on the effective date of the final rule, January 27, 2020.⁵³

24. As relevant to Exelon Companies' request for rehearing, the Commission stated that the full regulatory liability for excess ADIT should be captured in transmission formula rates, beginning on the effective date of any proposed tariff revision. In other words, the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act must be returned to transmission formula rate customers.⁵⁴

25. In addition, the Commission clarified that the requirements adopted in Order No. 864 apply only to excess and deficient ADIT resulting from the Tax Cuts and Jobs Act and any future tax rate changes. The Commission stated that, therefore, the

⁵³ Order No. 864, 169 FERC ¶ 61,139 at P 100.

⁵⁴ *Id.* P 45.

requirements in Order No. 864 do not conflict with the Commission's determination in *Commonwealth Edison*, which is discussed below.⁵⁵

2. Exelon Orders

26. Beginning in December 2016, prior to the issuance of Order No. 864, Exelon Companies submitted multiple filings under section 205 of the Federal Power Act (FPA)⁵⁶ that proposed tariff revisions seeking to, among other things, recover past deficient ADIT amounts. While the specific facts of the filings differ, of relevance here, Exelon Companies sought to recover the full amount of past deficient ADIT resulting from prior state corporate income tax rate increases.

27. The Commission rejected Exelon Companies' proposed tariff revisions, finding that Exelon Companies had not shown the proposed tariff revisions allowing for the recovery of the full amount of past deficient ADIT to be just and reasonable because, among other things, Exelon Companies failed to meet the requirement in Order No. 144 to propose recovery in the public utility's next rate case.⁵⁷ In rejecting Exelon Companies' proposed tariff revisions, the Commission provided guidance that, due to

⁵⁵ *Id.* P 51 (citing *Commonwealth Edison Co.*, 164 FERC ¶ 61,172 (2018) (*Commonwealth Edison*)). See also *infra* n.57.

⁵⁶ 16 U.S.C. 824d (2018).

⁵⁷ *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,163 (2017), *reh'g denied*, 164 FERC ¶ 61,173 (2018), *aff'd sub nom. Balt. Gas & Elec. Co. v. FERC*, No. 18-1298, 2020 WL 1482394 (D.C. Cir. Mar. 27, 2020) (*BG&E*); *Commonwealth Edison*, 164 FERC ¶ 61,172 (collectively, Exelon Orders).

recent state corporate income tax rate increases, a portion of the deficient ADIT that Exelon Companies sought to recover may still be eligible for recovery. The Commission stated that should Exelon Companies seek recovery of such deficient ADIT amounts, Exelon Companies should support these amounts by providing detailed workpapers, as well as provide for the reduction of the associated ADIT liabilities from rate base.⁵⁸

28. The Commission also announced a limited, one-year compliance period in which a public utility could file to recover past deficient ADIT if the public utility did not file a rate case subsequent to the Commission's issuance of Order No. 144 or if the public utility properly preserved its right to recover past ADIT through settlement terms.⁵⁹ Following this limited compliance period, the Commission clarified that public utilities should submit FPA section 205 filings seeking recovery of deficient ADIT amounts within two years of incurring such amounts.⁶⁰

3. Exelon Companies' Request for Rehearing

29. Exelon Companies request rehearing of the Commission's requirement that public utilities with transmission formula rates must return the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act to customers. Exelon Companies contend that the requirement in Order No. 864 that excess ADIT resulting from the Tax Cuts and Jobs

⁵⁸ *Commonwealth Edison*, 164 FERC ¶ 61,172 at P 130.

⁵⁹ *Id.* P 132.

⁶⁰ *Id.* P 133.

Act should be “wholly preserved” until a public utility’s transmission formula rate contains a mechanism to flow through that “full amount” of excess ADIT in rates is inconsistent with the Commission’s decisions in the Exelon Orders.⁶¹

30. Exelon Companies assert that their proposed tariff revisions in the Exelon Orders sought to address various deferred tax adjustments, which according to Exelon Companies are recorded pursuant to the Commission’s policies concerning Statement of Financial Accounting Standards No. 109 (FAS 109).⁶² Exelon Companies argue that they proposed, among other things, to recover the full amount of past deficient ADIT and return the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act. Exelon Companies allege that the Commission rejected the proposed tariff revisions, finding that only a portion of the past deficient ADIT would be available for recovery once the proposed tariff revisions become effective. Exelon Companies therefore argue that no justification has been provided to support treating excess ADIT related to the Tax Cuts and Jobs Act differently from the other FAS 109 amounts addressed in the Exelon

⁶¹ Exelon Companies Rehearing at 8-9.

⁶² Exelon Companies’ use of the term FAS 109 amounts refers generally to its proposals to flow three items through its formula rate: (1) excess and deficient ADIT caused by the Tax Cuts and Jobs Act; (2) accumulated tax balances for past allowance for funds used during construction (AFUDC) equity originations that have not flowed through rates and future AFUDC equity originations; and (3) tax account balance differences caused by a switch from the flow-through method to normalization.

Orders, which erode away if the transmission formula rate does not contain a mechanism to reflect those amounts.⁶³

31. Exelon Companies allege that the Commission's tax normalization policies should be conducted in an even-handed fashion, meaning that the full amount of excess ADIT resulting from the Tax Cuts and Jobs Act should be treated similarly to other FAS 109 amounts. According to Exelon Companies, the Commission attempts to provide a technical justification for treating excess ADIT for transmission formula rates different than transmission stated rates, explaining that the rates of public utilities with transmission formula rates increased as a result of the Tax Cuts and Jobs Act where those formula rates did not have a mechanism to offset the excess ADIT from rate base. Exelon Companies argue that their formula rates have a mechanism to offset rate base by FAS 109 amounts, so the distinction does not apply to Exelon Companies. Exelon Companies further contend that the Commission acknowledges that Order No. 864 reaches a different result than the Exelon Orders, but provides no explanation for why the different result is justified.⁶⁴

⁶³ Exelon Companies Rehearing at 3-6, 8-9.

⁶⁴ *Id.* at 9-13.

4. Commission Determination

32. We deny Exelon Companies' request for rehearing.⁶⁵ We disagree with Exelon Companies' central argument that the Commission is treating the return of excess ADIT (a regulatory liability) resulting from the Tax Cuts and Jobs Act differently than how the Commission treated deficient ADIT (a regulatory asset) resulting from past tax rate increases in the Exelon Orders. Exelon Companies both mischaracterize the Commission's reasons for rejecting full recovery of their past deficient ADIT amounts in the Exelon Orders and the Commission's actions in Order No. 864. Simply, the Commission rejected Exelon Companies' attempt to recover the full amount of past deficient ADIT because Exelon Companies failed to meet the next rate case requirement of Order No. 144.⁶⁶ Order No. 864 does not address past deficient ADIT,⁶⁷ nor does it change the requirements of Order No. 144.⁶⁸

⁶⁵ To the extent Exelon Companies' request for rehearing extends to all FAS 109 amounts, we find that AFUDC equity and flow-through items are beyond the scope of this proceeding. Order No. 864 addresses only the treatment of excess and deficient ADIT resulting from the Tax Cuts and Jobs Act (and future tax rate changes) for public utilities with transmission formula rates, not AFUDC equity and flow-through items.

⁶⁶ See also *BG&E*, 2020 WL 1482394, at 2 (finding that "the 'next rate case following applicability of the rule' is the 'next rate case' after the utility has incurred an item (either a cost or a benefit) requiring 'normalization' under Order No. 144 and [the Commission's 1993 accounting guidance in Docket No. AI93-5-000], not counting periods in which a rate case or settlement had itself normalized the treatment of the item (or adequately addressed its normalization)").

⁶⁷ Order No. 864, 169 FERC ¶ 61,139 at P 51.

⁶⁸ *Id.* PP 42, 86, 90.

33. In the Exelon Orders, contrary to Exelon Companies' contention, the Commission did not require Exelon Companies to amortize prior recorded FAS 109 regulatory asset amounts even though Exelon Companies' transmission formula rates contained no mechanism to pass them through.⁶⁹ Instead, the Commission did not permit Exelon Companies to recover the full amount of those regulatory assets because Exelon Companies failed the next rate case requirement of Order No. 144. Specifically, the Commission determined that the transmission formula rates that resulted from the settlement of those proceedings accounted for ADIT; the Commission interpreted the Exelon Companies' transmission formula rates to explicitly exclude recovery of this past deficient ADIT. In supporting this conclusion, the Commission found that Exelon Companies' "initial [f]ormula [r]ate filings included line items that expressly excluded recovery of these [deficient ADIT] items in their [f]ormula [r]ates."⁷⁰ The Commission therefore determined that Exelon Companies have not sought to recover this past deficient ADIT in their next rate proceedings after Order No. 144⁷¹ and failed to expressly reserve this issue in the settlements of those proceedings.⁷²

⁶⁹ Exelon Companies Rehearing at 12.

⁷⁰ *Commonwealth Edison*, 164 FERC ¶ 61,172 at P 111.

⁷¹ *Id.* ("Exelon Companies thus failed to comply with the requirement in Order No. 144 that recovery should be addressed in the 'next rate case' at the time they initially filed their Formula Rates.").

⁷² *Id.* P 112 ("Moreover, because Exelon Companies did not request recovery of FAS 109 amounts in their initial filings of their Formula Rate cases, Exelon Companies

34. The Commission also explained that the next rate case requirement in Order No. 144 works in conjunction with the reasonable period of time requirement.⁷³

Accordingly, the Commission determined that because Exelon Companies failed the next rate case requirement, they also necessarily failed the reasonable period of time requirement.⁷⁴ The Commission also rejected Exelon Companies' attempt to recover the full amount of past ADIT because Exelon Companies waited longer than seven years to seek recovery of this past deficient ADIT and failed to offer an adequate reason for the delay.⁷⁵

35. The requirements of Order No. 864 have no bearing on Exelon Companies' efforts to recover past deficient ADIT that pre-dated the existence of their transmission formula rates. The Commission's requirements in Order No. 864 resolve the issue that most

could not have deferred recovery of FAS 109 amounts for the next rate case unless they expressly addressed this issue in the settlements of their Formula Rates.”).

⁷³ *Id.* P 113.

⁷⁴ *Id.* (“Exelon Companies failed to comply with the directive in Order No. 144 to begin the process of adjusting its deferred tax deficiencies and excesses ‘so that, within a reasonable period of time to be determined on a case-by-case basis, [it would] be operating under a full normalization policy.’”).

⁷⁵ *Id.* (“Exelon Companies still do not explain why they waited an additional nine and a half years to make their February 23, 2018 filings [after the end of the rate moratorium in the settlement agreement]. And Exelon Companies' apparent conclusion that they could hold these amounts in reserve indefinitely conflicts with the language of Order No. 144.”); *see also* *BG&E*, 2020 WL 1482394, at 6 (finding that the Commission acted reasonably in determining that Baltimore Gas & Electric Company's 12 year delay was “far longer” than the four and seven year delays previously accepted by the Commission and that Baltimore Gas & Electric Company “failed to offer an adequate reason for the delay”).

public utility transmission formula rates were not designed to properly address excess or deficient ADIT resulting from the Tax Cuts and Jobs Act and future tax rate changes.

The original framework adopted in Order No. 144, which was issued when all public utilities used transmission stated rates, required public utilities to address excess and deficient ADIT within a reasonable period of time in their next rate cases.⁷⁶ However, public utilities with transmission formula rates no longer file traditional rate cases as contemplated by Order No. 144. Thus, prior to Order No. 864, most public utilities with transmission formula rates were required to make an FPA section 205 filing to seek approval to flow through excess or deficient ADIT in their transmission formula rates.⁷⁷

While this requirement relates to regulatory assets and regulatory liabilities more broadly, in the context of tax rate changes and Order No. 144, it functioned as the way in which public utilities with transmission formula rates complied with Order No. 144 and the Commission's regulations. Specifically, it represented the way that a public utility with transmission formula rates began "the process of making up deficiencies in or eliminating excesses in their deferred tax so that, within a reasonable period of time . . . they will be operating under a full normalization policy" following a tax rate change.⁷⁸ If the Commission accepted such a filing by a public utility with transmission formula rates, then that public utility would have a Commission-approved ratemaking method for that

⁷⁶ See Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,560.

⁷⁷ *PJM Interconnection, L.L.C.*, 165 FERC ¶ 61,275, at P 28 (2018).

⁷⁸ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,560.

specific tax rate change consistent with the Commission's regulations. However, this approach generally required such filings to seek approval of a new ratemaking method after each tax rate change by public utilities with transmission formula rates.

36. As a result of Order No. 864, public utilities with transmission formula rates are no longer required to make a filing pursuant to FPA section 205 to obtain Commission approval prior to including excess and deficient ADIT in their transmission formula rates following future changes to tax rates.⁷⁹ Instead, the Commission required public utilities with transmission formula rates to implement certain mechanisms that accurately reflect excess or deficient ADIT in their formula rates, which will serve as the ratemaking method for the Tax Cuts and Jobs Act and all future tax rate changes and ensure that excess and deficient ADIT are automatically included in a public utility's transmission formula rate following a tax rate change.

37. The Commission's requirements in Order No. 864 apply equally to Exelon Companies and all other public utilities with transmission formula rates. Similar to most public utilities with transmission formula rates at the time of the Tax Cuts and Jobs Act, Exelon Companies lacked a mechanism in its formula rates and did not have a Commission-approved ratemaking method to address excess and deficient ADIT resulting from the Tax Cuts and Jobs Act.⁸⁰ Thus, public utilities with transmission

⁷⁹ Order No. 864, 169 FERC ¶ 61,139 at P 48.

⁸⁰ In its rehearing request, Exelon Companies argue that the Commission's rate base justification for treating public utilities with transmission formula rates differently

formula rates, including Exelon Companies, are required under Order No. 864 to return the full amount of excess ADIT and recover the full amount deficient ADIT resulting from the Tax Cuts and Jobs Act. It is appropriate to return the full amount of excess and deficient ADIT resulting from the Tax Cuts and Jobs Act because Order No. 144 provides that public utilities will have a reasonable amount of time to begin accounting for excess or deficient ADIT if such public utilities lack a Commission-approved ratemaking method for addressing excess and deficient ADIT. By complying with Order No. 864, all public utilities with transmission formula rates will “begin the process of making up deficiencies in or eliminating excesses in their deferred tax so that, within a reasonable period of time . . . they will be operating under a full normalization policy” following the Tax Cuts and Jobs Act in accordance with Order No. 144.⁸¹ These public utilities will also have a Commission-approved ratemaking method, and therefore, will comply with the Commission’s regulations.⁸² Additionally, because excess and deficient

than those with transmission stated rates is inapplicable to them because Exelon Companies’ formula rates have always contained “an adjustment to rate base to subtract FAS 109 amounts from the deferred tax calculation.” Exelon Companies Rehearing at 10-11. To the extent Exelon Companies’ assertion is true, we agree that this rate base explanation is inapplicable to Exelon Companies. However, as discussed elsewhere, Exelon Companies failed to seek recovery of past deficient ADIT within a reasonable period of time in its next rate case. It is for this reason that Exelon Companies are unable to recover past deficient ADIT. This is also distinguishable from the circumstances surrounding the Commission’s issuance of Order No. 864, as discussed elsewhere. *See supra* at PP 32-37.

⁸¹ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,560.

⁸² 18 CFR 35.24(c)(2) and (3).

ADIT will be automatically included in transmission formula rates following future tax rate changes pursuant to this Commission-approved ratemaking method, public utilities with transmission formula rates will be able to maintain compliance with Order No. 144 and the Commission's regulations going forward without seeking additional Commission approval through an FPA section 205 filing.

III. Document Availability

38. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page www.ferc.gov. At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

39. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits in the docket number field.

40. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room

at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

IV. Dates

41. The effective date of the document published on November 27, 2019 (84 FR 65281), is confirmed: January 27, 2020.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.