

171 FERC ¶ 61,217
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Commonwealth Edison Company	Docket Nos. ER18-899-002
Delmarva Power & Light Company	ER18-903-002
Atlantic City Electric Company	ER18-904-002
Potomac Electric Power Company	ER18-905-002
PJM Interconnection, L.L.C.	(Not Consolidated)

ORDER DENYING REHEARING
AND GRANTING CLARIFICATION

(Issued June 18, 2020)

1. On October 9, 2018, Commonwealth Edison Company (ComEd), Delmarva Power & Light Company (Delmarva), Atlantic City Electric Company (ACE), and Potomac Electric Power Company (PEPCO) (together, Exelon Companies) filed a request for rehearing of the September 7, 2018 order in the captioned dockets that rejected proposed revisions to Exelon Companies' formula transmission rates (Formula Rates), contained in Attachments H-13A, H-3D, H-1A, and H-9A of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (OATT).¹ That same day, Delaware Municipal Electric Corporation, Inc. (DEMEC) and Southern Maryland Electric Cooperative, Inc. (SMECO) each filed requests for clarification or, in the alternative, rehearing of the September 2018 Order in Docket Nos. ER18-903-001 and ER18-905-001, respectively.
2. For the reasons discussed below, we deny Exelon Companies' request for rehearing and grant DEMEC's and SMECO's requests for clarification of the September 2018 Order.

¹ *Commonwealth Edison Co.*, 164 FERC ¶ 61,172 (2018) (September 2018 Order).

I. Background

A. Order No. 144

3. The origins of this proceeding extend back almost four decades to 1981, when the Commission amended its regulations in Order No. 144 to require companies to determine the income tax allowance in jurisdictional rates on a fully normalized basis.² Prior to Order No. 144, utilities generally flowed-through to ratepayers the tax benefits resulting from deductible expenses in the same period that the utility used those deductions to reduce its tax liability, such that ratepayers would not be charged more than the utility's current tax liability. Under normalization, the reduction of a utility's tax expense in its cost of service for determining rates is timed to match the ratemaking treatment for recovery of that expense, which may be spread over a number of years (referred to as the "matching" principle).³ In Order No. 144, the Commission required utilities to use tax normalization to address all relevant timing differences but permitted them to file, in their next rate case following the rule's applicability, "any adjustments to deferred taxes for deficiencies or excesses caused by reversals of past flow-through transactions or tax rate changes."⁴

4. Following Order No. 144, the Financial Accounting Standards Board issued its 1992 Financial Accounting Standards Board Statement No. 109 (FAS 109), which required public utilities to make certain changes to their balance sheets. Among other things, FAS 109 required: (1) recognition in the deferred tax accounts for changes in tax laws or tax rates in the period that the change is enacted (Excess/Deficient Deferred Taxes); (2) recognition of a deferred tax liability for the equity component of Allowance for Funds Used During Construction (AFUDC) depreciation expense (AFUDC Equity); and (3) recognition of a deferred tax liability for timing differences under normalization even if the deferred tax liability was previously flowed through to ratepayers prior to adopting normalization (Flow-Through Items). In a 1993 guidance letter, the Commission's Chief Accountant noted that Order No. 144 already required utilities to make provision for excess or deficient deferred taxes to reflect the change to

² *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), *reh'g*, Order No. 144-A, FERC Stats. & Regs. ¶ 30,340 (1982) (cross-referenced at 18 FERC ¶ 61,163).

³ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,521.

⁴ *Id.* at 31,519.

normalization and tax rate changes, but explained that FAS 109 required more detailed accounting and reporting.⁵

B. Baltimore Gas and Electric Company's (BGE) Filing in Docket No. ER17-528-000

5. Prior to the Exelon Companies' Formula Rates filings at issue in this proceeding, Exelon Companies' affiliate BGE filed a similar proposal in December 2016 seeking to recover or refund in its formula rate amounts accounted for under FAS 109.⁶ Specifically, BGE sought to implement mechanisms to recover or refund, as appropriate, Excess/Deficient Deferred Taxes, AFUDC Equity, and Flow-Through Items.⁷ In addition to implementing these mechanisms on a prospective basis, however, BGE also proposed to use the "*South Georgia* method" to collect from, or return to, customers amounts related to deferred Accumulated Deferred Income Taxes (ADIT) that would have been collected had these mechanisms been in place when BGE's formula rate became effective in 2005, over the remaining depreciable life of the plant from which the recoverable amounts originated.⁸ The Commission rejected the proposed revisions in November 2017, finding that BGE failed to demonstrate that its proposed mechanism for the recovery of previously incurred tax amounts was just and reasonable.⁹ In particular, the Commission found that BGE should have captured the accumulated amounts associated with AFUDC Equity that has already been depreciated and prior period tax balances

⁵ *Accounting for Income Taxes*, Docket No. AI93-5-000 (April 23, 1993) (1993 Guidance Letter).

⁶ BGE supplemented its Formula Rate filing in May 2017, in response to a deficiency letter from Commission staff.

⁷ See *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,163, at PP 6-8 (2017) (BGE November 2017 Order), *reh'g denied*, 164 FERC ¶ 61,173, at PP 36-38 (2018) (BGE Rehearing Order), *aff'd sub nom. Balt. Gas & Elec. Co. v. FERC*, 954 F.3d 279 (D.C. Cir. 2020) (*BG&E*).

⁸ As explained in the September 2018 Order, under the *South Georgia* method, the difference between the amount actually in the deferred account and the amount that would have been in the deferred account had normalization continuously been followed is collected from ratepayers over the remaining depreciable life of the plant that caused the difference. When the deferred account is fully funded at the end of this transition period, the annual increment ceases. *Id.* P 6 n.10 (citing *South Georgia Nat. Gas Co.*, Docket No. RP77-32 (May 5, 1978) (delegated order); *Memphis Light, Gas & Water Div. v. FERC*, 707 F.2d 565, 569 (D.C. Cir. 1983)).

⁹ BGE November 2017 Order, 161 FERC ¶ 61,163 at P 18.

associated with Flow-Through Items in its formula rate since its implementation in 2005, i.e. BGE's "next rate case" following Order No. 144.¹⁰

6. BGE sought rehearing of the Commission's determination regarding the deferred tax amounts, contending, among other arguments, that BGE had complied with the "next rate case" requirement in Order No. 144 because, although its formula rate proceeding resulted in a settlement that expressly excluded FAS 109 amounts, BGE had, in any event, sought recovery within a "reasonable period of time,"¹¹ and its proposal complied with the matching principle.¹² BGE and late intervenor Edison Electric Institute (EEI) both suggested that the Commission misinterpreted Order No. 144 to impose an arbitrary time limit on applicants seeking to recover tax deficiencies, and failed to explain its departure from prior decisions approving similar rate mechanisms.¹³ EEI further suggested that prohibiting BGE from recovering legitimate costs due solely to delay violated BGE's statutory right to recovery under section 205 of the Federal Power Act (FPA).¹⁴

¹⁰ *Id.* PP 18-19.

¹¹ BGE Clarification and Rehearing Request, Docket No. ER17-528-001, at 41-50 (filed Dec. 18, 2017) (BGE Rehearing Request). BGE also sought clarification that, despite the Commission's rejection of its request for recovery of deferred tax amounts, it could implement its proposed mechanism to recover amounts accrued on or after the requested February 11, 2017 effective date, as well as amounts that would have been unrecovered as of that time if BGE had included the mechanism in its formula rate as of 2005. *Id.* at 10-11, 27-36. The Commission denied this clarification, finding that BGE presented its filing as an integrated rate proposal and the Commission thus appropriately rejected the proposal in its entirety, but noted that BGE could make a filing seeking to recover the tax effect on an ongoing basis. BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 36-38. The Maryland Public Service Commission also sought clarification that the BGE November 2017 Order did not preclude refunds to customers associated with tax rate changes. The Commission also denied this clarification based on its rejection of BGE's proposal as a whole. *Id.* P 35.

¹² BGE Rehearing Request at 54-67.

¹³ *Id.* at 51-54, 57-62; EEI Late Intervention and Rehearing Request, Docket No. ER17-528-001, at 8-9, 13-25 (filed Dec. 18, 2017).

¹⁴ 16 U.S.C. § 824d (2018).

C. Exelon Companies' Filings in Docket No. ER18-899-000 et al.

7. In February 2018, as amended in July 2018, Exelon Companies submitted separate but nearly identical filings in these dockets proposing to incorporate into their Formula Rates essentially the same mechanism to refund or recover Excess/Deficient Deferred Taxes, AFUDC Equity, and Flow-Through Items that the Commission rejected in the BGE November 2017 Order.¹⁵ As in BGE's filing, Exelon Companies proposed to use a "South Georgia method" catch-up provision to collect from, or return to, customers any amounts that would have been collected had these mechanisms always been in place when their Formula Rates became effective (2005 or 2007, depending on the individual company), over the remaining depreciable life of the plant from which the recoverable amounts originated.¹⁶

8. Exelon Companies employed several of the same arguments raised in BGE's request for rehearing in Docket No. ER17-528-002 in defense of their proposed recovery of deferred tax amounts. In particular, Exelon Companies echoed points from the BGE rehearing request to assert that the proposed revisions: (1) did not violate the "next rate case" requirement in Order No 144 because Exelon Companies' 2005 and 2007 Formula Rates cases were resolved via settlement;¹⁷ (2) would permit recovery within a "reasonable period of time," consistent with Order No. 144;¹⁸ (3) were consistent with Commission policy and the Commission's acceptance of similar proposals;¹⁹ and (4) did not violate the matching principle.²⁰

9. Exelon Companies stressed that the proposed Formula Rates provisions would permit Exelon Companies to flow the benefits of the reduction in the income tax rate

¹⁵ September 2018 Order, 164 FERC ¶ 61,172 at PP 10-12.

¹⁶ See *id.* P 10 n.18 (citing *South Georgia Nat. Gas Co.*, Docket No. RP77-32 (May 5, 1978) (delegated order)).

¹⁷ See ComEd Transmittal Letter, Docket No. ER18-899-000 at 35-37 (filed Feb. 23, 2018) (ComEd Transmittal Letter); BGE Rehearing Request at 41-46. As the ACE, PEPCO, and Delmarva filings are almost identical to ComEd's filing, we have cited to the ComEd transmittal letter for reference to arguments made by Exelon Companies in all four filings.

¹⁸ See ComEd Transmittal Letter at 37-40; BGE Rehearing Request at 47-51.

¹⁹ See ComEd Transmittal Letter at 41-15; BGE Rehearing Request at 57-62.

²⁰ See ComEd Transmittal Letter at 40-41; BGE Rehearing Request at 54-56.

from the Tax Cuts and Jobs Act of 2017²¹ through to customers via decreased rates.²² Although noting that rate impacts would vary from year to year, Exelon Companies used 2017 data to estimate that the proposed Formula Rates revisions would result in a one-year decrease in annual transmission revenue requirements of approximately: \$17 million for ComEd, \$3.4 million for Delmarva, \$3.6 million for ACE, and \$4.4 million for PEPCO.²³

D. September 7, 2018 Order and BGE Rehearing Order

10. On September 7, 2018, the Commission issued concurrently an order rejecting Exelon Companies' filings in these dockets,²⁴ and an order denying BGE's request for rehearing of the Commission's November 2017 Order rejecting BGE's similar filing in Docket No. ER17-528-002.²⁵

11. Consistent with the reasoning in the BGE November 2017 Order, the Commission determined in the September 2018 Order that Exelon Companies had not shown their proposed Formula Rates provisions allowing for the recovery of previously incurred income tax amounts to be just and reasonable.²⁶ Specifically, the Commission held that the deferred amounts Exelon Companies sought to recover should have been captured when their Formula Rates were implemented in 2005 (for Delmarva, ACE, and PEPCO) and 2007 (for ComEd), consistent with the requirement in Order No. 144 that adjustments for the recovery of such tax deficiencies be made in "the applicant's next rate case following the applicability of the rule."²⁷ The Commission found that Exelon Companies failed to comply with this requirement because their initial Formula Rates included line items that expressly excluded recovery of these items and, although these

²¹ 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).

²² See ComEd Transmittal Letter at 3-5 and n.5.

²³ September 2018 Order, 164 FERC ¶ 61,172 at P 14. The Exelon Companies' annual revenue requirements are roughly \$709 million (ComEd), \$127.9 million (Delmarva), \$132.7 million (ACE), and \$161.7 million (PEPCO).

²⁴ September 2018 Order, 164 FERC ¶ 61,172.

²⁵ BGE Rehearing Order, 164 FERC ¶ 61,173.

²⁶ September 2018 Order, 164 FERC ¶ 61,172 at PP 2, 109.

²⁷ *Id.* P 111 (citing Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,519).

filings resulted in settlements, the settlements did not expressly reserve deferred income tax issues to be addressed in some later proceeding.²⁸ The Commission further found that Exelon Companies' delay in filing to adjust their deferred tax deficiencies and excesses likewise did not comply with the requirement in Order No. 144 that applicants begin the process of making these adjustments "so that, within a reasonable period of time to be determined on a case-by-case basis, they will be operating under a full normalization policy."²⁹ The Commission also expressed concern that Exelon Companies' proposed Formula Rates revisions were inconsistent with the matching principle,³⁰ and was not persuaded by Exelon Companies' arguments that permitting recovery of the deferred tax amounts sought in their filings would be consistent with Order No. 144, Commission staff guidance on FAS 109, and prior orders in which Exelon Companies assert that the Commission accepted similar proposals.³¹

12. In the BGE Rehearing Order, the Commission similarly affirmed the determination in the BGE November 2017 Order that BGE should have sought recovery of deferred amounts related to AFUDC Equity and Flow-Through Items at the time BGE implemented its formula rate in 2005, and did not otherwise comply with the directive to implement normalization within a reasonable time.³² Consistent with the BGE November 2017 Order and September 2018 Order, the Commission also affirmed that BGE's proposal raised concerns with the matching principle,³³ and confirmed that the prior orders cited by BGE did not compel the Commission to accept BGE's proposal.³⁴

13. Although confirming that BGE's recovery of the deferred amounts was not just and reasonable, the Commission granted EEI's request for clarification in the BGE Rehearing Order and explained that the Commission's rejection of BGE's proposal in the BGE November 2017 Order was without prejudice to BGE making a filing under section 205 of the FPA to refund or recover Excess/Deficient Deferred Taxes and the tax-on-tax

²⁸ *Id.* PP 111-112.

²⁹ *Id.* P 113 (citing Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,560).

³⁰ *Id.* PP 118-122.

³¹ *Id.* PP 124-128.

³² *See* BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 15-21.

³³ *Id.* PP 25-26.

³⁴ *Id.* PP 27-30.

effect of AFUDC Equity on an ongoing basis.³⁵ The Commission further noted that, if properly supported under FPA section 205, BGE also could seek recovery of the tax effect of undepreciated AFUDC Equity, even if the related assets were placed into service in prior years, as well as Excess/Deficient Deferred Taxes associated with past tax rate changes, such as the Maryland corporate income tax rate increases in 2001 and 2008, which may still be eligible for recovery given the lengthy amortization period associated with excess or deficient ADIT.³⁶ The Commission likewise provided guidance in the September 2018 Order that the Commission's rejection of Exelon Companies' filings did not prohibit Exelon Companies from recovering any prior period tax deficiencies and AFUDC Equity on an ongoing basis, including undepreciated AFUDC Equity associated with assets placed into service in prior years and Excess/Deficient Deferred Taxes associated with recent state tax rate increases and the Tax Cuts and Jobs Act.³⁷

14. The Commission also provided guidance in the September 2018 Order regarding the "reasonable period of time" to file for recovery under Order No. 144, specifying that utilities that had not yet had their "next rate case" following Order No. 144, or who had properly preserved their right to recover past amounts through settlement, could file for recovery within one year of publication of the September 2018 Order in the *Federal Register* without running afoul of this requirement.³⁸ Following this limited compliance period, the Commission clarified that utilities should submit FPA section 205 filings seeking recovery of ADIT amounts within two years of incurring such amounts.³⁹

15. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed the Commission, finding that "the 'next rate case *following applicability of the rule*' is the 'next rate case' after the utility has incurred an item (including either a cost or a benefit) requiring 'normalization' under Order No. 144 and the [1993 Guidance Letter], not counting periods in which a rate case or settlement had itself normalized the treatment of the item (or adequately addressed its normalization)."⁴⁰

³⁵ *Id.* P 36.

³⁶ *Id.* PP 36, 38.

³⁷ September 2018 Order, 164 FERC ¶ 61,172 at PP 130-131.

³⁸ *Id.* P 132.

³⁹ *Id.* P 133.

⁴⁰ *BG&E*, 954 F.3d at 282 (emphasis in original).

E. Order No. 864

16. The Commission provided guidance regarding ADIT for public utilities in Order No. 864, issued on November 21, 2019.⁴¹ On November 15, 2018, the Commission issued a Notice of Proposed Rulemaking in response to the Tax Cuts and Jobs Acts to address excess and deficient ADIT for public utility transmission providers with transmission rates under an OATT, a transmission owner tariff, or a rate schedule.⁴² In Order No. 864, the Commission required public utilities to include the following in their transmission formula rates: (1) a mechanism in their transmission formula rates to deduct any excess ADIT from or add any deficient ADIT to their rate bases;⁴³ (2) a mechanism to decrease or increase their income tax allowances by any amortized excess or deficient ADIT, respectively;⁴⁴ and (3) a new permanent worksheet that will annually track information related to excess or deficient ADIT.⁴⁵ As relevant here, the Commission clarified that the requirements in Order No. 864 “apply only to excess and deficient ADIT caused by the Tax Cuts and Jobs Act and any future tax rate changes, not past period deficient ADIT, and, therefore, do not conflict with the Commission’s determination in [the September 2018 Order].”⁴⁶

F. October 2018 Filings

17. On October 1, 2018, Exelon Companies and BGE submitted new FPA section 205 filings (October 2018 Filings) in Docket Nos. ER19-5-000, ER19-6-000, ER19-10-000, ER19-14-000, and ER19-18-000. In the October 2018 Filings, Exelon Companies and BGE again propose to implement the three tax-related changes to their Formula Rates (Excess/Deficient Deferred Taxes, AFUDC Equity and Flow-Through Items) that were rejected by the September 2018 Order. In the October 2018 Filings, however, Exelon Companies and BGE purported to seek recovery of only the “ongoing” amounts in accordance with the September 2018 Order’s guidance, with a requested effective date of

⁴¹ *Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 864, 84 Fed. Reg. 65,281 (Nov. 27, 2019), 169 FERC ¶ 61,139 (2019), *order on reh’g*, Order No. 864-A, 171 FERC ¶ 61,033 (2020).

⁴² *Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (2018).

⁴³ Order No. 864, 169 FERC ¶ 61,139 at P 28.

⁴⁴ *Id.* P 42.

⁴⁵ *Id.* P 62.

⁴⁶ *Id.* P 51.

October 1, 2018. Exelon Companies and BGE stated in the October 2018 Filings that, “[a]s required by the Commission’s determination ... that [Exelon Companies] may seek recovery of only ‘excess or deficient ADIT to be calculated as of the effective date in the new filings,’ the ... rates pursuant to this Application will not flow through the impacts of the Tax Cuts and Jobs Act on deferred taxes that could have been collected from January 1, 2018 through the Effective Date of this Application.”⁴⁷ On April 26, 2019, the Commission issued an order accepting and suspending the proposed tariff revisions and setting the October 2018 Filings for hearing and settlement judge procedures.⁴⁸

II. Requests for Rehearing and Clarification

A. Exelon Companies Rehearing Request

18. Exelon Companies request that the Commission reverse the September 2018 Order and accept their original applications with the originally requested effective dates.⁴⁹ Exelon Companies argue several points on rehearing similar to those previously raised by Exelon Companies’ affiliate BGE in Docket No. ER17-528-002. In particular, Exelon Companies assert that the Commission erred in the September 2018 Order by: (1) failing to find that the settlements resolving Exelon Companies’ Formula Rates cases preserved FAS 109 issues to be addressed in future proceedings and thus complied with Order No. 144’s “next rate case” requirement;⁵⁰ (2) finding that Exelon Companies did not pursue recovery within a “reasonable period of time”;⁵¹ (3) denying rate recovery to Exelon Companies when rate recovery has been granted for similarly situated

⁴⁷ See, e.g., Delmarva Filing, Docket No. ER19-6-000, at 4 & n.11, 17 & n.49 (filed Oct. 1, 2018) (citing September 2018 Order, 164 FERC ¶ 61,172 at P 131).

⁴⁸ *Commonwealth Edison Co.*, 167 FERC ¶ 61,071 (2019). Settlement discussions remain ongoing.

⁴⁹ Exelon Companies Rehearing Request at 3. Exelon Companies explain that the October 2018 Filings seek recovery only of ongoing FAS 109 amounts, but not catch-up amounts, with a proposed October 1, 2018 effective date. Thus, Exelon Companies assert that, even if the October 2018 Filings were accepted, rehearing of the September 2018 Order is still warranted to ensure recovery of the catch-up amounts from the inception of Exelon Companies’ Formula Rates until October 1, 2018 (or any other effective date adopted by the Commission). *Id.* at 11-12.

⁵⁰ *Id.* at 4, 8, 12-21.

⁵¹ *Id.* at 8, 21-35.

companies;⁵² and (4) holding that Exelon Companies are violating the matching principle for Flow-Through Items.⁵³ In addition, Exelon Companies argue that the Commission: (5) incorrectly concluded that the “FAS 109 regulatory asset for the Exelon Companies should have been amortized away over the years 2005 (or 2007, for ComEd) through 2018;⁵⁴ (6) improperly applied *Stingray Pipeline Co.*, 50 FERC ¶ 61,159 (1990) to make this finding;⁵⁵ (7) effected a new policy, inconsistent with the Commission’s prior FAS 109 rulings, to find that catch-up AFUDC Equity violates the matching principle;⁵⁶ (8) provided a compliance period for other companies to seek catch-up recovery while holding that Exelon Companies only may seek recovery for the period after the effective date of a new filing;⁵⁷ and (9) rejected recovery of properly recorded costs, which Exelon Companies assert, amounts to a violation of the FPA and taking of property without due process or just compensation.⁵⁸

B. SMECO and DEMEC Clarification Requests

19. In separate clarification requests, SMECO and DEMEC each seek clarification, in light of the October 2018 Filings, that the determination in the September 2018 Order that if PEPCO or Delmarva “seek(s) recovery of ADIT amounts in new FPA section 205 filings [it] may obtain such recovery or refund of excess or deficient ADIT to be calculated as of the effective date in the new filings” did not foreclose PEPCO and Delmarva, respectively, from establishing deferred tax balances or creating regulatory liabilities or regulatory assets as of December 31, 2017 and refunding 100% of the Tax Cuts and Jobs Act-related excess ADIT (including as of January 1, 2018 through the effective date of PEPCO’s or Delmarva’s new application) upon Commission authorization for PEPCO or Delmarva to amortize the excess/deficient ADIT balances.⁵⁹ To the extent the Commission did intend such a result, DEMEC and SMECO seek

⁵² *Id.* at 9-10, 40-50.

⁵³ *Id.* at 10, 50-52.

⁵⁴ *Id.* at 9, 35-36.

⁵⁵ *Id.* at 9, 37-40.

⁵⁶ *Id.* at 10, 52-53.

⁵⁷ *Id.* at 10-11, 53-56.

⁵⁸ *Id.* at 11, 56-57.

⁵⁹ DEMEC Clarification Request at 1-2, 7, 10-12; SMECO Clarification Request at 1-2, 5-6 (citing September 2018 Order, 164 FERC ¶ 61,172 at P 131).

rehearing of the September 2018 Order, on the basis that the Commission erred by: (1) depriving customers of the benefit of excess ADIT associated with the Tax Cuts and Jobs Act from January 1, 2018 through the effective date of the October 2018 Filings, contrary to guidance in the September 2018 Order permitting Exelon Companies to submit new FPA section 205 filings to recover and refund excesses and deficiencies related to the Tax Cuts and Jobs Act;⁶⁰ (2) failing to adhere to the Commission's regulations and precedent pertaining to deferred tax balances;⁶¹ (3) impermissibly prejudging Commission action on the Notice of Inquiry in Docket No. RM18-12-000;⁶² (4) diverging from the Commission's recognition in the Notice of Inquiry that it would be appropriate for utilities to include interest on excess and deficient ADIT for the period from January 1, 2018 until adjustments to rate base are implemented;⁶³ and (5) failing to address DEMEC's and SMECO's requests for an FPA section 206⁶⁴ investigation to ensure against the utility's collection of unreasonable and excessive rates.⁶⁵

20. DEMEC further requests clarification that parties will have the ability to raise issues with respect to the ongoing components of Delmarva's proposal in a subsequent proceeding without having them deemed collateral attacks on the September 2018 Order.⁶⁶ Absent such clarification, DEMEC requests rehearing of the September 2018 Order for failure to address DEMEC's arguments pertaining to the ongoing aspects of

⁶⁰ DEMEC Clarification Request at 7-8, 13-14; SMECO Clarification Request at 2-3, 7-8.

⁶¹ DEMEC Clarification Request at 7, 12-13 (citing 18 C.F.R. § 35.24(c)(2) (2019); FAS 109; 1993 Guidance Letter); SMECO Clarification Request at 3, 7 (same).

⁶² DEMEC Clarification Request at 7-8, 14 (citing September 2018 Order, 164 FERC ¶ 61,172 at P 110 n.142; *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdictional Rates*, 162 FERC ¶ 61,223 at PP 15-16) (Notice of Inquiry); SMECO Clarification Request at 3-4, 8-9 (same).

⁶³ DEMEC Clarification Request at 8, 14 (citing Notice of Inquiry, 162 FERC ¶ 61,223 at P 16); SMECO Clarification Request at 4, 8-9 (same).

⁶⁴ 16 U.S.C. § 824e.

⁶⁵ DEMEC Clarification Request at 8-9, 15-17; SMECO Clarification Request at 4, 9-11.

⁶⁶ DEMEC Clarification Request at 9, 17-18.

Delmarva's application,⁶⁷ as well as its requests for an FPA section 206 investigation,⁶⁸ and circumventing *NRG Power Marketing, LLC v. FERC*⁶⁹ by providing guidance on certain aspects of the ongoing aspects of Delmarva's application that could be refiled without addressing DEMEC's concerns.⁷⁰

21. On October 24, 2018, Delmarva and PEPCO each filed answers to the clarification requests in Dockets Nos. ER18-903-002 and ER18-905-002, respectively. Delmarva and PEPCO both assert that permitting flow-through of only "catch-up" Tax Cuts and Jobs Act amounts would be inconsistent with the September 2018 Order, but posit that if the Commission does permit this flow-through of those amounts it should likewise permit flow-through of all of the prior FAS 109 amounts requested in this proceeding.⁷¹ Delmarva and PEPCO further assert that there is no basis for the Commission to institute an FPA section 206 proceeding because the Commission could provide for complete flow-through by granting rehearing in the current proceedings, and the proceedings on the October 2018 Filings in Docket No. ER19-5-000, et al. already provide for flow-through of ongoing amounts as of October 1, 2018 and a new FPA section 206 proceeding instituted now could not provide any broader relief for Tax Cuts and Jobs Act amounts.⁷²

III. Commission Determination

A. Procedural Matters

22. Rule 213(a)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(3) (2019), permits an answer to any pleading if not prohibited by Rule 213(a)(2). We therefore accept Delmarva's and PEPCO's answers to DEMEC's and SMECO's requests for clarification in Docket Nos. ER18-903-001 and ER18-905-001.⁷³

⁶⁷ *Id.* at 9, 18.

⁶⁸ *Id.* at 10, 18.

⁶⁹ 862 F.3d 108 (D.C. Cir. 2017).

⁷⁰ DEMEC Clarification Request at 9-10, 18.

⁷¹ Delmarva Answer at 2, 6-12; PEPCO Answer at 2, 6-12.

⁷² Delmarva Answer at 3, 12-13; PEPCO Answer at 3, 12-13.

⁷³ In the course of responding to DEMEC and SMECO's requests for clarification regarding the recovery of ongoing amounts, Delmarva and PEPCO incorporate arguments related to the claims in the request for rehearing submitted by Exelon

B. Substantive Matters

23. As discussed further below, we deny Exelon Companies' request for rehearing and affirm the Commission's determination in the September 2018 Order that Exelon Companies failed to demonstrate that their proposed Formula Rates revisions that would permit recovery of previously incurred income tax amounts were just and reasonable.⁷⁴ In reaching this finding, the Commission interpreted and applied its prior precedent, but did not implement any new policies. Exelon Companies fail to demonstrate in their request for rehearing that accepting their filings is consistent with the matching principle underpinning the Commission's normalization policy, or is compelled by prior precedent. We also find that the Commission's determination in the September 2018 Order did not constitute an unconstitutional taking of Exelon Companies' property. Finally, we confirm that the compliance period announced in the September 2018 Order does not apply retroactively or unduly discriminate against Exelon Companies.

24. With respect to DEMEC's and SMECO's requests for clarification of the statements in the September 2018 Order regarding the recovery of ongoing amounts, we clarify that the September 2018 Order was not intended to foreclose the recovery or return of 100% of the excess or deficient ADIT amounts incurred prior to the effective date of new filings seeking to implement adjustments enabling such recovery or return.⁷⁵ We further clarify, per DEMEC's request, that the Commission did not make any findings in the September 2018 Order regarding the ongoing portions of the filings, and did not intend to foreclose parties from raising any arguments related to these aspects of Exelon Companies' proposals as relevant to other proceedings.⁷⁶

25. Several of the arguments in Exelon Companies' request for rehearing have been advanced, addressed, and rejected twice—both in the September 2018 Order and in the orders addressing the “essentially identical” filing by BGE, an Exelon Companies'

Companies (including Delmarva and PEPCO) in this proceeding. “Commission precedent is clear that untimely supplements to timely filed requests for rehearing, i.e., supplements filed after the expiration of the statutory 30-day period, will be rejected.” *Tres Palacios Gas Storage LLC*, 162 FERC ¶ 61,255, at P 8 (2018) (quoting *Texas-New Mexico Power Co. v. El Paso Elec. Co.*, 107 FERC ¶ 61,316, at P 22 (2004)). Accordingly, we respond only to the arguments related to DEMEC and SMECO's clarification requests.

⁷⁴ September 2018 Order, 164 FERC ¶ 61,172 at PP 2, 109.

⁷⁵ DEMEC Clarification Request at 1-2, 10-12; SMECO Clarification Request at 1-2, 5-6.

⁷⁶ DEMEC Clarification Request at 2, 9, 17-18.

affiliate, in Docket No. ER17-528-000, et al.⁷⁷ In particular, Exelon Companies repeat claims already addressed in the September 2018 Order and BGE Rehearing Order regarding whether Exelon Companies' proposed recovery of deferred tax amounts should have been accepted because: (1) the settlements resolving Exelon Companies' initial Formula Rates cases complied with the "next rate case" requirement in Order No. 144;⁷⁸ (2) Exelon Companies pursued recovery within a "reasonable period of time";⁷⁹ (3) the proposed Formula Rates revisions are consistent with the Commission's matching principle;⁸⁰ and (4) the Commission has granted recovery of deferred tax amounts to similarly situated companies.⁸¹ These arguments already have been considered, and the responses previously provided in the September 2018 Order, BGE Rehearing Order, and BGE November 2017 Order fully address most of these arguments. Although we reference these arguments below, in the interest of efficiency, we focus this discussion on arguments which have not previously been addressed or merit further consideration.

1. Timing of Exelon Companies Filings

26. We continue to find that the deferred amounts Exelon Companies sought to recover in these dockets should have been captured when Exelon Companies' Formula Rates were implemented in 2005 (for Delmarva, ACE, and PEPCO) and 2007 (for

⁷⁷ See ComEd Transmittal Letter at 33 ("ComEd's Formula Rate is substantially similar to that of its affiliate company BGE, which submitted an application in Docket No. ER17-528 proposing essentially identical amendments to BGE's formula rate.").

⁷⁸ Exelon Companies Rehearing Request at 4, 8, 12-21; ComEd Transmittal Letter at 35-37; BGE Rehearing Request at 41-45. See September 2018 Order, 164 FERC ¶ 61,172 at PP 111-112; BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 16-17.

⁷⁹ Exelon Companies Rehearing Request at 8, 21-35; ComEd Transmittal Letter at 37-40; BGE Rehearing Request at 47-53. See September 2018 Order, 164 FERC ¶ 61,172 at PP 113-117; BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 18-24.

⁸⁰ Exelon Companies Rehearing Request at 10, 50-52; ComEd Transmittal Letter at 40-41; BGE Rehearing Request at 54-56. See September 2018 Order, 164 FERC ¶ 61,172 at PP 118-123; BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 25-26; BGE November 2017 Order, 161 FERC ¶ 61,163 at P 20.

⁸¹ Exelon Companies Rehearing Request at 9-10, 40-50; ComEd Transmittal Letter at 41-45; BGE Rehearing Request at 57-59. See September 2018 Order, 164 FERC ¶ 61,172 at PP 124-128; BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 27-30; BGE November 2017 Order, 161 FERC ¶ 61,163 at P 22.

ComEd).⁸² The fact that Exelon Companies' 2005 and 2007 Formula Rates cases were resolved by settlements does not remedy Exelon Companies' failure to comply with the "next rate case" requirement in Order No. 144,⁸³ and we also do not agree that their proposals to recover deferred amounts comply with the requirement to achieve full normalization within a reasonable period of time.⁸⁴

27. As previously explained, in connection with the transition to normalization, Order No. 144 directed utilities to make adjustments for the recovery of certain tax deficiencies in "the applicant's next rate case following the applicability of the rule."⁸⁵ The Commission's regulations thus require a utility that has not provided deferred taxes in the same amount that would have accrued had tax normalization been applied for transactions occurring any time before the test period, or whose accumulated provisions for deferred income has become deficient or excess due to a tax rate change, to make provision in its cost of service for such excess or deficient deferred taxes "in its next rate case"; such provision must be consistent with a Commission-approved ratemaking method made specifically applicable to the rate applicant.⁸⁶ Order No. 144 also established that utilities must "begin the process of making up deficiencies in or eliminating excesses in their deferred tax reserves so that, within a reasonable period of time to be determined on a case-by-case basis, they will be operating under a full normalization policy."⁸⁷

28. In the September 2018 Order, the Commission found that Exelon Companies did not comply with this requirement in their initial Formula Rates filings, as these filings included line items that expressly excluded recovery of FAS 109 amounts in their

⁸² September 2018 Order, 164 FERC ¶ 61,172 at P 111; *see* BGE Rehearing Order 164 FERC ¶ 61,173 at P 16.

⁸³ Exelon Companies Rehearing Request at 8, 12-21.

⁸⁴ *Id.* at 8, 21-35.

⁸⁵ Order No. 144, FERC Stats. & Regs ¶ 30,254 at 31,519; *see* September 2018 Order, 164 FERC ¶ 61,172 at P 111; BGE Rehearing Order, 164 FERC ¶ 61,173 at P 16.

⁸⁶ 18 C.F.R. § 35.24(c); *see* September 2018 Order, 164 FERC ¶ 61,172 at P 111 n.144; BGE Rehearing Order, 164 FERC ¶ 61,173 at P 16 n.31.

⁸⁷ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,560; *see* September 2018 Order, 164 FERC ¶ 61,172 at P 133; BGE Rehearing Order, 164 FERC ¶ 61,173 at P 18.

Formula Rates.⁸⁸ Exelon Companies argue for the first time on rehearing that the 2005 and 2007 Formula Rates cases were not, in fact, their “next rate cases” for the purpose of complying with Order No. 144, but rather were preceded by numerous rate cases in the 1990s prior to Exelon Companies’ switch from stated rates to Formula Rates.⁸⁹

29. Heretofore, Exelon Companies have argued that the 2005 and 2007 Formula Rate cases were the “next rate cases” following Order No. 144, and that the settlements in these cases reserved recovery of FAS 109 amounts for resolution in a future proceeding.⁹⁰ Exelon Companies now reframe the “real issue” as whether the Commission’s rules permit applicants to seek “catch-up” recovery of FAS 109 amounts arising from a prior rate case that resulted in a settlement.⁹¹ As a rule, we reject requests for rehearing that raise a new issue, unless we find that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances.⁹² Exelon Companies provide no justification for raising this issue for the first time on rehearing. The purpose of the rehearing requirement is to identify alleged errors in the Commission’s decision, not to

⁸⁸ See September 2018 Order, 164 FERC ¶ 61,172 at P 111 (citing ComEd Formula Rate Filing, Docket No. ER07-583-000, Appendix A, Attachment H-13, at line 40 (filed Mar. 1, 2007); ACE, Delmarva, and PEPCO Formula Rate Filing, Docket No. ER05-515-000, Appendix A, Attachments H-1, H-3 and H-9, at line 40 (filed Jan. 31, 2005)).

⁸⁹ Exelon Companies Rehearing Request at 13, 26-27.

⁹⁰ *Id.* at 13-14; see ComEd Transmittal Letter at 35 (“Just as with BGE, the ‘next rate case’ ruling cannot be applied against ComEd, because ComEd’s 2007 Formula Rate filing resulted in a settlement that expressly excluded FAS 109 amounts from current rates, thus leaving the issue to be addressed in some later proceeding.”); *id.* at 40 (“This is ‘the next rate case’ and the filing provides for recovery over a ‘reasonable period of time.’ This Application precisely meets the Commission’s requirements under Order No. 144.”).

⁹¹ Exelon Companies Rehearing Request at 13-14.

⁹² See *Sw. Power Pool, Inc.*, 163 FERC ¶ 61,111, at P 18 (2018). Rule 713(c)(3) of the Commission’s Rules of Practice and Procedure states that a request for rehearing must “[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.” 18 C.F.R. § 385.713(c)(3) (2019).

raise new issues.⁹³ Because answers to requests for rehearing are prohibited under Rule 713 of the Commission's Rules of Practice and Procedure, raising this argument for the first time on rehearing effectively precludes other parties from responding.⁹⁴ We thus find this argument to be procedurally barred.⁹⁵

30. Moreover, Exelon Companies fail to show that the settlements resolving their Formula Rates, and subsequent rate moratorium, relieved Exelon Companies of the requirement to seek this recovery prior to their February 2018 filings in this proceeding. Exelon Companies mostly renew prior arguments that: (1) the proposed recovery of deferred amounts did not violate Order No. 144 because Exelon Companies' initial Formula Rates proceedings in 2005 and 2007 were resolved by settlements that, Exelon Companies claim, deferred recovery of the FAS 109 amounts for later proceedings;⁹⁶ (2) Order No. 144 expressly contemplated that parties could reach settlement on any issues covered by the rule;⁹⁷ (3) the Commission accepted the settlements as entire

⁹³ See *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,255, at P 153 (2017) (citing *Ecee, Inc. v. FERC*, 611 F.2d 554, 565 (5th Cir. 1980)).

⁹⁴ 18 C.F.R. § 385.713(d)(1). See, e.g., *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 250 (2016) (novel issues raised on rehearing are rejected “because our regulations preclude other parties from responding to a request for rehearing and such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision”) (internal quotations omitted); *Balt. Gas & Elec. Co.*, 92 FERC ¶ 61,043, at 61,114 (2000).

⁹⁵ In any event, if we were to address the substance of this new argument, it would not change the outcome of this proceeding. Exelon Companies' filings state that they have assumed that an amortized portion of FAS 109 amounts was recovered in their rates until the Formula Rates, which expressly excluded such recovery, went into effect. See ComEd Transmittal Letter at 22. Thus, prior to the implementation of their Formula Rates, Exelon Companies presumably “provided deferred taxes in the same amount that would have accrued had tax normalization been applied for the tax effects of timing difference transactions originating at any time prior to the test period,” consistent with section 35.24(c) of the Commission's regulations. 18 C.F.R. § 35.24(c). In switching to Formula Rates, however, Exelon Companies would need Commission approval to incorporate a provision to make these adjustments.

⁹⁶ Exelon Companies Rehearing Request at 12-13; BGE Rehearing Request at 41; ComEd Transmittal Letter at 36-37.

⁹⁷ Exelon Companies Rehearing Request at 14-15; BGE Rehearing Request at 44-45; ComEd Transmittal Letter at 36.

agreements and without condition;⁹⁸ and (4) the Commission provided no lawful basis for disregarding the settlements and misinterpreted the settlements, contrary to principles of contract interpretation, to read in extraneous provisions.⁹⁹ Although the Commission acknowledged in Order No. 144 that parties may “reach a settlement on any of the issues covered by the rule,”¹⁰⁰ we continue to find that Exelon Companies’ Formula Rates settlements did not expressly reserve the right to wait for a later proceeding to seek recovery of tax deficiencies.¹⁰¹ The text of the regulation specifies that a Commission-approved ratemaking method can include a ratemaking method contained in a settlement agreement, if the method applies beyond the effective term of the settlement agreement.¹⁰²

31. Exelon Companies contend on rehearing that the references in the Formula Rates settlements to line items being “net of” or “less” FAS 109 amounts¹⁰³ necessarily show that the parties intended to expressly defer these issues as contemplated in Order No. 144, because “[b]y recognizing the existence of a regulatory asset, and leaving the regulatory asset in place, the settlement necessarily left for a later proceeding the issue of recovery

⁹⁸ Exelon Companies Rehearing Request at 16-17; BGE Rehearing Request at 41-42; ComEd Transmittal Letter at 35.

⁹⁹ Exelon Companies Rehearing Request at 17-18; BGE Rehearing Request at 42-43; ComEd Transmittal Letter at 35-36.

¹⁰⁰ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,519.

¹⁰¹ September 2018 Order, 164 FERC ¶ 61,172 at P 112; *see* BGE Rehearing Order, 164 FERC ¶ 61,173 at P 17; *BG&E*, 954 F.3d at 282-83 (finding that the Commission did not abuse its discretion in determining that BGE’s settlement did not reserve income tax issues where the settlement was silent on this point, and further observing that permitting recovery of such “would have seriously compromised the Commission’s matching principle”).

¹⁰² 18 C.F.R. § 35.24(d)(3).

¹⁰³ *See* ComEd Offer of Settlement, Docket No. ER07-583-000 (filed October 5, 2007) (Attachment H-13, at line 40 (line item for “ADIT *net of FASB 106 and 109*”) (emphasis added) and Attachment 1 – ADIT Worksheet (“Less FASB 109 Above if not separately removed”), ACE, Delmarva, and PEPCO Offer of Settlement, Docket No. ER05-515-000 (filed March 20, 2006) (Attachments H-1, H-3 and H-9, at line 40 (line item for “ADIT *net of FASB 106 and 109*”) (emphasis added) and Attachment 1 – ADIT Worksheets (“Less FASB 109 Above if not separately removed”).

‘in a different period’ of the same amounts.”¹⁰⁴ Exelon Companies fail to explain why the fact that the regulatory asset continues to exist proves that the parties “reached a settlement on” FAS 109 issues in compliance with Order No. 144. As the Commission has stated, the existence of a regulatory asset does not guarantee recovery in rates.¹⁰⁵

32. Further, Exelon Companies’ argument reflects an unreasonable interpretation of Order No. 144’s text. The settlement exception provides that, “[Order No. 144] leaves undisturbed the ability of the parties to reach a settlement *on* any of the issues covered by the [Order].”¹⁰⁶ To “reach a settlement *on*” an issue reasonably means *actually addressing* that issue in the settlement itself, rather than simply excluding it from consideration. Our interpretation accords with agency precedent. In *Stingray*, the Commission held that a settlement agreement did not “reach[] a settlement on the issue of tax normalization,” as required by Order No. 144, because it did not expressly “mention ... the extent of normalization in the settlement.”¹⁰⁷ By comparison, in *El Paso Natural Gas Co.*, the Commission approved a settlement agreement that expressly resolved the issue of deferred taxes.¹⁰⁸

33. Moreover, requiring parties to expressly reach a settlement *on* the issue of deferred taxes best aligns with the matching principle anchoring Order No. 144 itself. If a settlement explains, for example, *when* a utility will begin incorporating deferred taxes into its rates in the future, the Commission can review that resolution for justness and reasonableness when the settlement agreement is filed for Commission approval.¹⁰⁹ That is, the Commission can decide whether the departure from the matching principle is acceptable. Exelon Companies’ approach, by contrast, would compel the Commission to presume that a utility’s some-day, unarticulated future intention to retrospectively collect deferred taxes is just and reasonable. This runs counter to the requirement in the Federal Power Act and Natural Gas Act placing the burden on the regulated entity to show that its

¹⁰⁴ Exelon Companies Rehearing Request at 18-19.

¹⁰⁵ *Piedmont Municipal Power Agency v. Duke Energy Carolinas, LLC*, 162 FERC ¶ 61,109, at P 32 (2018).

¹⁰⁶ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,519 (emphasis added).

¹⁰⁷ *Stingray Pipeline Company*, 49 FERC ¶ 61,240, at 61,859 (1989) (*Stingray*).

¹⁰⁸ 120 FERC ¶ 61,208, at 61,897 (2007).

¹⁰⁹ See 16 U.S.C. § 824d; 15 U.S.C. § 717c (2018).

proposed rates are just and reasonable,¹¹⁰ and could allow utilities to defer indefinitely addressing deferred taxes in rates.

34. With these principles in mind, we continue to be unpersuaded by Exelon Companies' argument that a few lines in the settlement attachments stating that items were "net of" or "less" FAS 109 amounts meant that there was an agreement by the parties to settle this issue by reserving recovery for a later proceeding. Rather, we believe that the reasonable reading of this language is that the parties were not pursuing recovery, particularly as Exelon Companies' Formula Rates filings did not propose to recover these amounts in the first instance.¹¹¹ Exelon Companies appear to concede that the initial Formula Rates filings would not have complied with the requirement to seek a Commission-approved mechanism to make these adjustments, but counter that those filings are "simply irrelevant," as they were replaced in their entirety by the settled rates.¹¹² However, it is not reasonable contract interpretation to suggest that notations excluding FAS 109 amounts from the initial Formula Rates filings could mean that Exelon Companies were not seeking recovery, whereas the same notations in the Formula Rates settlements mean that the parties reached settlement on these issues and agreed to seek recovery in a later proceeding.

35. We also do not find the blanket waivers of other requirements in the settlement sufficient to counteract the specific requirements of Order No. 144.¹¹³ In essence, Exelon Companies suggest that, instead of needing to place clear language in the settlement reserving an issue for future recovery, the onus is on the Commission, in approving the settlements, to raise concerns that the parties have not clearly reserved an issue. Order No. 144 required companies to propose a ratemaking method for making up deficiencies or recovering excesses that would be "specifically applicable to the rate applicant" and approved by the Commission on a case-by-case basis.¹¹⁴ Although utilities may agree to

¹¹⁰ *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993) (citing 16 U.S.C. § 824d(e)).

¹¹¹ September 2018 Order, 164 FERC ¶ 61,172 at P 112.

¹¹² Exelon Companies Rehearing Request at 20 n.52 ("The Commission seems to attribute its finding, at least in part, to the treatment of the issue in the 'initial' Section 205 rate filings by the Exelon Companies, as originally filed, prior to the settlements. But those initial filings were entirely replaced by the settled rates Because they were entirely replaced by the settled rates, the rates as originally filed are simply irrelevant.") (citation omitted).

¹¹³ *Id.* at 20-21.

¹¹⁴ Order No. 144, FERC Stats. & Regs. 30,254 at 31,560.

this method in a Commission-approved settlement,¹¹⁵ the nature of the individual, company-specific requirement is not one that can be skirted via general blanket waiver language.

36. We further affirm that Exelon Companies failed to comply with the directive in Order No. 144 to begin the process of adjusting their deferred tax deficiencies and excess “so that, within a reasonable period of time to be determined on a case-by-case basis, they will be operating under a full normalization policy.”¹¹⁶ Again, Exelon Companies reiterate several arguments raised in their filings in this proceeding and the BGE Rehearing Request to allege that the Commission misinterpreted Order No. 144 to impose a requirement that rate filings be made within a specific time window.¹¹⁷ Exelon Companies assert that their Formula Rates revisions should be accepted even if they were not made in the “next rate case,” because they met the requirements for seeking normalization over a reasonable period of time. However, as the Commission explained in the September 2018 Order, (1) the requirement to begin the process of recovering deficiencies and returning excesses to achieve full normalization within “a reasonable period of time” is not an alternative standard, but rather works in conjunction with the “next rate case” requirement; and (2) in any event, Exelon Companies’ delay even following the end of the rate moratorium likewise would not meet this standard.¹¹⁸ Exelon Companies again maintain that the definition of “rate applicant” as a utility that makes a rate filing means that the requirement to achieve full normalization within a reasonable period of time applies only after the utility makes its rate filing, with no time limit whatsoever on when the utility must file.¹¹⁹ Under Exelon Companies’ reasoning, utilities could wait 50 years to file for recovery as long as, once filed, the choice of normalization method ensures that the utility will be operating within full normalization within a “reasonable period of time” thereafter. We continue to find that “requiring

¹¹⁵ *Id.* at 31,519, 31,561; 18 C.F.R. § 35.24(d)(3).

¹¹⁶ September 2018 Order, 164 FERC ¶ 61,172 at P 113 (citing Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,560); *see* Exelon Companies Rehearing Request at 3, 8, 21-34.

¹¹⁷ Exelon Companies Rehearing Request at 21-25, 28-29, 32-35; BGE Rehearing Request at 47-54; ComEd Transmittal Letter at 37-40.

¹¹⁸ September 2018 Order, 164 FERC ¶ 61,172 at PP 113-114; *see also* *BG&E*, 954 F.3d at 286-87 (finding that the Commission acted reasonably in determining that BGE’s 12 year delay was “far longer” than the four and seven year delays previously accepted by the Commission and that BGE “failed to offer an adequate reason for the delay”).

¹¹⁹ Exelon Companies Rehearing Request at 25 and n.61.

applicants to select normalization methods that will ensure a timely transition to full normalization would be meaningless if the applicants can defer filing those proposed methods over the course of several rate cases.”¹²⁰

37. Exelon Companies insist that “when the Commission actually imposes a time limit, it says so,” contrasting Commission guidance directing companies to file a rate change within three years of adopting FAS 106 accounting.¹²¹ That the Commission did not direct a specific number of years in Order No. 144 in which utilities must come in to seek Commission approval of a method to make adjustments does not mean that Order No. 144 gave utilities license to delay indefinitely at their sole discretion. Rather, Order No. 144 required that utilities 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 deferred tax reserves so that they will be operating under a full normalization policy within a reasonable period of time.¹²² Exelon Companies’ discussion of Order No. 475 does not support their claim.¹²³ Given the circumstances of that proceeding,¹²⁴ the Commission set up an abbreviated process and established deadlines (by first letter of the filing utility’s name, but all within one year from Order No. 475) for utilities to avail themselves of the abbreviated procedures. By contrast, in Order No. 144 the Commission expressly found that the adjustment for excesses or deficiencies should be made by “a Commission-approved ratemaking method made

¹²⁰ September 2018 Order, 164 FERC ¶ 61,172 at P 115. To the extent Exelon Companies argue that the 2005 and 2007 Formula Rate cases were not the “next rate cases” for compliance with Order No. 144 and Order No. 144 does not establish deadlines for subsequent rate cases, this argument is raised for the first time on rehearing and thus procedurally barred as discussed *supra* P 29. See Exelon Companies Rehearing Request at 26-28.

¹²¹ Exelon Companies Rehearing Request at 28-31 (citing *Post-Employment Benefits Other Than Pensions, Statement of Policy*, 61 FERC ¶ 61,330, at 62,000 (1992)); see BGE Rehearing Request at 52-53.

¹²² Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,519, 31,560.

¹²³ Exelon Companies Rehearing Request at 29-31 (citing *Rate Changes Relating to Federal Corporate Income Tax Rates for Public Utilities*, Order No. 475, FERC Stats. & Regs. ¶ 30,752 (1987) (cross-referenced at 39 FERC ¶ 61,357)).

¹²⁴ See Order No. 475, FERC Stats. & Regs. ¶ 30,752 at 24,987 (“The Commission is concerned that large overcollections on an industry-wide basis may occur unless rates are reduced promptly to reflect the new tax rate since the reduction in the tax rate affects all utilities.”).

specifically applicable to the rate applicant.”¹²⁵ Thus, although the Commission held that the “interperiod inequity in rates” arising from the tax effects of the switch to normalization must be addressed, it directed utilities to include this proposed adjustment in their next rate case, for case-by-case consideration.¹²⁶ The fact that the Commission did not put a specific deadline on when that rate case must be filed does not mean that utilities could wait decades and file several rate cases before complying. Likewise, the fact that utilities could refrain from making a filing pursuant to the abbreviated procedures in Order No. 475, if they did not believe that a rate reduction was warranted, also fails to call into question the September 2018 Order.¹²⁷

38. Indeed, Order No. 475 is entirely consistent with Order No. 144, as it likewise required utilities to address any associated changes to their “make-up provision amortization” and methods for returning over accruals of unfunded future tax liability in their next rate cases, to permit more fulsome consideration of these issues.¹²⁸ Exelon Companies assert that, “[i]f there were some time limit for submission of the ‘next rate application’ at which such 1986 Tax Act deferred tax issues would be addressed, the Commission surely would have said so,”¹²⁹ but the Commission did not reject Exelon Companies’ filings for failure to file a rate case within a certain period of time. Rather, the Commission found that *when Exelon Companies filed their next rate cases* in 2005 and 2007, they failed to seek approval to make these adjustments as required by Order No. 144.

39. Given Exelon’s arguments regarding the reasonable period of time requirement, the Commission offered guidance on what would constitute a reasonable period of time

¹²⁵ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,560.

¹²⁶ *Id.* at 31,559-60 (“Because of the equity considerations underlying the Commission’s decision to require tax normalization, the Commission finds that it is appropriate to require all companies to make some provision in their deferred taxes for the tax effects of timing difference transactions that had previously been flowed through. As long as there are any timing difference transactions for which deferred tax provisions have not been made, there is some interperiod inequity in the rates to consumers. Similarly, when tax rates change and cause deferred tax reserves to become excessive or insufficient for the funding of future tax liabilities at current tax rates, there is an interperiod inequity in rates that can be lessened by some policy that would adjust the deferred tax reserves over a reasonably short period of time.”).

¹²⁷ Exelon Companies Rehearing Request at 29-30.

¹²⁸ *See* Order No. 475, FERC ¶ Stats. & Regs. ¶ 30,752 at 30,736.

¹²⁹ Exelon Companies Rehearing Request at 31.

to file for recovery under Order No. 144. To the extent that there may be utilities that had not yet filed their “next rate case” following Order No. 144 or that had expressly deferred consideration of the adjustment via settlement, the Commission announced a one-year compliance period in which such utilities could file to recover past deficient ADIT amounts if filed by September 14, 2019.¹³⁰ The Commission also provided guidance on a prospective basis that, for deficient ADIT amounts incurred in the future, utilities should seek recovery within two years after such amounts are incurred.¹³¹ This guidance does not impinge on utilities’ sole FPA section 205 filing rights,¹³² but simply provides reasonable parameters on timing if utilities plan to seek such recovery in their future rate cases. Contrary to Exelon Companies’ assertion, the Commission’s reading of the “reasonable period of time” requirement in Order No. 144 does not impose a new rule retroactively without notice or opportunity to comply.¹³³ Rather, given Exelon Companies’ apparent misunderstanding of the timing requirements, the Commission used the opportunity to further elucidate the timing requirement in Order No. 144.¹³⁴

40. Citing generally to the portion of the determination in the September 2018 Order finding that Exelon Companies should have sought recovery of the deferred amounts in their 2005 and 2007 rate cases, Exelon Companies assert that the September 2018 Order implicitly holds that Exelon Companies “should have been amortizing away their FAS 109 regulatory assets or liabilities from 2005 (or 2007 for ComEd) as if the regulatory assets or liabilities were being recovered in rates—even though FAS 109 amounts were not flowing through the formula rates.”¹³⁵ Exelon Companies assert that this outcome

¹³⁰ September 2018 Order, 164 FERC ¶ 61,172 at P 132.

¹³¹ *Id.* P 133.

¹³² *See* Exelon Companies Rehearing Request at 31 (citing Order No. 475, FERC Stats. & Regs. ¶ 30,752 at 30,738).

¹³³ *Id.* at 3, 25-26.

¹³⁴ Moreover, in announcing the compliance period, the Commission was not conceding “that there was no time limit in the past,” as Exelon Companies posit. *Id.* at 6, 31-32. Rather, the Commission provided some context on how this “reasonable period of time” should be interpreted, in the event that there are any utilities who have not yet had a rate case or who expressly reserved the issue for later consideration, as well as for amounts incurred going forward.

¹³⁵ Exelon Companies Rehearing Request at 35 (citing September 2018 Order, 164 FERC ¶ 61,172 at PP 111-117).

would violate *Transcontinental Gas Pipe Line Corp.*,¹³⁶ which required the FAS 109 regulatory asset to be reduced consistent with the recovery of those attendant amounts in rates.¹³⁷ In other words, Exelon Companies argue, because the FAS 109 asset was not recovered in rates during the period from 2005/2007-2018, there is no basis to conclude that the FAS 109 regulatory asset should have been reduced for that period.¹³⁸ However, recovery of a regulatory asset is not guaranteed; for that, Commission approval is needed. The Commission's statements in the September 2018 Order were simply intended to clarify the portion of the regulatory asset that Exelon Companies would not be permitted to recover (i.e., the portion that would have been amortized if recovery in rates, and amortization, had begun immediately).

2. Matching

41. In the BGE November 2017 Order, the Commission noted that BGE's delay in filing its proposal for recovery raised concerns that permitting the recovery would contravene the Commission's primary rationale for requiring tax normalization, i.e., "matching: the recognition in rates of the tax effects of expenses and revenues with the expenses and revenues themselves."¹³⁹ Exelon Companies argued in their filings in this proceeding that their proposals comply with the matching principle because they are tied to recovery over the remaining life of appropriately chosen assets.¹⁴⁰ The Commission disagreed, explaining that even if the regulatory asset is linked to assets that are still in service, assets often remain in service after the amortization period has expired and the assets are fully depreciated.¹⁴¹ Exelon Companies' repetition of these arguments once more on rehearing is no more persuasive.¹⁴² We continue to find that the correct time

¹³⁶ 78 FERC ¶ 62,128 (1997) (*Transcontinental Gas*).

¹³⁷ Exelon Companies Rehearing Request at 35-36 (citing *Transcontinental Gas*, 78 FERC ¶ 62,128 at 64,496).

¹³⁸ *Id.* at 9, 35-36.

¹³⁹ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,522; BGE November 2017 Order, 161 FERC ¶ 61,163 at P 21 ("Because BGE did not address the tax deficiency in a reasonable time, its proposal no longer has the requisite matching of the amortization period with the relevant transmission assets.").

¹⁴⁰ See ComEd Transmittal Letter at 40-41; BGE Rehearing Request at 54-56.

¹⁴¹ September 2018 Order, 164 FERC ¶ 61,172 at PP 118-123; BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 25-26.

¹⁴² Exelon Companies Rehearing Request at 10, 50-52 (arguing that the Commission erred in finding that Exelon Companies are violating matching for flow-

period for recovering the tax benefits from depreciation expense would have been over the remaining life of the assets in place at the time the Exelon Companies switched to full normalization (i.e., in the 1970s).¹⁴³ Put simply, permitting Exelon Companies to adjust for deferred taxes more than a decade after they should have started seeking such an adjustment undermines the Commission's objective of "match[ing] tax benefits with cost responsibility."¹⁴⁴ Thus, although the Commission rejected the filings because Exelon Companies failed to comply with Order No. 144, we confirm that failing to comply with the "next rate case" requirement also conflicts with the matching principle.

42. We likewise affirm that this concern applies to the recovery of catch-up Equity AFUDC.¹⁴⁵ In the September 2018 Order, the Commission explained that, "to ensure consistency with the matching principle, only the additional taxes associated with the relevant year's depreciation of AFUDC Equity are eligible for recovery."¹⁴⁶ Exelon Companies contend that the Commission deprived Exelon Companies of their lawfully accrued regulatory asset by announcing a new policy requiring that AFUDC Equity be recovered only in the rate year in which the associated AFUDC Equity is depreciated.¹⁴⁷ Exelon Companies assert that the Commission presented no support for this "new rule," which contravenes other FAS 109 precedent, such as a recent order noting that the Commission has recognizing since at least its 1993 Guidance Letter on FAS 109 that the tax consequences of AFUDC Equity would be treated as a temporary timing difference like other FAS 109 amounts.¹⁴⁸ Contrary to Exelon Companies' assertions, the Commission did not apply a new rule; rather, consistent with the 1993 Guidance Letter, the Commission required matching the tax effects of AFUDC Equity with the depreciation of AFUDC Equity.

through items by seeking recovery after the remaining life of assets because these assets have depreciable lives of 60 years or more and interested parties can pursue discovery in any annual rate update).

¹⁴³ September 2018 Order, 164 FERC ¶ 61,172 at P 122.

¹⁴⁴ Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,522.

¹⁴⁵ See September 2018 Order, 164 FERC ¶ 61,172 at PP 122-123.

¹⁴⁶ *Id.* P 123; see BGE November 2017 Order, 161 FERC ¶ 61,163 at P 20.

¹⁴⁷ Exelon Companies Rehearing Request at 10, 52-53.

¹⁴⁸ *Id.* at 52-53 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 163 FERC ¶ 61,163, at P 59 (2018)).

43. Exelon Companies misinterpret a single sentence in Order No. 144-A in order to support a *South Georgia* catch-up provision for AFUDC Equity.¹⁴⁹ In fact, there were no deferred income taxes related to AFUDC Equity on the books of jurisdictional utilities until the adoption of FAS 109 in 1993. What FAS 109 did was look at the Commission's practice of allowing tax adjustments for AFUDC Equity when it is recognized in depreciation expense in a rate making setting (i.e., either in a rate case or, as in this case, in an amendment to a formula rate). Thus, FAS 109 required utilities to include on their balance sheets equal and offsetting regulatory assets in Account 182.3 and deferred income taxes for AFUDC Equity. Thus FAS 109 recognized that additional income taxes liabilities were being generated when the Commission recognizes AFUDC Equity in depreciation expense. Although utilities have put these regulatory assets and tax liabilities on their books, this does not relieve the Exelon Companies of the obligation to make shareholders whole on an after-tax basis either initially in their formula rates or on a prospective basis with an amendment. In order to be consistent with the matching principle, however, the tax adjustment must match the current year's depreciation expense.

3. Prior Decisions

44. Exelon Companies renew prior arguments¹⁵⁰ that the Commission's rejection of their filings is inconsistent with its acceptance of similar recovery in *PPL*,¹⁵¹ *Duquesne*,¹⁵² *VEPCO*,¹⁵³ and *ITC*.¹⁵⁴ We continue to find these arguments unpersuasive.

¹⁴⁹ See ComEd Transmittal Letter at 29 ("It was the intention in Order No. 144 to require the normalization of the difference between straight-line depreciation used for rate purposes (as adjusted for permanence differences such as equity AFUDC) and aggregate straight-line tax depreciation.") (citing Order No. 144-A, FERC Stats. and Regs. ¶ 30, 340 at 30,136)).

¹⁵⁰ Exelon Companies Rehearing Request at 9-10, 40-50; see ComEd Transmittal Letter at 41-44; BGE Rehearing Request at 57-59.

¹⁵¹ *PPL Elec. Util. Corp.*, Docket No. ER12-1397-000 (May 23, 2012) (delegated order) (*PPL*).

¹⁵² *Duquesne Light Co.*, Docket No. ER13-1220-000 (April 26, 2013) (delegated order) (*Duquesne*).

¹⁵³ *Virginia Elec. Power Co.*, Docket No. ER16-2116-000 (August 2, 2016) (delegated order) (*VEPCO*).

¹⁵⁴ *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,374 (2015) (*ITC*).

45. The *PPL*, *Duquesne*, *VEPCO*, and *ITC* orders are distinguishable. *PPL* and *Duquesne* involved delays of four and seven years, respectively, whereas Exelon Companies waited more than 10 years to seek recovery.¹⁵⁵ Exelon has “failed to offer an adequate reason for the delay”¹⁵⁶ and has failed to explain why it did not “act[] more expeditiously”¹⁵⁷ in doing so. Indeed, Exelon Companies propose imposing on future ratepayers payments for past accruals beginning in 2019,¹⁵⁸ rather than, for example, 2014 (which would have been seven years after ComEd’s “next rate case” in 2007). Thus, Exelon Companies’ proposal ensures that ratepayers paying for their deferred tax deficiencies would be even further mis-matched from the corresponding facility expense than Duquesne’s ratepayers.¹⁵⁹

46. Nor would granting Exelon Companies even partial recovery—e.g., seven years’ worth of retrospective recovery on par with *Duquesne*—align Exelon Companies with Duquesne. Even if we granted such recovery, it would still be ratepayers 12 years (for ComEd) and 14 years (for Delmarva, ACE, and PEPCO) hence—in 2019 and beyond—paying the expense. The result would be a further departure from the matching principle than permitted even in *Duquesne*. Because, as the *BG&E* court correctly acknowledged in a substantially similar context, Exelon Companies seek “permissive” treatment “notwithstanding the requirement[] of Order No. 144” that a utility seek deferred tax recovery “in its next rate case,” we decline to grant a further departure from Order No. 144 than previously allowed. Indeed, granting partial recovery would do precisely what Order No. 144 and our orders here prevent: allow utilities to wait an unlimited amount of time to address deferred taxes, knowing they can recoup at least the last seven years from ratepayers.

47. Moreover, PPL’s and Duquesne’s Formula Rates represented the utilities’ change from the Pennsylvania Public Utility Commission’s flow-through requirements. Exelon

¹⁵⁵ See September 2018 Order, 164 FERC ¶ 61,172 at P 125; *BG&E*, 954 F.3d at 286.

¹⁵⁶ *BG&E*, 954 F.3d at 286.

¹⁵⁷ See BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 21, 28-29.

¹⁵⁸ September 2018 Order, 164 FERC ¶ 61,172 at P 9.

¹⁵⁹ See BGE Rehearing Order, 164 FERC ¶ 61,173 at PP 21, 25, 29 (explaining that matching requires “the tax reducing effect of an expense (or revenue increase) [to be] allocated to the same customers who pay the expense *during the same period*,” and holding that Baltimore Gas failed to normalize its rates to achieve matching within a “reasonable period of time” (emphasis added)).

Companies began their full normalization in the 1970s or early 1980s.¹⁶⁰ Indeed, Exelon Companies had practiced normalization for approximately three decades when they abandoned the practice in their 2005 and 2007 rate filings. By contrast, Duquesne and PPL had no experience with tax normalization when they filed their “next rate case[s]” in 2006 and 2008, respectively.¹⁶¹ Further, VEPCO multiplied its accumulated AFUDC Equity by its transmission depreciation rate to match its depreciation expense. Exelon Companies divided their respective accumulated AFUDC Equities by 29 or 30 year average remaining life at 2005 or 2007 year end, as applicable, to determine an improperly developed South Georgia tax provision.¹⁶² ITC is also distinguishable because there, the applicant did comply with Order No. 144’s “next rate case” requirement. The rate case in which the applicants sought recovery with respect to the 2011 tax rate change was their next rate case following that tax change, and so they complied with Order No. 144’s express “next rate case” requirement.¹⁶³ By contrast, Exelon Companies did not seek recovery for deferred amounts related to the transition to full normalization in their “next rate case.”

48. We find Exelon Companies’ reliance on the *PPL*, *Duquesne*, *VEPCO*, and *ITC* orders misplaced for an additional, independent reason. In *BG&E*, the D.C. Circuit explained that “an agency applying existing policy must explain how an outcome coheres with previous decisions.”¹⁶⁴ Prior to *PPL*, *Duquesne*, and *VEPCO*, the Commission made plain that Order No. 144 disallows retrospective recovery of deferred taxes where a utility failed to seek such recovery “in its next rate case.” In *Stingray*, the Commission held that the utility there could only make up an ADIT account deficiency that existed at the time of its 1985 rate settlement—which was its “next rate case”—from the effective date of its subsequently-filed rates and going forward. The Commission explained that it should have begun collecting on that deficiency with the 1985 settlement. Thus, the Commission allowed a “make-up provision to the extent that ... such deficiency is reduced to take into account the amortization of that deficiency that *should have occurred*

¹⁶⁰ See Exelon Companies Rehearing Request at 10.

¹⁶¹ See BGE Rehearing Order, 164 FERC ¶ 61,173 at P 28 n.86; Duquesne, OATT Filing, Docket No. ER13-1220-000, at 5 (filed Apr. 1, 2013); PPL, OATT Filing, Docket No. ER12-1397-000, at 6 (filed Mar. 30, 2012).

¹⁶² See *BG&E*, 954 F.3d at 286.

¹⁶³ The Commission letter order does not mention the 2011 tax rate change noted by Exelon Companies and referenced in the application, and does not describe the proposal as applying to amounts already incurred. See Exelon Companies Rehearing Request at 47.

¹⁶⁴ *BG&E*, 954 F.3d at 286.

between April 1, 1985 and the April 1, 1988 effective date of the rates in [the newly proposed rate case].”¹⁶⁵ Our determination here “coheres” with our policy set forth in *Stingray*.¹⁶⁶ If there was an unexplained departure from that policy, it was reflected in the *PPL*, *Duquesne*, and *VEPCO* orders, not in our orders here.

49. Where confronted with competing applications of existing policy, we must choose which to follow. We reaffirm here our policy set forth in *Stingray* for two independent reasons. First, *Stingray* expressly invokes and pays fidelity to Order No. 144’s “next rate case” requirement.¹⁶⁷ *PPL*, *Duquesne*, and *VEPCO* make no mention of the “next rate case” requirement—not in the utilities’ initial applications, in protests (of which there were none), or in the Commission’s delegated letter orders. We therefore choose to follow here our prior interpretation that adheres to the “next rate case” requirement.

50. Second, ““in the absence of protests”” in *PPL*, *Duquesne*, and *VEPCO*, ““the Commission may simply have accepted [those utilities’ filings] without examining whether they conformed to Commission policy and precedent. Under such circumstances, accepting another [utility’s] provisions does not necessarily establish a generic Commission policy or precedent regarding similar [filings].””¹⁶⁸ The D.C. Circuit ratified this explanation for differential treatment in *Gas Transmission Northwest*.¹⁶⁹

¹⁶⁵ *Stingray*, 49 FERC ¶ 61,240 at 61,859 (emphasis added), *reh’g denied in relevant part*, 50 FERC ¶ 61,159 at 61,469 (1990).

¹⁶⁶ This holding of *Stingray* was not raised to, or addressed by, the D.C. Circuit in *BGE*.

¹⁶⁷ *Stingray*, 49 FERC ¶ 61,240 at 61,859 (explaining that, under Order No. 144, “*Stingray* was required to begin the process of making up deficiencies ... in its ... filing that was its first rate filing after the 1981 effective date of Order No. 144”).

¹⁶⁸ *Gas Transmission Nw. Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (quoting *North Baja Pipeline, LLC v. PG&E Transmission*, 117 FERC ¶ 61,146 (2006)).

¹⁶⁹ *Id.* (calling the Commission’s decision “adequately explained” and adding: “We think [the Commission’s] position is eminently reasonable.”). To the extent that language in *BG&E* suggests that the Commission may not distinguish prior orders on the basis that the issues for which they are cited as precedent were uncontested or unreasoned in those prior orders, we note that this interpretation does not appear to be necessary to the holding of *BG&E*. See *BG&E*, 954 F.3d at 286 (explaining that “FERC cannot avoid its obligation to provide a reasoned explanation for contrary treatment of ‘similarly situated’ parties solely because those decisions were uncontested or unreasoned”). Because the court concluded that the Commission adequately distinguished *PPL*,

51. Accordingly, we affirm that the cases cited by Exelon Companies in this proceeding do not demonstrate that the Commission's rejection of Exelon Companies' filing in the September 2018 Order was unduly discriminatory, nor do these cases otherwise compel acceptance of Exelon Companies' proposals for recovery of deferred income tax amounts arising from Order No. 144.

4. Unconstitutional Taking

52. We also disagree with Exelon Companies' assertion that the Commission's rejection of their requested recovery in the September 2018 Order violates the FPA and "amounts to a taking of the Exelon Companies' property without due process or just compensation."¹⁷⁰ In the September 2018 Order, the Commission found that Exelon Companies had not demonstrated that allowing for the recovery of tax amounts incurred more than a decade, and several rate cases, ago was just and reasonable.¹⁷¹ Although Exelon Companies state that the proposed Formula Rates revisions would result in a rate decrease to customers, due to the change in regulatory liability arising from the Tax Cuts and Jobs Act,¹⁷² that fact does not establish that the Commission violated the FPA by rejecting the Formula Rates revisions without prejudice in the September 2018 order. The proposed recovery of prior period ADIT amounts would have reduced the amounts returned to customers,¹⁷³ without Exelon Companies demonstrating that this offsetting increase was just and reasonable or complied with Order No. 144.¹⁷⁴

Duquesne, *VEPCO*, and *ITC* from its orders on review in *BG&E*, the court's discussion of the inadequacy of the Commission's alternative basis for distinguishing those prior orders—that the disputed issue was neither contested nor decided—was not necessary to its holding. *See BG&E*, 954 F.3d at 285-86.

¹⁷⁰ Exelon Companies Rehearing Request at 3, 11, 56-57.

¹⁷¹ *See* September 2018 Order, 164 FERC ¶ 61,172 at PP 109-123.

¹⁷² Exelon Companies Rehearing Request at 7 n.12.

¹⁷³ *See* September 2018 Order, 164 FERC ¶ 61,172 at P 14.

¹⁷⁴ As discussed in Section III.B.5 below, we disagree with Exelon Companies' interpretation of the Commission's guidance in the September 2018 Order regarding ongoing amounts. We thus disagree that this holding will deprive customers of Tax Cuts and Jobs Act benefits through the period of the effective date of filings seeking ongoing FAS 109 recovery.

53. We likewise do not agree that the Commission's rejection of Exelon Companies' filings in this proceeding constitutes an unconstitutional taking.¹⁷⁵ As explained above, the Commission's determination is not based on a new rule applied retroactively. Rather, the Commission applied its reasonable understanding of language in Order No. 144. Contrary to Exelon Companies' assertion, this proceeding is not analogous to *Eastern Enterprises v. Apfel*,¹⁷⁶ which involved legislation passed by Congress in 1992 that would have imposed a new requirement for a former operator that made contributions to benefit funds before leaving the industry in 1965 to pay \$50 to \$100 million to fund health benefits for retired miners. The United States Supreme Court acknowledged that "legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience," and found that the Coal Industry Retiree Health Benefit Act of 1992 fit into this narrow category.¹⁷⁷ By contrast, the Commission set forth in Order No. 144 both the requirement for utilities to implement full normalization and the requirement that utilities propose a method for recovering or returning excess or deficient amounts related to this change in their next rate filing. To the extent the September 2018 Order upset Exelon Companies' expectations of full compensation, this was not due to a new rule applied retroactively, but rather a result of Exelon Companies' latency in seeking recovery, contrary to the requirements in Order No. 144.

5. Guidance in the September 2018 Order

54. In the September 2018 Order, the Commission noted that Exelon Companies could submit new filings seeking to recover or refund deferred income tax expenses and deficiencies related to the recent Tax Cuts and Jobs Act and any future income tax changes, "to be calculated as of the effective date in the new filings."¹⁷⁸ As requested by DEMEC and SMECO, we clarify that the September 2018 Order does not foreclose Exelon Companies from recovering or refunding to customers 100% of excess or deficient ADIT amounts from the period from January 1, 2018, when the Tax Cuts and Jobs Act went into effect, until the effective date of any FPA section 205 filings seeking to implement an adjustment to reflect the federal income tax rate change (in the case of

¹⁷⁵ See Exelon Companies Rehearing Request at 57.

¹⁷⁶ 524 U.S. 498 (1998).

¹⁷⁷ *Id.* at 528-29.

¹⁷⁸ September 2018 Order, 164 FERC ¶ 61,172 at P 131.

the October 2018 Filings, October 1, 2018).¹⁷⁹ We note that this clarification is consistent with Order No. 864, in which the Commission specified that “the full regulatory liability for excess ADIT should be captured in transmission formula rates, beginning on the effective date of any proposed tariff provision.”¹⁸⁰ We further clarify, per DEMEC’s request, that the Commission did not make any findings in the September 2018 Order with respect to protestors’ arguments regarding the ongoing components of the filings, and the parties may raise (and have raised) such issues in Docket No. ER19-5-000 et al.¹⁸¹ Because we grant DEMEC’s and SMECO’s requests for clarification, we dismiss their alternative requests for rehearing as moot.¹⁸²

55. Delmarva and PEPCO assert that the Tax Cuts and Jobs Act amounts were recorded at the end of 2017 and thus could have flowed through rates as of January 1, 2018, but that in light of (1) the Commission’s rejection of the proposed flow-through of catch-up amounts and (2) the requirement that ongoing amounts be recovered as of the effective date of new filings, the Tax Cuts and Jobs Act amounts from January 1, 2018 through the effective date of the October 2018 Filings are excluded from the October 2018 Filings.¹⁸³ This was not the Commission’s intent in the September 2018 Order. Consistent with Order No. 864, we clarify that, in stating that recovery or refunds of excess or deficient ADIT as a result of the Tax Cuts and Jobs Acts were “to be calculated as of the effective date in the new filings,” the Commission intended that the full regulatory liability for excess ADIT should be captured in transmission formula rates, beginning on the effective date of any proposed tariff provision.¹⁸⁴ This is not inconsistent with the guidance provided in the September 2018 Order; the Commission rejected Exelon Companies’ Formula Rates revisions in the September 2018 Order

¹⁷⁹ DEMEC Clarification Request at 1-2, 10-12; SMECO Clarification Request at 1-2, 5-6.

¹⁸⁰ Order No. 864, 169 FERC ¶ 61,139 at P 45 (“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.”).

¹⁸¹ DEMEC Clarification Request at 2, 9, 17-18. *See* Order No. 864, 169 FERC ¶ 61,139 at P 51 (clarifying that the requirements regarding the return or recovery of excess or deficient ADIT in the Order No. 864 apply only to amounts related to the Tax Cuts and Jobs Act or any future tax rate changes, and not to recovery of past tax amounts).

¹⁸² *See id.* at 7-10, 12-16, 18; SMECO Clarification Request at 2-4, 6-9, 10-11.

¹⁸³ Delmarva Answer at 2, 5-6; PEPCO Answer at 2, 5-6.

¹⁸⁴ Order No. 864, 169 FERC ¶ 61,139 at P 45.

because Exelon Companies failed to comply with the next rate case requirement. By contrast, the clarification granted here, consistent with Order No. 864, does not address past deficient ADIT or compliance with Order No. 144.

6. Compliance Period

56. Finally, we deny Exelon Companies' request for rehearing with respect to the compliance period described in the September 2018 Order.¹⁸⁵ In the September 2018 Order, the Commission provided guidance, on a prospective basis, regarding what would constitute a "reasonable period of time" to file for recovery under Order No. 144.¹⁸⁶ "Consistent with the requirement in Order No. 144 that FAS 109 recovery for ADIT excesses and deficiencies should at least be addressed in the 'next rate case,'" the Commission announced a limited one-year compliance period from publication of the September 2018 Order in the *Federal Register* during which utilities who have not yet filed their "next rate case" following Order No. 144, or who properly preserved recovery of past ADIT through settlement terms, could submit formula rate revisions consistent with the requirement to begin the process of making the requisite adjustments to operate under a full normalization period within a "reasonable period of time."¹⁸⁷ With respect to recovery of deficient ADIT amounts incurred in the future following this one-year period, the Commission provided guidance that utilities should seek recovery within two years after such amounts are incurred.¹⁸⁸

57. Exelon Companies mistakenly assert that this compliance period "is available to every utility except the Exelon Companies," who may only seek amounts from after the effective date of the new filing.¹⁸⁹ On the contrary, the one-year compliance period for implementing the adjustment contemplated in Order No. 144 (regarding amounts associated with the change to full normalization) is not discriminatory, as this period applies equally to all utilities who have not yet had their "next rate case," or who have expressly reserved via settlement the right to file to recover past ADIT in a future rate

¹⁸⁵ Exelon Companies Rehearing Request at 6, 10-11, 53-56.

¹⁸⁶ September 2018 Order, 164 FERC ¶ 61,172 at PP 132-133.

¹⁸⁷ *Id.* P 132. The September 2018 Order was published in the *Federal Register* on September 14, 2018. 83 Fed. Reg. 46,715 (Sept. 14, 2018).

¹⁸⁸ September 2018 Order, 164 FERC ¶ 61,172 at P 133.

¹⁸⁹ Exelon Companies Rehearing Request at 53-54.

case, and no utility availed itself of the compliance period.¹⁹⁰ Exelon Companies also suggest that they are somehow excluded from the going forward compliance period for ADIT amounts incurred in the future.¹⁹¹ This is not true. Exelon Companies are eligible to seek recovery of future deficient ADIT amounts in accordance with the Commission's expectation that a filing seeking such recovery is made within two years after such amounts are incurred.¹⁹² Moreover, as explained above, this recovery is not limited to amounts from after the effective date of the new filing.¹⁹³

58. As explained in section III.B.1 above, the Commission is not announcing a "new" policy or implementing it retroactively. Rather, the Commission provided additional guidance in explaining the application of its existing policy and regulations. The establishment of the one- and two-year periods is consistent with the requirements in Order No. 144 and applies only prospectively.

59. Exelon Companies note that these time periods may, in some instances, result in ratepayers being deprived of tax benefits that would reduce their rates, because "rates will not always alter immediately—whether because of rate moratoriums or other reasons."¹⁹⁴ While we agree that rates may not always alter immediately, we find that the expectation that utilities will make FPA section 205 filings to recover deficient ADIT amounts within two years after such amounts are incurred strikes a reasonable balance between customers' and utilities' interests.

The Commission orders:

(A) Exelon Companies' request for rehearing is hereby denied, as discussed in the body of this order.

¹⁹⁰ September 2018 Order, 164 FERC ¶ 61,172 at P 132.

¹⁹¹ Exelon Companies Rehearing Request at 54.

¹⁹² In Order No. 864, the Commission required public utilities to make certain revisions to their transmission formula rates to address excess and deficient ADIT. As a result of these requirements, transmission formula rates will allow excess and deficient ADIT to be returned or recovered automatically following a tax rate change, thereby meeting and exceeding the Commission's two-year expectation.

¹⁹³ Exelon Companies Rehearing Request at 54.

¹⁹⁴ *Id.* at 7.

(B) DEMEC's and SMECO's requests for clarification are hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.