

168 FERC ¶ 61,078  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Cheryl A. LaFleur and Richard Glick.

Duke Energy Progress, LLC

Docket No. ER19-2106-000

ORDER GRANTING REQUEST FOR WAIVER

(Issued August 6, 2019)

1. On June 11, 2019, as supplemented on July 9, 2019, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,<sup>1</sup> Duke Energy Progress, LLC (DEP) submitted a request for waiver of the applicable provisions of its formula rate power sales agreements (Formula Rate PPAs) with four wholesale customers<sup>2</sup> to address certain discrete effects of the Tax Cuts and Jobs Act<sup>3</sup> in their annual processes to true-up 2018 rates. Specifically, DEP seeks a prospective waiver to allow it to make adjustments to its 2018 annual true-up processes under the Formula Rate PPAs to eliminate the impact of excess accumulated deferred income taxes (ADIT) resulting from the Tax Cuts and Jobs Act and hold customers harmless from a potential rate base increase. For the reasons discussed below, we grant DEP's waiver request.

**I. Background**

2. DEP is a public utility headquartered in Raleigh, North Carolina. DEP describes itself as being engaged in the generation, transmission, distribution, and sale of electric power to approximately 1.5 million retail and wholesale customers in the states of North

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<sup>1</sup> 18 C.F.R. § 385.207(a)(5) (2018).

<sup>2</sup> These customers are: (1) Public Works Commission of the City of Fayetteville, North Carolina; (2) Haywood Electric Membership Cooperative; (3) North Carolina Eastern Municipal Power Agency; and (4) City of Camden.

<sup>3</sup> Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (Tax Cuts and Jobs Act). Section 13001 of the Tax Cuts and Jobs Act reduces the federal corporate income tax rate from a maximum of 35 percent to a flat 21 percent effective January 1, 2018. *See also Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (2018) (ADIT NOPR).

Carolina and South Carolina,<sup>4</sup> and is a wholly-owned subsidiary of Duke Energy Corporation (Duke Energy). In addition to selling capacity under Formula Rate PPAs, DEP also provides transmission services to wholesale customers under formula rates in its join Open Access Transmission Tariff.

3. DEP states that each of the Formula Rate PPAs includes a Production Capacity Rate Formula that DEP uses to calculate total rate base and annually true-up the prior year's billings to actual costs through a process that occurs on or before June 30 of each year.<sup>5</sup>

## II. Waiver Request

4. DEP explains that, to comply with Financial Accounting Standard No. 109 (FAS 109), it is required to adjust ADIT liabilities and assets to account for the effect of changes in tax laws or rates. DEP thus re-measured its ADIT balances based on the 21 percent federal corporate income tax rate established by the Tax Cuts and Jobs Act. This re-measurement of ADIT to comply with FAS 109 yielded excess ADIT, which had to be removed from the ADIT balances for 2017 year end reporting and beginning and ending balances for 2018. In its 2017 FERC Form No. 1 filing, DEP adjusted its ADIT assets and liabilities to reflect the excess ADIT.<sup>6</sup> Specifically, DEP transferred the excess ADIT from an ADIT asset or liability (i.e., FERC Accounts 190, 282, and 283) into a regulatory asset or liability (i.e., FERC Accounts 182.3 or 254). The ADIT balances for 2018 year-end reporting continue to reflect the re-measurement of ADIT to comply with FAS 109 following the Tax Cuts and Jobs Act.<sup>7</sup>

5. DEP further explains that each Formula Rate PPA provides that ADIT amounts in FERC Accounts 190, 282, and 283 will be an adjustment to rate base. DEP states that there are no provisions in its Formula Rate PPAs to adjust rate base to reflect the corresponding excess ADIT recorded as regulatory assets or liabilities recorded in FERC Accounts 182.3 and 254 or for adjustments made in accordance with FAS 109.

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<sup>4</sup> Waiver Request at 3.

<sup>5</sup> *Id.* at 4, 7.

<sup>6</sup> *Id.* at 5 & n.14 (citing 18 C.F.R. §§ 35.24 and 154.305; *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 15 FERC ¶ 61,133), *order on reh'g*, Order No. 144-A, FERC Stats. & Regs. ¶ 30,340 (1982) (cross-referenced at 18 FERC ¶ 61,163); *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdictional Rates*, 162 FERC ¶ 61,223 (2018) (Notice of Inquiry)).

<sup>7</sup> *Id.* at 5.

Accordingly, DEP asserts that strict adherence to the current templates in the Formula Rate PPAs would create unintended, significant increases to the rate base.<sup>8</sup>

6. DEP asserts that, to hold customers harmless from a rate base increase, it seeks a waiver to deviate from the terms of the Formula Rate PPAs to eliminate the impact of reclassifications of excess ADIT. Specifically, it plans to unwind the changes made to Accounts 190, 282, and 283 and restate the balances in those ADIT accounts to reflect the 2017 and 2018 year-end balances that would have existed without the re-measurement and transfer that occurred to comply with FAS 109.<sup>9</sup> DEP states that, by unwinding these changes, the restated amounts will neutralize rate base increases that would occur without this waiver.<sup>10</sup> DEP notes that its request addresses an issue identified in the Notice of Inquiry and ADIT NOPR, which is ongoing. DEP states that the adjustment it seeks is intended to hold customers harmless while the Commission works to finalize a long-term solution.<sup>11</sup>

7. DEP states that good cause exists to grant its waiver request. It states that the Commission generally requires that a requested waiver: (1) be in good faith; (2) be of limited scope; (3) address a concrete problem that needs to be remedied; and (4) not have undesirable consequences, such as harming third parties. DEP argues that its waiver request satisfies Commission standards for waivers and should be granted. DEP also asserts that the Commission has granted similar waiver requests in recent orders to ensure that customers receive the benefits of the Tax Cuts and Jobs Act.<sup>12</sup>

8. First, DEP states that its waiver request is in good faith. It states that, after the passage of the Tax Cuts and Jobs Act, it undertook an evaluation of how the federal corporate income tax rate changes would impact its Commission-jurisdictional rates.

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<sup>8</sup> *Id.* at 6-7. DEP states that ADIT liabilities in FERC Account 282 associated with production plant were reduced by approximately \$900 million. In addition, DEP notes that FAS 109 requires that Account 254 liabilities be “grossed-up” to reflect future formula rate changes that are needed to ratably flow back the net amounts in future rates, and the offset to the gross-up are new ADIT assets in Account 190, reflecting an additional increase to rate base.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 10. DEP anticipates that the rate base neutrality issue, as well as tariff provisions, will be resolved in the future by compliance filings required after the Commission’s issuance of a final rule in the ADIT NOPR proceeding.

<sup>12</sup> *Id.* at 8 (citing *Pub. Serv. Co. of Colo.*, 162 FERC ¶ 61,216 (2018); *MISO Transmission Owners*, 162 FERC ¶ 61,217 (2018)).

DEP asserts that its waiver request is consistent with its good faith efforts to ensure that the economic benefits of the reduction in the federal corporate income tax rate established by the Tax Cuts and Jobs Act are passed on to customers, while awaiting final Commission action in the ADIT NOPR proceeding.<sup>13</sup>

9. Second, DEP explains that its requested waiver is limited in scope because it: (1) solely addresses the federal corporate income tax rate reduction established by the Tax Cuts and Jobs Act; (2) is tailored to address specific issues associated with its compliance with financial and Commission accounting standards in response to the federal corporate income tax rate reduction; and (3) is limited to adjustments as part of the Formula Rate PPAs 2018 annual true-up processes.<sup>14</sup> DEP also states that the waiver will not impact other provisions of the Formula Rate PPAs and will not otherwise impact the rates for wholesale power charged by DEP.<sup>15</sup>

10. Third, DEP states that granting the requested waiver addresses and remedies a concrete problem. Specifically, the requested waiver will ensure that wholesale customers under the Formula Rate PPAs are held harmless and not subject to a rate increase as a consequence of the required accounting entries to be made by DEP under the Tax Cuts and Jobs Act.<sup>16</sup>

11. Finally, DEP maintains that the requested waiver will not have unintended consequences, such as harming third parties.<sup>17</sup> Rather, DEP states that the requested waiver will hold customers harmless from potential rate base increases as a result of DEP's compliance with financial and Commission accounting standards and the filed rate. DEP notes that the Commission has previously granted waiver requests to protect DEP's wholesale customers in similar circumstances.<sup>18</sup>

### **III. Notice and Responsive Pleadings**

12. Notice of DEP's filing was published in the *Federal Register*, 84 Fed. Reg. 28,296 (2019), with interventions, comments, and protests due on or before July 2, 2019. None was filed.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 8-9.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 9-10.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> *Duke Energy Progress, LLC*, 164 FERC ¶ 61,080 (2018).

13. On July 9, 2019, DEP submitted a supplemental filing to correct an error to note that the Formula Rate PPAs also include the City of Camden's formula rate power sales agreement.

#### IV. Discussion

14. We grant DEP's waiver request to allow DEP to make a one-time adjustment as part of the Formula Rate PPAs' 2018 annual true-up processes to hold customers harmless from potential rate base increases that otherwise would result from reclassification of estimated excess ADIT as a result of the Tax Cuts and Jobs Act, and to preserve rate base neutrality.

15. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem that needs to be remedied; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>19</sup> We find that DEP's waiver request satisfies these criteria.

16. First, we find that DEP acted in good faith because its waiver request is consistent with good faith efforts to ensure that the economic benefits of the reduction in the federal corporate income tax rate established by the Tax Cuts and Jobs Act are passed on to customers, while awaiting final Commission action in the ADIT NOPR proceeding.

17. Second, we find that the waiver is limited in scope because it solely addresses the federal corporate income tax rate reduction established by the Tax Cuts and Jobs Act, is tailored to address specific issues with the DEP's compliance with financial and Commission accounting standards in response to the federal corporate income tax rate reduction, and is limited to the Formula Rate PPAs 2018 true-up processes. We note that the waiver request does not address whether and, if so, how DEP intends to return any excess ADIT under the Formula Rate PPAs in the future.<sup>20</sup>

18. Third, we find that the waiver addresses and remedies a concrete problem. Specifically, while DEP waits for Commission direction in the ADIT NOPR proceeding, the requested waivers will ensure that wholesale customers under the Formula Rate PPAs are held harmless from rate base increases that would otherwise occur.

19. Finally, we find that the waiver will not have undesirable consequences, such as harming third parties. Rather, it will hold DEP customers harmless from potential rate

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<sup>19</sup> See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

<sup>20</sup> See ADIT NOPR, 165 FERC ¶ 61,117.

base increases that otherwise would result from making the required accounting entries pursuant to the Commission's accounting standards.

The Commission orders:

DEP's waiver request is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.