

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

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

Delmarva Power & Light Company

Docket No. ER09-1158-000

ORDER DENYING FORMAL CHALLENGE

(Issued December 3, 2019)

1. On May 15, 2018, Delmarva Power & Light Company (Delmarva) submitted its 2018 annual informational formula rate update (2018 Annual Update), as required by the formula rate protocols set forth in Delmarva's formula filed as Attachment H-3E of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (Tariff).¹ On February 15, 2019, the Delaware Municipal Electric Corporation, Inc. (DEMEC) filed a formal challenge pursuant to Section 4(a) of Attachment H-3E of the PJM Tariff (Formal Challenge), challenging certain inputs of Delmarva's formula rate. As discussed below, we deny the Formal Challenge.

I. The Formula Rate and Protocols

2. Attachments H-3D and H-3E of the PJM Tariff set forth Delmarva's formula rate template and protocols under which Delmarva recovers its annual transmission revenue requirement (ATRR), and through which it establishes charges for transmission service for facilities it owns that are under PJM's functional control.

3. Preliminary and formal challenges are limited to six issues as listed in section 3(d) of Delmarva's formula rate protocols: (1) whether Delmarva has properly calculated the Annual Update under review; (2) whether the costs included in the Annual Update are properly recordable and recorded, and otherwise consistent with Delmarva's accounting policies, practices and procedures consistent with the FERC Uniform System of Accounts; (3) whether Delmarva's actual costs and expenditures were reasonable and prudent (including whether such costs were incurred according to cost control methodologies); (4) whether the input data used in the Annual Update are accurate and correctly used in the formula rate; (5) whether the formula rate has been applied

¹ See Delmarva May 15, 2018 Informational Filing of 2018 Formula Rate Annual Update, Transmittal Letter at 1 (2018 Annual Update).

according to its terms, including the procedures in Delmarva's protocols; and (6) whether Delmarva's accounting changes are reasonable and consistent with the Uniform System of Accounts.

II. Background

4. DEMEC is a joint action agency² formed under Delaware law consisting of the following members: Delaware Cities and Towns of Newark, Milford, New Castle, Seaford, Lewes, Smyrna, Clayton, Middletown, and Dover. In total, DEMEC members have a peak load of more than 450 MW. DEMEC is a member of PJM and a transmission customer taking service under the PJM Tariff at the Delmarva zone rate.³ Pursuant to Section 3 of the protocols, DEMEC submitted six sets of data requests to Delmarva regarding its 2018 Annual Update. On October 12, 2018, DEMEC submitted a timely Preliminary Challenge pursuant to Section 3(a) of the formula rate protocols. On November 9, 2018, Delmarva provided its response to the Preliminary Challenge. In January and February 2019, the parties held discussions and exchanged information, and Delmarva consented to extending the Formal Challenge deadline to February 15, 2019.⁴

III. Formal Challenge

5. On February 15, 2019, DEMEC submitted a Formal Challenge to Delmarva's 2018 Annual Update regarding Delmarva's inclusion of \$196.9 million in Prepaid Pension Assets (PPA) in its formula rate. Specifically, DEMEC contends that Delmarva's prepaid pension balance is neither a reasonable nor prudent expenditure.⁵

6. Additionally, DEMEC challenges Delmarva's use of the federal income tax rate of 35 percent for the true-up of the rates from January 1, 2018 to May 31, 2018, in its 2018 Annual Update, and its failure to return to transmission customers the accumulated deferred income tax (ADIT) associated with two transmission facilities Delmarva retired

² "Joint Action Agencies are a resource that municipal distribution utilities can use to accomplish their goals of reliable, safe and low-cost electric supply and services to their communities in an efficient and effective manner," through "[s]hared costs and mutual support[.]" Delaware Municipal Electric Corporation, *About DEMEC, Joint Action Agency Values* (2019), <https://www.demecinc.net/joint-action-agency-values/>.

³ Formal Challenge at 1.

⁴ *Id.* at 3-4 (citing Exs. B, C, F, G).

⁵ *Id.* at 6.

in 2017.⁶ Finally, DEMEC challenges Delmarva's inclusion of certain software-related costs booked to Account 303 as Intangible Plant.⁷

7. DEMEC requests that the Commission direct Delmarva to make adjustments to its 2018 Annual Update consistent with DEMEC's demonstrations. Alternatively, DEMEC requests that the Commission establish hearing and settlement procedures.⁸

IV. Filings and Responsive Pleadings

8. On March 18, 2019, Delmarva filed an answer to DEMEC's Formal Challenge (Delmarva Answer). On April 2, 2019, DEMEC filed a motion for leave to answer and answer (DEMEC Answer). On April 12, 2019, Delmarva filed a motion for leave to answer and answer (Delmarva Second Answer).

V. Discussion

A. Procedural Matters

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept DEMEC's Answer and Delmarva's Second Answer, as they have provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Prepaid Pension Assets

a. Delmarva's Formula Rate and Prepaid Pension Assets

10. In its 2018 Annual Update, Delmarva records Prepaid Pension Assets in Account No. 186 (Miscellaneous Deferred Debits) and allocates a portion of that amount to its transmission rate base. Specifically, Attachment 5, line 45 of the formula rate includes in rate base Account 165, Prepayments, plus "Prepaid Pensions if not included in Prepayments," which are to be "recorded in FERC account 186."⁹

⁶ *Id.* at 12-13.

⁷ *Id.* at 15.

⁸ *Id.* at 15-16.

⁹ 2018 Annual Update at Attachment 5 – Cost Support.

11. In the 2018 Annual Update, Delmarva included Prepaid Pension Assets of approximately \$196.9 million, resulting in an addition to rate base of approximately \$12.4 million.¹⁰ Delmarva's Prepaid Pension Assets represent the amount of money (Cash Contributions) Delmarva has deposited into the pension trust fund for its employees, and which exceed Delmarva's Accounting Cost¹¹ for pensions.¹² Delmarva's affiant Allen explains that "[o]ver the long run, the cumulative employer Cash Contributions made to a plan and the cumulative Accounting Cost amounts should be equal. However, in the short and intermediate run, there can be significant differences" due to liability measurements and the period accounting for experience losses.¹³ "The Financial Accounting Standards Board (FASB) governs pension accounting" and federal tax and labor laws govern pension funding.¹⁴ As Delmarva's affiant Allen explains, "[t]he Employee Retirement Income Security Act of 1974 [ERISA] and the Internal Revenue Code ([IRC] – sections 430 and 436, enacted as part of the Pension Protection Act of 2006 [Pension Act]) mandate that pension plan contributions satisfy the fiduciaries' responsibility to prudently protect the interests of the plan participants and beneficiaries."¹⁵

12. Delmarva and its affiliates Atlantic City Electric Company (Atlantic City) and Potomac Electric Power Company (Pepco, together with Delmarva and Atlantic City, the PHI Companies) participate together in a consolidated pension plan (Pepco Holdings,

¹⁰ Delmarva applies an allocator to the Prepaid Pension Assets balance and includes a portion in rate base. *Compare id.* at Line 45, *with id.* at Attachment 5.

¹¹ "Under [Statement of Financial Accounting Standard] FAS 87, the annual 'Accounting Cost' for Delmarva's pension can generally be thought of as the expected change in the pension benefit obligation ('PBO') funded status (*i.e.*, the difference between pension plan assets and the PBO) over the next year. The Accounting Cost is the amount included for pensions in Account 926. Accounting Cost includes the year's expected increase in liability due to active benefit accruals, but also includes certain interest, return and amortization costs." Delmarva Answer at 14-15 (citing Allen Aff. ¶¶ 5-8).

¹² *Id.* at 12-13.

¹³ *Id.*, Allen Aff. ¶¶ 23-28.

¹⁴ *Id.*, Allen Aff. ¶¶ 5, 9; *id.*, Ex. JWA-4 at 2.

¹⁵ *Id.*, Allen Aff. ¶ 9.

Inc. (PHI) Retirement Plan).¹⁶ Exelon Corporation (Exelon), Delmarva's parent company,¹⁷ administers the PHI Retirement Plan as well as the pension plans of other affiliates.¹⁸ Exelon has a pension funding policy that it uses to determine the annual contributions to all of its pension funds.¹⁹ As discussed in this policy, Exelon conducts an annual pension contribution study for all of its qualified pension plans, including the PHI Retirement Plan, and takes into account an analysis from a third-party actuary.²⁰ As of 2018, Exelon's current funding strategy "is to contribute the greater of (1) \$300 million until all the qualified plans are fully funded on an [Accumulated Benefit Obligation (ABO)] basis, and (2) the minimum amounts under ERISA and the [Pension Act] to meet minimum contribution requirements and/or to avoid benefit restrictions and at-risk status."²¹ Once Exelon management determines the annual contributions for its qualified pension plans, it uses "specific legacy company allocation methodologies" to allocate contributions to the operating companies.²² Delmarva's affiant Allen explains that "PHI has generally targeted at least 90 [percent] utility funding levels for all years and the contribution allocation to each PHI utility . . . is determined by each utility's funding status."²³

b. Delmarva 2017 Order

13. DEMEC submitted a formal challenge to Delmarva's annual update in 2016.²⁴ The Commission rejected DEMEC's challenge of the Prepaid Pension Assets.²⁵ First, the

¹⁶ *Id.* at 16 (citing Allen Aff. ¶ 34).

¹⁷ Pursuant to a March 2016 merger, PHI operating companies Delmarva, Pepco and Atlantic City are now Exelon subsidiaries. *See* Formal Challenge at 3.

¹⁸ Delmarva Answer at 17.

¹⁹ *Id.*; *see id.*, Ex. JWA-5.

²⁰ *Id.*, Allen Aff. ¶¶ 13-14.

²¹ *Id.*, Allen Aff. ¶ 15.

²² *Id.*, Allen Aff. ¶ 16; *id.* at 21.

²³ *Id.*, Allen Aff. ¶ 16.

²⁴ *Delmarva Power & Light Co.*, 160 FERC ¶ 61,102, at P 7 (2017) (Delmarva 2017 Order).

²⁵ *Id.* P 19.

Commission explained that DEMEC impermissibly attacked the formula rate by arguing that Prepaid Pension Assets should not be included in rate base.²⁶ The Commission stated that “the formula rate has always contained a provision that explicitly allows these Prepaid Pension Assets as an adjustment to rate base.”²⁷ Second, the Commission rejected DEMEC’s argument that the prepaid pension amounts should be excluded from rate base because they “are ‘voluntary’ and therefore should be treated as imprudent expenditures.”²⁸ The Commission found that Delmarva justified the Prepaid Pension Assets as prudent, agreeing with Delmarva that “ERISA and the Pension [] Act [] impose higher funding obligations than Delmarva’s [Generally Accepted Accounting Principles (GAAP)]-based pension costs,” and that “pre-paying pension costs to ensure the security of employees’ pensions is a reasonable and prudent business decision.”²⁹

c. DEMEC’s Formal Challenge

14. DEMEC challenges Delmarva’s inclusion of \$196.9 million in Prepaid Pension Assets in its 2018 Annual Update, which increases Delmarva’s transmission rate base by approximately \$12.4 million.³⁰ DEMEC states that this amount is not reasonable or prudent because Delmarva failed to correlate the amount to its funding obligations under ERISA and the Pension Act, and because Delmarva failed to show benefits to transmission customers in the form of reduced rates that correspond to the Prepaid Pension Assets amounts it seeks to recover.³¹ DEMEC maintains that the Prepaid Pension Assets balance is based on the discretion of Exelon management, which allows contributions that far exceed PHI’s ERISA and Pension Act obligations.³² DEMEC

²⁶ *Id.* P 20.

²⁷ *Id.*

²⁸ *Id.* PP 21-22.

²⁹ *Id.* P 22.

³⁰ Formal Challenge at 5.

³¹ *Id.* at 6 (citing Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 22); *id.* at 10-11 (citing *Southern Company Servs., Inc.*, 122 FERC ¶ 61,218, at PP 21, 23 (2008), *order on clarification and compliance filing*, 128 FERC ¶ 61,276 (2009), *order on compliance filing and request for reh’g*, 131 FERC ¶ 61,120 (2010) (*Southern*); *Entergy Gulf States Louisiana, L.L.C.*, 165 FERC ¶ 63,010, at PP 104, 128 & nn.213, 285 (2018) (*Entergy*)). DEMEC also alleges that testimony filed in Docket No. ER17-1519 supports careful review of contributions in excess of ERISA and Pension Act obligations. *Id.* at 10.

³² *Id.* at 7.

asserts there is a significant question about the reasonableness and prudence of Delmarva's Prepaid Pension Assets because those balances of the PHI operating companies far exceed Exelon's own funding strategy.³³ DEMEC also notes Delmarva's assertion that PHI made contributions under minimum funding requirements from 2014 to 2017.³⁴ DEMEC argues that Delmarva's failure to correlate the Prepaid Pension Assets balance to its funding obligations violates Commission precedent requiring transparency in the basis for rates.³⁵ DEMEC also argues that Delmarva does not show that the Prepaid Pension Assets balance specifically ensures the security of its employees' pensions.³⁶

d. Delmarva's Answer

15. Delmarva argues that *res judicata* bars DEMEC's Prepaid Pension Assets challenge, as in 2017 the Commission rejected DEMEC's prudence challenge to the Prepaid Pension Assets. In that decision, Delmarva states, the Commission found that Delmarva's inclusion of the Prepaid Pension Assets—and not just a portion of the Prepaid Pension Assets amount—was “a reasonable and prudent business decision.”³⁷ Delmarva characterizes as fictional and not based on prior precedent DEMEC's argument that it is imprudent to include the portion of the Prepaid Pension Assets above the minimum levels required by ERISA and the Pension Act.³⁸

16. Delmarva further explains that in DEMEC's previous challenge, the Prepaid Pension Assets was \$205 million, higher than the current amount of \$197 million. Moreover, Delmarva explains, the portion of the Prepaid Pension Assets included in transmission rate base fell from \$14.04 million to \$12.43 million. Delmarva argues that DEMEC has not raised new facts or arguments, has not provided any evidence that the

³³ *Id.* at 8.

³⁴ *Id.* at 9 (citing Ex. F).

³⁵ *Id.* at 6 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 18 (2013)); *id.* at 10.

³⁶ *Id.* at 8-9.

³⁷ Delmarva Answer at 9 (quoting Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 22).

³⁸ *Id.* at 7-9, 28-29.

Prepaid Pension Assets level is now too high, and has not shown that other circumstances have changed that would now make the Prepaid Pension Assets imprudent.³⁹

17. Delmarva asserts that the Commission presumes utility costs are prudent, and as such, DEMEC bears the burden of creating “serious doubt” about the prudence of the Prepaid Pension Assets.⁴⁰ Delmarva specifies that DEMEC’s affiant Kumar reasons that the inclusion of the Prepaid Pension Assets is imprudent because Delmarva did not provide sufficient supporting information. Delmarva counters that it would only need to produce such information after DEMEC has put forth evidence creating serious doubt about prudence, and that both DEMEC and Mr. Kumar have failed to produce such evidence.⁴¹ Delmarva then argues that, as DEMEC has failed to create a serious doubt, the Commission does not need to decide whether the Prepaid Pension Assets are prudent.⁴²

18. Nevertheless, Delmarva argues, the Prepaid Pension Assets are prudent. Delmarva explains that its Prepaid Pension Assets are calculated as its cumulative Cash Contributions to the overall PHI Retirement Plan less Delmarva’s Accounting Cost.⁴³ Delmarva maintains that “[c]ontributing only the Accounting Cost can leave a pension fund severely underfunded and can violate federal pension law.”⁴⁴ Delmarva also notes that Accounting Costs can change considerably based on market factors, and that “a company may make additional contributions [to its pension plan] to reduce the likelihood of large contribution spikes in future years just to satisfy minimum funding requirements and avoid benefit restrictions.”⁴⁵ Delmarva explains that its pension funding is based in part on projected returns and acknowledges that the pension fund in which Delmarva

³⁹ *Id.* at 9.

⁴⁰ *Id.* at 10-11 (quoting Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 22 n.34).

⁴¹ *Id.* at 11-12.

⁴² *Id.* at 13.

⁴³ *Id.* at 22.

⁴⁴ *Id.* at 14-15.

⁴⁵ *Id.* at 18.

participates earned more than twice the expected return in 2017 due to the stock market's strong year. Delmarva emphasizes, however, that the Commission does not rely on hindsight in its prudence analysis.⁴⁶

19. Delmarva explains that Exelon maintains a formal policy to determine the annual contributions to all of Exelon's pension funds, including the PHI Retirement Plan. Delmarva states that Exelon engages a firm to provide a detailed, multi-factored analysis to develop optimum funding policies. Delmarva explains that Exelon management determines how much to contribute annually to the plans and how those amounts are allocated among the plans. Delmarva further explains that PHI aims to have at least 90 percent utility funding levels for all years and that contributions to PHI's affiliates are made to achieve similar funding status at its three utilities.⁴⁷

20. Delmarva disagrees with DEMEC that the Delmarva 2017 Order requires tying the Prepaid Pension Assets balance to ERISA and Pension Act obligations. Delmarva argues that Commission precedent does not support DEMEC's argument that contributions in excess of legal requirements are imprudent. Moreover, Delmarva argues that DEMEC's views reflect a misunderstanding of pension funding.⁴⁸

21. Delmarva explains that the minimum requirements imposed by ERISA and the Pension Act apply to the plan itself, not to individual companies that participate in the plan. Delmarva explains that its pension fund is consolidated with that of the other PHI Companies, but that each company's Cash Contributions and share of the total pension fund is tracked separately. Delmarva explains that it and its affiliates participate in a plan together to reduce administrative costs, and to retain flexibility in complying with federal requirements.⁴⁹

22. Delmarva contends that its Cash Contributions that create the Prepaid Pension Assets are necessary to prudently comply with federal law and meet Delmarva's pension obligations. Delmarva asserts that there is no additional requirement that it must demonstrate a commensurate benefit in the form of an offsetting transmission rate reduction in order to include the Prepaid Pension Assets in its rates.⁵⁰

⁴⁶ *Id.* at 19-20.

⁴⁷ *Id.* at 17-21; *see id.*, Allen Aff. ¶ 16.

⁴⁸ *Id.* at 32-33 & n.85.

⁴⁹ *Id.* at 16-17, 32 & n.51.

⁵⁰ *Id.* at 24, 38-39.

23. Delmarva further contends that its Prepaid Pension Assets is nonetheless beneficial to customers through tax benefits and associated earnings. For example, Delmarva claims that, in 2017, its revenue requirement “was \$1.2 million lower than it otherwise would have been” if it did not have its Prepaid Pension Assets.⁵¹

24. Delmarva states that DEMEC relies upon distinguishable cases in its argument about customer benefits.⁵²

25. Delmarva refutes DEMEC’s claim that, from 2014 to 2017, Delmarva did not contribute sufficient funds to comply with ERISA and the Pension Act.⁵³

26. Delmarva also refutes DEMEC’s contention that the PHI Companies’ total Prepaid Pension Assets of \$600 million is excessive because Exelon contributes \$300 million annually to the pension plans of its family of companies. Delmarva clarifies that the \$600 million Prepaid Pension Asset represents *cumulative* Cash Contributions whereas the \$300 million reflects the Exelon family of companies’ *annual* cash contribution to the pension plans.⁵⁴

e. **DEMEC’s Answer**

27. DEMEC argues that its challenge of the Prepaid Pension Assets is not barred by *res judicata* for two reasons.⁵⁵ First, DEMEC argues it is not challenging the issue of whether Delmarva can recover the Prepaid Pension Assets under its formula rate, which DEMEC maintains was the primary issue it raised in its formal challenge in the Delmarva 2017 Order. DEMEC argues that here, it is challenging the Prepaid Pension Assets input to the formula rate.⁵⁶

28. Second, DEMEC argues that rather than being barred by the Delmarva 2017 Order, DEMEC’s Formal Challenge is grounded on an application of this order’s findings that (1) ERISA and the Pension Act impose higher obligations than Delmarva’s GAAP-based pension costs; and (2) ensuring the security of Delmarva’s employees’ pensions is

⁵¹ *Id.* at 25-26.

⁵² *Id.* at 37, 40-41.

⁵³ *Id.* at 35.

⁵⁴ *Id.* at 22, 36.

⁵⁵ DEMEC Answer at 4.

⁵⁶ *Id.* at 4-5.

a reasonable and prudent business decision. Applying these findings here, DEMEC argues that Delmarva failed to correlate its Prepaid Pension Asset balance in the 2018 Annual Update to (1) Delmarva's ERISA and Pension Act obligations and (2) the security of Delmarva's employees' pensions. Additionally, DEMEC argues that by failing to provide specific quantifiable evidence of the benefits to customers relative to Delmarva's Prepaid Pension Assets, Delmarva's PPA balance is unreasonable and imprudent.⁵⁷

29. In addition, DEMEC argues that Delmarva does not explain why a finding of reasonableness in a prior update means that the input to the Prepaid Pension Assets balance in a subsequent year's formula rate annual update will necessarily be reasonable or prudent. DEMEC maintains that Delmarva affiant Allen explained that the basis for the lower Prepaid Pension Assets in the 2018 Annual Update was changed contribution requirements and its prior contributions. DEMEC also argues that Delmarva cannot invalidate DEMEC's challenge to the Prepaid Pension Assets merely by relying on the specific dollar amount recorded in the input from one year to another.⁵⁸

30. DEMEC argues that it has satisfied its burden of casting a serious doubt on the prudence of Delmarva's Prepaid Pension Assets balance in the 2018 Annual Update. DEMEC argues it did so by showing Delmarva has not complied with Commission precedent that requires Delmarva to demonstrate a tie between the Prepaid Pension Assets balance and Delmarva's ERISA and Pension Act funding obligations.⁵⁹

31. DEMEC clarifies that it compared the PPA contribution to the PPA balance to show that Delmarva's contributions are not tied to ERISA and Pension Act obligations but are tied to Exelon's funding strategy, which is based on management discretion. DEMEC argues that Delmarva provides no evidence, such as a comparative analysis, to support its claim of retaining flexibility through a consolidated plan. Additionally, DEMEC states that Delmarva's arguments related to the differences between Accounting Costs and Cash Contributions are inapposite as DEMEC only challenged the Cash Contributions.⁶⁰

32. DEMEC asserts that Delmarva does not resolve the deficiency concerning the lack of demonstrated benefits to Delmarva's customers. DEMEC argues that Delmarva incorrectly claims that prudence is the only relevant question with respect to DEMEC's

⁵⁷ *Id.* at 5-6.

⁵⁸ *Id.* at 6-7.

⁵⁹ *Id.* at 7-8.

⁶⁰ *Id.* at 8-11.

challenge of the Prepaid Pension Assets balance and that Delmarva also incorrectly claims that there is no additional requirement to show customer benefits from the PPA.⁶¹

33. DEMEC disagrees with Delmarva that the Prepaid Pension Assets reduced the revenue requirement in 2017 by \$1.2 million. DEMEC notes that, although the Commission precedent it relies upon is based on the inclusion of the Prepaid Pension Assets in the formula rate for the first time, that fact does not invalidate the underlying principles when applied to demonstrating the reasonableness and prudence of Delmarva's input to its 2018 Annual Update.⁶²

f. Delmarva's Second Answer

34. Delmarva reasserts that *res judicata* bars DEMEC's challenge to the prudence of the Prepaid Pension Assets input to the formula rate. Delmarva asserts that DEMEC previously challenged the prudence of the Prepaid Pension Assets, and in the Delmarva 2017 Order, the Commission found that Delmarva met its burden to justify these expenses as prudent.⁶³ Further, Delmarva argues that DEMEC is incorrectly alleging that Delmarva failed to correlate its Prepaid Pension Assets balance in the 2018 Annual Update to

(1) Delmarva's ERISA and Pension Act obligations; and (2) the security of Delmarva's employees' pensions. Delmarva avers that DEMEC's argument here is illogical because it claims that Delmarva has failed to meet the very standards laid out and ruled on in the Delmarva 2017 Order. Delmarva also maintains that its affiant Allen did not state that there were any material changes in Delmarva's situation, and that DEMEC has not shown a significant change in circumstances, which is required to avoid *res judicata*.⁶⁴

g. Commission Determination

i. DEMEC's Claims

35. DEMEC claims the Prepaid Pension Assets amount in the 2018 Annual Update is unreasonable and imprudent because Delmarva did not correlate the PPA balance to its ERISA and Pension Act obligations, or show benefits to customers that correspond to the

⁶¹ *Id.* at 11-12.

⁶² *Id.* at 12-16.

⁶³ Delmarva Second Answer at 2-3 (citing Delmarva 2017 Order, 160 FERC ¶ 61,102 at PP 21-22).

⁶⁴ *Id.* at 3-4 & n.12.

PPA amounts Delmarva seeks to recover in rates.⁶⁵ We construe these claims as distinct. That is, DEMEC raises a prudence challenge relating to alleged ERISA and Pension Act requirements, based primarily on the Delmarva 2017 Order, and a reasonableness claim about alleged customer benefits, based primarily on *Southern*. As discussed below, we reject both claims. We turn first to DEMEC's prudence challenge.

ii. *Res Judicata*

36. Delmarva argues that the doctrine of *res judicata* bars DEMEC's Formal Challenge to the Prepaid Pension Assets balance in the 2018 Annual Update. Delmarva argues that DEMEC presents no new facts or arguments, and presents no evidence of a change in circumstances, since the Commission denied DEMEC's prudence challenge to the Prepaid Pension Assets balance in the Delmarva 2017 Order.⁶⁶ We disagree.

37. The Commission has stated that the doctrine of *res judicata* "precludes the relitigation of a claim or issue that was the subject of a prior cause of action between the parties."⁶⁷ The Commission has also stated that this doctrine applies only "where the issues presented have been fully litigated and decided on the merits, and no new circumstances would justify relitigation."⁶⁸ With respect to rates, the Commission has explained that *res judicata* "generally does not bar litigation of the justness and reasonableness of rates based on new facts (i.e., new economic data) or arguments . . . tending to show that the rates, even though previously adjudged to be just and reasonable, may no longer be just and reasonable."⁶⁹

38. We agree with DEMEC that the Commission's finding in the Delmarva 2017 Order—that Delmarva justified the Prepaid Pension Assets as prudent⁷⁰—does not prohibit DEMEC from challenging the balance in a subsequent year. DEMEC herein

⁶⁵ Formal Challenge at 6.

⁶⁶ Delmarva Answer at 7-10.

⁶⁷ *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 70 n.96 (2010).

⁶⁸ *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 166 FERC ¶ 61,022, at P 27 (2019) (citations omitted).

⁶⁹ *San Diego Gas & Elec. Co. v. Pub. Serv. Co. of N. M.*, 86 FERC ¶ 61,253, at 61,912 (1999); see *Tex. E. Transmission Corp. v. FERC*, 893 F.2d 767, 774 (5th Cir. 1990) ("In addition, the doctrine of *res judicata* is simply not applicable to Commission rate proceedings. FERC has a continuing obligation to ensure that pipeline rates are just and reasonable pursuant to §§ 4 and 5 of the [Natural Gas Act].").

⁷⁰ Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 22.

challenges the prudence and reasonableness of a different Prepaid Pension Assets balance in a different annual update.⁷¹ Moreover, DEMEC raises different arguments, notably that Delmarva did not correlate the Prepaid Pension Assets balance to its funding obligations under ERISA and the Pension Act, or show benefits to transmission customers that correspond to the increase in rate base associated with this balance.⁷² Thus, we find that the doctrine of *res judicata* does not bar DEMEC's claim.⁷³

iii. Prudence

39. Delmarva's formula rate protocols state that "[n]othing herein is intended to alter the burdens applied by FERC with respect to prudence challenges."⁷⁴ Under the Commission's well-established prudence standard, "[t]he Commission will not disallow costs as imprudent if they are costs 'which a reasonable utility management . . . would have made, in good faith under the same circumstances, and at the relevant point in time.'"⁷⁵ "The regulated entity has the burden of proof to establish prudence."⁷⁶ However, as the Commission stated in the Delmarva 2017 Order, "in order to ensure that rate cases are manageable, the Commission presumes that all expenditures are prudent so the utility need not justify in its case-in-chief the prudence of all of its costs. Parties

⁷¹ Compare Formal Challenge at 5 (challenging \$12.4 million increase to rate base associated with Prepaid Pension Assets balance of approximately \$196.9 million), with DEMEC, Formal Challenge, Docket No. ER09-1158-000, at 6-7 (filed Jan. 18, 2017) (challenging addition of \$14.04 million addition to rate base associated with Prepaid Pension Assets).

⁷² Formal Challenge at 6, 10-11.

⁷³ Delmarva insists that DEMEC must show "a significant change in circumstances" to avoid *res judicata*. Delmarva Second Answer at 4 n.12 (citing *Alamito Co.*, 43 FERC ¶ 61,274, at 61,753 (1988)). While the Commission said in *Alamito* that the relitigation of an issue is unjustified "[a]bsent a showing of significant change in circumstances," the Commission said that its policy against relitigation of issues is based not on the doctrine of *res judicata* but on "the fact that it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been fully determined." 43 FERC at 61,753.

⁷⁴ PJM, Intra-PJM Tariffs, OATT, OATT Attachment H-3E (3.1.0), § 4(c).

⁷⁵ *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,092, at P 8 (2017) (quoting *New England Power Co.*, 31 FERC ¶ 61,047, at 61,084 (1985)).

⁷⁶ *Potomac-Appalachian Transmission Highline, LLC*, Opinion No. 554, 158 FERC ¶ 61,050, at P 100 (2017) (*PATH*).

challenging the prudence of an expenditure have to raise ‘serious doubt’ as to the prudence of an expenditure.”⁷⁷ The Commission has said that “[s]erious doubt must be more than a ‘bare allegation of imprudence,’ but this threshold may not be so demanding that it effectively reverses the statutory burden of proof.”⁷⁸ Once a party raises serious doubts, “the company has ‘the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.’”⁷⁹ Because we do not find that DEMEC has created a serious doubt about the prudence of Delmarva’s Prepaid Pension Assets balance,⁸⁰ we deny the Formal Challenge on this issue.

40. DEMEC primarily argues that Delmarva violated Commission precedent by not showing a connection between the Prepaid Pension Assets balance and its ERISA and Pension Act obligations.⁸¹ DEMEC’s argument is flawed for several reasons. First, DEMEC misreads the Delmarva 2017 Order, on which its argument stands. In that order, the Commission agreed with Delmarva that ERISA and the Pension Act impose higher funding obligations than Delmarva’s pension costs under GAAP.⁸² The Commission effectively rejected DEMEC’s contention that Delmarva’s pension expenses were voluntary.⁸³ However, the Commission did not say that an expenditure is imprudent if it exceeds the minimum funding requirements established by federal pension laws, or that there is a serious doubt about the prudence of an expenditure just because it is not required by federal pension laws. DEMEC’s argument runs contrary to the Commission’s prudence standard because it suggests that Delmarva was limited to a single correct act—making Cash Contributions that matched minimum funding obligations under federal law—rather than having discretion in its decision-making.⁸⁴

⁷⁷ Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 22 n.34.

⁷⁸ *PATH*, 158 FERC ¶ 61,050 at P 100 (quoting *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233, at P 13 (2015)).

⁷⁹ *Id.* P 101 (quoting *Anaheim, Riverside, Banning, Colton, and Azusa, Cal. v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981)).

⁸⁰ *See* DEMEC Answer at 7.

⁸¹ *Id.* at 7-8 (citing Formal Challenge at 6-10 (citing Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 22)).

⁸² Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 22.

⁸³ *See supra* Part V.B.1.b.

⁸⁴ *See Entergy Servs., Inc.*, 130 FERC ¶ 61,023 at P 51 (“[T]he Commission has held that this prudence standard ‘permits considerable latitude, in that the Commission, in reviewing a decision . . . , does not look for a single correct result or require that every

Thus, DEMEC is misguided in attempting to raise a serious doubt about the prudence of Delmarva's Prepaid Pension Assets balance by focusing primarily on whether Delmarva's contributions were required by federal pension laws or not.⁸⁵

41. Second, DEMEC's main argument presumes that ERISA and Pension Act funding requirements apply to Delmarva specifically. Importantly, Delmarva and the other two PHI affiliates participate together in the PHI Retirement Plan.⁸⁶ As Delmarva explains, "[m]inimum funding obligations under the ERISA and Pension [] Act requirements are determined at the plan level, not by operating company. It is not possible to calculate the minimum funding obligations by operating company with certainty without splitting up the consolidated PHI Retirement Plan."⁸⁷ Thus, the ERISA and Pension Act funding requirements apply to the consolidated PHI Retirement Plan, not to Delmarva.⁸⁸ Consequently, a fundamental premise of DEMEC's argument is inconsistent with the record in this proceeding.

possible alternative be evaluated.'" (quoting *Dakota Gasification Co.*, Opinion No. 410, 77 FERC ¶ 61,271, at 62,153-54 (1996))).

⁸⁵ We decline to address the testimony DEMEC refers to in Docket No. ER17-1519. *See* Formal Challenge at 10. No final decision was issued in this proceeding, and an offer of settlement was filed on July 22, 2019. *See* PECO Energy Company, Settlement Agreement, Docket No. ER17-1519-002 (filed July 22, 2019). An Administrative Law Judge certified the settlement as uncontested on September 18, 2019. *PJM Interconnection, L.L.C.*, 168 FERC ¶ 63,038 (2019).

⁸⁶ Delmarva Answer, Allen Aff. ¶ 34.

⁸⁷ Formal Challenge, Ex. F (DPL Pension Responses 1-11-19 at 6).

⁸⁸ *Id.*, Ex. F (DPL Pension Responses 1-11-19 at 6-7); *see* 26 U.S.C. § 430 (2018) (minimum funding standards for single-employer defined benefit pension plans under Title 26, Internal Revenue Code); 26 U.S.C. § 436 (2018) (funding-based limits on benefits and benefit accruals under single-employer plans); 29 U.S.C. § 1083 (2018) (minimum funding standards for single-employer defined benefit pension plans under Title 29, Chapter 18, Employee Retirement Income Security Program).

42. Delmarva states that “[m]anagement believes it is prudent to have one consolidated plan as it reduces administrative complexity and costs such as audit fees.”⁸⁹ DEMEC does not argue that managing a consolidated plan, as opposed to separate plans for each operating company, is unreasonable or imprudent. Rather, DEMEC argues that a consolidated pension plan undermines transparency regarding discretionary contributions that “PHI/Exelon management determines to include in the PHI [Prepaid Pension Assets] balances above any ERISA and Pension Act requirements.”⁹⁰ We disagree. Delmarva provided information going back to 2007 that shows whether PHI contributed amounts to the PHI Retirement Plan over or under minimum requirements.⁹¹

43. DEMEC also asserts that the “the PPA balances as of December 31, 2017 for the three PHI operating companies in combination are almost double Exelon’s own funding strategy.”⁹² DEMEC’s comparison is inapposite. Exelon’s funding strategy reflects one “annual contribution policy” applicable to “all qualified pension plans and Operating Companies of Exelon.”⁹³ By contrast, the PHI operating companies’ Prepaid Pension Assets balances “represent[] the cumulative difference between costs and contributions at the Operating Company level.”⁹⁴ DEMEC responds that it did not intend to point out the difference between the two figures but to show that “Delmarva’s contributions [are] irrespective of any ERISA/Pension Act obligations, and that these decisions are tied to the Exelon funding strategy that is based on management discretion.”⁹⁵ We have already rejected this argument as inapposite; furthermore, DEMEC points to no evidence that suggests Exelon has exercised unreasonable discretion in allocating contributions to Delmarva.⁹⁶ Rather, as Delmarva’s affiant Allen states, “[d]espite the contributions made

⁸⁹ Formal Challenge, Ex. F (DPL Pension Responses 1-11-19 at 6); *see* Delmarva Answer, Allen Aff. ¶ 13 n.2 (“As of year-end 2017, there were about 75,000 people participating in the various plans that Exelon administers.”).

⁹⁰ Formal Challenge at 9-10.

⁹¹ *Id.*, Ex. F (DPL Pension Responses 1-11-19 at 7).

⁹² *Id.* at 8.

⁹³ Delmarva Answer, Allen Aff. ¶ 19.

⁹⁴ *Id.*

⁹⁵ DEMEC Answer at 9.

⁹⁶ *See* Delmarva Answer, Allen Aff. ¶ 16 (explaining the allocation based on the funding status of the PHI Companies as of January 1, 2017).

to date, all of Exelon's qualified pension plans still continue to be under 100 [percent] funded."⁹⁷

44. DEMEC also argues that Delmarva has not shown that its Prepaid Pension Assets balance is tied to "ensuring the security of Delmarva employee pensions."⁹⁸ In finding in the Delmarva 2017 Order that Delmarva justified the Prepaid Pension Assets as prudent, the Commission agreed with Delmarva that "pre-paying pension costs to ensure the security of employees' pensions is a reasonable and prudent business decision."⁹⁹ DEMEC avers that Delmarva has stated that PHI contributed less than the minimum requirements under ERISA and the Pension Act from 2014 to 2017.¹⁰⁰ But Delmarva's affiant Allen clarifies that the "the minimum required contribution was satisfied in all years through the use of the Plan's available credit balance in conjunction with cash contributions."¹⁰¹

45. Once Exelon determines the annual contributions for each qualified pension plan, allocations to the PHI Retirement Plan are made with the aim of achieving a 90 percent utility funding level for each PHI affiliate.¹⁰² DEMEC criticizes PHI's target of 90 percent utility funding levels for the PHI affiliates by arguing that Delmarva does not tie the funded status of each PHI affiliate to its respective Prepaid Pension Assets balance.¹⁰³ But that argument is inapposite. The Prepaid Pension Assets balance reflects the difference between cumulative Cash Contributions and cumulative Accounting Costs,

⁹⁷ *Id.*, Allen Aff. ¶ 15.

⁹⁸ Formal Challenge at 8 (citing Ex. A, Kumar Aff. ¶¶ 19-20).

⁹⁹ Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 22.

¹⁰⁰ Formal Challenge at 9 (citing Ex. F (DPL Pension Responses 1-11-19 at 6-7)); *see* Delmarva Answer, Allen Aff. ¶ 12 ("The guidelines associated with pension contributions are intended to represent the standard by which plan sponsors must contribute to the plan in a single annual period to avoid violating the law and/or other restrictions in that year.").

¹⁰¹ Delmarva Answer, Allen Aff. ¶ 18; *see* 29 U.S.C. § 1083(f) (2018) (reduction of minimum required contribution by prefunding balance and funding standard carryover balance).

¹⁰² Delmarva Answer, Allen Aff. ¶ 16.

¹⁰³ *See* Formal Challenge at 9 (citing Ex. A, Kumar Aff. ¶ 20 & n.8).

and does not correspond to an affiliate's funded status.¹⁰⁴ DEMEC also argues that Delmarva fails to explain the relationship between securing its employees' pensions and Exelon management's aim to achieve a similar funding status for the PHI affiliates.¹⁰⁵ We find that it is reasonable for a company like Exelon that administers a consolidated plan to aim to fund employee pensions of the affiliates in the plan at a consistently high level.

iv. Reasonableness of Prepaid Pension Assets

46. Although Delmarva argues that prudence is the only issue in this proceeding,¹⁰⁶ DEMEC also challenges the reasonableness of the Prepaid Pension Assets balance.¹⁰⁷ As the Commission stated in the Delmarva 2017 Order, "[t]he formula rate protocols specify that Formal Challenges are limited to whether costs are reasonable, prudent, and properly recorded, and whether the formula rate has been applied according to its terms."¹⁰⁸ DEMEC argues that the Prepaid Pension Assets amount is not reasonable because Delmarva did not show benefits to transmission customers that correspond to the PPA amounts it seeks to recover.¹⁰⁹ Relying primarily on *Southern*, DEMEC argues that Delmarva must show that its recorded pension expenses contributed to transmission rate reductions.¹¹⁰

47. We find that DEMEC misunderstands the Commission's holding in *Southern* as it relates to Delmarva's formula rate. The Prepaid Pension Assets in Delmarva's formula rate, for which Delmarva seeks recovery, comprise the Cash Contributions that Delmarva

¹⁰⁴ See *supra* discussion *supra* Part V.B.1.a.

¹⁰⁵ Formal Challenge at 9.

¹⁰⁶ Delmarva Answer at 7.

¹⁰⁷ Formal Challenge at 5.

¹⁰⁸ Delmarva 2017 Order, 160 FERC ¶ 61,102 at P 19 (citing PJM, Intra-PJM Tariffs, OATT, OATT Attachment H-3E, § 3(d)).

¹⁰⁹ Formal Challenge at 6 (citing *Southern*, 122 FERC ¶ 61,218 at PP 21-24); *id.* at 11; DEMEC Answer at 11-13.

¹¹⁰ Formal Challenge at 10-11 (citing *Southern*, 122 FERC ¶ 61,218 at PP 21, 23). DEMEC also relies on a recently-issued initial decision. *Id.* at 11 (citing *Entergy*, 165 FERC ¶ 63,010). The parties in that proceeding have timely filed exceptions to the initial decision and thus it is not a final Commission decision. See 18 C.F.R. § 385.708(d) (2019).

has already financed.¹¹¹ However, in *Southern*, it was critical to show a reduction in rates resulting from pension income in order to show that the utility financed the amounts it sought to include in rate base.¹¹²

48. Exelon’s current funding strategy—encompassing Delmarva—is “to contribute the greater of (1) \$300 million until all the qualified plans are fully funded on an [Accumulated Benefit Obligation (ABO)] basis, and (2) the minimum amounts under ERISA and the [Pension Act] to meet minimum contribution requirements and/or to avoid benefit restrictions and at-risk status.”¹¹³ The Prepaid Pension Assets amount of \$196.6 million in the 2018 Annual Update thus reflects payments Delmarva has made over the years to fulfill its ongoing pension obligations. We find that Delmarva’s Cash Contributions reflect necessary costs, and that it was reasonable for Delmarva to include a portion of the \$196.6 million Prepaid Pension Assets amount in rate base in the 2018 Annual Update.

49. As we reject DEMEC’s argument about customer benefits, we dismiss DEMEC’s related argument that it is difficult to correlate benefits to Delmarva’s transmission customers with increases to the Prepaid Pension Assets balance.¹¹⁴

50. Finally, we deny DEMEC’s alternative request to establish hearing and settlement judge procedures.¹¹⁵ We find no basis for further transparency as to PHI’s ERISA and Pension Act obligations or for a determination about benefits to customers relative to Delmarva’s prepaid pension expenses.

¹¹¹ Delmarva Answer, Allen Aff. ¶ 23 (explaining the calculation of the Prepaid Pension Assets); *id.* at 24 (“Delmarva is asking customers to reimburse Delmarva for the time value of money that Delmarva incurs in making these contributions.”).

¹¹² *Southern*, 122 FERC ¶ 61,218 at P 21 (finding that “when a utility’s rates have been reduced by pension income, but the utility has not received such income from the external trust, it will have to finance such amount, and is entitled to include the pension income in rate base”).

¹¹³ Delmarva Answer, Allen Aff. ¶ 15.

¹¹⁴ *See* Formal Challenge at 7.

¹¹⁵ *Id.* at 12.

2. Income Tax Rate

a. Delmarva's Treatment

51. In its 2018 Annual Update, Delmarva filed rates to be effective from June 1, 2018 to May 31, 2019 (Rate Year).¹¹⁶ The Annual Update for each Rate Year is “based upon Delmarva’s FERC Form No. 1 data or other verifiable data for the most recent calendar year and shall be based upon Delmarva’s books and records consistent with FERC’s accounting policies.”¹¹⁷ Delmarva also trued up rates for the period June 1, 2017 to May 31, 2018 based on January 1, 2017 to December 31, 2017 data.¹¹⁸ Delmarva records federal income tax (FIT) in Line 128 of its formula rate.¹¹⁹

b. DEMEC's Formal Challenge

52. DEMEC asserts that in the 2018 Annual Update Delmarva improperly used the FIT rate of 35 percent to true up the January 1, 2018 – May 31, 2018 rates. DEMEC states that the 2018 Annual Update fails to reflect that the Tax Cuts and Jobs Act of 2017¹²⁰ (TCJA) reduced the FIT rate to 21 percent effective January 1, 2018. DEMEC argues that because the revenues received by Delmarva for the period of January 1, 2018 to May 31, 2018 were subject to a 21 percent FIT rate, transmission customers should not be charged rates incorporating the prior FIT rate of 35 percent. DEMEC argues that the Commission has previously recognized that the TCJA became effective on January 1, 2018, and that its benefits should be provided to transmission customers as of that date.¹²¹

¹¹⁶ See PJM, Intra-PJM Tariffs, OATT ATT H-3E, OATT Attachment H-3E – Delmarva (3.1.0), Formula Rate Implementation Protocols § 2(a).

¹¹⁷ *Id.* § 2(f)(i).

¹¹⁸ *Id.*, OATT ATT H-3D, OATT Attachment H-3D – Delmarva (6.2.0), Appendix A, Attachment 6; *see also* Delmarva Answer at 44.

¹¹⁹ PJM, Intra-PJM Tariffs, OATT ATT H-3D, OATT Attachment H-3D – Delmarva (6.2.0), Appendix A.

¹²⁰ Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

¹²¹ Formal Challenge at 13.

c. Delmarva's Answer

53. Delmarva argues that DEMEC ignores the fact that Delmarva's formula rate requires that it use historical data, and therefore, Delmarva was required to use the 35 percent FIT rate to true up rates from January 1, 2018 to May 31, 2018.¹²² Delmarva maintains that it acted consistent with the filed-rate doctrine.¹²³ Delmarva also notes that, though this use of historical data resulted in higher rates in this instance, DEMEC has benefited in prior years when tax rates increased.¹²⁴ Delmarva further states that the Commission recently addressed this issue, rejecting a formal challenge against Duke Energy Progress, LLC's (DEP) formula rate, which similarly uses a historic test year.¹²⁵ Delmarva emphasizes the Commission's finding "that DEP correctly used the federal corporate income tax rate in effect in 2017 in preparing the 2018 Annual Update, and appropriately did not adjust its January 1, 2018, to May 31, 2018 wholesale transmission rates to reflect the reduction in the federal corporate income tax rate that took effect on January 1, 2018."¹²⁶

d. DEMEC's Answer

54. DEMEC rejects for two reasons Delmarva's claim that it calculated its rates for January 1, 2018 to May 31, 2018 based on 2017 data. First, DEMEC argues that in Delmarva's true-up calculations, in Attachment 6 of Attachment H-3D, Delmarva substituted actual 2018 plant costs in place of the projected costs for plant to be installed in 2018. Similarly, DEMEC argues, the 21 percent FIT rate should be used since the TCJA was signed into law during Delmarva's test period and became effective January 1, 2018. Second, DEMEC notes Delmarva did not deny the fact that, with respect to its tax obligations to the Internal Revenue Service, its revenues for the period of January 1, 2018 to May 31, 2018 were subject to the 21 percent FIT rate. DEMEC maintains that

¹²² Delmarva Answer at 42.

¹²³ *Id.* at 43 (citing *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246 (1951); *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000)).

¹²⁴ *Id.*

¹²⁵ *Id.* at 45 (citing *N.C. Elec. Membership Corp. v. Duke Energy Progress, LLC*, 166 FERC ¶ 61,026, at PP 42-47 (*Duke*) (2019)).

¹²⁶ *Id.* at 45-46 (citing *Duke*, 166 FERC ¶ 61,026 at P 43).

Delmarva would receive a windfall at customers' expense if it is allowed to use the 35 percent FIT rate for this period. DEMEC also argues that *Duke* is distinguishable from this proceeding.¹²⁷

e. Delmarva's Second Answer

55. Delmarva rejects as false and unsupported DEMEC's claim that it substituted actual 2018 plant costs in place of projected costs in the true-up calculation. Delmarva argues that DEMEC appears to deliberately misconstrue the operation of Attachment 6 of Attachment H-3D (Delmarva's Estimate and Reconciliation Worksheet) to suggest that actual 2018 plant costs are substituted in place of projected costs for the plant to be installed in 2018. Delmarva argues actual plant costs from 2018 were never used to true-up the charges for June 1, 2017 to May 31, 2018. Instead, Delmarva maintains, those charges were trueed up based on actual costs from 2017, as reported on the FERC Form 1 and as required by the formula rate.¹²⁸

f. Commission Determination

56. We deny DEMEC's Formal Challenge of Delmarva's FIT rate used in the true-up portion of the 2018 Annual Update. On May 12, 2017, Delmarva filed its annual update (2017 Annual Update) to set transmission rates for June 1, 2017 to May 31, 2018 (2017/2018 Rate Year), based on test year costs incurred between January 1, 2017 and December 31, 2017.¹²⁹ Due to when the Annual Update is filed, certain of these costs must be projected. The differences between the projected costs and actual costs in the 2017/2018 Rate Year are trueed-up in the 2018 Annual Update.¹³⁰ In its 2017 Annual Update, Delmarva forecasted a 35 percent FIT rate.¹³¹ The actual FIT rate in the same period (January 1, 2017 to December 31, 2017) was also 35 percent because, as DEMEC

¹²⁷ DEMEC Answer at 16-17.

¹²⁸ Delmarva Second Answer at 5.

¹²⁹ Delmarva Answer at 44; *see also* PJM, Intra-PJM Tariffs, OATT ATT H-3D, OATT Attachment H-3D – Delmarva (6.2.0), Appendix A, Attachment 6.

¹³⁰ PJM, Intra-PJM Tariffs, OATT ATT H-3E, OATT Attachment H-3E – Delmarva (3.1.0), Formula Rate Implementation Protocols § 5(a); Delmarva Second

Answer at 6 & n.14 (explaining the multi-step process in Attachment 6 to arrive at the true-up amount).

¹³¹ Delmarva, May 12, 2017 Informational Filing of 2017 Formula Rate Annual Update at Appendix A, Line 128.

notes, the TCJA took effect on January 1, 2018. Because the forecasted and actual FIT rate were the same, Delmarva did not need to true up the FIT rate in its 2018 Annual Update for the January 1, 2018 to May 31, 2018 rates.¹³²

57. The Commission has previously rejected the use of a changed income tax rate where a formula rate uses a lagged historical test year, most recently in *Duke* regarding the TCJA.¹³³ There, the Commission noted that it generally requires that formula rate inputs be calculated on a synchronized basis over the same test period absent a contrary statement in the filed rate.¹³⁴ We find that Delmarva appropriately adhered to its filed rate. Delmarva's formula rate protocols specify that annual updates "shall be applicable to services on and after June 1 of a given calendar year through May 31 of the subsequent calendar year (the "Rate Year"),"¹³⁵ and that each annual update "shall, as specified in Attachment H, be based upon Delmarva's FERC Form No. 1 data or other verifiable data for the most recent calendar year[.]"¹³⁶ Therefore, Delmarva's use of a historical formula rate methodology dictates that Delmarva use the federal corporate income tax rate in effect during the historical test year, which it did.¹³⁷

¹³² Delmarva's 2018 Annual Update (filed May 15, 2018 for the June 1, 2018 through May 31, 2019 Rate Year) appropriately used a 21 percent FIT rate.

¹³³ *Duke*, 166 FERC ¶ 61,026 at PP 42-47.

¹³⁴ *Id.* P 44.

¹³⁵ PJM, Intra-PJM Tariffs, OATT ATT H-3E, OATT Attachment H3-E – Delmarva (3.1.0), Formula Rate Implementation Protocols § 2(a).

¹³⁶ *Id.* § 2(f)(i).

¹³⁷ See, e.g., *Ameren Ill. Co.*, 163 FERC ¶ 61,200, at P 4 (2018) (noting "the Commission's requirement that all rate base components and expenses in rates be calculated on a synchronized basis over the same test period"); *Westar Energy, Inc.*, 122 FERC ¶ 61,268, at P 98 (2008) ("Under Commission policy, companies must use a fully-synchronized test period cost-of-service study that uses either an historical test period or a projected test period."); *Metropolitan Edison Co.*, Opinion No. 304, 44 FERC ¶ 61,053, at 61,146 (1988) ("Under Commission ratemaking procedures for developing the wholesale cost of service, all test year expenses and revenues, including an allowance for income taxes associated with such revenues, are synchronized.").

58. As the Commission noted in *Duke*,¹³⁸ this synchronization requirement, and the Commission's related reluctance to permit selective post-test period adjustments,¹³⁹ protects both utilities and their customers by preventing either from selectively choosing which inputs should come from which time period to one party's exclusive benefit.¹⁴⁰ Moreover, as the Commission noted in *Duke*, this is particularly important where the formula rate at issue is the product of a negotiated settlement between the utility and its customers, as is the case with Delmarva's transmission formula rate.¹⁴¹

59. Furthermore, we find unavailing DEMEC's argument that Delmarva will receive a windfall because its "tax obligations to the [IRS] [for] its revenues for the period of January 1, 2018 – May 31, 2018 were subject to the 21 [percent tax] rate."¹⁴² DEMEC overlooks the nature of using a historic test year, which means that each Rate Year is based on costs incurred during the "most recent calendar year."¹⁴³

¹³⁸ *Duke*, 166 FERC ¶ 61,026 at P 44.

¹³⁹ *E.g.*, *Pub. Serv. Co. of N.M.*, Opinion No. 73, 10 FERC ¶ 61,053, at 61,121-23 (concluding that it is not proper to adjust the test period cost-of-service data in a cost-of-service rate proceeding to reflect post-test year changes in the federal corporate income tax rates), *reh'g denied*, 10 FERC ¶ 61,244 (1980).

¹⁴⁰ *See Idaho Power Co.*, 153 FERC ¶ 61,212, at P 33 (2015) ("Allowing Idaho Power to continue to use a historic formula rate methodology for recovering all its other expenses, with the certainty and protections that provides to Idaho Power, while allowing it to deviate from the prescribed methodology in this one instance would favor Idaho Power's interests over that of its customers.").

¹⁴¹ *Duke*, 166 FERC ¶ 61,026 at P 44 n.106 (quoting *Idaho Power Co.*, 153 FERC ¶ 61,212 at P 33 ("Idaho Power's Formula Rate, for which it sought and obtained Commission approval, was the product of negotiations among the parties wherein they reached agreement on a comprehensive methodology that would be the sole means by which Idaho Power would recover its costs.")); *Baltimore Gas and Elec. Co.*, 153 FERC ¶ 61,140 (2015) (approving partial settlement agreement concerning, among other things, Delmarva's formula rate protocols); *Baltimore Gas and Elec. Co.*, 115 FERC ¶ 61,066 (2006) (approving uncontested settlement of transmission owners including Delmarva concerning their formula rates).

¹⁴² DEMEC Answer at 16-17.

¹⁴³ PJM, Intra-PJM Tariffs, OATT ATT H-3E, OATT Attachment H-3E – Delmarva (3.1.0), Formula Rate Implementation Protocols § 2(f)(i). Moreover, as Delmarva notes, and DEMEC does not dispute, it appears that DEMEC has previously been the beneficiary of the utility's use of a historic test year. Maryland increased its

60. Finally, we find to be without merit DEMEC's assertion that Delmarva substituted actual costs from 2018 in place of projected costs for transmission plant to be installed in 2018.¹⁴⁴ DEMEC fails to explain this claim, and we find no evidence that Delmarva has made the alleged substitution.

3. Retired Plant ADIT

a. Delmarva's Treatment

61. In its 2018 Annual Update, Delmarva removed from Account 282 (Accumulated Deferred Income Taxes – Other Property) approximately \$1.25 million of ADIT associated with two transmission facilities that it retired in 2017. Delmarva records the total ADIT allocated to transmission on Line 43 of its formula rate.¹⁴⁵

b. DEMEC's Formal Challenge

62. DEMEC alleges Delmarva failed to return to transmission customers in the 2018 Annual Update the \$1.25 million of ADIT associated with the two transmission facilities Delmarva retired in 2017. DEMEC maintains that customers fund the ADIT associated with retired transmission facilities, and therefore should not lose the benefit of that ADIT.¹⁴⁶

state income tax rate from 7 percent to 8.25 percent, effective January 1, 2008. Tax Reform Act of 2007, Md. Code, Tax – General, § 10-105(b). In the true-up portion of its annual update filed in 2008, Delmarva maintains it used the 7 percent state income tax rate to true up rates charged from June 1, 2007 through May 31, 2008. Delmarva Answer, Spanos Aff. ¶ 8. As a result, Delmarva customers would be charged at a lower state income tax rate during the period January 1, 2008 to May 31, 2008 than was effective at that time.

¹⁴⁴ See 2018 Annual Update at Appendix A, Attachment 6.

¹⁴⁵ PJM, Intra-PJM Tariffs, OATT ATT H-3D, OATT Attachment H-3D (6.2.0), Appendix A; see also 2018 Annual Update at Attachment 1 – Accumulated Deferred Income Taxes Worksheet.

¹⁴⁶ Formal Challenge at 13-15 (citing *Pub. Util. Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117, at PP 3, 4, 18 (2018) (ADIT NOPR); *Accounting and Ratemaking Treatment of Accumulated Deferred Income Taxes and Treatment Following the Sale or Retirement of an Asset*, 165 FERC ¶ 61,115, at P 40 (2018) (ADIT Policy Statement)).

c. Delmarva's Answer

63. Delmarva argues that there was no excess ADIT to return to customers for facilities that were retired prior to the change in the tax rate in 2018. Delmarva also contends that the two Commission issuances that DEMEC references are not applicable to 2017 plant retirements.¹⁴⁷

d. DEMEC's Answer

64. DEMEC argues that Delmarva misconstrues the basis of its challenge regarding the retired plant ADIT. DEMEC maintains that, while it referred to the TCJA and the associated Notice of Proposed Rulemaking (NOPR) in Docket No. RM19-5 and Policy Statement in Docket No. PL19-2, the TCJA was not the impetus for DEMEC's Formal Challenge on this issue. DEMEC argues it referred to the NOPR given the Commission's recognition that customers fund the ADIT associated with retired transmission facilities. Thus, DEMEC argues, the NOPR supports DEMEC's position that customers should not lose the benefit of the associated ADIT. DEMEC argues that the Commission should require Delmarva to reduce the ATRR and return to transmission customers the value of the ADIT associated with the retired plant. Once the plant is retired, DEMEC maintains, Delmarva will not earn a return on it, and it would not have any current or future income tax liability with the retired plant. As a result, DEMEC avers, the whole ADIT associated with the retired transmission facility becomes excess.¹⁴⁸

e. Commission Determination

65. We deny DEMEC's Formal Challenge to Delmarva's treatment of retired plant ADIT. ADIT balances are accumulated on the books and records of regulated companies based on the requirements of the Uniform System of Accounts.¹⁴⁹ 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.¹⁵⁰

¹⁴⁷ Delmarva Answer at 48-49.

¹⁴⁸ DEMEC Answer at 18.

¹⁴⁹ See Definitions of Account 182.3 and Account 254, 18 CFR part 101, *Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act*.

¹⁵⁰ See 18 C.F.R. § 35.24(d)(2) (2019).

66. In Order No. 144, the Commission explained that the purpose of tax normalization is to match the tax effects of costs and revenues with the recovery in rates of those same costs and revenues.¹⁵¹ Because of the timing differences that lead to ADIT, the tax effects of these differences are placed in a deferred tax account, which is to be used in later periods when the differences reverse.¹⁵²

67. DEMEC argues that customers should receive the benefit of the ADIT associated with this retired plant. Delmarva replies that it retired two transmission facilities in 2017 and thus any remaining taxes on those assets became due upon retirement.¹⁵³ We agree. As the Commission stated in its recent ADIT Policy Statement, “the sale or retirement of an asset with an ADIT balance is usually deemed a taxable event under IRS rules, and, as such, the ADIT balance is extinguished as the deferred taxes then become payable to the appropriate government authorities, and there is no longer an ADIT balance to ‘return’ to customers.”¹⁵⁴ Delmarva therefore had no excess taxes to include in ADIT and appropriately reduced its ADIT balance.

68. The ADIT NOPR which DEMEC cites is inapposite as it deals with a different issue, the effect of a reduction in tax rates in the TCJA on the remaining ADIT balance. Since Delmarva retired the plant at issue in 2017 before the TCJA took effect, no tax rate change occurred. The 35 percent tax rate applies to both the ADIT balance and the taxes Delmarva owed to the IRS on these facilities, so no excess ADIT exists.

¹⁵¹ *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, at 31,522, 31,530 (1981) (cross-referenced at 15 FERC ¶ 61,133), *order on reh’g*, Order No. 144-A, FERC Stats. & Regs. ¶ 30,340 (1982).

¹⁵² Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,554.

¹⁵³ Delmarva Answer at 48 (citing Order No. 144, FERC Stats. & Regs. ¶ 30,254 at p. 44).

¹⁵⁴ ADIT Policy Statement, 165 FERC ¶ 61,115 at P 40.

4. **Intangible Plant**

a. **Delmarva's Treatment**

69. Delmarva records General and Intangible Plant costs, including Miscellaneous Intangible Plant recorded in Account 303, on Line 23 of its formula rate.¹⁵⁵ Delmarva provides related cost support in Attachment 5.¹⁵⁶

b. **DEMEC's Formal Challenge**

70. DEMEC challenges Delmarva's inclusion of certain software-related costs in Account 303, Miscellaneous Intangible Plant.¹⁵⁷ DEMEC states that, based on Delmarva's description, these software items should be booked as distribution facilities to an account such as Account 370, Meters. Moreover, DEMEC maintains, it is inappropriate to include these items in Account 303 because software is not intangible per the description of Account 303.¹⁵⁸ DEMEC states that its requested adjustment here would reduce the net Intangible Plant by about \$862,000, resulting in a total ATRR reduction of \$10,000.¹⁵⁹

c. **Delmarva's Answer**

71. Delmarva refutes DEMEC's claim that it booked certain software-related costs incorrectly. Delmarva asserts that Account 303 is meant to include software licenses, and that Delmarva acquired all three software programs, which track work management issues or relate to customer billing, by purchasing a license. Delmarva further explains that its accounting treatment of these assets is consistent with GAAP. Delmarva avers that DEMEC cannot conclusively state where the costs should be booked, only that Delmarva should book the costs elsewhere, "such as Account 370." Delmarva maintains that Account 370 is inappropriate because, by its own definition, Account 370

¹⁵⁵ PJM, Intra-PJM Tariffs, OATT ATT H-3D, OATT Attachment H-3D (6.2.0), Appendix A.

¹⁵⁶ 2018 Annual Update at Attachment 5 – Cost Support, ARO & Merger Related Exclusion – Cost Support, Line 23.

¹⁵⁷ Formal Challenge at 15; *see also id.*, Ex. L (Response of Delmarva to Question DEMEC 1-25).

¹⁵⁸ *Id.* (citing Ex. A, Kumar Aff. ¶ 32).

¹⁵⁹ *Id.*

does not include software to track work management.¹⁶⁰ Delmarva argues that FERC does not permit the selective removal of multi-functional assets recorded to Account 303 based on whether they are identified as relating more to one function, such as distribution, than another. Instead, Delmarva states, the wage and salary allocator is the only means by which charges recorded to Account 303 are allocated among the transmission and distribution functions.¹⁶¹

d. DEMEC's Answer

72. DEMEC argues Delmarva's answer fails to explain whether Account 370 would be appropriate for recording software associated with customer billing. DEMEC argues that if the software is not related to metering and billing, Account 383 would be the appropriate account as Account 383 is titled "Computer Software" and is the only account where "Software licenses" and not just "Licenses" are mentioned. However, DEMEC argues, if the software is related to metering and billing, then it should be booked to Account 370.¹⁶²

e. Commission Determination

73. We deny DEMEC's Formal Challenge related to Delmarva's three software assets booked to Account 303. The instructions for this account state that it "shall include the cost of patent rights, licenses, privileges, and other intangible property necessary or valuable in the conduct of utility operations and not specifically chargeable to any other account."¹⁶³ DEMEC maintains that software is not intangible, but as Delmarva explains, the items involve licenses. Account 303 expressly includes licenses. Delmarva notes that the licenses are for "software [that] generally track work management issues or relate to customer billing."¹⁶⁴ We find Delmarva's accounting here to be appropriate because

¹⁶⁰ Delmarva Answer at 50-52.

¹⁶¹ *Id.* at 52.

¹⁶² DEMEC Answer at 19.

¹⁶³ See Definition of Account 303, 18 CFR part 101, *Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act*.

¹⁶⁴ Delmarva Answer at 50; see Formal Challenge, Ex. A, Kumar Aff. ¶ 32 ("The Dynamic Pricing Functionality project created the functionality in the SAP system to enroll customers in the program, calculate their individual usage baselines, determine the customer credits and apply those credits to the customer bills." (quoting Delmarva's response to DEMEC 2-14(a))).

these software licenses are “not specifically chargeable to any other account.”¹⁶⁵ DEMEC proffers that Delmarva should have used Account 370 or Account 383. We disagree. Account 370 is specifically for “the cost installed of meters or devices ... for use in measuring the electricity delivered to its users”¹⁶⁶ and Account 383 is restricted to software “purchased and used to provide scheduling, system control and dispatching, system planning, standards development, market monitoring, and market administration activities.”¹⁶⁷ The software assets at issue here fall outside the scope of both of those accounts, and are more appropriately booked to Account 303, as Delmarva has done.

The Commission orders:

The Formal Challenge is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁶⁵ See Definition of Account 303, 18 CFR part 101, *Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act*.

¹⁶⁶ See Definition of Account 370, 18 CFR part 101, *Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act*.

¹⁶⁷ See Definition of Account 383, 18 CFR part 101, *Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act*.