

166 FERC ¶ 61,202  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Alexandria, Louisiana

Docket No. EL19-6-000

v.

Cleco Power LLC

ORDER DISMISSING FORMAL CHALLENGE AND DENYING IN PART AND  
DISMISSING IN PART COMPLAINT

(Issued March 21, 2019)

1. On October 12, 2018, pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA),<sup>1</sup> Rule 206 of the Commission's Rules of Practice and Procedure,<sup>2</sup> and Cleco Power LLC's (Cleco) Annual Update, Information Exchange and Challenge Procedures (Protocols), the City of Alexandria, Louisiana (Alexandria) filed a Formal Challenge and Complaint against Cleco. Alexandria argues that Cleco violated its transmission formula rate by: (1) failing to reflect in its wholesale transmission charges from January 1, 2018 through May 31, 2018, the reduction in the federal corporate income tax rate that went into effect January 1, 2018, and (2) removing from accounts in the transmission formula rate the excess Accumulated Deferred Income Tax (ADIT) balances that relate to that reduction in the federal corporate income tax rate. In addition, Alexandria argues that the Commission should require Cleco to flow back to transmission customers the excess ADIT. In this order, we dismiss the Formal Challenge on procedural grounds, and we deny in part and dismiss in part the Complaint.

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<sup>1</sup> 16 U.S.C. §§ 824e, 825e, 825h (2012).

<sup>2</sup> 18 C.F.R. § 385.206 (2018).

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## **I. Background**

### **A. Tax Cuts and Jobs Act and Subsequent Commission Issuances**

2. On December 22, 2017, the President signed into law the Tax Cuts and Jobs Act of 2017 (Tax Cuts and Jobs Act), which, among other things, reduced the federal corporate income tax rate from 35 percent to 21 percent, effective January 1, 2018.<sup>3</sup> This means that, beginning January 1, 2018, companies subject to the Commission's jurisdiction will compute income taxes owed to the Internal Revenue Service (IRS) based on a 21 percent tax rate. The tax rate reduction will result in a lower corporate income tax expense going forward.<sup>4</sup> The tax rate reduction will also result in a reduction in ADIT liabilities and ADIT assets on the books of rate-regulated companies.<sup>5</sup>

3. On March 15, 2018, pursuant to section 206 of the FPA, the Commission issued two orders to show cause directing public utilities that use stated transmission rates or transmission formula rates with a fixed line item of 35 percent for the federal corporate income tax rate under an open access transmission tariff (OATT) or transmission owner tariff to propose revisions to their stated transmission rates or transmission formula rates

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<sup>3</sup> Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

<sup>4</sup> *See id.* § 13001, 131 Stat. at 2096.

<sup>5</sup> ADIT balances are accumulated on the regulated books and records of public utilities based on the requirements of the Uniform System of Accounts. ADIT arises from timing differences between the method of computing taxable income for reporting to the IRS and the method of computing income for regulatory accounting and ratemaking purposes. *See* 18 C.F.R. § 35.24(d)(2) (2018). As a result of the reduction in the federal corporate income tax rate, a portion of an ADIT liability that was collected from customers will no longer be due from public utilities to the IRS and is considered excess ADIT, which must be returned to customers in a cost-of-service ratemaking context. Additionally, for public utilities that have an ADIT asset, the Tax Cuts and Jobs Act will result in a reduction to that ADIT asset, and public utilities may seek to reflect in rates a portion of such reductions. Public utilities are required to adjust their ADIT assets and ADIT liabilities for the effect of a change in tax rates in the period that the change is enacted. *Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117, at PP 7-8 (2018) (ADIT NOPR) (citing 18 C.F.R. §§ 35.24, 154.305 (2018); *Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes*, Order No. 144, FERC Stats. & Regs. ¶ 30,254 (1981) (cross-referenced at 15 FERC ¶ 61,133), *order on reh'g*, Order No. 144-A, FERC Stats. & Regs. ¶ 30,340 (1982) (cross-referenced at 18 FERC ¶ 61,163)).

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to reflect the reduced federal corporate income tax rate or show cause why they should not be required to do so.<sup>6</sup> Cleco was not the subject of either of these orders because its transmission formula rate does not state the 35 percent federal corporate income tax rate as a fixed line item.

4. Also on March 15, 2018, the Commission issued a Notice of Inquiry (Tax NOI) seeking comments on, among other things, whether, and if so, how, the Commission should address the effects of the Tax Cuts and Jobs Act on ADIT.<sup>7</sup> On November 15, 2018, the Commission issued a Notice of Proposed Rulemaking (ADIT NOPR) proposing to require all public utility transmission providers with transmission formula rates under an OATT, a transmission owner tariff, or a rate schedule to revise those rates to: include a mechanism to deduct any excess ADIT from or add any deficient ADIT to their rate bases; include a mechanism that decreases or increases their income tax allowances by any amortized excess or deficient ADIT, respectively; and incorporate a new permanent worksheet that will annually track information related to excess or deficient ADIT.<sup>8</sup>

**B. Cleco's Transmission Formula Rate**

5. Cleco's cost-based transmission formula rate is contained in Attachment O of the Midcontinent Independent System Operator, Inc. (MISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff). It consists of Cleco's transmission formula rate template (Template) and Protocols. Cleco's transmission formula rate employs a historical test year methodology without a true-up mechanism and is based on actual costs (rather than projected costs).<sup>9</sup>

6. Cleco's Template calculates its Annual Transmission Revenue Requirement (ATRR) using cost data from Cleco's FERC Form No. 1 (FERC Form 1). Cleco's Template is based on the MISO FERC Form 1 Generic Rate Template contained in Attachment O of the MISO Tariff, with some company-specific revisions. As it relates to the tax rate, Line 21 of Page 3 of Cleco's Template shows a placeholder

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<sup>6</sup> See *AEP Appalachian Transmission Co., Inc.*, 162 FERC ¶ 61,225 (2018) (Formula Rates Show Cause Order); *Alcoa Power Generating Inc. - Long Sault Division*, 162 FERC ¶ 61,224 (2018) (Stated Rates Show Cause Order).

<sup>7</sup> See *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdictional Rates*, 162 FERC ¶ 61,223 (2018) (Tax NOI).

<sup>8</sup> See ADIT NOPR, 165 FERC ¶ 61,117 at PP 1-5.

<sup>9</sup> See, e.g., Formal Challenge and Complaint at 5; Cleco Answer at 2-3.

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of 0.00 percent for the federal corporate income tax rate.<sup>10</sup> In addition, Note K, which pertains to this Line 21 of Page 3 of the Template, provides that the tax rates shall be “the currently effective income tax rate.”<sup>11</sup>

7. Cleco’s transmission formula rate also provides for adjustments to rate base for ADIT.<sup>12</sup> Note F of the Template describes these adjustments to rate base as follows:

The balances in Accounts 190, 281, 282 and 283, as adjusted by any amounts in contra accounts identified as regulatory assets or liabilities related to [Financial Accounting Standards Board (FASB)] 106 or 109. Balance of Account 255 is reduced by prior flow throughs and excluded if the utility chose to utilize amortization of tax credits against taxable income as discussed in Note K. Account 281 is not allocated.

8. Pursuant to Cleco’s Protocols, on or before June 1 of a given year, Cleco must produce an Annual Update which recalculates its ATRR, which shall be applicable to services on and after June 1 of the given year through May 31 of the subsequent year (the Rate Year).<sup>13</sup> Cleco must provide the Annual Update to MISO to be posted on the MISO website and Open Access Same-Time Information System.<sup>14</sup> The Annual Update must contain a data-populated Template, underlying workpapers, and other supporting information.<sup>15</sup> By March 15 of the subsequent year, Cleco must submit to the Commission an Informational Filing of its Annual Update.<sup>16</sup>

9. The Protocols provide processes for transmission customers to submit information requests and for Informal and Formal Challenges to Annual Updates each year.<sup>17</sup> Under the Protocols, Interested Parties may challenge “the inputs, supporting explanations,

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<sup>10</sup> Template at Page 3, Line 21.

<sup>11</sup> *Id.* at Page 5, Note K.

<sup>12</sup> *Id.* at Page 2, Lines 19-24.

<sup>13</sup> Protocols, §§ II(A), II(B).

<sup>14</sup> *Id.* § II(B).

<sup>15</sup> *Id.* § II(D).

<sup>16</sup> *Id.* § VI(A).

<sup>17</sup> *Id.* §§ IV(A) through (D).

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allocations, calculations, or other information” pertaining to the Annual Update.<sup>18</sup> As relevant here, the Protocols specify that “Informal and Formal Challenges shall be limited to all issues that may be necessary to determine,” *inter alia*, “the proper application of the formula rate and procedures in these [P]rotocols.”<sup>19</sup>

10. Under the Protocols, Interested Parties generally have until January 31 after the Annual Update is produced to submit an Informal Challenge to Cleco.<sup>20</sup> Cleco must generally respond to all Informal Challenges by no later than February 28.<sup>21</sup> Interested Parties generally have until April 15 to file a Formal Challenge with the Commission.<sup>22</sup> A Formal Challenge must be filed in the same docket as Cleco’s Informational Filing of its Annual Update.<sup>23</sup> Further, a party may not pursue a Formal Challenge if that party did not submit an Informal Challenge on any issue during the applicable Review Period.<sup>24</sup>

**C. Cleco’s 2017 and 2018 Annual Updates**

11. On May 31, 2017, Cleco populated and posted its 2017 Annual Update, which contained Cleco’s ATRR that was to be in effect for the 2017 Rate Year (i.e., the ATRR in effect from June 1, 2017 through May 31, 2018).<sup>25</sup> Cleco calculated its ATRR for the 2017 Rate Year by using inputs from Cleco’s FERC Form 1 for Calendar Year 2016 and by using the then-effective 35 percent federal corporate income tax rate. Cleco did not recalculate this ATRR for the period of January 1, 2018 through May 31, 2018 to reflect

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<sup>18</sup> *Id.* § IV(B).

<sup>19</sup> *Id.* § IV(D).

<sup>20</sup> *Id.* § IV(A)-(B).

<sup>21</sup> *Id.* § IV(B).

<sup>22</sup> *Id.* § IV(G).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Cleco Answer at 6.

(continued ...)

the new federal corporate income tax rate of 21 percent.<sup>26</sup> Alexandria did not submit an Informal or Formal Challenge to Cleco's 2017 Annual Update.<sup>27</sup>

12. On July 2, 2018, Cleco posted its 2018 Annual Update, which contained Cleco's ATRR rate for the 2018 Rate Year (i.e., the ATRR in effect from June 1, 2018 through May 31, 2019).<sup>28</sup> This ATRR was calculated using inputs from Cleco's FERC Form 1 for Calendar Year 2017 and included the new federal corporate income tax rate of 21 percent, which was the effective tax rate at the time of the 2018 Annual Update.

13. On August 30, 2018, Alexandria submitted an Informal Challenge to Cleco's 2018 Annual Update.<sup>29</sup> On September 19, 2018, Cleco submitted a response disputing the Informal Challenge.<sup>30</sup> On October 12, 2018, Alexandria filed the instant Formal Challenge and Complaint.

**D. Revisions to Attachment O Formula Rates Pertaining to ADIT by MISO Transmission Owners**

14. On November 1, 2018, MISO submitted in Docket No. ER19-249-000 revisions to the MISO FERC Form 1 Generic Rate Template contained in Attachment O and to the company-specific transmission formula rate templates of several MISO Transmission Owners, including Cleco (MISO Attachment O Filing).<sup>31</sup> The revisions added two income tax items to the MISO FERC Form 1 Generic Rate Template and the company-specific transmission formula rate templates to more accurately calculate ATRRs. As relevant here, one of these items was a provision to return to (or recover from) customers excess (or deficient) ADIT resulting from tax law or rate changes.<sup>32</sup> Specifically, the

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<sup>26</sup> See, e.g., Formal Challenge and Complaint at 9-10; Cleco Answer at 7-8.

<sup>27</sup> Cleco Answer at 6.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> See Formal Challenge and Complaint, Attachment C.

<sup>30</sup> See *id.*, Attachment D.

<sup>31</sup> Cleco Answer at 4-5 (citing Midcontinent Indep. Sys. Operator, Inc., Revisions to Attachment O Formula Rates, Docket No. ER19-249-000, (filed Nov. 1, 2018) (MISO Attachment O Filing)); see also *id.* 18-19.

<sup>32</sup> *Id.* at 5.

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MISO Attachment O Filing proposed a mechanism for returning excess deferred taxes to ratepayers (or recovering deficient deferred taxes from ratepayers) by adding a new line labeled “(Excess)/Deficient Deferred Income Taxes” with a reference to a new note.<sup>33</sup> The MISO Attachment O Filing also proposed adding a new line labeled “(Excess)/Deficient Deferred Income Tax Adjustment” to implement an adjustment to reflect the tax gross up associated with the ADIT amount shown.<sup>34</sup> On December 20, 2018, the filing was accepted, effective January 1, 2019.<sup>35</sup>

## **II. Formal Challenge and Complaint**

15. Alexandria argues that Cleco has violated, and continues to violate, its transmission formula rate and Commission orders, regulations, and generally applicable ratemaking policies by: (1) failing to reflect in its wholesale transmission charges from January 1, 2018 through May 31, 2018, the reduction in the federal corporate income tax rate from 35 percent to 21 percent that went into effect January 1, 2018 as a result of the Tax Cuts and Jobs Act; (2) removing from accounts in the formula rate the excess ADIT balances that relate to that reduction in the federal corporate income tax rate in a manner that unreasonably increases the transmission rate to Alexandria and other wholesale customers; and (3) failing to flow back to transmission customers those excess amounts of ratepayer-contributed capital.<sup>36</sup> Alexandria states that it estimates that, as of the date of the Formal Challenge and Complaint, these violations have resulted in transmission rates that are overstated by a total of approximately \$6,688,000, with Alexandria bearing approximately \$271,000 of those amounts.<sup>37</sup>

16. Alexandria requests that the Commission direct Cleco to: (1) revise its ATRR for the 2017 Rate Year to reflect the federal corporate income tax rates actually in effect from January 1, 2018 through May 31, 2018; (2) revise its 2018 Annual Update to properly account for excess ADIT amounts that resulted from the changes in the federal corporate income tax rates; and (3) begin flowing back the excess ADIT to wholesale

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<sup>33</sup> *Id.* at 18 (citing MISO Attachment O Filing at 4-5).

<sup>34</sup> *Id.* (citing MISO Attachment O Filing at 5).

<sup>35</sup> *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER19-249-000 (Dec. 20, 2018) (delegated order).

<sup>36</sup> Formal Challenge and Complaint at 1-2.

<sup>37</sup> *Id.* at 2.

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transmission customers as of January 1, 2018.<sup>38</sup> Alexandria requests that the Commission direct Cleco to provide refunds, with interest, necessary to ensure that wholesale transmission customers receive the full benefit of the reduced federal corporate income tax rates and thus are paying a just and reasonable rate.<sup>39</sup>

17. Alexandria asserts that the requested changes to the calculation of Cleco's ATRR involve only changes in the factors used to calculate the tax allowance and ADIT balances in the as-filed Cleco transmission formula rate and do not require a change in the formula rate itself.<sup>40</sup> Alexandria argues that the Commission therefore has the authority, pursuant to sections 306 and 309 of the FPA, to provide the requested relief, as of the date of Cleco's violation of its tariff, with respect to the reductions in Cleco's tax allowance associated with the reductions in the federal corporate income tax rate and the related federal excess ADIT amounts. Alternatively, Alexandria requests that the Commission find that Cleco's existing formula transmission rate is unjust and unreasonable, establish a refund effective date as of January 1, 2018, and direct Cleco to file changes to its transmission formula rate that the Commission deems necessary to ensure that wholesale transmission customers receive the full value of the lowered federal corporate income tax rate and the related federal excess ADIT amounts.<sup>41</sup>

18. Alexandria faults Cleco for not filing to update its ATRR for the 2017 Rate Year to reflect the reduction in the federal corporate income tax rate that went into effect on January 1, 2018 and for not providing its transmission customers appropriate rate adjustments as part of the 2018 Annual Update process.<sup>42</sup> Alexandria argues that allowing Cleco to recover its tax allowance during the period January 1, 2018 through May 31, 2018 based on a 35 percent federal corporate income tax rate would result in an overstated ATRR and a permanent windfall to Cleco because Cleco's transmission formula rate lacks a true-up mechanism.<sup>43</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.* at 3, 23-24.

<sup>42</sup> *Id.* at 8.

<sup>43</sup> *Id.*



19. Alexandria explains that Cleco's transmission formula rate includes a federal income tax allowance based upon the federal corporate income tax rate currently in effect.<sup>44</sup> Alexandria argues that although Cleco's formula rate is generally based on historical costs from the prior calendar year, the calculation of Cleco's federal income tax allowance is an exception to that general rule. Alexandria contends that the federal corporate income tax rate is not a fixed component of the formula rate as Cleco's Template shows the tax rate as "0.00%." Further, Alexandria asserts that Note K to the Template requires the use of the currently effective income tax rate and not the tax rate that was in effect during the previous year or at the time a prior Annual Update was performed. Alexandria argues that Cleco should therefore have recalculated its 2017 Annual Update for the period January 1, 2018 through May 31, 2018 to reflect the reduced federal corporate income tax rate. Alexandria asserts that Cleco's failure to apply the 21 percent federal corporate income tax rate for the first five months of 2018 is a violation of the filed rate.<sup>45</sup>

20. Alexandria argues that, although Cleco failed to take appropriate action at the time the federal corporate income tax rate was lowered, Cleco could have addressed that alleged error through the 2018 Annual Update process.<sup>46</sup> Citing Line 6a and Note CC of the Template and section V of the Protocols, Alexandria asserts that Cleco's transmission formula rate dictates that the Company must flow through the reduced transmission costs as a result of a change to the inputs used in a prior Annual Update process. Alexandria notes that, specifically, Line 6a of Cleco's transmission formula rate provides for "Adjustments to Net Revenue Requirement" and references Note CC, which provides that the input is for "Adjustment required pursuant to [s]ection V (Changes to Annual Updates) [of the Protocols]" and that "[r]efunds shall be entered as a negative number to reduce the net revenue requirement."<sup>47</sup> Alexandria notes that section V of the Protocols provides, in part:

Any changes to the data inputs, including but not limited to revisions to Cleco's FERC Form No. 1, or as the result of any [Commission] proceeding to consider the Annual Update, or as a result of the procedures set forth herein, shall be incorporated into the formula rate and the charges produced

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<sup>44</sup> *Id.* at 9.

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (quoting Template at Page 5, Note CC).

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by the formula rate in the Annual Update for the next effective Rate Year. This reconciliation mechanism shall apply in lieu of mid-Rate Year adjustment.<sup>48</sup>

Alexandria argues that, accordingly, Cleco should have either made an adjustment to the federal corporate income tax rate during the 2017 Rate Year, or made an adjustment in the 2018 Annual Update to refund Cleco's over-collections during the 2017 Rate Year, including interest.<sup>49</sup>

21. Alexandria requests that the Commission direct Cleco to abide by its transmission formula rate and make customers whole either through refunds as of January 1, 2018 or by an adjustment through the 2018 Annual Update process.<sup>50</sup> Alexandria asserts that if Cleco does not recognize the reduction from the Tax Cut and Jobs Act until June 1, 2018, Cleco would receive a windfall of approximately \$2,010,000 for the five-month period from January 1, 2018 through May 31, 2018.<sup>51</sup> Alexandria asserts that of this amount, \$99,000 would be the excessive transmission charges to Alexandria for that time period.<sup>52</sup>

22. Alexandria asserts that although Cleco is not one of the named utilities against whom the Formula Rates Show Cause Order and the Stated Rates Show Cause Order were issued, the Commission's expectation was that formula rates such as Cleco's, where the federal income tax component is defined as the "currently effective income tax rate," would not require Commission action under FPA section 206 to hold customers harmless.<sup>53</sup> Alexandria contends that Cleco's response to Alexandria's Informal Challenge that Cleco is obligated to use a repealed tax rate has no foundation in Cleco's transmission formula rate or in law. Alexandria asserts that the Commission should reject each of Cleco's arguments in support of this position raised in response to Alexandria's Informal Challenge. First, Alexandria disagrees with Cleco's contentions

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<sup>48</sup> *Id.* (quoting Protocols, § V).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 10-11.

<sup>51</sup> *Id.* at 11 (quoting Formal Challenge and Complaint, Attachment A, Affidavit of Terry M. Myers at P 12 (Myers Affidavit); Myers Affidavit, Exhibit TMM-2, Line 17, Column (E)); *see also id.* at 20.

<sup>52</sup> *Id.* at 11 (quoting Myers Affidavit at P 13); *see also id.* at 20.

<sup>53</sup> *Id.* at 12.

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that the use of the 35 percent federal corporate income tax rate in 2018 rates is appropriate because the “[Cleco Template] is a Historical Test Year approach with no true-up mechanism” and that the formula “is based on the concept that the Historical Test Year’s costs are deemed to be a reasonable proxy for the utility’s costs during the service year.”<sup>54</sup> Alexandria argues that the absence of a full true-up mechanism is immaterial to the resolution of the instant dispute because Note K to the Template requires the use of the “currently effective income tax rate.”<sup>55</sup>

23. Alexandria asserts that Cleco’s argument also ignores the fact that the federal income tax allowance is not a historical fixed cost.<sup>56</sup> Alexandria explains that Cleco will be paying income taxes based on the revenues generated during 2018 at the reduced 21 percent federal corporate income tax rate. Further, Alexandria observes that the transmission formula rate does not use actual tax expense incurred in the previous year to calculate Cleco’s ATRR. Alexandria argues that the level of anticipated tax expense for the rate year is not a function of past tax expense, but rather, is the function of the return on rate base and the currently effective tax rate. Alexandria therefore disagrees with Cleco that the use of the repealed 35 percent tax rate is a reasonable proxy for Cleco’s tax expense.<sup>57</sup>

24. Second, Alexandria disagrees with Cleco’s contention that Alexandria’s position is an improper Informal Challenge because, according to Cleco, Alexandria seeks to amend Cleco’s transmission formula rate.<sup>58</sup> Alexandria argues that no change to Cleco’s transmission formula rate is needed to reflect the 21 percent federal corporate income tax rate. Alexandria asserts that had Cleco applied the “currently effective income tax rate” as required by Note K, Cleco’s transmission formula rate would have been properly updated to reflect the Company’s tax expense beginning in 2018. Alexandria asserts that, alternatively, Cleco could make an adjustment to the 2018 Annual Update calculation through the process dictated by Note CC. Alexandria contends that its Formal Challenge focuses on whether Cleco’s treatment of federal income tax expense is a “proper

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<sup>54</sup> *Id.* (quoting Myers Affidavit, Ex. TMM-5 at 1).

<sup>55</sup> *Id.* at 13.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* (quoting Myers Affidavit, Ex. TMM-5 at 2).

application of the formula rate” and claims that this challenge is expressly permitted by section IV(D) of the Protocols.<sup>59</sup>

25. Finally, Alexandria disagrees with Cleco’s contention that it is appropriate to use the 35 percent federal corporate tax rate for January 2018 through May 2018 because that was “the income tax rate effective during the update for the upcoming effective rate.”<sup>60</sup> Alexandria argues that when a stated component of a formula rate becomes unreasonable, the Commission has the authority to direct a modification to the resulting rate outside of the transmission provider’s Annual Update process. For example, Alexandria notes that in Opinion No. 551,<sup>61</sup> the Commission affirmed an Initial Decision finding that the 12.38 percent base return on equity included in certain MISO Transmission Owners’ transmission formula rates—including Cleco’s transmission formula rate—was unjust and unreasonable and should be reduced to 10.32 percent. Alexandria also notes that the Commission ordered refunds as of the date of the filing of the complaint in that proceeding. Alexandria argues that, contrary to Cleco’s interpretation of its transmission formula rate in response to Alexandria’s Informal Challenge, Cleco’s transmission rates were not shielded from modification because the 12.38 percent return on equity was in effect and deemed reasonable when the Company performed its prior Annual Updates.<sup>62</sup>

26. Further, Alexandria argues that Cleco has improperly treated the excess ADIT associated with the reduced federal corporate income tax rate.<sup>63</sup> Alexandria explains that in response to the Tax NOI certain MISO Transmission Owners, including Cleco, filed comments, in which they stated that, *inter alia*, rate base neutrality is accomplished by giving effect to Note F of the MISO FERC Form 1 Generic Rate Template contained in Attachment O, which describes adjustments to rate base.<sup>64</sup> Alexandria asserts that in Cleco’s 2018 Annual Update, Cleco failed to correctly incorporate the re-measured excess ADIT regulatory assets and liabilities as components of rate base as required by Note F. Alexandria claims that Cleco moved the excess ADIT into a regulatory liability

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<sup>59</sup> *Id.* (quoting Protocols, § IV(D)).

<sup>60</sup> *Id.* (quoting Myers Affidavit, Ex. TMM-5 at 2).

<sup>61</sup> *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234 (2016) (Opinion No. 551).

<sup>62</sup> Formal Challenge and Complaint at 15.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 16 (citing Comments of the MISO Transmission Owners, Docket No. RM18-12-000 (filed May 21, 2018)).

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account, FERC Account 254, but failed to adjust Accounts 190, 281, 282, and 283 by the regulatory asset/liability contra accounts required by the ADIT adjustment and Note F of Cleco's Template.<sup>65</sup>

27. Alexandria contends that Cleco's failure to adjust Accounts 190, 281, 282, and 283 to reflect the excess ADIT denies rate base neutrality to transmission customers.<sup>66</sup> Alexandria asserts that the impact of Cleco's error results in an overstatement in Cleco's ATRR of \$4,678,000, which results in overcharges to the City of approximately \$172,000 per year. Cleco argues that these overcharges will continue until Cleco makes the appropriate adjustment to rate base to reflect the excess ADIT.<sup>67</sup>

28. Finally, Alexandria contends that, even though the Commission has initiated an inquiry into the proper treatment of the excess ADIT associated with the change in the federal corporate income tax rate, it is appropriate and administratively efficient for the Commission to require Cleco to flow back to transmission customers Cleco's excess ADIT associated with the reduction in the federal corporate income tax rate.<sup>68</sup> Alexandria states that utilizing the approach of returning all the excess ADIT to transmission customers over the remaining life of the assets would result in an annual amortization amount of approximately \$2,091,000 to be returned to transmission customers, including approximately \$77,000 to be returned to Alexandria.<sup>69</sup>

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

29. Notice of the Formal Challenge and Complaint was published in the *Federal Register*, 83 Fed. Reg. 53,240-41 (2018), with interventions and protests due on or before on November 1, 2018. On November 1, 2018, Cleco filed an answer to the Formal Challenge and Complaint. On November 16, 2018, Alexandria filed a motion for leave to answer and answer to Cleco's answer.

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<sup>65</sup> *Id.* at 17.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (citing Myers Affidavit at PP 16-17).

<sup>68</sup> *Id.* at 17-18.

<sup>69</sup> *Id.* at 18 (citing, *inter alia*, Myers Affidavit at PP 19-20); *see also id.* at 20-21.

**A. Cleco Answer**

30. Cleco argues that it properly uses the tax rate in effect for the test year in its Annual Updates.<sup>70</sup> Cleco contends that, contrary to Alexandria's claims, Cleco's transmission formula rate did not permit the new tax rate to be used in its 2017 Annual Update. Cleco argues that the new federal corporate income tax rate could not be reflected until Cleco's 2018 Annual Update, where it was correctly used. Cleco argues that, accordingly, Alexandria's Formal Challenge to the use of the 35 percent federal corporate income tax rate for the five-month period from January 1, 2018 through May 31, 2018 should be dismissed.<sup>71</sup>

31. Cleco argues that Alexandria's Formal Challenge and Complaint attempts to ignore the fact that Cleco's transmission formula rate is wholly based on a historical test year methodology under which all parties agree to the use of a utility's actual costs incurred in a test year as a proxy for the costs to be incurred in a given rate year.<sup>72</sup> Cleco notes that the Commission has recognized test year ratemaking to be a fundamental ratemaking concept, in which rates are based on a utility's entire cost of service for a particular test year.<sup>73</sup> Cleco contends that under a test year ratemaking methodology, all costs in a test year must be synchronized to reflect each of the costs in that particular test year, and neither the utility nor the customer may pick and choose costs that may have fluctuated up or down after the test year ended. Cleco states that, under the test year ratemaking approach, a utility's rates do not recover actual costs for the service year, but recover the utility's test year costs as a reasonable proxy for service year costs.<sup>74</sup>

32. Cleco explains that, specifically, the historical test year approach in formula ratemaking uses a prior time period as the test period for costs in the upcoming year.<sup>75</sup> Cleco also explains that although some formula rates do contain true-up mechanisms, in which actual costs are later input into the formula and "trued-up," the Commission does

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<sup>70</sup> Cleco Answer at 7.

<sup>71</sup> *Id.* at 8.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.* at 8 (citing *Am. Pub. Power Assoc. v. FPC*, 522 F.2d 142, 147 (D.C. Cir. 1975); *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,174, at P 128 (2010)).

<sup>74</sup> *Id.* at 9.

<sup>75</sup> *Id.*

(continued ...)

not require the use of a true-up mechanism. Cleco notes that the Commission has refused to permit later adjustments to formula rates that use inputs from a historical period and that do not contain a true-up mechanism.<sup>76</sup>

33. Cleco argues that for the period June 1, 2017 through May 31, 2018, Cleco properly utilized its 2016 FERC Form 1 data to populate the Template and to calculate its ATRR for that time period.<sup>77</sup> Cleco argues that it would be a violation of the approved historical test year approach that it uses in its transmission formula rate to include cost increases or decreases that occur outside the historical test year. Cleco asserts that, through Alexandria's complaint, Alexandria seeks to accomplish this impermissible deviation from the filed rate.<sup>78</sup>

34. Cleco disagrees with Alexandria's claim that the calculation of federal income tax allowance is an exception to the use of historical costs, arguing that there is no income tax exception to historical test year ratemaking principles.<sup>79</sup> Cleco argues that Alexandria ignores the premise of using a historical test year. Cleco argues that allowing only one component of the rate to use out-of-test-year data would mean that the costs would no longer be synchronized.<sup>80</sup>

35. Cleco agrees with Alexandria that Cleco will be paying income taxes based on the revenues generated in 2018.<sup>81</sup> Cleco notes that it must pay other costs incurred in any given year that do not necessarily match those of the historical test year. Cleco explains that this is the way a backward-looking formula rate with no true-up works. Cleco asserts that Alexandria seeks to cherry-pick a single declining cost in Cleco's transmission formula rate, whose change will be to Alexandria's benefit, without recognizing other costs that may have increased after the test year, whose change would benefit Cleco.<sup>82</sup>

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<sup>76</sup> *Id.* (citing *Idaho Power Co.*, 153 FERC ¶ 61,212, at P 33 (2015)).

<sup>77</sup> *Id.* at 9-10.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (citation omitted).

<sup>81</sup> *Id.* at 11.

<sup>82</sup> *Id.*

36. Cleco notes that, as an example, transmission wages increased by 13 percent in 2017 due to new hires in the Cleco transmission department.<sup>83</sup> Cleco explains that it did not attempt to capture those increased costs that occurred in 2017 in the ATRR for the 2017 Rate Year. Cleco states that instead, in accordance with test period ratemaking, Commission precedent, and its tariff, Cleco could only reflect that increased cost in wages in the ATRR for the 2018 Rate Year.<sup>84</sup>

37. Cleco argues that Alexandria misinterprets Note K of Cleco's Template as requiring Cleco either to retroactively adjust the federal corporate income tax rate used in the 2017 Annual Update or to refund the difference in taxes charged during the period January 1, 2018 through May 31, 2018 using the adjustments provision in Cleco's Template and Protocols.<sup>85</sup> Cleco contends that the Note K language requires Cleco to use the federal corporate income tax rate effective during the historical test year for the upcoming effective rate. Cleco asserts that this is what Cleco did in June of 2017 (i.e., in its 2017 Annual Update), when it used the 35 percent federal corporate income tax rate currently in effect at the time, and in June 2018 (i.e., in its 2018 Annual Update), when it updated the federal corporate income tax rate to reflect the currently effective income tax rate of 21 percent. Cleco argues that it is illogical and unreasonable to assume that the transmission formula rate references a tax rate that is not known at the time of the Annual Update.<sup>86</sup>

38. Cleco also disagrees with Alexandria's contention that section V of the Protocols requires Cleco to adjust its ATRR for the 2017 Rate Year to reflect the effects of the reduction in federal corporate tax rate.<sup>87</sup> Cleco asserts that section V of the Protocols is intended to be used only for changes resulting from Challenges made in accordance with the Protocols. Cleco notes that the Protocols provide that Challenges can be made to the "inputs, supporting explanations, allocations, and calculations" of the Annual Update.<sup>88</sup> Cleco asserts that the change in the federal corporate income tax rate is not an error in an input, supporting explanation, allocation, or calculation of the Annual Update. Cleco argues that Section V is not intended to serve as a true-up mechanism that permits out-of-

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 11-12 (citations omitted).

<sup>86</sup> *Id.* at 12.

<sup>87</sup> *Id.* at 13.

<sup>88</sup> *Id.* (quoting Protocols, § IV(A)).

(continued ...)



test-year adjustments to “data inputs” from the appropriate FERC Form 1. Cleco contends that such an interpretation would result in every historical test year transmission formula rate in effect being subject to a true-up mechanism. Cleco argues that this result cannot be the intent of section V.<sup>89</sup>

39. Cleco also disagrees with Alexandria’s contention that no change to Cleco’s transmission formula rate is needed for the Commission to grant Alexandria’s requested relief (i.e., retroactively adjusting the ATRR for the 2017 Rate Year or refunding the amounts).<sup>90</sup> Cleco notes that the Tax Cuts and Jobs Act was enacted after the relevant test period. Cleco argues that requiring it to adjust its ATRR for the 2017 Rate Year to reflect the effects of the Tax Cuts and Jobs Act would permit an out-of-test-year change that the transmission formula rate does not allow and, therefore, would constitute retroactive ratemaking and a violation of the filed rate. Cleco asserts that, because there is no true-up provision in the transmission formula rate, nor any other provision that can reasonably be interpreted to permit the type of retroactive changes that Alexandria seeks, Alexandria is actually seeking to modify Cleco’s transmission formula rate through the Challenge Procedures, an action that Cleco contends is specifically prohibited by the Protocols.<sup>91</sup>

40. Further, Cleco argues that, although Alexandria’s Informal Challenge to the rates charged during the five-month period from January 1, 2018 through May 31, 2018 is styled as a challenge to the 2018 Annual Update, it is actually an impermissible challenge to the 2017 Annual Update.<sup>92</sup> Cleco notes that one of the components of Alexandria’s requested relief is to direct Cleco to revise its ATRR for the 2017 Rate Year. Cleco asserts that because Alexandria did not challenge the 2017 Annual Update within the

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<sup>89</sup> *Id.* at 14.

<sup>90</sup> *Id.* at 12.

<sup>91</sup> *Id.* at 14-15 (citation omitted). Cleco notes that section IV of the Protocols provides:

No party shall seek to modify the formula rate under the Challenge Procedures set forth in these protocols and the Annual Update shall not be subject to challenge by anyone for the purpose of modifying the formula rate.

*Id.* at 15 (quoting Protocols, § IV(J)).

<sup>92</sup> *Id.* at 14.

(continued ...)

time set forth in the Protocols, Alexandria is procedurally barred from challenging the 2017 Annual Update and its associated inputs.<sup>93</sup>

41. In addition, Cleco argues that Alexandria has failed to meet its burden of proof in its alternative request that the Commission change Cleco's transmission formula rate under FPA section 206.<sup>94</sup> Cleco asserts that Alexandria has failed to prove that the transmission formula rate is unjust and unreasonable due to the use of historical tax rates. Cleco argues that the historical test year approach generally favors transmission customers and that Alexandria has failed to demonstrate that Cleco's tax rate practice offsets the rate-reducing effects obtained in other components of the historical test year. Cleco also notes that using a historical test year cost of service has never been found by the Commission to be inherently unjust and unreasonable and that the Commission has approved many such rate structures. Further, Cleco argues that Alexandria's requested refund effective date of January 1, 2018, is contrary to the provisions of the FPA.<sup>95</sup>

42. In addition, Cleco asserts that Alexandria's claims regarding Cleco's treatment of excess ADIT are premature and are inconsistent with Commission accounting and ratemaking principles.<sup>96</sup> Cleco argues that, because the Commission has an ongoing Tax NOI proceeding to decide on the excess ADIT issue, any other forum is inappropriate and Alexandria's claims attempting to remove the issue from that proceeding should be rejected. Cleco affirms that it will comply with any directions from Commission related to excess ADIT. Cleco also asserts that contrary to Alexandria's claims, Cleco has complied with Note F of Cleco's transmission formula rate and moved the excess ADIT into a regulatory liability account, FERC Account 254.<sup>97</sup> Cleco argues that this accounting treatment is appropriate pending the MISO Attachment O Filing. Cleco contends that moving the amounts to FERC Account 254 follows FERC accounting guidance, which states that deferred income taxes or income tax reserve amounts that have been paid by the customers is either a deferred asset, which should be

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 15.

<sup>95</sup> *Id.* at 16.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 17.

recorded in FERC Account 182.3, or a deferred liability, which should be recorded in FERC Account 254.<sup>98</sup>

43. Finally, Cleco asserts that the MISO Attachment O Filing, which would, *inter alia*, provide a mechanism for returning excess ADIT to ratepayers, renders moot Alexandria's argument that the Commission should require Cleco to flow back excess ADIT amounts collected under the previous federal corporate income tax rate.<sup>99</sup>

**B. Alexandria Answer**

44. Alexandria argues that nowhere in the Cleco Answer does Cleco deny that its proposed treatment of the federal corporate income tax law changes will result in Alexandria overpaying for Cleco's federal income tax expenses or that Cleco has removed from accounts in Cleco's template the excess ADIT balances related to that reduction in the federal corporate income tax rate in a manner that increases the transmission rate to Alexandria and other wholesale customers while not flowing back to transmission customers those excess amounts of ratepayer-contributed capital.<sup>100</sup>

45. Alexandria argues that Cleco's transmission formula rate is not based entirely on historical costs.<sup>101</sup> Alexandria disagrees with Cleco's contention that Alexandria's Formal Challenge and Complaint attempts to ignore the fact that Cleco's transmission formula rate is wholly based on a historical test year methodology under which all parties agree to use a utility's actual costs incurred in a test year as a proxy for the costs to be incurred in a given rate year. Alexandria argues that this statement is an inaccurate oversimplification of how Cleco's transmission formula rate operates. Alexandria notes that although several components of Cleco's transmission formula rate are taken from historical data reported in the Company's FERC Form 1, the tax allowance component is not one of those components. Alexandria argues that contrary to Cleco's claim, the Cleco tax allowance component of the transmission formula rate is not a historical cost. Alexandria asserts that, rather, the tax allowance is computed annually based on a composite factor employing the current federal and state corporate income tax rates which is then multiplied by Cleco's return on rate base. Alexandria asserts that the

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 16, 18-19.

<sup>100</sup> Alexandria Answer at 2-3.

<sup>101</sup> *Id.* at 3.

income tax allowance component of Cleco's transmission formula rate is therefore designed to reflect what Cleco will pay in taxes during the rate effective period.<sup>102</sup>

46. Alexandria argues that Cleco's income tax allowance is not, as Cleco contends, designed to recover historical income tax payments made by Cleco.<sup>103</sup> Alexandria observes that Cleco's transmission formula rate does not, for example, import Cleco's actual tax expenses incurred in 2017. Alexandria asserts that Cleco's supposed equitable arguments about the treatment of other historical expenses that may have increased is therefore inapposite. Specifically, Alexandria notes that, unlike federal income tax expenses, transmission wage expenses are historical costs that are, as directed in Cleco's transmission formula rate, pulled directly from Cleco's FERC Form 1. Alexandria argues that contrary to Cleco's contention, Alexandria is not trying to cherry-pick certain decreasing rate components but is seeking to enforce the filed rate.<sup>104</sup>

47. Moreover, Alexandria argues that it is clear that certain stated components of Cleco's transmission formula rate can change during the rate effective period.<sup>105</sup> Alexandria, notes that, for example, when the MISO-wide return on equity component was reduced, the Commission ordered refunds as of the refund effective date in that proceeding.<sup>106</sup> Alexandria argues that if Cleco's interpretation of its transmission formula rate were correct—i.e., that it is based entirely on historical costs as calculated at the time of the last Annual Update—there would have been no reason for the Commission to impose refund liability on Cleco when the Commission reduced the currently effective return on equity in response to those complaints. Alexandria asserts that under Cleco's theory of its transmission formula rate, it would have been sufficient to lower the return on equity during the next Annual Update. Alexandria argues that contrary to the Cleco's arguments, the fact that certain aspects of its transmission formula rate are historical does not completely insulate the ATRR from review once an Annual Update has been performed.<sup>107</sup>

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<sup>102</sup> *Id.* at 4.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 4-5 (citing Cleco Answer at 11).

<sup>105</sup> *Id.* at 5.

<sup>106</sup> *Id.* (citation omitted); *see also* Opinion No. 551, 156 FERC ¶ 61,234.

<sup>107</sup> *Id.* at 6.

(continued ...)

48. Further, Alexandria disagrees with Cleco that utilizing section V of the Protocols to grant Alexandria's requested relief violates the filed rate and constitutes retroactive ratemaking.<sup>108</sup> Alexandria disagrees with Cleco's claim that section V is intended to be used only for changes resulting from Challenges made in accordance with the Protocols. Alexandria asserts that the plain language of section V is directly counter to Cleco's interpretation. Alexandria notes that section V provides that it applies to "*any* changes to data inputs" and that any such changes are "*not limited to*" changes as a result of the procedures set forth in the Protocols.<sup>109</sup>

49. Alexandria also disagrees with Cleco's argument that adjusting for the change in the federal corporate income tax rate would be improper because section V is not intended to serve as a true-up mechanism that permits out-of-test-year adjustments to data inputs from the appropriate FERC Form 1.<sup>110</sup> Alexandria asserts that this argument is inapposite. Alexandria reiterates that the income tax allowance component of Cleco's transmission formula rate is not one of the historical costs taken from the Company's FERC Form No. 1. Moreover, Alexandria asserts that its position does not mean that all data inputs would be subject to a true-up, as Cleco contends. Alexandria argues that it seeks to have section V utilized as intended: to correct erroneous data inputs to the existing formula rate.<sup>111</sup> Alexandria argues that, if, for example, Cleco misreported an item on its 2017 FERC Form 1 and had to refile that data, section V would permit an adjustment for that mistake in the next Annual Update.<sup>112</sup> Alexandria argues that this process does not mean that Cleco could true-up historical data to match its actual expense in the rate effective period. Alexandria asserts that, here, it requests that Cleco be required to correct the mistaken data point that was used for the federal corporate income tax rate and thereby be denied the unjust enrichment Cleco seeks to keep.<sup>113</sup>

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<sup>108</sup> *Id.* at 6-7.

<sup>109</sup> *Id.* (quoting Cleco Attachment O, Protocols, § V) (emphasis added by Alexandria).

<sup>110</sup> *Id.* at 8 (citation omitted).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

50. In addition, Alexandria disagrees with Cleco's claim that Alexandria is procedurally barred from challenging the change in the federal corporate income tax rate in the 2018 Annual Update.<sup>114</sup> While Alexandria acknowledges that it did not challenge the 2017 Annual Update, it argues that its Formal Challenge is properly lodged against the 2018 Annual Update and Cleco's failure to correct its mistaken data input from the 2017 Annual Update. Alexandria notes that section V of the Protocols provides that errors in data inputs "shall be incorporated into the formula rate and the charges produced by the formula rate in the Annual Update for the next effective Rate Year." Alexandria asserts that it is Cleco's failure to abide by this requirement in the 2018 Annual Update that is the subject of Alexandria's Formal Challenge. Alexandria argues that because it properly raised the issue in the time prescribed for challenges to the 2018 Annual Update, there is no procedural bar to Alexandria's challenge.<sup>115</sup>

51. Further, Alexandria disagrees with Cleco's contentions that Alexandria's ADIT issues are premature and are mooted by the MISO Attachment O Filing.<sup>116</sup> Alexandria argues that although Alexandria proposed that Cleco begin to flow back the excess ADIT, Alexandria's Formal Challenge and Complaint also concerns the failure of Cleco to abide by the filed rate and to hold Alexandria and other customers harmless for so long as Cleco retains this customer-contributed capital. Alexandria argues that Commission action on the MISO Attachment O Filing will not remedy this harm, asserting that Alexandria will continue to pay unjust and unreasonable transmission rates for so long as Cleco retains all, or any portion of, the excess ADIT and fails to provide transmission customers with an offset to rate base as required by Cleco's transmission formula rate. Alexandria asserts that Cleco does not deny that it has failed to adjust Accounts 190, 281, 282, and 283 by the regulatory asset/liability contra accounts required by the ADIT adjustment and Note F to Cleco's transmission formula rate.<sup>117</sup>

52. Alexandria reiterates that it seeks redress of Cleco's violations of its as-filed transmission formula rate and that the remedy that Alexandria seeks does not require a change in the formula rate itself.<sup>118</sup> However, Alexandria explains that if the Commission finds that a change to Cleco's transmission formula rate is required to implement any portion of the relief Alexandria seeks, Alexandria has met its burden

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 9.

<sup>116</sup> *Id.* at 9-10.

<sup>117</sup> *Id.* at 10-11.

<sup>118</sup> *Id.* at 11.

(continued ...)

under FPA section 206 to support a finding that Cleco's transmission formula rate is not just and reasonable. Alexandria also notes that the Commission has previously recognized that jurisdictional rates should reflect a significant decrease in the federal corporate income tax rate."<sup>119</sup>

53. Alexandria argues that the Commission has the authority, based on the record in this proceeding, to find that Cleco's transmission formula rate is unjust and unreasonable and to direct Cleco to file changes to its transmission formula rate to ensure that wholesale transmission customers receive the full value of the lowered federal corporate income tax rate and the related federal excess ADIT amounts.<sup>120</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

54. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept Alexandria's answer because it has provided information that assisted us in our decision-making process.

55. We dismiss on procedural grounds the Formal Challenge part of Alexandria's Formal Challenge and Complaint. As noted above, under Cleco's Protocols, a Formal Challenge must be filed in the same docket as Cleco's Informational Filing of its Annual Update,<sup>121</sup> which Alexandria did not do.

56. Further, to the extent Alexandria's Formal Challenge could be construed as a challenge to Cleco's 2017 Annual Update, such a challenge is barred under the Protocols. As Cleco notes, Alexandria did not challenge the 2017 Annual Update within the time set forth in the Protocols; that is, Alexandria submitted its Informal Challenge after the January 31, 2018 deadline and its Formal Challenge after the April 15, 2018 deadline.<sup>122</sup> Further, Alexandria did not file the Formal Challenge in the same docket as Cleco's Informational Filing of its 2017 Annual Update.<sup>123</sup>

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<sup>119</sup> *Id.* at 12 (citations omitted).

<sup>120</sup> *Id.*

<sup>121</sup> Protocols, § IV(G).

<sup>122</sup> *See id.* §§ IV(A), (G).

<sup>123</sup> Cleco submitted its Informational Filing of its 2017 Annual Update in Docket No. ER18-999-000.

57. Although we are rejecting Cleco's Formal Challenge on procedural grounds, we note that Alexandria's Complaint largely overlaps with its Formal Challenge. We address Alexandria's Complaint below.

**B. Substantive Matters**

58. We disagree with Alexandria that Cleco violated its transmission formula rate by using a 35 percent federal corporate income tax rate to calculate its ATRR for the five-month period from January 1, 2018 through May 31, 2018. Cleco's transmission formula rate employs a historical test year methodology without a true-up mechanism, and therefore, per Note K of Cleco's Template, Cleco properly used the 35 percent federal corporate income tax rate that was in effect at the time of the 2017 Annual Update to calculate its ATRR for the 2017 Rate Year. The 2017 Rate Year covers the period June 1, 2017 through May 31, 2018; thus it includes the January 2018 through May 2018 period at issue in this proceeding.

59. The reduction in the federal corporate income tax rate took effect on January 1, 2018. Alexandria argues that because Note K refers to the "currently effective income tax rate," Note K required Cleco to recalculate the ATRR for the 2017 Rate Year for the months of January 2018 through May 2018 to reflect this reduction, and Alexandria alleges that Cleco's failure to do so was an error. We disagree. We do not read Note K as requiring Cleco to recalculate its ATRR for the 2017 Rate Year to account for the reduction in federal corporate income tax rate. Cleco's Template calculates a single ATRR for the entire Rate Year. There is no provision in Cleco's Template for a partial year ATRR calculation, nor is there a provision to calculate the ATRR for a given Rate Year using two different federal corporate income tax rates. The change in the federal corporate income tax rate that took effect on January 1, 2018 was unknown when Cleco prepared the Annual Update for the 2017 Rate Year. Further, there is no provision in Cleco's Protocols that provides that, after Cleco calculates its ATRR for a given Rate Year in an Annual Update, Cleco must recalculate its ATRR for that year to reflect a change in the tax rate or other data inputs during the rate year. Thus, Cleco could not have reflected the reduced tax rate through a recalculation of the ATRR for 2017 Rate Year under its existing transmission formula rate; changes to the transmission formula rate itself would have been required.

60. To support its argument that Cleco's ATRR for the months January 2018 through May 2018 should reflect the reduced 21 percent federal corporate income tax rate, Alexandria cites Opinion No. 551 for the proposition that when a stated component of a formula rate becomes unreasonable, the Commission may direct a modification to the ATRR outside of the Annual Update process. We find Opinion No. 551 to be inapposite here. As Alexandria acknowledges, at issue in Opinion No. 551 was whether the stated component of the transmission formula rates of certain MISO Transmission Owners—



specifically, the base return on equity—was unjust and unreasonable. In contrast, in this proceeding, the federal corporate income tax rate at issue here is not a stated component in Cleco's Template, but instead is updated each year based on the tax rate in effect at the time of the Annual Update for a given Rate Year.

61. We also disagree with Alexandria that, pursuant to Line 6a and Note CC of Cleco's Template and section V of Cleco's Protocols, Cleco was required to adjust its ATRR for the 2018 Rate Year, to correct its alleged mistake in failing to recalculate the ATRR for the 2017 Rate Year for the months January 2018 through May 2018. We find Alexandria's interpretation of the scope of section V to be overbroad and do not read the phrase "[a]ny changes to the data inputs" in section V of Cleco's Protocols to include the reduction in the federal corporate income tax rate. We note that section V does not contain a true-up mechanism such as found in transmission formula rates where projected costs are trued-up to actual costs; rather, it contains a "reconciliation mechanism" to be used if a prior year's ATRR were based on FERC Form 1 data or other data inputs that required revision. Alexandria equates Cleco adjusting its ATRR for the 2018 Rate Year to reflect the reduction in federal corporate income tax rate with Cleco hypothetically adjusting its ATRR for the 2018 Rate Year to account for a correction of misreported data on Cleco's 2017 FERC Form 1. This is a faulty analogy because, as discussed above, Cleco properly followed Note K of its Template in its 2017 Annual Update when it used the then-effective tax rate to calculate the ATRR for the 2017 Rate Year.

62. We also deny Alexandria's alternative request that the Commission order Cleco to make changes to its transmission formula rate to ensure that wholesale transmission customers receive the full value of the lowered federal corporate income tax rate. Alexandria has not shown that Cleco's transmission formula rate is unjust and unreasonable. As noted above, Alexandria has asserted that because Cleco used the 35 percent federal corporate income tax rate rather than the reduced 21 percent federal corporate income tax rate in calculating its ATRR for January 2018 through May 2018, Cleco received compensation for an overstated income tax allowance and an overstated ATRR. However, this occurrence does not render Cleco's transmission formula rate unjust and unreasonable, but rather reflects the nature of an acceptable historical-looking transmission formula rate that lacks a true-up mechanism.

63. Due to this nature of Cleco's transmission formula rate, Cleco may under-collect or over-collect various costs during a given Rate Year. For example, as Cleco observes, although transmission wages increased by 13 percent in 2017, it could not capture these increased costs in the ATRR for the 2017 Rate Year. Thus, according to Cleco, it under-recovered its labor costs in 2017. We also note that had the Tax Cut and Jobs Act increased the federal corporate income tax rate rather than reduced it, Cleco would likely have under-recovered its tax allowance from January 2018 through May 2018.

64. Further, we observe that in the Formula Rates Show Cause Order, in explaining how adjustments in formula rates usually occur, the Commission noted that “[f]or formula rates with inputs that are adjusted annually, the current 21 percent federal corporate income tax rate will be reflected in a transmission revenue requirement without requiring a revision to the formula rate.”<sup>124</sup> The Commission did not speak to the timing for the reduced federal corporate income tax rate to be reflected in transmission formula rates with inputs that are adjusted annually. Pursuant to Note K of Cleco’s Template, Cleco properly used the reduced 21 percent federal corporate income tax rate that was in effect at the time of the 2018 Annual Update to calculate its ATRR for the 2018 Rate Year.

65. In addition, regarding Alexandria’s claim that Cleco has not complied with Note F because Cleco has failed to adjust Accounts 190, 281, 282, and 283 for any unamortized excess/deficient ADIT amounts, we find that Alexandria has not presented sufficient evidence to substantiate this claim. Thus, we deny this part of Alexandria’s Complaint. However, we note that under Note F, Cleco is required to maintain rate base neutrality with respect to the excess ADIT. In addition, we note that Cleco is required to follow the accounting guidance in Docket No. AI93-5-000 (*Accounting for Income Taxes*), which requires that any future refunds or recoveries through rates as a result of a future increase or decrease in taxes payable, resulting from a change in tax law or rates, should be recognized in Account 254 or Account 182.3, Other Regulatory Assets, as appropriate.

66. Finally, regarding Alexandria’s request that the Commission require Cleco to flow back to transmission customers Cleco’s excess ADIT associated with the reduction in the federal corporate income tax rate, we find that the acceptance of the MISO Attachment O Filing renders this request moot.<sup>125</sup> Accordingly, we dismiss this aspect of Alexandria’s Complaint.

The Commission orders:

(A) Alexandria’s Formal Challenge is hereby dismissed, as discussed in the body of this order.

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<sup>124</sup> Formula Rates Show Cause Order, 162 FERC ¶ 61,225 at P 4.

<sup>125</sup> *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER19-249-000 (Dec. 20, 2018) (delegated order).

(B) Alexandria's Complaint is hereby denied in part and dismissed in part, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.