181 FERC ¶ 61,244
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

System Energy Resources, Inc. Docket No. ER18-1182-001
EL23-11-000

ORDER ON INITIAL DECISION AND ESTABLISHING A SHOW CAUSE PROCEEDING

(Issued December 23, 2022)

1. This order addresses briefs on exceptions and opposing exceptions to an Initial Decision issued on July 9, 2020 by the presiding Administrative Law Judge (Presiding Judge) in the above-captioned proceeding[1] concerning System Energy Resource, Inc.'s (SERI) proposed rate revisions to return to customers unprotected excess accumulated deferred income taxes (ADIT) resulting from the Tax Cuts and Jobs Act of 2017 (TCJA).

2. The Initial Decision sets forth the Presiding Judge's findings. As discussed below, we affirm in part and modify in part the Initial Decision. In addition, pursuant to section 206 of the Federal Power Act (FPA),[2] we institute a proceeding in Docket No. EL23-11-000 to determine whether it is unjust and unreasonable that SERI has failed to return to customers the value of excess ADIT prior to IRS resolution of SERI's nuclear decommissioning tax deductions. We direct SERI to either: (1) propose revisions to its Unit Power Sales Agreement (UPSA) to return the appropriate amounts to customers as described below; or (2) show cause why it should not be required to do so.

I. Background

3. SERI, a wholly-owned subsidiary of Entergy Corporation, owns or leases 90% of the Grand Gulf nuclear generating facility (Grand Gulf) from which it sells wholesale capacity and energy to its affiliates Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy Louisiana, LLC, and Entergy New Orleans, LLC (collectively, the Entergy

[1] *Sys. Energy Res., Inc.*, 172 FERC ¶ 63,003 (2020) (Initial Decision).

[2] 16 U.S.C. § 824e.

Operating Companies)[3] pursuant to the terms of SERI's UPSA.[4] The UPSA contains a formula rate mechanism that the Commission first approved in 1985.[5]

4. The Initial Decision states that, pursuant to the UPSA, SERI began collecting decommissioning expenses for Grand Gulf from customers in the 1980s, for a process estimated to begin in 2044 when Grand Gulf shuts down.[6]

II. Hearing Order and Initial Decision

5. On March 27, 2018, SERI filed proposed revisions to its UPSA pursuant to FPA section 205 to "capture the effect of the [TCJA's] reduced federal corporate income tax rate on SERI's unprotected excess ADIT balances and flow the value of the resulting unprotected excess ADIT balances back to SERI's wholesale customers over a seven month period during 2018."[7] On May 31, 2018, the Commission issued an order accepting and suspending the Filing to become effective June 1, 2018, subject to refund, and set the Filing for hearing and settlement judge procedures.[8]

III. Partial Settlement

6. The Mississippi Public Service Commission (Mississippi Commission) protested the Filing in this proceeding, participated in the hearing, and jointly submitted a brief opposing exceptions with the Arkansas Public Service Commission (Arkansas

[3] An additional Entergy Operating Company, Entergy Texas, Inc. (Entergy Texas), does not purchase Grand Gulf energy from SERI. For ease of use, in this order, references to the Entergy Operating Companies do not include Entergy Texas. Also, shortly before the beginning of this proceeding and since the filing of the proposed rate revisions initiating this proceeding, several entities changed their names: Entergy Services, Inc. is now Entergy Services, LLC; Entergy Arkansas, Inc. is now Entergy Arkansas, LLC; Entergy Mississippi, Inc. is now Entergy Mississippi, LLC (Entergy Mississippi); and Entergy New Orleans, Inc. is now Entergy New Orleans, LLC.

[4] Initial Decision, 172 FERC ¶ 63,003 at P 39.

[5] *Id.* P 40 (citing *Middle S. Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305 (1985)).

[6] *Id.* P 42.

[7] SERI March 27, 2018 Filing at 4 (Filing).

[8] *Sys. Energy Res., Inc.*, 163 FERC ¶ 61,164, at PP 9-13 (2018) (Hearing Order).

Commission). We note, however, that in an order issued on November 17, 2022,[9] the Commission approved a partial settlement (Settlement) reached by SERI, Entergy Services, Entergy Corporation, Entergy Mississippi, and the Mississippi Commission in multiple proceedings, including the instant proceeding. This Settlement "comprehensively resolves and settles all issues, claims, demands and allegations by the Settling Parties . . . in the [implicated] dockets, and no compensation, refunds, or damages shall be due to any [Settling] Party in connection with any such issues, claims, demands and allegations, except as provided under [the Settlement]."[10] The Louisiana Public Service Commission (Louisiana Commission), the Arkansas Commission, and the Council for the City of New Orleans (New Orleans Council) are not parties to the Settlement. While the Mississippi Commission has agreed to resolve and settle the issues, claims, demands, and allegations that it made in this proceeding, the issues raised in this order must still be addressed because they were also raised by one or more other non-settling parties.

7. The Settlement states that SERI shall provide a black-box refund to Entergy Mississippi in the amount of $235 million, inclusive of Commission interest.[11] Additionally, Section II.1.B provides that this refund payment is subject to a "Most Favored Nation" provision pursuant to which the refund will be adjusted upward if, prior to a Commission decision in one or all of the dockets implicated by the Settlement, SERI settles with another participant and that settlement "either in the aggregate or a docket-by-docket basis, cumulatively, if grossed-up to a total company basis, would require SERI to pay a total historical refund greater than $588.25 million, inclusive of interest, to the [Entergy] Operating Company buyers."[12] We note that, in multiple places in this order, the Commission directs the calculation and payment of refunds to the Entergy Operating Companies. We note, however, that Entergy Mississippi shall only receive refunds pursuant to the Settlement and not pursuant to the directives of this order.

8. The Initial Decision states that the central question in this proceeding is whether $147.3 million related to nuclear decommissioning tax deductions, which are now under U.S. Internal Revenue Service (IRS) audit, constitute unprotected excess ADIT required to be returned to customers pursuant to SERI's filing in this proceeding.[13] The Initial Decision determined that SERI erroneously excluded this amount as an input to its UPSA

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[9] *Sys. Energy Res., Inc.*, 181 FERC ¶ 61,120 (2022).

[10] Settlement at 17.

[11] *Id.* at 12.

[12] *Id.* at 13.

[13] Initial Decision, 172 FERC ¶ 63,003 at P 1.

formula rate and must return this amount to customers consistent with the return methodology contained in SERI's rate filing in this proceeding.[14]

9. On July 9, 2020, the Presiding Judge certified the Initial Decision and record in this proceeding.[15]

IV. Motions to Lodge and Responsive Pleadings

10. On September 22, 2020 in Docket Nos. EL18-152-001 and ER18-1182-001, SERI submitted a motion to lodge and request to take notice of a September 15, 2020 Notice of Proposed Adjustment (NOPA) issued by the IRS, which SERI had executed on September 16, 2020.[16] According to SERI, the NOPA memorializes an official IRS action that establishes a fundamental change in the circumstances on which the Initial Decision is based in part by resolving the uncertainty surrounding SERI's formerly uncertain tax position and its ratemaking effects.[17] SERI asserts that granting the motion will assist the Commission's decision-making by providing it with information to act in accordance with the resolution of SERI's tax position.[18]

11. SERI states that, during a taxpayer audit, the IRS may issue a NOPA notifying the taxpayer that the IRS intends to adjust the tax return under the audit. The NOPA memorializes the IRS's position on facts and law with respect to issues under examination and the IRS's adjustment as to those issues. According to SERI, if the taxpayer accepts the NOPA's statement of facts and adjustments, it can accept the IRS's proposed disposition and adjustment by executing the NOPA. Then, the resolution memorialized in the NOPA will be reflected in the IRS examiner's Revenue Agent Report (RAR) that identifies the bases for the IRS's adjustments to income, credits, and deductions on the taxpayer's return, in addition to any additional taxes, penalties, and interest arising from the adjustments. If the taxpayer does not protest those adjustments

[14] *Id.*

[15] Sys. Energy Res., Inc., Certification of Initial Decision and Official Record, Docket No. ER18-1182-001 (July 9, 2020).

[16] NOPA Motion to Lodge at 1.

[17] *Id.* at 2. This tax position is discussed in more detail further below.

[18] *Id.*

to the IRS's Office of Appeals or file suit in the U.S. Tax Court, they are final and binding on the taxpayer, according to SERI.[19]

12. According to SERI, the NOPA provides that the IRS will allow $101,517,825 of future decommissioning expenses with regard to SERI's Costs of Goods Sold tax position, which Entergy Corporation began including on consolidated federal income tax returns beginning in 2015.[20] SERI states that, during the hearing, SERI assessed the likelihood of the IRS agreeing with SERI's tax position at 50% or less based on criteria set forth in Financial Accounting Standards Board (FASB) Interpretation No. 48, *Accounting for Income Taxes* (FIN 48). SERI states that, consistent with Generally Accepted Accounting Principles (GAAP) and U.S. Securities and Exchange Commission (SEC) reporting requirements, SERI's books include FIN 48 liability in connection with the uncertain tax position.[21]

13. SERI states that the Initial Decision directs SERI to pay over $334 million in refunds, a directive that SERI believes is predicated upon the uncertainty of SERI's tax position at the time of the Initial Decision's issuance.[22] To the extent that this was the case, SERI believes that the Initial Decision was wrongly decided.[23] SERI states that, because the NOPA resolves this uncertainty, it is relevant to core issues in this proceeding and, therefore, SERI asks the Commission to lodge the NOPA in the record in this proceeding and take official notice of it pursuant to Rule 212[24] and Rule 508[25] of the Commission's rules of practice and procedure.[26]

14. While SERI believes that the NOPA is relevant to an issue central to the disposition of matters decided in the Initial Decision and will assist the Commission's decision making, its motion does not propose how the Commission should treat the

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[19] *Id.* at 3.

[20] *Id.* at 3-4.

[21] *Id.* at 5.

[22] *Id.* at 6-7.

[23] *Id.* at 8.

[24] 18 C.F.R. § 385.212 (2021).

[25] 18 C.F.R. § 385.508 (2021).

[26] NOPA Motion to Lodge at 9.

information memorialized in the NOPA or advocate a particular path.[27] SERI also argues that the Commission may take official notice of an action at any stage of the proceeding and that the IRS, not the taxpayer, controls the timing of audit determinations.[28] SERI notes, however, that it filed this motion promptly after executing the NOPA to alert the Commission as soon as possible.[29] Finally, SERI argues that portions of the NOPA constitute what it refers to as "Highly Sensitive Protected Materials," which SERI has designated as such, and requests appropriate privileged treatment pursuant to section 388.112 of the Commission's regulations.[30]

15. On October 2, 2020, the Louisiana Commission, the Arkansas Commission, the Mississippi Commission, and the New Orleans Council (collectively, Retail Regulators) and Trial Staff filed a joint motion to extend the period for answers to SERI's motion to lodge from October 7, 2020 to October 21, 2020, which was granted.

16. On October 21, 2020, Trial Staff filed an answer arguing that the NOPA does not constitute a final IRS action.[31] Trial Staff argues that the details of the IRS's resolution of the 2015 change of method of accounting, which may become relevant to the amounts SERI collects in UPSA rates going forward, are not known and measurable at this time and will not be known until the IRS issues a RAR.[32] Trial Staff further argues that the NOPA standard would not assist the Commission's decision making and is not dispositive regarding any relevant issues.[33] Trial Staff further argues that the matters that the NOPA raises are best addressed in a separate docket once the IRS resolves the issue.[34] Trial Staff asks the Commission to deny the motion to lodge and direct SERI to abide by

[27] *Id.* at 9-10.

[28] *Id.* at 11.

[29] *Id.*

[30] *Id.* at 12-13.

[31] Trial Staff NOPA Motion Answer at 6-10.

[32] *Id.* at 7.

[33] *Id.* at 7-8 (citing *NextEra Energy Res. LLC*, 142 FERC ¶ 61,043, at P 20 (2013); *Midwest Indep. Trans. Sys. Operator, Inc.*, 156 FERC ¶ 61,202, at P 129 (2016) (*MISO*)).

[34] *Id.* at 10-14; *see also* Retail Regulators Opposition at 14-15.

the commitment made in the motion to submit appropriate filings to the Commission when the IRS resolves the issue.[35]

17. On October 21, 2020, Retail Regulators made a filing opposing the motion to lodge, arguing that the motion is an attempt to reopen the record in this proceeding, and that the NOPA does not fundamentally change how the Commission should assess the Initial Decision's findings of fact and conclusions about deferred taxes and unprotected excess ADIT.[36] Retail Regulators further argue that SERI did not present a witness with direct knowledge about the uncertainty of the tax position and failed to demonstrate pursuant to section 385.716(c) of the Commission's regulations that there have been changes in conditions of fact or law or the public interest that require reopening the record or that there have been extraordinary circumstances showing a material change that "goes to the very heart of the case."[37] Instead, Retail Regulators argue the uncertainty of a tax position is irrelevant for Commission accounting and ratemaking.[38] Furthermore, the Retail Regulators state that the Commission's tax normalization regulation and 2007 Accounting Guidance with respect to uncertain tax positions make clear that the benefits of tax deductions must be recognized as deferred taxes regardless of uncertainty and included in rate base.[39] Retail Regulators also state that, even if uncertainty were relevant, SERI could have established the uncertainty of its decommissioning tax position in this proceeding, which it did not.[40]

18. Retail Regulators also state that the NOPA is a settlement, which, pursuant to Rule 408 of the Federal Rules of Evidence, is not admissible to prove the validity or amount of a disputed claim.[41] Additionally, Retail Regulators state that this settlement can only be considered in a proceeding that allows full discovery, evidentiary submissions, and

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[35] Trial Staff NOPA Motion Answer at 14.

[36] Retail Regulators Opposition at 8.

[37] *Id.* at 9 (citing *Ass'n of Bus Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator. Inc.*, 171 FERC ¶ 61,154, at P 29 (2020); *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Servs.*, 127 FERC ¶ 61,269, at P 35 (2009)).

[38] *Id.*

[39] *Id.* at 11 (citing 18 C.F.R. § 35.24(b)(2) (2021); *Acct. & Fin. Reporting for Uncertainty in Income Taxes*, 119 FERC ¶ 62,167, at 64,453-54 (2007) (Office of Enforcement Order) (2007 Accounting Guidance)).

[40] Retail Regulators Opposition at 11-12.

[41] *Id.* at 12 (citing Fed. R. Evid. 408).

factual findings.[42] Finally, Retail Regulators ask the Commission to deny SERI's request for privileged treatment because SERI fails to identify any competitive harm that may arise from disclosure of the designated material.[43]

19. In its Brief Opposing Exceptions, filed on October 22, 2020 in Docket No. EL18-152-001, the Louisiana Commission asserts that the NOPA is irrelevant to the issues determined in the Initial Decision and that it would be unfair to consider it. The Louisiana Commission states that the Initial Decision determines how the decommissioning ADIT should be treated if the funds are in SERI's possession and does not address future dispositions of the tax benefits. The Louisiana Commission states that the going-forward impacts are properly addressed in a new proceeding.[44]

20. On November 5, 2020, SERI filed an answer arguing that the NOPA is authentic and reliable and resolves SERI's formerly uncertain tax position.[45] SERI also argues that, while the NOPA is relevant in other proceedings, it is also relevant here, and that Retail Regulators' argument that the NOPA is irrelevant is based on the NOPA conflicting with their view of the case.[46] Further, SERI argues that it notified counsel in the relevant dockets within three days of the IRS's issuance and that it could not have provided earlier notice.[47] SERI further argues that it did not act imprudently in accepting the NOPA.[48] Finally, SERI argues that lodging the NOPA does not require reopening the record or taking other evidence and that the Commission should grant highly sensitive protected treatment to the designated material.[49]

21. On November 20, 2020, Retail Regulators filed a reply asking the Commission to deny SERI's motion to answer and arguing SERI fails to explain how the NOPA can

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[42] *Id.* at 13-17.

[43] *Id.* at 17.

[44] Louisiana Commission Brief Opposing Exceptions, Docket No. EL18-152-001, at 117-118.

[45] SERI NOPA Answer at 6-14.

[46] *Id.* at 16.

[47] *Id.*

[48] *Id.* at 18.

[49] *Id.* at 19-23.

make a difference in this proceeding.[50] Retail Regulators also argue that SERI offers no sufficient description of potential harm that could arise from not granting privileged treatment that would outweigh the public interest in full disclosure.[51]

22. On December 4, 2020, SERI submitted a motion to lodge the RAR issued by the IRS on November 30, 2020 and executed by SERI on December 4, 2020. SERI argues that the RAR is an official IRS action that reconfirms and implements the determination made in the NOPA.[52] SERI also argues that the RAR memorializes the final resolution of this issue and asks the Commission to grant this motion to avoid acting on records that do not reflect the resolution of SERI's tax position.[53] SERI reiterates that the IRS Examiner's RAR identifies the bases for the IRS's adjustments to items of income, credits, and deductions on a taxpayer's return, in addition to any additional taxes, penalties, and interest arising from the adjustments, and that, if the taxpayer does not protest those adjustments to the IRS's Office of Appeals or file suit in the U.S. Tax Court, they are binding on the taxpayer.[54] SERI states that the RAR contains the same adjustment reflected in the NOPA and affirms that Entergy Corporation and SERI do not wish to exercise appeal rights.[55]

23. Additionally, while SERI considers the RAR relevant to core issues and central findings in the Initial Decision, SERI states that it does not propose how the Commission should treat the information memorialized in the RAR or advocate a particular path.[56] SERI notes that the motion simply requests that the Commission take official notice of the IRS's partial allowance and partial disallowance of SERI's formerly uncertain tax

[50] Retail Regulators Reply at 4.

[51] *Id.* at 8.

[52] RAR Motion to Lodge at 1.

[53] *Id.* at 2.

[54] *Id.* at 3-4.

[55] *Id.* at 4-5.

[56] *Id.* at 11.

position.[57] Finally, SERI argues that the motion is timely because it was filed promptly after the execution of the RAR.[58]

24. On January 13, 2021, Trial Staff filed an answer opposing the RAR motion to lodge, which argues that this "fully-litigated proceeding" is not an appropriate venue for addressing any new issues.[59] Trial Staff further argues that the Commission should explore issues related to the RAR in Commission proceedings initiated by SERI's proposed amendments to the UPSA in Docket Nos. ER21-117-000 and ER21-129-000.[60] Trial Staff further argues that resolution of the 2015 change of accounting method will only affect the prospective computation of book-tax timing differences, a result that it argues is consistent with the Commission's tax normalization regulations and required by the rule against retroactive ratemaking.[61] Further, Trial Staff argues that it would be inappropriate to lodge the RAR given the substantial record evidence on which the Initial Decision relied as well as the inability of participants to respond to or challenge the RAR.[62] Trial Staff also argues that the motion omits any of the factual elements necessary to determine the extent to which the IRS's resolution impacts SERI's Uniform System of Accounts (USofA) books and records or UPSA formula rate billings.[63]

25. Retail Regulators also ask the Commission to reject the RAR motion to lodge as procedurally deficient because SERI made no motion to reopen the record to include additional evidence and does not cite the procedural requirements of Rule 716.[64] Additionally, Retail Regulators argue that the RAR does not constitute a change in condition of fact or law that is relevant to the issues or that was a basis for the Initial Decision, and thus there is no good cause to reopen the record.[65] Finally, Retail

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[57] *Id.*

[58] *Id.* at 12.

[59] Trial Staff RAR Answer at 2.

[60] *Id.*

[61] *Id.* at 4.

[62] *Id.* at 6.

[63] *Id.* at 6-7.

[64] Retail Regulators RAR Answer at 5.

[65] *Id.* at 6.

Regulators further argue that SERI failed to establish the uncertainty of its tax position and that the RAR adds nothing to aid the resolution of this proceeding.[66]

26. On January 28, 2021, SERI filed an answer to Retail Regulators and Trial Staff arguing that these parties merely oppose the motion because they believe that SERI's tax position should have been treated in rates as if it would be 100% successful.[67] SERI argues that the Commission may take notice of the RAR because the standard for doing so is whether the "matter may be judicially noticed by the courts of the United States," or whether the matter is one "about which the Commission, by reason of its functions, is expert."[68] SERI argues that the RAR satisfies this standard because the NOPA is an authentic and reliable issuance by a sister federal agency,[69] is undeniably relevant to issues presented in this proceeding, and there are no procedural bars to the Commission taking notice of the RAR.[70]

27. The Mississippi and Arkansas Commissions assert that, if the NOPA affects UPSA rates, then that information should not be considered in this docket but rather in subsequent proceedings such as Docket No. ER21-129.[71] The Mississippi and Arkansas Commissions disagree with SERI's interpretation of the NOPA and contend that the Commission should disregard any effect it may have on the Initial Decision because it is not part of the record.[72] The Mississippi and Arkansas Commissions assert that Rule 510(c) of the Code of Federal Regulations provides that "evidence may not be added to the evidentiary record after the record is closed, unless the record is reopened under Rule 716."[73] The Mississippi and Arkansas Commissions also contend that Rule 2201 prohibiting *ex parte* communications and Rule 505 defining disclosure of facts in

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[66] *Id.* at 8.

[67] SERI RAR Answer at 3.

[68] *Id.* (citing 18 C.F.R. § 385.508(d)(1) and Fed. R. Evid. 20).

[69] *Id.*

[70] *Id.* at 4-6.

[71] Mississippi and Arkansas Commissions Brief Opposing at 4.

[72] *Id.* at 8 (citing 18 C.F.R. § 385.510(c).

[73] *Id.* at 9.

hearings will be violated if extra-record evidence is evaluated.[74] Therefore, the Mississippi and Arkansas Commissions state the Commission cannot rely on the NOPA without violating "fundamental canons of due process."[75]

28. In addition, the Mississippi and Arkansas Commissions note that SERI did not request to reopen the record under Rule 716, but, rather SERI filed a Motion to Lodge and the Commission has not acted on that filed request.[76] The Mississippi and Arkansas Commissions also state that SERI wishes to introduce the NOPA after successfully opposing a motion to include documents related to SERI's IRS tax strategy.[77] The Mississippi and Arkansas Commissions claim that since the NOPA is a settlement, it should be rejected as inadmissible.[78] The Mississippi and Arkansas Commissions also assert that developments after the end of 2018, when SERI proposed the return of excess ADIT, are not relevant to this proceeding.[79]

29. We grant SERI's motions to lodge the NOPA and RAR because the NOPA and RAR provided information that assisted us in our decision-making process.

30. Additionally, as noted above, SERI requests "highly sensitive protected materials" privileged treatment for designated portions of the NOPA. It states that those portions of the NOPA constitute highly sensitive materials pursuant to section 388.112 of the Commission's regulations and SERI has labeled such materials as such and provided a redacted version of the NOPA as part of the public version of its NOPA motion to lodge.[80]

31. Section 388.112(a) of the Commission's regulations defines the scope of, and procedures associated with seeking, privileged treatment for materials filed with the Commission, stating that a person "may request privileged treatment for some or all of the information contained in a particular document that it claims is exempt from the

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[74] *Id.* (citing *Off. Of Consumers' Counsel, State of Oh. v. FERC*, 783 F.2d 206, 232 (D.C. Cir. 1986)).

[75] *Id.* at 11.

[76] *Id.*

[77] *Id.* at 11-12.

[78] *Id.* at 12.

[79] *Id.*

[80] SERI Motion to Lodge at 13.

mandatory public disclosure requirement of the Freedom of Information Act, 5 U.S.C. 552, and should be withheld from public disclosure."[81] Here, SERI appears to seek to have the designated material treated as "Highly Sensitive Protected Material," and the entry of a corresponding modified Commission protective agreement. Notably, the Commission's regulations do not provide for a level of confidential treatment beyond simply "privileged."[82]

32. Under section 388.112, materials filed with the Commission as "privileged" are placed in the non-public record "until such time as the Commission may determine that the document is not entitled to the treatment sought and is subject to disclosure consistent with § 388.108."[83] We have considered SERI's arguments and we grant its request for privileged treatment. Section 388.112(a) of the Commission's regulations defines the scope of this privileged treatment, stating that a person "may request privileged treatment for some or all of the information contained in a particular document that it claims is exempt from the mandatory public disclosure requirement of the Freedom of Information Act, 5 U.S.C. 552 (FOIA), and should be withheld from public disclosure."

33. Exemption 4 of FOIA covers "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[84] We find that the material at issue meets these requirements. Here, based on relevant precedents, the information sought constitutes "commercial or financial information"[85] and was "obtained from a person."[86] Further, consistent with the U.S. Supreme Court precedent

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[81] 18 C.F.R. § 388.112(a) (2020).

[82] *Entergy Ark.*, *LLC*, 174 FERC ¶ 61,222, at P 29 (2021).

[83] 18 C.F.R. § 388.112(c)(1)(i) (2021).

[84] 5 U.S.C. § 552(b)(4)).

[85] *See*, *e.g.*, *Baker & Hostetler LLP v. U.S. Dep't of Com.*, 473 F.3d 312, 319-20 (D.C. Cir. 2006) (rejecting argument that Exemption 4 is confined only to records that reveal basic commercial operations or relate to the income-producing aspects of a business; and noting that the exemption "reaches more broadly and applies (among other situations) when the provider of the information has a commercial interest in the information submitted to the agency."); *Pub. Citizen v. U.S. Dep't of Health & Hum. Servs.*, 975 F. Supp. 2d 81, 100 (D.D.C. 2013) ("The scope of 'commercial' information has also been applied more broadly to records containing information in which the provider of the records has a 'commercial interest"').

[86] *Elec. Privacy Info. Ctr. v. U.S Dep't Homeland Sec.*, 117 F. Supp. 3d 46 (D.D.C. 2015) ("Information is considered 'obtained from a person' [under Exemption 4]

in *Food Marketing Institute v. Argus Leader Media*,[87] the information submitted to a government agency such as the Commission will be protected from disclosure under Exemption 4 if: (1) the information is customarily treated as confidential by the submitters; and (2) the government agency provides assurance that the information will be treated as confidential.[88] Thus, we find that the information submitted here satisfies these requirements. With that, we note that the Commission's regulations provide only for privileged or confidential status and not a higher category of sensitive information and direct SERI to the Commission's standard protective order.

34. In reaching this conclusion, it is important to note that "[t]he Commission retains the right to make determinations with regard to any claim of privilege status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities."[89]

V. Motion to Vacate and Responsive Pleadings

35. On November 24, 2020, SERI filed a motion to pursuant to 18 C.F.R. § 385.212 to vacate the Initial Decision and terminate this proceeding. In support of its motion, SERI argues that its formerly uncertain tax position was resolved on September 15, 2020, when the IRS issued a NOPA reflecting a partial allowance of SERI's tax position. SERI notes that it executed the NOPA to reflect its determination not to contest the issue further and moved to lodge the NOPA in this proceeding on September 22, 2020.[90] According to SERI, the NOPA, which applies to the 2015, 2016, and 2017 tax years, states that the IRS will allow SERI to include $101,517,825 of its decommissioning liability in its cost of goods sold and disallow the balance (roughly 90% of SERI's tax position). SERI argues that the application of the IRS's determination to these tax years removes approximately $1.1 million from SERI's tax position, resulting in cumulative deductions of approximately $100.4 million as of December 31, 2017.[91]

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if the information originated from an individual, corporation, or other entity, and so long as the information did not originate with the federal government").

[87] 139 S. Ct. 2356 (2019).

[88] *Id.* at 2363.

[89] 18 C.F.R. § 388.112(c)(1)(i).

[90] Motion to Vacate at 7.

[91] *Id.*

36. SERI states that, on October 16, 2020, Entergy Services, LLC (Entergy Services) proposed an amendment to the UPSA in Docket No. ER21-129-000 on its behalf to address the actual excess ADIT that resulted from the resolution of the tax position in conjunction with the TCJA, by providing a nearly $18 million one-time credit to customers that corresponds to the $100.4 million of actual cumulative deductions allowed by the IRS and approximately $13.4 million in unprotected excess ADIT that resulted from the IRS decision as of December 31, 2017.[92]

37. In support of the motion to vacate, SERI argues that the NOPA is an official IRS determination that memorializes highly relevant new facts and that, while Retail Regulators argued in Docket No. ER21-129-000 that the NOPA is a settlement, it, in fact, reflects an official determination by IRS officials on how the tax laws apply to the facts. SERI further argues that its decision not to contest the NOPA does not change this fact. SERI asks the Commission to take notice of the IRS's decision on the actual tax consequences regarding SERI's tax position to guide it to vacate the Initial Decision.[93]

38. In support of this request, SERI argues that, through the NOPA, the IRS has resolved SERI's previously uncertain nuclear decommissioning tax deductions and mooted the Initial Decision. SERI argues that, while it proved the uncertainty of its tax position during the hearing, the NOPA now defines with certainty the excess ADIT that actually results from the TCJA.[94] SERI therefore states that it is now certain that SERI's tax position resulted in approximately $13.4 million of unprotected excess ADIT and thus there is no remaining tax position that could result in $147.3 million of additional unprotected excess ADIT identified by the Initial Decision.[95] SERI also argues that the NOPA renders moot the issues of: (1) whether SERI should be required to return to customers any, all, or none of the $147.3 million recorded in Account 236, Taxes Accrued; (2) whether any future order of the Commission should include provisions concerning a potential disallowance of SERI's nuclear decommissioning tax deductions by the IRS; and (3) whether SERI should be allowed a mechanism to recover amounts that the Initial Decision directed be refunded prior to a final resolution by the IRS.[96] Consequently, SERI asks the Commission to vacate the Initial Decision and terminate this proceeding.

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[92] *Id.* at 8.

[93] *Id.* at 9.

[94] *Id.* at 10.

[95] *Id.*

[96] *Id.*

39. On January 13, 2021, Retail Regulators and Trial Staff filed answers opposing SERI's motion to vacate. Retail Regulators argue that the NOPA cannot be used as a basis to vacate a duly issued Initial Decision and terminate a proceeding before final Commission resolution.[97] They further argue that the NOPA and RAR are irrelevant to the issues that the Initial Decision resolves, and even so, they are not part of the record and were not subject to scrutiny or discovery.[98]

40. Retail Regulators argue that the NOPA does not resolve or moot any issues presented in the Initial Decision. They point out that the Commission has stated that the notion of uncertainty is irrelevant for Commission accounting and reporting and argue that, while the settlement may eliminate the excess ADIT prospectively from the time the audit becomes final, it does not resolve SERI's non-compliance with its UPSA from 2018 forward.[99]

41. Retail Regulators further state that the deduction's uncertainty was never an issue, but merely a twice-failed defense for SERI's failure to properly account for the ADIT and to properly reflect it in SERI's rates.[100] They argue that the NOPA and RAR do not impact the determination that all of the $147.3 million in excess ADIT should have been returned to customers with the rest of the excess ADIT that was returned, as this determination is based on SERI's past violation of its filed rate. Retail Regulators further state that this amount should have been returned in 2018 because uncertainty is not a factor for Commission accounting and ratemaking.[101] They argue that what matters instead is that the tax expense was collected and deferred rather than paid to the tax authority, thus giving rise to ADIT that came to be excessive due to the reduction in the corporate tax rate. They assert that what happens regarding the IRS's conclusion of the audit is an issue for another proceeding that provides full discovery of the facts and determination of the proper tax treatment under the law.[102]

42. Retail Regulators also contend that the NOPA and RAR do not impact the Initial Decision's determination that: (1) SERI incorrectly accounted for excess ADIT; (2) the failure to return the $147.3 million was a tariff violation; and (3) SERI must compensate

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[97] Retail Regulators Opposition at 9.

[98] *Id.* at 9-10.

[99] *Id.* at 11.

[100] *Id.*

[101] *Id.* at 12.

[102] *Id.*

customers for the time value effects of the appropriate rate base neutrality mechanism, plus interest. They further contend that the Initial Decision recognizes that its fundamental holdings are not impacted by any future resolution with the IRS, including through the NOPA and RAR. Retail Regulators further state that any modification of the excess tax return requirement in the future should be evaluated in a new FPA section 205 proceeding that includes full discovery.[103]

43. Retail Regulators further assert vacatur is not warranted and that SERI misrepresents the Commission's vacatur standard. They argue that vacatur only lies where the action is moot, which the Initial Decision is not. Retail Regulators further state that the Commission will only vacate an order if the movant shows "exceptional circumstances" that warrant doing so,[104] and that SERI made no such showing. They further contend that, when a losing party commits voluntary actions that moot a decision, such as through the execution of the NOPA and RAR, it forfeits its legal remedy by the ordinary processes of appeal and surrenders its equitable remedy of vacatur.[105]

44. Retail Regulators further argue that there is no separate vacatur standard when the motion involves an Initial Decision as opposed to a Commission order. They argue that the precedent SERI cites all preceded the U.S. Supreme Court's decision in *U.S. Bancorp*[106] and is thus premised on outdated Commission policy.[107] They argue, among other things, that because Initial Decisions are interlocutory, there is less justification to vacate them.[108] They point to *Commonwealth Edison Co.*, where the Commission stated that Initial Decisions are not final Commission decisions, and thus "there is no need to vacate an Initial Decision . . . where the parties have withdrawn the underlying filing and pleadings and the *Initial Decision* is not addressed on the merits."[109]

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[103] *Id.* at 13.

[104] *Id.* at 16 (citing *Exelon Corp.*, 130 FERC ¶ 61,095, at P 4 (2010); *Athens Energy, LLC*, 166 FERC ¶ 61,005, at P 8 & n.22 (2019)).

[105] *Id.* at 17-18 (citing *Town of Neligh v. Kinder Morgan Interstate Gas Transmission, LLC*, 94 FERC. ¶ 61,075, at 61,348 n.8 (2001)).

[106] *U.S. Bancorp Mtg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994) (*U.S. Bancorp*).

[107] Retail Regulators Opposition at 20; *see also* Trial Staff Answer at 10.

[108] Retail Regulators Opposition at 24.

[109] *Id.* (citing *Commonwealth Edison Co.*, 135 FERC ¶ 61,051, at P 27 (2011)).

45. Trial Staff similarly argues that the new material submitted by SERI does not moot the Initial Decision, and even if it did, the Commission has consistently declined to vacate decisions when the basis for the vacatur was caused by the movant's voluntary action. Trial Staff argues that the 2015 tax return that gave rise to the ADIT and excess ADIT remains unchanged, so there is still a book-tax difference that requires the return of unprotected excess ADIT resulting from the TCJA. Additionally, Trial Staff argues that there is reason to doubt the accuracy of SERI's calculations in light of the Initial Decision's finding of unprotected excess ADIT of $147.3 million compared to the $58.9 million that SERI claimed in this proceeding.[110]

46. Trial Staff also argues that the Initial Decision explicitly contemplated disallowance of the deduction that gave rise to the excess ADIT, finding that this possibility "is not synonymous with a finding that the TCJA did not impact SERI's FIN 48 liabilities and create excess ADIT."[111] Thus, Trial Staff determines that SERI's insistence that the Initial Decision is moot is belied by the NOPA and the Initial Decision's holding.[112]

47. Trial Staff further argues that there are not separate standards for vacating interlocutory Initial Decisions versus Commission orders.[113] Trial Staff further states that, if mootness was caused by the voluntary action from the party seeking relief from the judgment, vacatur is not appropriate.[114] Trial Staff further contends that SERI decided to "give up" SERI's uncertain tax position with the IRS based on the "adverse ruling" of the Initial Decision and that the IRS issued the NOPA in response to SERI's concession.[115]

48. On February 26, 2021, SERI submitted an answer reiterating arguments from its motion and asserting that it has taken no action to moot its decision.[116] It also disagrees

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[110] Trial Staff Answer at 3.

[111] *Id.* (citing Initial Decision, 172 FERC ¶ 63,003 at P 117).

[112] *Id.* at 4.

[113] *Id.* at 5.

[114] *Id.* (citing *U.S. Bancorp*, 513 U.S. at 24; *Town of Neligh, NE v. Kinder Morgan Interstate Gas Transmission*, 94 FERC ¶ 61,075, at 61,348 (2001)).

[115] *Id.* at 6.

[116] SERI Answer at 10-14.

that exceptional circumstances are necessary to vacate an initial decision.[117] Finally, SERI argues that it is not in the public interest for the Commission to act on a moot Initial Decision when no further investigation is needed to "divine the impact" that the NOPA and RAR have on SERI's excess ADIT obligations.[118]

49. On March 11, 2021, Retail Regulators filed a response reiterating their disagreements with SERI's motion and requesting that the Commission reject SERI's answer. They argue that SERI is attempting to "resurrect its failed arguments" and "introduce new and wholly inaccurate findings into the Initial Decision."[119]

50. In its brief opposing exceptions, the New Orleans Council argues that the NOPA does not moot the Initial Decision, changes none of the issues, and does not warrant reversal of the conclusions reached by the Presiding Judge. The New Orleans Council also asserts that SERI's concession does not alter or excuse SERI's disputed ADIT accounting or relieve SERI's failure to credit customers for the time value of the customer-provided capital for the entire period during which SERI had those funds. The New Orleans Council argues that SERI ignores the Commission's accounting requirements by arguing that the concept of "uncertainty" that SERI has taken from GAAP FIN 48 allows SERI to retain unprotected excess ADIT properly returned to customers.[120]

51. We deny the motion to vacate the Initial Decision. As discussed further below, while the NOPA and RAR have resolved some of the uncertainty surrounding the tax position at issue in this proceeding, namely for the 2015 tax year, they do not resolve the uncertainty for the entire period covered by this proceeding. Furthermore, an Initial Decision is not a final Commission decision but is a recommendation by a presiding judge.[121] Therefore, it is not appropriate to vacate the Initial Decision here.[122]

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[117] *Id.* at 14-20.

[118] *Id.* at 20-22.

[119] Retail Regulators Response at 4.

[120] New Orleans Council Brief Opposing Exceptions at 13-14.

[121] *See Commonwealth Edison Co.*, 135 FERC ¶ 61,051 at P 27.

[122] We note that the dissent takes the position that this proceeding is moot. We disagree. Apart from the fact that the uncertainty surrounding SERI's tax position has not been resolved for every covered tax year, as discussed further below, this proceeding

VI. Discussion

A. Issue 1: SERI's Nuclear Decommissioning Tax Deductions

1. Issue 1.A. Whether SERI should be required to return to customers any, all, or none of the $147.3 million recorded in Account 236 prior to IRS resolution of SERI's nuclear decommissioning tax deductions?

a. Initial Decision

52. The Initial Decision states that SERI must return all of the $147.3 million to customers without any delay to account for the ongoing IRS audit.[123] The Initial Decision states SERI took a series of deductions on its filed tax returns for calendar years 2015 to 2017 that remain under IRS audit and that, effective, January 1, 2018, the TCJA reduced the corporate income tax rate applicable to SERI.[124] The Initial Decision further states that the "operative regulatory matters" at issue with respect to these facts are the treatment of uncertain tax positions taken in the form of a deduction and the treatment of excess ADIT under tax normalization.[125] The Initial Decision states that the resolution of Issue 1.A ultimately concerns whether the TCJA caused the creation of excess ADIT.

53. The Initial Decision states that the USofA governs regulatory accounting of jurisdictional entities and that USofA *General Instruction 18* requires such entities to recognize and record deferred taxes when "there are timing differences between the periods in which transactions affect taxable income and the periods in which they enter into the determination of pretax accounting income."[126] The Initial Decision states that deferred tax liabilities generate when the amount that a utility deducts on its filed tax return exceeds the amount it records as an expense for financial accounting purposes

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grapples with how to determine how much excess ADIT remains after the 2015 IRS resolution and requires SERI to recompute these amounts on compliance.

[123] Initial Decision, 172 FERC ¶ 63,003 at P 75.

[124] *Id.* P 76.

[125] *Id.*

[126] *Id.* P 79 (quoting 18 C.F.R. pt. 101, Gen. Instr. 18(A) (2021)).

because there are "numerous items that are treated differently for IRS purposes and regulatory accounting and ratemaking purposes."[127]

54. The Initial Decision further states that each year temporary tax differences are calculated and accumulate in ADIT balances in the regulated entities' books and records and that SERI's filing in this proceeding defines ADIT as "the amount of income taxes that is collected by a public utility but is not currently payable to the taxing authority."[128] The Initial Decision explains that the Commission has stated that ADIT arises from "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."[129] The Initial Decision notes, however, that the mismatch that characterizes ADIT is not permanent as the utility will eventually pay the same tax amounts over time; the difference simply results from the fact that the utility pays taxes later than they are collected from customers. The Initial Decision states that the Office of Enforcement's accounting guidance requires that utilities measure their ADIT balances based on the positions taken in their filed tax returns without regard to probability estimates as to whether the IRS will ultimately uphold those positions.[130]

55. The Initial Decision states that, in 2015, SERI initiated a new method of accounting for income taxes formally referred to as a "changing in accounting method" (CAM). SERI began treating its future nuclear decommissioning costs as production costs of electricity included in cost of goods sold, in essence, to "basically claim that the future cost of decommissioning [Grand Gulf] is part of the cost of selling electricity in the year in which the deduction is taken"[131] pursuant to Internal Revenue Code section 263A in order to "accelerate the deduction of nuclear decommissioning expenditures that will be incurred after the plant is shut down in 2044."[132] The Initial Decision states that this action created an expense for income tax purposes and a timing difference between SERI's income tax filing and regulatory book accounting, which is a hallmark characteristic of "deferred taxes" as defined by USofA *General Instruction 18*. The

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[127] *Id.* (citing *Inquiry Regarding the Effects of the Tax Cuts & Jobs Act on Commission-Jurisdictional Rates*, 162 FERC ¶ 61,223, at P 10 (2018)).

[128] 18 C.F.R. pt. 101, Gen. Instr. 18(A).

[129] Initial Decision, 172 FERC ¶ 63,003 at P 81.

[130] *Id.* (citing 2007 Accounting Guidance, 119 FERC at 64,454).

[131] *Id.* P 82 (citing Tr. 120:11-15). SERI's "changing in accounting method" or CAM is referred to herein as the "2015 CAM".

[132] *Id.* (citing Ex. SER-0021 at 13:15-18 (Hunt)).

Initial Decision states that SERI took this action in its original return for tax year 2015 and on its original returns for tax years 2016 and 2017. At the time of the Initial Decision, SERI stated that these nuclear decommissioning deductions, which cumulatively totaled $1,107,888,059 as of December 31, 2017, were under IRS audit with an unknown conclusion date.[133] As an example of the effect of these deductions, the Initial Decision states that on SERI's 2015 original tax return, SERI deducted approximately $1.2 billion from its taxable income but charged its customers the same tax expense through the UPSA, and that this situation "falls squarely" within SERI's definition of ADIT.[134]

56. The Initial Decision states that, at Grand Gulf's estimated 2044 shutdown, SERI will incur a significant decommissioning expenditure and that given that SERI has accelerated this expense on its tax returns, SERI's later payment of decommissioning expenses will be when the "temporary difference" caused by the deductions reverses.[135] The Initial Decision notes that SERI has collected decommissioning expenses from its customers through the UPSA and that SERI, in turn, has contributed to a qualified nuclear decommissioning trust fund to pay Grand Gulf's decommissioning costs.[136]

57. The Initial Decision states that SERI correctly notes that the trust fund contributions, when collected, created taxable income for which SERI took a corresponding deduction under Internal Revenue Code section 468A.[137] The Initial Decision states, however, that this proceeding pertains to deductions that SERI began taking in 2015 under section 263A, to accelerate the deduction of nuclear decommissioning expenditures to be incurred after Grand Gulf shuts down in 2044. The Initial Decision states that SERI fails to acknowledge that the trust fund will eventually pay the decommissioning costs for which SERI has claimed accelerated deductions.[138] The Initial Decision concludes that SERI's nuclear decommissioning tax deductions associated with its actions beginning in 2015 created ADIT.[139]

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[133] *Id.* P 83.

[134] *Id.*

[135] *Id.* P 84.

[136] *Id.*

[137] *Id.* P 86.

[138] *Id.* P 85.

[139] *Id.* P 86.

58. The Initial Decision further states that the FASB issued FASB Interpretation No. 48, Accounting for Uncertain Tax Positions: An Interpretation of FASB Statement No. 109 (FIN 48), which governs financial reporting and "clarifies the accounting for uncertainty in income taxes recognized in an enterprise's financial statement."[140] The Initial Decision states that FIN 48 establishes a two-step evaluative process where the entity must determine whether it is more likely than not that a tax position will be sustained upon examination and then requires the entity to measure the amount if it meets the first step's threshold. The Initial Decision further states that, for GAAP financial reporting purposes, ADIT may only be recognized for tax positions that meet the "more-likely-than not" standard.[141]

59. The Initial Decision states that the Commission's Chief Accountant issued 2007 Accounting Guidance effectively directing jurisdictional entities to not apply the core aspects of FIN 48 for Commission accounting and reporting purposes and to instead "continue to recognize deferred income taxes for Commission accounting and reporting purposes based on the difference between positions taken in tax returns . . . and amounts reported in the financial statements."[142] The Chief Accountant stated that this approach would ensure that an entity's ADIT accounts reflect an accurate measurement of cash available to the entity as a result of temporary differences.[143]

60. According to the Initial Decision, SERI interpreted this guidance as instructing utilities to record the effects of uncertain positions in ADIT accounts, and that SERI's 2015 action, which SERI considered an uncertain tax position, gave rise to liability amounts that it recorded in Account 283, Accumulated Deferred Income Taxes – Other, an ADIT account.[144] The Initial Decision states, however, that SERI argues that this amount is not ADIT or is a special type of ADIT and prefers to refer to these liability amounts as FIN 48 liabilities. The Initial Decision states, however, that the 2007 Accounting Guidance makes clear that the relative uncertainty of whether a tax position is upheld is irrelevant for the purpose of creating or measuring ADIT and that since SERI took nuclear decommissioning deductions in its 2015, 2016, and 2017 tax returns, the

[140] *Id.* P 87 (citing Ex. LC-0001 at 11:15-12:2).

[141] *Id.*

[142] *Id.* P 88 (citing 2007 Accounting Guidance, 119 FERC at 64,454).

[143] *Id.*

[144] *Id.* P 89.

requisite ADIT calculation involves comparing those tax returns to SERI's financial accounting statements.[145]

61. The Initial Decision also states that SERI unconvincingly argues that when the IRS denies a deduction that gives rise to FIN 48 liability, there will be no difference in the treatment of taxable income or expense items on the tax return compared to what is on the company's books. The Initial Decision responds that this argument ignores the present ramifications resulting from deductions on tax returns (temporary differences between taxable and book income) and that the taking of deductions lowers a utility's current taxable income and therefore lowers its current tax payments.[146]

62. The Initial Decision states that protected ADIT is derived from accelerated depreciation of utility plant assets and the TCJA requires that the average rate assumption method (ARAM) be used to determine the timing of the return of this type of ADIT, a step which is already underway and not disputed in this proceeding. The Initial Decision states that the parties dispute the return of unprotected excess ADIT, which is not bound by ARAM and is approved instead on a case-by-case basis.[147] The Initial Decision states that many of the authorities that inform how to adjudicate the dispute relate to the Commission's tax normalization policy.[148] Regarding this policy, the Initial Decision states that 18 C.F.R. § 35.24, which is among the controlling authorities, provides that:

> If, as a result of changes in tax rates, the accumulated provision for deferred taxes becomes deficient in or in excess of amounts necessary to meet future tax liabilities as determined by application of the current tax rate to all timing difference transactions originating in the test period and prior to the test period... "[t]he public utility must compute the income tax component in its cost of service by making provision for any excess or deficiency in deferred taxes."[149]

63. The Initial Decision states that the relevant regulatory provision states that to execute this action, the utility must use a "Commission-approved ratemaking method" or

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[145] *Id.* P 90.

[146] *Id.* P 91.

[147] *Id.* P 93.

[148] *Id.* P 94.

[149] *Id.* PP 95-96 (quoting 18 C.F.R. § 35.24(c)(1)(ii) & 35.24(c)(2)).

if one does not exist "some ratemaking method for making such provision, . . . the appropriateness of [which] will be subject to case-by-case determination."[150]

64. The Initial Decision asserts that Order No. 144 recognized that if this requirement is "not appropriately implemented" so that excess ADIT is returned to the customers, shareholders may experience a windfall.[151] The Initial Decision further explains that the 1993 Accounting Guidance states that:

> The entity shall adjust its deferred tax liabilities and assets for the effect of the change in tax law or rates in the period that the change is enacted. The adjustment shall be recorded in the proper deferred tax balance sheet accounts (Accounts 190, 281, 282 and 283) based on the nature of the temporary difference and the related classification requirements of the accounts. If as a result of action by a regulator, it is probable that the future increase or decrease in taxes payable due to the change in tax law or rates will be recovered from or returned to customers through future rates, an asset or liability shall be recognized in Account 182.3, Other Regulatory Assets, or Account 254, Other Regulatory Liabilities, as appropriate, for that probable future revenue or reduction in future revenue. That asset or liability is also a temporary difference for which a deferred tax asset or liability shall be recognized in Account 190, Accumulated Deferred Income Taxes or Account 283, Accumulated Deferred Income Taxes - Other, as appropriate.[152]

65. Based on these requirements, the Initial Decision states that, when there is a tax rate change, utilities must adjust their ADIT balances to account for this change and record a regulatory liability in Account 254 if as a result of action by a regulator, it is probable that the future decrease in taxes payable due to the tax change will be returned to customers.[153] The Initial Decision further states that action by a regulator refers to the Commission or the utility's state level regulator. The Initial Decision states that such actions are singled out because only these regulators perform actions having to do with recovery or return of amounts in customer rates, and thus, application of this condition depends on the regulations, orders, policy, and guidance of the Commission and the state

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[150] *Id.* P 96 (citing 18 C.F.R. § 35.24(c)(3)).

[151] *Id.* P 97. The Initial Decision states that in light of the TCJA, the Commission has repeatedly reaffirmed this treatment. *Id.*

[152] *Accounting for Income Taxes*, Docket No. AI93-5-000 (Apr. 23, 1992) (delegated order) at 8, item no. 8 (1993 Accounting Guidance).

[153] Initial Decision, 172 FERC ¶ 63,003 at P 99.

public utility commission to analyze whether the amount at issue will be returned to customers.[154]

66. The Initial Decision finds that the TCJA impacted SERI's FIN 48 liabilities and created excess ADIT to be returned to customers. The Initial Decision states that, effective January 1, 2018, SERI's composite federal and state income tax rate fell from 38.25% to 24.95% because of the TCJA. Additionally, the Initial Decision states that SERI's nuclear decommissioning tax deductions recorded in ADIT Account 283 was, itself, ADIT, and the rate reduction impacted the ADIT amount and rendered a portion no longer payable to the IRS.[155] It further states that, pursuant to the 1993 Accounting Guidance, SERI must adjust its Account 283 deferred tax liabilities balance as a result of the tax rate change and recognize a regulatory liability in Account 254 for that same amount because Order No. 144 and section 35.24 of the Commission's regulations make it probable that the future decrease in taxes payable due to change in tax law or rates will be returned to customers through future rates.[156] The Initial Decision also states that the 2007 Accounting Guidance indicates that GAAP's FIN 48 probability analysis is wholly inapplicable to the 1993 Accounting Guidance's probability determination – i.e., a deduction that is uncertain under the FIN 48 standard does not "accord that deduction any differential treatment for the purpose of accounting ADIT or excess ADIT" before the Commission.[157]

67. The Initial Decision states that the primary approach for determining the excess ADIT calculation is by multiplying the cumulative amount of the nuclear decommissioning tax deductions associated with SERI's 2015 to 2017 tax positions ($1,107,888,059) by the percentage that SERI's composite federal and state tax rate changed as a result of the TCJA (13.30%) which results in $147,349,112, which corresponds to the participants' preferred reference of $147.3 million that is not disputed by the parties. The Initial Decision states that the governing Commission authorities "overwhelmingly compel the legal conclusion" that the $147.3 million is excess ADIT resulting from the TCJA that must be returned to customers.[158]

68. The Initial Decision concludes that SERI erroneously calculated its unprotected excess ADIT balance input to the UPSA and is noncompliant with the governing

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[154] *Id.*

[155] *Id.* P 102.

[156] *Id.* P 103 (citing 1993 Accounting Guidance at 8, item no. 8).

[157] *Id.*

[158] *Id.* P 104.

Commission authorities. The Initial Decision asserts that the outcome here rests on evaluating SERI's contention that uncertain tax positions should be accorded differential treatment. The Initial Decision states that the stakes of this argument are reflected by SERI's concession that the $147.3 million would qualify as unprotected excess ADIT resulting from the TCJA if the tax positions became "certain." The Initial Decision states, however, that this is a "distinction without a difference" and that the relative uncertainty before the IRS is irrelevant.[159]

69. The Initial Decision further responds that Commission precedent makes clear that when a utility's ADIT intersects with a lower tax rate, a portion of that ADIT must be returned to customers. The Initial Decision further states that, to calculate its unprotected excess ADIT to return to customers, SERI: (1) multiplied the cumulative temporary differences by "the new lower income tax rate;" (2) compared the recalculated ADIT balances to "calculate the effect of the change in tax rate;" and (3) analyzed the underlying temporary differences to determine if there were amounts that "were probable to be paid to customers through future rates."[160] The Initial Decision states that, in this third step, SERI interpreted the 1993 Accounting Guidance as requiring that it remove the $147.3 million from the unprotected excess ADIT balance.[161] The Initial Decision finds that this interpretation is incompatible with the text and violates the directive of the 2007 Accounting Guidance.

70. In particular, the Initial Decision states that SERI interprets the references to the regulator in the 1993 Accounting Guidance to refer to the IRS, when it refers to the Commission. The Initial Decision further states that, given "the strong probability that the Commission will continue to adhere to its previous pronouncements," the 1993 Accounting Guidance instructs that the $147.3 million is a regulatory liability to be recognized in Account 254 and returned as excess ADIT to customers.[162]

71. The Initial Decision also disagrees that the $147.3 million is not sourced from customers. While the Initial Decision acknowledges that the governing authorities "do not expressly invoke an analysis into whether funds originally came from customers," it finds that such an analysis is not wholly material to the outcome of this issue.[163] It states, however, that, for decades, SERI collected from customers the expense to

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[159] *Id.* P 105.

[160] *Id.* P 106 (citing SERI Initial Br. 4-5).

[161] *Id.* PP 106-07.

[162] *Id.* P 108.

[163] *Id.* P 111.

decommission Grand Gulf, and while SERI states that the source of the $147.3 million is a "re-measurement," a re-measurement is an action, not a source. The Initial Decision finds that the subject of the re-measurement was SERI's FIN 48 liabilities that arose as a result of its nuclear decommissioning deductions, which were taken to accelerate a future cost covered by decades of collections from ratepayers and routed to a trust fund. In short, the Initial Decision finds that "[r]atepayers paid the cost of decommissioning, which is being used as a deduction to reduce taxable income."[164]

72. The Initial Decision further states that the Entergy Tax Allocation Agreement (ETAA)[165] allocates tax liability as determined on a separate company basis that requires the $147.3 million to be reviewed under the tax normalization requirements that govern SERI and the UPSA.[166] The Initial Decision further states that the UPSA includes a revenue requirement component for income taxes that collects the income tax allowance from SERI's customers in its rates and that these collections are governed by a tax normalization methodology whereby the rate's income tax allowance is calculated under the assumption that the utility's book expenses equal their tax deductions.[167] The Initial Decision states that, while SERI is correct that customers pay the same tax expense in rates whether or not the company succeeds in the decommissioning deductions, SERI's customers paid the full federal tax expense as if there was no deduction and the tax normalization rules require that excess ADIT created by such deductions be returned.[168]

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[164] *Id.* P 112 (citing Arkansas Commission Reply Br. 11).

[165] The Entergy Tax Allocation Agreement is a mechanism for allocating among the Entergy companies the tax liabilities and assets from the filing of the Entergy Corporation consolidated group's tax return. As described by SERI witness Mr. Roberts and summarized in the Initial Decision in Docket No. EL18-152-001, the Entergy Corporation consolidated group files a consolidated federal income tax return with the IRS each year. Entergy subsidiaries that are not members of the Entergy Corporation consolidated group either file separate tax returns or file as a separate consolidated group. Mr. Roberts explains that the Entergy Tax Allocation Agreement provides for the allocation among member Entergy companies of the resulting tax liabilities and assets from the filing of the Entergy Corporation consolidated group's tax returns with the allocation determined on an individual company basis. *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 171 FERC ¶ 63,003, at P 447 (2020).

[166] Initial Decision, 172 FERC ¶ 63,003 at P 114.

[167] *Id.*

[168] *Id.* P 115.

73. The Initial Decision further states that, while the IRS may reject SERI's deductions and require payment of taxes at the previous higher rate, this does not preclude the finding that the TCJA impacted SERI's FIN 48 liabilities and created excess ADIT. The Initial Decision reasons that SERI collected in customer rates its cost-of-service income tax component with the view that the tax rate would remain constant and acquired its ADIT balance consistent with this view, which resulted in excess collections.[169] The Initial Decision also concludes that SERI's own accounting supports the view that the $147.3 million is excess ADIT. The Initial Decision notes that SERI recorded its FIN 48 liabilities in Account 283, an ADIT account.[170]

74. The Initial Decision further finds that the record evidence does not overcome SERI's FPA section 205 burden regarding the nuclear decommissioning tax deductions claimed uncertain status. It states that SERI's witnesses did not provide any substantive documentation or details regarding SERI's probability analysis as to the ultimate disposition of the deductions by the IRS and that the evidence came instead in the "form of generic statements about accounting standards."[171] The Initial Decision further states that "the evidentiary shortcoming is accentuated by the incongruous relationship between the limited content in the records . . . relative to SERI's position on the weighty consequences that it dictated."[172]

75. The Initial Decision also declines to change its findings based upon an evaluation of SERI's evaluation of equitable and policy arguments.[173]

b. Brief on Exceptions

76. SERI argues that the Initial Decision incorrectly found that SERI did not meet its burden of proof to establish the uncertainty of the 2015 CAM. SERI states that the Initial Decision's conclusion rested on the view that the only evidence of the 2015 CAM's uncertainty was "largely unsubstantiated" statements from two SERI witnesses

[169] *Id.* P 118.

[170] *Id.* P 121.

[171] *Id.* P 126.

[172] *Id.* P 127.

[173] *Id.* PP 131-36.

and externally audited disclosures included in SERI's FERC Form No. 1 and SEC Form 10-K.175.[174] SERI argues that the Initial Decision erred in overlooking additional record evidence[175] and that SERI's analytical method is consistent with the requirements of FIN 48, which is the standard that must be used before a tax position can be designated as "uncertain."[176] SERI also states that the Entergy Operating Company's assessment was externally audited.[177] Additionally, SERI asserts that the Initial Decision incorrectly concludes that omission of the $147.3 million is a formula input error and that Attachment E can be modified to add the $147.3 million recorded in Account 236.[178]

77. SERI further argues that the Initial Decision has unreasonably elevated the burden of proof on this question[179] and wrongly suggested that Mr. Roberts' testimony cannot be relied upon to establish the uncertainty of the 2015 CAM. SERI also contends that no party attempted to challenge whether the 2015 CAM was an uncertain tax position prior to the Louisiana Commission's post-hearing briefs. SERI argues that the Initial Decision did not identify any reasons to question SERI's analysis of the 2015 CAM in this case, and the Commission does not have to consider such concerns when no party has even attempted to challenge the assessment that the 2015 CAM is uncertain under the FIN 48 standard.[180]

78. SERI states that the primary source for the Initial Decision's determination that the uncertainty of the 2015 CAM is "irrelevant" for ratemaking is the 2007 Accounting Guidance. SERI argues that the Initial Decision wrongly presumed that the accounting instruction for purposes of calculating ADIT balances also prohibits consideration of the FIN 48 analysis for ratemaking purposes. SERI argues that this interpretation is incorrect because it fails to recognize that the 2007 Accounting Guidance is not "binding on the

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[174] SERI Brief on Exceptions at 57 (citing Initial Decision, 172 FERC ¶ 63,003 at PP 125-26).

[175] *Id.* at 58-59.

[176] *Id.* at 60 (citing Ex. SER-0001 at 9-10 and Ex. SER-0007 at 6).

[177] *Id.* at 61.

[178] *Id.* at 28 (citing Initial Decision, 172 FERC ¶ 63,003 at PP 1, 33, 124, 208, 211, 214, 215, 217, 226-29, 251, & 266).

[179] *Id.* at 62 (citing Initial Decision, 172 FERC ¶ 63,003 at PP 128-30).

[180] *Id.* at 63-64.

Commission and . . . not controlling precedent for ratemaking purposes."[181] SERI argues that, unlike other Commission issuances that have contained both accounting and ratemaking directives, the 2007 Accounting Guidance did not announce a formal policy for the treatment of FIN 48 liabilities in rates and explicitly stated that it was not prejudging the appropriate ratemaking treatment of FIN 48 liabilities.

79. Second, SERI argues that the accounting and reporting guidance set forth in the 2007 Accounting Guidance is not nearly as broad as the Initial Decision suggests. SERI claims that the 2007 Accounting Guidance's primary directive is to instruct jurisdictional entities as to how they should "account for unrecognized tax benefits related to temporary differences for Commission accounting and reporting purposes."[182] SERI contends that this instruction does not extend to accounting for excess or deficient ADIT, and nothing in the 2007 Accounting Guidance states that the FIN 48 analysis must be irrelevant for all Commission purposes.[183]

80. Third, SERI argues that the 2007 Accounting Guidance is not a prohibition on an "IRS-centric probability analysis." Instead, it argues that the concern of the 2007 Accounting Guidance is measurement of the cash available to the entity because of temporary differences. SERI contends that this is a narrower and separate issue from the question of how excess ADIT should be measured and treated in rates.[184]

81. SERI also disputes the Initial Decision's conclusions that the 2015 CAM did not create ADIT and that SERI lacks differentiation between FIN 48 liabilities and ADIT.[185] SERI argues that the 2007 Accounting Guidance does not preclude companies from treating FIN 48 liabilities separately from traditional ADIT.[186] Additionally, SERI disputes the Initial Decision's finding that SERI's ratepayers are the source of the disputed $147.3 million. To this point, SERI contends that the 2015 CAM is not a tax deduction that arose from the collection of nuclear decommissioning trust fund contributions in customer rates and that the collection of trust fund contributions was a separate transaction and the source of an entirely different tax deduction. SERI states that the 2015 CAM is a separate deduction under Internal Revenue Code section 263A

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[181] *Id.* at 66.

[182] *Id.* at 67.

[183] *Id.* at 67-68.

[184] *Id.* at 68.

[185] *Id.* at 69 (citing Initial Decision, 172 FERC ¶ 63,003 at P 91).

[186] *Id.* at 70.

and it is the deduction of future decommissioning costs that have no corresponding expense that is recovered in the UPSA. SERI states that it is not deducting the same expenses twice, and it is not collecting the same expenses twice. SERI states that the two tax transactions are independent: even in the absence of the trust fund (and trust fund contributions), SERI would have been able to assert the 2015 CAM.[187]

82. SERI also argues that the 2015 CAM did not create ADIT or excess ADIT for Commission ratemaking purposes. SERI argues that the Initial Decision unreasonably assumed that such differences between the FIN 48 liabilities and traditional ADIT are foreclosed from consideration by the 2007 Accounting Guidance.[188] SERI contends that these differences matter for ADIT ratemaking purposes because FIN 48 liabilities do not have the characteristics that the Commission relied upon in fashioning its rate base rule. SERI states that the 2007 Accounting Guidance does not address or dismiss the differences between FIN 48 liabilities and ADIT that are relevant for ratemaking, and the Initial Decision cites no valid reason to disregard them in that context. In particular, SERI states that, for FIN 48 liabilities, "there is a greater likelihood that the deduction giving rise to the ADIT will be rejected by the IRS; whereas, with respect to traditional ADIT, the opposite is true."[189] Second, SERI states that traditional ADIT deducted from rate base "is cost free because the IRS does not assess any interest on those amounts where the turnaround occurs."[190] SERI states that, in contrast, FIN 48 liabilities are not cost-free while they are uncertain; SERI is required to accrue interest, and none of that accrued interest cost is included in bills to customers. SERI also argues that it is reasonable to assume that traditional ADIT is invested in assets that are included in the rate base, but "in the case of the decommissioning FIN 48 liabilities [arising from the 2015 CAM], it is unreasonable to make that assumption."[191]

83. SERI explains that, in Order No. 144, the Commission recognized that ADIT provides cost-free cash flow, and that cost-free cash flow can be used in place of other forms of financing such that a reduction to rate base for the ADIT balance is reasonable. SERI argues that, in contrast, FIN 48 liabilities arising from uncertain tax positions do not generate cost-free cash flow, and any cash flow produced cannot be reliably invested in rate base assets because it is more likely than not that the tax liability will come due, in whole or major part, in a relatively short period of time. SERI states that the Initial

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[187] *Id.* at 74-75.

[188] *Id.* at 79 (citing Initial Decision, 172 FERC ¶ 63,003 at P 90).

[189] *Id.* (citing Ex. SER-0021 at 18).

[190] *Id.*

[191] *Id.* at 79-80 (citing Ex. SER-0021 at 18).

Decision failed to recognize or address any of these facts when it dismissed SERI's argument and drew its own conclusions without any evidentiary support in the record.[192]

84. SERI argues that the Initial Decision also wrongly concluded that, because the 2015 CAM created ADIT, the TCJA must therefore have created excess ADIT that is now owed to customers. SERI states that, instead, the $147.3 million represented only potential excess ADIT; and now, the actual amount of excess ADIT is known. SERI states that the $147.3 million differs fundamentally from the unprotected excess ADIT that was identified in SERI's original filings. SERI states that the amounts of unprotected excess ADIT included in the March 2018 Filing arose from timing differences based on highly certain tax positions and these deferred taxes will be repaid at the new tax rate, with no IRS interest. SERI states that in contrast, the $147.3 million arose from a deduction that was uncertain, and that SERI ultimately expected it would have to pay the IRS (through the ETAA) at the old tax rate, with interest.[193]

85. SERI states that, when the Initial Decision was issued, SERI did not know whether there would be any excess ADIT resulting from the 2015 CAM and tax rate change that will be paid ultimately to customers, or how much. SERI argues that it was therefore reasonable for SERI to propose to wait until those questions were resolved before providing any related credit that may arise from the 2015 CAM.[194]

86. SERI contends that the Initial Decision also wrongly concluded that the TCJA was sufficient to create excess ADIT in connection with the 2015 CAM. SERI argues that the TCJA did not eliminate a future obligation to the IRS, as now is apparent by the IRS's partial disallowance of the 2015 CAM. Moreover, SERI asserts that the FIN 48 designation was reliable and credible evidence that such obligation was likely to become due. SERI argues that because the Initial Decision wrongly concluded that the FIN 48 probability analysis must be ignored entirely by the Commission, it determined that "the governing Commission authorities overwhelmingly compel the legal conclusion that the $147.3 million is excess ADIT resulting from the impact of the [TCJA] that must be returned to customers."[195] SERI states that notably, Trial Staff witnesses in the Docket No. EL18-152-001 case and this case have disagreed on this point, and the Initial Decision in Docket No. EL18-152-001 concluded that the TCJA had no impact on the 2015 CAM. SERI states that this conflict belies the view set forth in the Initial Decision

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[192] *Id.* at 80.

[193] *Id.* at 81.

[194] *Id.* at 81-82.

[195] *Id.* at 82-83 (citing Initial Decision, 172 FERC ¶ 63,003 at P 104).

that "the governing Commission authorities overwhelmingly compel the legal conclusion."[196]

87. SERI argues that a reasonable approach would neither ignore FIN 48 nor declare that no excess or deficient ADIT can result in connection with a FIN 48 position when there is a change in tax rate. SERI states that, instead, the Commission should accept ratemaking proposals that factor in the unique circumstances of ADIT balances that arise from uncertain tax positions, and that allow for the final IRS resolution of uncertainty to be addressed in rates so that the correct amount of ADIT can be reflected.[197]

88. SERI also argues that the Initial Decision erred in concluding that SERI was required to prematurely credit $147.3 million in connection with the 2015 CAM. SERI notes that the Initial Decision points to *Alaskan Northwest Natural Gas Transportation Co.* to prove that there was no need to await final IRS rulings in connection with a tax deduction when not reflected in pipeline companies' AFUDC calculations.[198] SERI alleges that *Alaskan Northwest Natural Gas Transportation Co.* does not involve excess ADIT, a uniform framework was lacking to evaluate risk of the deductions, and the IRS audit resolution was unknown as compared to the known outcome in this proceeding.[199] SERI argues that *Tennessee Gas Transmission Co.*[200] deferred final decision until the issuance of the IRS's decision to address the appropriate rate treatment.[201]

c. Briefs Opposing Exceptions

i. Mississippi and Arkansas Commissions

89. The Mississippi and Arkansas Commissions argue that the scope of the hearing as determined by the Hearing Order is final and not subject to challenge,[202] yet SERI, which

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[196] *Id.* at 83 (citing Initial Decision, 172 FERC ¶ 63,003 at P 104).

[197] *Id.*

[198] *Id.* (citing Initial Decision, 172 FERC ¶ 63,003 at P 91 (citing *Alaskan Nw. Nat. Gas Transportation Co.*, 19 FERC ¶ 61,218 (1982) (*Alaskan Nw.*))).

[199] *Id.* at 85 (citing Ex. SER-0007 at 3).

[200] 18 FPC 428 (1957).

[201] SERI Brief at 85-86.

[202] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 13 (citing 16 U.S.C. 825l).

did not seek rehearing, repeatedly states in the Briefs on Exception that it did not place the excess ADIT associated with its uncertain tax position at issue in this proceeding.[203] The Mississippi and Arkansas Commissions contend that SERI recorded ADIT with uncertain tax positions in Account 283[204] and SERI states that the ADIT associated with uncertain tax positions was placed into specific sub-accounts of Account 283.[205] The Mississippi and Arkansas Commissions state that the 2007 Accounting Guidance instructs this specific ADIT to be placed in Account 283 but the USofA does not use subdivisions.[206] The Mississippi and Arkansas Commissions disagree with SERI's attestation that a lack of internal subdivision of ADIT associated with uncertain tax positions means that ADIT is not a part of the case at large.[207] The Mississippi and Arkansas Commissions argue that SERI's subdivisions of Account 283 are without meaning for ratemaking purposes.[208]

90. The Mississippi and Arkansas Commissions assert that SERI relied on Exhibit A, a high level workpaper,[209] to show calculations of unprotected excess ADIT but the Hearing Order states that SERI did not demonstrate proper calculations.[210] The Mississippi and Arkansas Commissions disagree with SERI's claim that Attachment E is not a formula rate[211] and that the amounts are fixed,[212] because SERI does not clarify them as such in the March 2018 Filing letter.[213] The Mississippi and Arkansas Commissions also render SERI's case comparison to the ruling in *NRG Power*

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[203] *Id.*

[204] *Id.*

[205] *Id.* at 14 (citing SERI Brief on Exception at 21-23).

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.* (citing Filing at 5).

[210] *Id.* at 14-15.

[211] *Id.* at 15 (citing SERI Brief on Exceptions at 23-29).

[212] *Id.*

[213] *Id.*

Marketing, LLC v. FERC (*NRG*) inapposite due to different procedural postures[214] while highlighting that the Commission's hearing authority is set forth in FPA section 205(e), which they assert gives the Commission broad authority to order SERI to make returns of $147 million in excess ADIT.[215]

91. The Mississippi and Arkansas Commissions request that the Commission disregard SERI's attacks on the application of the 2007 Accounting Guidance and SERI's insistence that FIN 48 ADIT receive special treatment.[216] The Mississippi and Arkansas Commissions explain that the 2007 Accounting Guidance clearly indicated that ADIT operates as an offset to the rate base on which utilities earn a return.[217]

92. The Mississippi and Arkansas Commissions assert that accounting and ratemaking, as noted in the Initial Decision,[218] are tied in this proceeding.[219] The Mississippi and Arkansas Commissions also contend that SERI's tax deduction allotted SERI funds that have been available to SERI throughout the proceeding through the ADIT mechanism of Account 283.[220]

93. The Mississippi and Arkansas Commissions state that the Hearing Order recognizes that the 1993 Accounting Guidance states that excess ADIT must be recorded in Account 254.[221] The Mississippi and Arkansas Commissions ask that the Commission reject SERI's request for a new policy to deal with the novel treatment to FIN 48 in this proceeding.[222] The Mississippi and Arkansas Commissions assert that FIN 48 ADIT, as of December 31, 2017, was rendered excess by the TCJA once SERI re-measured its

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[214] 862 F.3d 108 (D.C. Cir. 2017) (*NRG*).

[215] Mississippi and Arkansas Commissions Brief Opposing Exceptions. at 16-17.

[216] *Id.* at 18.

[217] *Id.* (citing 2007 Accounting Guidance, 119 FERC at 64,454).

[218] *Id.* at 19 (citing Initial Decision, 172 FERC ¶ 63,003 at P 169).

[219] *Id.*

[220] *Id.* at 20.

[221] *Id.* (citing Hearing Order, 163 FERC ¶ 61,164 at PP 15 & 17).

[222] *Id.* at 21.

ADIT.[223] Therefore, the Mississippi and Arkansas Commissions agree with the Presiding Judge's conclusion that the 1993 Accounting Guidance stands and SERI should have recorded excess ADIT in Account 254.[224]

ii. Louisiana Commission

94. The Louisiana Commission argues that the NOPA settlement should not be considered by the Commission because it is not relevant to the issues in this proceeding, was not in the record, and was not subject to scrutiny or discovery.[225] The Louisiana Commission states that SERI's NOPA-related arguments have no bearing on SERI's tariff violation because the certainty of the deduction was not determinative.[226] The Louisiana Commission contends that if SERI did not violate the tariff, SERI's ratepayers would have begun receiving a return starting June 1, 2018 when SERI's proposed UPSA amendments became effective until the $147.3 million excess decommissioning ADIT was returned.[227] Regardless of the NOPA's determinations, the Louisiana Commission states that, should the Initial Decision be affirmed, SERI will owe a monthly return on the $147.3 million until SERI is able to submit a future UPSA mechanism to recover any amount of that return back from ratepayers.[228]

95. The Louisiana Commission maintains that SERI lacks evidence to support SERI's claim that it carried its burden of proof on the uncertainty issue.[229] The Louisiana Commission asserts that, since SERI did not disclose its tax analysis, SERI cannot maintain secrecy and carry the burden of proving uncertainty at the same time.[230]

96. The Louisiana Commission also disagrees with SERI's assertion that the Initial Decision requires ignorance of certain tax positions because the 2007 Accounting Guidance clarifies that uncertainty is not a relevant factor for the Commission to

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[223] *Id.* at 21-22.

[224] *Id.* at 22.

[225] Louisiana Commission Brief Opposing Exceptions at 11.

[226] *Id.* at 12.

[227] Hearing Order, 163 FERC ¶ 61,164 at P 1.

[228] Louisiana Commission Brief Opposing Exceptions at 13.

[229] *Id.* at 47.

[230] *Id.* at 52-53.

determine the treatment of ADIT. It asserts that Commission issuances related to tax changes have not recognized uncertainty as a reason to withhold excess ADIT from ratepayers but that utilities must calculate and return excess ADIT when changes in tax rates occur.[231]

97. The Louisiana Commission disputes SERI's claim that Attachment E is not a formula rate that cannot be adjusted to include the $147.3 million excess ADIT as incorrect.[232] The Louisiana Commission notes that Attachment E contains inputs and formulas for each column and requests that SERI's claims be rejected.[233] The Louisiana Commission argues that the inputs are subject to Commission review and compliance with accounting rules, under any type of proceeding.[234] The Louisiana Commission disagrees with SERI's characterization of Attachment E and valuation of $58,970,779 unprotected excess ADIT as part of the filed rate, as opposed to an input, so that the calculation of the amount cannot be readily altered.[235]

98. The Louisiana Commission alleges that SERI added Account 190161 "Property and Ins Reserve – Fed" and Account 190451 "Incentive Fed" to Exhibit A in its March 15, 2019 true-up filing to identify excess ADIT to be returned to customers.[236] Due to SERI's addition of these subaccounts, the Louisiana Commission disagrees with SERI's argument that $147.3 million excess ADIT cannot be considered because no additional subaccounts originally listed in Account A can be added to the "universe" considered in this case.[237] Additionally, the Louisiana Commission and all parties agree that SERI's Exhibit A is not part of the filed rate since SERI identified Exhibit A as a workpaper with

[231] *Id.* at 53.

[232] SERI Brief on Exceptions at 21, 23.

[233] Louisiana Commission Brief Opposing Exceptions at 17-18.

[234] *Id.* at 18.

[235] *Id.* at 21.

[236] *Id.* at 23-24.

[237] *Id.* at 22.

calculations for the excess ADIT credit balance.[238] Thus, the Louisiana Commission claims that Exhibit A cannot limit the Commission's ability to add or remove accounts.[239]

99. The Louisiana Commission agrees with the Presiding Judge's finding that $58,970,779 in unprotected excess ADIT included in the UPSA Attachment E is an input to the formula.[240] The Louisiana Commission contends that Commission precedent in Order No. 864[241] has set an expectation for transmission providers to file sufficient details to verify excess ADIT resulting from the TCJA.[242]

100. The Louisiana Commission opposes SERI's argument that SERI's tariff amendments limit the amount of excess ADIT that is to be returned to specific subaccounts due to SERI's lack of limiting language in Attachment E.[243] The Louisiana Commission argues that SERI incorrectly stated in its answer to the Louisiana Commission's protest that the attached Expanded Exhibit A clarified that SERI identified all remaining excess ADIT balances.[244] The Louisiana Commission explains that SERI's tariff amendments require "Unprotected Excess ADIT Balance as of 12/31/17" to be returned and SERI violates its tariff by not including the $147.3 million unprotected excess ADIT related to SERI's nuclear decommissioning deduction.[245]

101. The Louisiana Commission argues that SERI's preferred method of returning the excess ADIT is through Attachment E but Attachment E is not the regulation that requires the return.[246] The Louisiana Commission states that the

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[238] *Id.* at 24.

[239] *Id.*

[240] *Id.* at 25.

[241] *Pub. Util. Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 864, 169 FERC ¶ 61,139 (2019) (Order No. 864), *order on reh'g*, Order No. 864-A, 171 FERC ¶ 61,033 (2020).

[242] Louisiana Commission Brief Opposing Exceptions at 27 (citing Order No. 864, 169 FERC ¶ 61,139 at P 65).

[243] *Id.* at 29.

[244] *Id.* at 31.

[245] *Id.* at 31-32.

[246] *Id.* at 32.

Commission's tax normalization regulation through 18 C.F.R. § 35.24 requires that SERI adhere to its filed rate and return excess ADIT through SERI's Monthly Capacity Charge Formula as it has shown in its true-up filing to be unwilling to make the return though Attachment E.[247] The Louisiana Commission alleges that SERI must return the correct amount of unprotected excess ADIT in this rate proceeding.[248]

102. Since SERI claims that the Commission cannot require the return of $147.3 million excess ADIT, the Louisiana Commission asserts that SERI is incorrect to state that a tariff change is necessary for its consent.[249] The Louisiana Commission maintains that a correction to the inputs in Attachment E can be adjusted without SERI's consent and if the Commission decided that Attachment E is a fixed rate that necessitates consent to change, then the "Adjustments to Federal Tax" variable on UPSA Attachment A, Page 4, line 24, would require the full return to customers through SERI's Monthly Capacity Charge Formula.[250]

103. The Louisiana Commission explains that the Initial Decision requires SERI to properly apply its newly effective formula rate by correcting its inputs and that is not a rate decrease.[251] Furthermore, the Louisiana Commission reasons that a failure to return the $147.3 million amount will cause SERI to charge more in taxes than its formula and Commission regulations permit.[252] Specifically, the Louisiana Commission contends that, under SERI's proposal, not all of SERI's deferred tax reserves would be adjusted and SERI would keep the excess deferred taxes related to uncertain tax positions, even though these deferred taxes were created by positions actually taken on the tax return and produced cash to SERI. In essence, the Louisiana Commission argues that SERI's proposal would fail to "compute the income tax component in its cost of service by making provision for any excess or deficiency in deferred taxes" and thus would increase the effective tax rate. The Louisiana Commission contends that SERI's proposed methodology is a request for a rate increase, over and above the "rate in effect at the end of the service month" provided in the formula. Therefore, the Louisiana Commission avers that the exclusion of the $147.3 million amount related to SERI's nuclear decommissioning tax deduction will make the rate unjust and unreasonable and, pursuant

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[247] *Id.*

[248] *Id.* at 34.

[249] *Id.*

[250] *Id.* at 34-35.

[251] *Id.* at 36.

[252] *Id.* at 37.

to FPA section 205(e), the Commission has full power to order the return of any increase in rates found to be unjust and unreasonable.[253]

iii. New Orleans Council

104. The New Orleans Council states that the Initial Decision correctly concluded that the argument of "uncertainty" of success of the decommissioning deductions is irrelevant for Commission accounting and ratemaking. The New Orleans Council asserts that the Presiding Judge correctly concluded that SERI was required to promptly return to customers all the $147.3 million in accordance with Commission tax normalization regulations, accounting guidance and applicable Commission policy. The New Orleans Council states that SERI's justification for excluding the $147.3 million from the other excess ADIT that it proposed to return to customers is that this ADIT is somehow distinct from other ADIT due to alleged uncertainty whether the IRS would disallow the nuclear decommissioning deductions.[254] The New Orleans Council asserts that the Commission's accounting guidance expressly rejects this distinction.[255] The New Orleans Council argues that the Commission does not allow reporting utilities to exclude from ADIT amounts related to that entity's tax deductions on the basis that the IRS may at some time in the future disallow all or part of the deductions. The New Orleans Council argues that the Commission requires entities to accurately report the capital they have at their disposition, and to credit customers accordingly when that capital is provided to the utility by them, including through the advance payment of taxes through rates.[256]

105. The New Orleans Council notes that the Commission directed entities to follow its long-standing policy on accounting for changes in tax laws or rates in accounting for the change in tax rates accorded by the TCJA and that the 1993 Accounting Guidance says nothing about any adjustments or differing treatment for ADIT related to uncertainty as to whether the IRS would accept the tax positions asserted by the public utility in its filed tax returns.[257] The New Orleans Council states that the record in this proceeding demonstrates that the notion of "uncertainty" could never have been a genuine issue

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[253] *Id.* at 38.

[254] New Orleans Council Brief Opposing Exceptions at 16-17.

[255] *Id.* at 17.

[256] *Id.*

[257] *Id.* at 18.

because SERI never had any expectation that the decommissioning deduction would be upheld by the IRS.[258]

iv. Trial Staff

106. Trial Staff argues that the Presiding Judge correctly determined that SERI erroneously excluded $147.3 million in unprotected excess ADIT from its filing. Trial Staff argues that, for the Commission's purposes, the likelihood that the IRS will uphold all or part of SERI's deductions is irrelevant in computing the amount of ADIT to be recorded on SERI's books. Trial Staff states that, having taken the deductions, SERI must recognize the tax effect of the book-tax difference from those deductions as ADIT. Trial Staff states that, in a proceeding litigated long before the issuance of the 2007 Accounting Guidance, the Commission squarely rejected assertions that an IRS audit is sufficient grounds to deviate from the Commission's policy, precedents, and regulations as it relates to ADIT. Trial Staff states that the Commission concluded that there was "no need to await final IRS rulings on this matter" before including the amounts in rate base, and the Commission noted that "[i]n the event of an adverse ruling from IRS, appropriate adjustments may be submitted" to the Commission.[259]

107. Trial Staff argues that SERI's own witnesses contradict its assertions that the 2015 CAM deductions did not give rise to ADIT because uncertain tax positions "do not generate cost-free cash flow,"[260] and that the $147.3 million was paid to SERI by other Entergy Operating Companies, not customers.[261] Trial Staff states that it is indisputable that SERI collected taxes from ratepayers. Trial Staff states that the book-tax difference triggered by those actions gave rise to cost-free capital in the form of ADIT for Commission purposes and that ratepayers provided the ADIT.[262]

108. Trial Staff asserts that the TCJA gave rise to excess ADIT associated with the 2015 CAM deduction. Trial Staff notes that following the enactment of the TCJA, a portion of the ADIT that arose from the 2015 CAM deductions became unprotected

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[258] *Id.* at 19.

[259] Trial Staff Brief Opposing Exceptions at 10-12 (citing *Alaskan Nw.*, 19 FERC at 61,427).

[260] *Id.* at 12 (citing SERI Brief on Exceptions at 80; Tr. 106:1-4 (Roberts)).

[261] *Id.*(citing SERI Brief on Exceptions at 76-77).

[262] *Id.* at 13 (citing Ex. SER-0012 at 2 n. 5; *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 171 FERC ¶ 63,003 at P 540; Ex. SER-0001 at 12; Order No. 864, 169 FERC ¶ 61,139 at P 8 & n.5)).

excess ADIT because the reduction of the federal corporate income tax rate from 35% to 21% meant that a portion of the ADIT SERI had accumulated would never be paid to the IRS.[263]

109. Trial Staff states that SERI attempts to distinguish the excess ADIT that it has already returned to customers from the $147.3 million at issue in this proceeding and that SERI bases this distinction on the very different risk profiles of the two types of excess ADIT relying on the IRS's prior rejection of three earlier attempts to deduct future decommissioning costs.[264] Trial Staff asserts, however, that there is nothing unique about the 2015 CAM deductions and that "FIN 48's 'more likely than not' probability analysis has already been reviewed in detail and adjudicated to be inapplicable regarding the determination of ADIT and excess ADIT."[265] Trial Staff notes that shortly after FIN 48 was published, the Commission issued its 2007 Accounting Guidance directing companies to disregard the standard set forth in the document and "continue to recognize deferred income taxes for Commission accounting and reporting purposes based on the difference between positions taken in tax returns filed or expected to be filed and amounts reported in the financial statements."[266] Trial Staff states that SERI has not explained how the Commission's stated objective of ensuring "an accurate measurement of the cash available to the entity as a result of temporary differences" could be achieved if these amounts were not treated as excess ADIT for ratemaking purposes.[267]

110. Regarding the NOPA, Trial Staff notes that the Presiding Judge concluded that the "fact that there is a possibility that the IRS may reject the tax deductions and require SERI to pay the amount back at the prior higher tax rate is not synonymous with a finding that the TCJA did not impact SERI's FIN 48 liabilities and create excess ADIT."[268] Trial Staff states that SERI's assertion that the resolution of the NOPA confirms that SERI was correct to regard these amounts as uncertain is also incorrect. Trial Staff argues that the NOPA is not a final agency action so much as a settlement agreement and proof that the IRS had concerns about the validity of SERI's deduction.

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[263] *Id.* at 16 (citing Ex. S-0004 at 6, 29).

[264] *Id.* (citing SERI Brief on Exceptions at 16 (quoting Ex. SER-0001 at 12; Tr. at 265 (Roberts))).

[265] *Id.* at 17-18 (citing Initial Decision, 172 FERC ¶ 63,003 at P 118).

[266] *Id.* at 18 (citing Ex. SER-0008 at 4).

[267] *Id.*

[268] *Id.* at 20 (quoting Initial Decision, 172 FERC ¶ 63,003 at P 117).

Trial Staff asserts that SERI's decision to concede the deduction is only proof that SERI is no longer willing to defend its deduction.[269]

d. Commission Determination

111. At the outset, we note that the Commission conclusively addresses many of the same positions assumed by the parties in the instant proceeding, in its Order on Initial Decision in Docket No. EL18-152-001.[270] In particular, in Docket No. EL18-152-001, the Commission fully assesses the required accounting and rate treatment of SERI's FIN 48 ADIT, which is tangentially at issue in the instant proceeding.[271] The instant proceeding addresses the effects of the TCJA on FIN 48 ADIT and the resulting excess ADIT, whose proper accounting and rate treatment is determined by the appropriate treatment of FIN 48 ADIT.

112. We agree with the Initial Decision's determination that since SERI's nuclear decommissioning tax deductions gave rise to ADIT,[272] the associated excess ADIT should have been reflected in rate base and returned to customers pursuant to Order No. 144 and the Commission's regulations in 18 C.F.R. § 35.24.[273] SERI takes issue with, among other things, the Initial Decision's finding that the instruction in the 2007 Accounting Guidance does not extend to accounting for excess or deficient ADIT, does not prohibit "IRS-centric probability analysis," and does not preclude the difference in treatment of FIN 48 liabilities from "traditional ADIT."[274] We disagree with SERI's contentions and policy interpretation because the 2007 Accounting Guidance details that, given new requirements under FIN 48, jurisdictional entities should continue to adhere to the Commission's existing requirements to measure and recognize:

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[269] *Id.* at 20-21.

[270] *La. Pub. Serv. Comm'n v. Sys. Energy Resources, Inc.*, 181 FERC ¶ 61,243 (2022) (UPSA Complaint Opinion).

[271] *Id.* PP 303-325 & 337-340

[272] UPSA Complaint Opinion, 181 FERC ¶ 61,243 at PP 303-308.

[273] *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).

[274] SERI Brief on Exceptions at 68, 78.

> current and deferred tax liabilities and assets based on the [tax] positions taken or expected to be taken in a filed tax return, and recognize uncertainties regarding [tax] positions by recording a separate liability for the potential future payment of taxes . . . and [w]here uncertainties exist with respect to tax positions involving temporary differences, the amounts recorded in the accounts established for [ADIT] are based on the positions taken in the tax returns filed or expected to be filed.[275]

113. We find here, consistent with the Commission's finding in the UPSA Complaint Opinion,[276] that whether an uncertain tax position prevails or fails, or is certain or uncertain, is not an appropriate determinant as to whether ADIT is properly recordable for regulatory purposes. This is the case because public utilities must follow the Commission's ratemaking principle of tax normalization.[277] The Commission has emphasized that the primary rationale for tax normalization is the matching of the recognition in rates of the tax effects of utilities' expenses and revenues with utilities' recovery in rates of the associated expenses and revenues themselves.[278] We find that the Commission's tax normalization policy is applicable here because SERI, which preserves an income tax allowance in UPSA cost of service rates, took nuclear decommissioning deductions for tax purposes that will not be recognized for regulatory book purposes until Grand Gulf begins the decommissioning process in a future period, a fact that gives rise to temporary timing differences that must be captured as ADIT. Additionally, pursuant to the UPSA, SERI has historically collected decommissioning expenses from its customers,[279] which will be used to pay the cost of decommissioning Grand Gulf.[280] Thus, regardless of its level of *uncertainty*, FIN 48 ADIT must be included in rate base

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[275] 2007 Accounting Guidance, 119 FERC at 64,454.

[276] UPSA Complaint Opinion, 181 FERC ¶ 61,243 at P 308.

[277] Under the ratemaking principle of tax normalization, the Commission permits the company to defer certain of its tax deductions for ratemaking purposes until the expenses that produced the deductions are recovered in the company's rates.

[278] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at P 31,522.

[279] Initial Decision, 172 FERC ¶ 63,003 at P 84 & n. 245 (The decommissioning expense collections from customers under the UPSA commenced during the 1980s and terminated due to a 2017 rate case that halted further contributions on the basis that the trust had achieved the requisite amount of funding to cover the decommissioning cost. *See* Tr. 116:25-119:13 (Roberts). As of 2015, the trust fund had a balance of more than $800 million. (citing Tr. 116:25-119:13 (Roberts; Tr. 118:16-19 (Roberts)).

[280] *Id*. (citing Tr. 117:6-11, 118:11-15 (Roberts)).

because the future decommissioning activities that have given rise to the ADIT are directly attributable to the underlying Grand Gulf facility. Since the decommissioning expenses are included in the UPSA cost of service, the associated deductions and their tax reducing benefits should be considered in determining the ADIT offset to rate base in the UPSA formula rate. As a general rule, the regulatory principle of matching tax effects of costs and revenues to their associated costs and revenues is an equitable principle that does not vary under an individual firm's circumstances.[281]

114. SERI's use of different terms, such as "FIN 48 probability analysis," "traditional ADIT," and "potential excess ADIT" to advance its argument that FIN 48 ADIT should be treated differently from all other cost of service components, are semantic distinctions that the Commission has not recognized or adopted into its tax normalization policies. Tax normalization achieves what the Commission finds is the more proper allocation of taxes over time by using the provision for deferred income taxes as a mechanism for setting the tax allowance at the level of current tax cost.[282] SERI's preferred practice frustrates this effort because it attempts to *flow-through* the resulting ADIT only at the time of its IRS-determined tax liability or resolution of its uncertain tax position, which does not result in an equitable allocation of tax costs to customers over time. SERI argues that, if it is probable that the amount at issue will be paid to the IRS, then it is also probable that the Commission would not require this same amount to be credited to customers.[283] This argument, however, misses the central point that SERI's income tax allowance component of its cost of service is not derived using a probability estimate. Thus, it follows that probabilities shall also not be applied to ADIT and excess or deficient ADIT to determine portions of which to include or exclude from cost of service rates.

115. The record indicates that, following the TCJA's enactment, SERI made an accounting entry to adjust its deferred tax account balance,[284] FIN 48 ADIT, resulting in an adjustment to Account 283 and a corresponding entry to Account 236 for $147.3 million.[285] We agree with the Initial Decision that despite disagreements as to how the parties characterize this action, the result was clearly a remeasurement of FIN 48 ADIT

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[281] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at P 31,527.

[282] *Id*. at 26,620.

[283] SERI Brief on Exceptions at 69.

[284] Initial Decision, 172 FERC ¶ 63,003 at P 53 (citing Ex. SER-0001 at 19:14-18 (Roberts); SERI Reply Br. 24; Tr. 171:21-172:3 (Roberts)).

[285] *Id.* (citing Ex. SER-0001 at 19:9 (Roberts) (stating that the amount "therefore has been recorded in Account 236")).

that resulted in $147.3 million of excess ADIT that was reclassified to Account 236. SERI contends that the $147.3 million "is only potential excess ADIT and it should not be treated the same as excess ADIT that arose from the TCJA."[286] We disagree with SERI's reasoning because, again, in the context of rate regulation, a utility's cost-of-service income tax allowance is not principled on a concept of *potential* income taxes.

116. We agree with the Initial Decision's finding that prior to the IRS resolution of SERI's nuclear decommissioning tax deductions, SERI failed to make the appropriate rate base adjustment and return the $147.3 million of excess ADIT to customers. However, due to the IRS's subsequent resolution of SERI's 2015 uncertain tax position, SERI is now only required to return the recomputed amount of excess ADIT as discussed further under Issue I.C. We also find here, as the Commission finds in the UPSA Complaint Opinion,[287] that SERI is required to follow the Commission's guidance for remeasuring its FIN 48 ADIT recognizing deficient or excess ADIT as a regulatory asset or liability, as appropriate. In Docket No. EL18-152-001, the Commission directed SERI to reverse the transfer of excess ADIT recorded in Account 236, and to further reclassify this amount from Account 283 to Account 282.[288] We remind SERI that coupling the Commission's tax normalization policy with FIN 48 requires that all uncertain tax positions taken in a given tax year, regardless of their level of certainty, shall be recognized in the proper ADIT accounts and appropriately included in rate base. Jurisdictional entities shall maintain this practice *during* and *until* the taxing authority has made its final determination as to whether an uncertain tax position will be accepted or disallowed, and such outcome has been properly reflected on a utility's revised income tax return for a given tax year. ADIT calculations shall be based upon amounts claimed in an entity's actual tax return,[289] and this appropriate accounting and ratemaking treatment shall be consistent with the computation of excess or deficient ADIT as a result of a change in tax regulation.

117. SERI argues that, through the NOPA, the IRS has resolved its previously uncertain nuclear decommissioning tax deductions and moots the Initial Decision. As such, on October 16, 2020, SERI preemptively proposed an amendment to the UPSA and an $18 million credit for excess ADIT to customers in Docket No. ER21-129-000. We note

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[286] *Id*. P 25 (citing SERI Initial Br. 15); *see also* SERI Initial Br. 33 (arguing that "all excess ADIT cannot be treated identically" given the "specific facts and circumstances" of this case and "the significant and undisputed uncertainty" regarding the nuclear decommissioning deductions).

[287] UPSA Complaint Opinion, 181 FERC ¶ 61,243 at P 338.

[288] *Id.* P 340.

[289] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at P 33.

that the Commission accepted this filing, subject to refund, set it for settlement and hearing procedures, instituted a FPA section 206 proceeding in Docket No. EL21-46-000, and consolidated these proceedings with proceedings in Docket Nos. ER21-117-000, ER21-117-001, ER21-129-000, ER21-129-001, and EL21-24-000.[290] However, because we are directing SERI to recompute excess ADIT in the instant proceeding, and will subsequently determine its amortization as discussed further under Issue I.C., the resolution of these issues may entirely overlap with the resolution of issues raised in Docket No. ER21-129-000.

118. As further discussed under Issue 1.C, because we are granting SERI's motions to lodge its 2015 tax resolution documents (the NOPA and the RAR) into the record, we find that it is appropriate for SERI on compliance, to recompute the amount of excess ADIT, consistent with the Commission's directive in the UPSA Complaint Opinion.[291] We disagree with SERI's contention that the NOPA and RAR resolve its previously uncertain nuclear decommissioning tax deductions as they relate to its 2016 and 2017 tax years because support for the resolution of these tax years has not been adequately shown in the record. We find that the NOPA and RAR provide that of the $1,179,632,700 nuclear decommissioning liability claimed in the 2015 CAM, the IRS will allow SERI to include $101,517,825 of future decommissioning expenses in cost of goods sold and disallow the remaining balance of the 2015 CAM for the 2015 tax year.[292] Additionally, SERI admitted into this proceeding's evidentiary record that the "Nuclear Decommissioning Cost of Goods Sold Deduction taken for tax years 2015, 2016, and 2017 are $1,179,632,700, $28,822,263, and $(100,565,905), respectively,"[293] which

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[290] *See Sys. Energy Res., Inc.*, 174 FERC ¶ 61,153 (2021); *Sys. Energy Res., Inc.*, 174 FERC ¶ 61,082 (2021).

[291] 181 FERC ¶ 61,243 at P 340.

[292] RAR Motion to Lodge.

[293] Initial Decision, 172 FERC ¶ 63,003 at P 47 (Ex. SER-0001 at 17:8 (Roberts)). The record reflects some minor discrepancies regarding the exact total amount of the deductions and the individual deduction amounts taken in each year. *See*, *e.g.,* Ex. S-0004 REV at 30-31 (Nicholas) (detailing an identified $999 discrepancy in the total amount of the deductions and offering a potential explanation for the discrepancy). While SERI's chief witness on this matter states that the figure is $1,107,888,059, Ex. SER-0001 at 17:8 (Roberts), a non-privileged discovery response from SERI admitted into this proceeding's evidentiary record states that the "Nuclear Decommissioning Cost of Goods Sold Deduction taken for tax years 2015, 2016, and 2017 are $1,179,632,700, $28,822,263, and $(100,565,905), respectively," which totals $1,107,889,058. Ex. S-0008 at 2, responses c-d. Regardless of this noted discrepancy, it is not material to the outcome of this proceeding given its relative small size ($999 in the context of an amount

indicates that the NOPA and RAR resolves deductions taken for the 2015 tax year. Therefore, as similarly required in the Commission's UPSA Complaint Opinion, SERI's correcting entry and computation of excess ADIT resulting from the TCJA must also be recomputed to consider the resolution of its 2015 tax position.[294] If uncertain tax positions taken in tax years 2016 and 2017 have each individually been resolved by taxing authorities, then all necessary and proper documentation supporting the resolution for each tax year must also be provided as part of the compliance filing for the re-computation of excess ADIT ordered under Issue 1.C.

2. Issue 1.B. Did SERI correctly account for the $147.3 million related to its nuclear decommissioning tax deductions in Account 236 and what relevance, if any, does this accounting determination have on the answer to Issue 1.A?

a. Initial Decision

119. The Initial Decision states that the Commission's USofA and interpretive guidance from the Commission's Chief Accountant govern the regulatory accounting of the $147.3 million related to SERI's nuclear decommissioning tax deductions, both where it should be accounted and certain procedural limitations in terms of how it should be accounted. The Initial Decision states that the USofA, which governs public utilities and their preparation of annual and quarterly reporting requirements, is intended to provide consistent criteria for accounting of transactions and economic events and establishes individual account numbers and provides associated account descriptions and instructions.[295] The Initial Decision also states that Account 283 is intended to hold money collected from ratepayers for taxes that have not yet been remitted to the tax authority but will be due in the future.[296] Further, the Initial Decision states that Account 254, titled Other Regulatory Liabilities, is for recordation of a utility's obligations to

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that exceeds $1 billion), the fact that the participants do not dispute the accuracy of the $1,107,888,059 stated by SERI's witness, *see*, *e.g.,* S-0004 REV at 30-31 (Nicholas), and the fact that this figure was relied on to calculate another undisputed figure, the $147,349,112 amount in controversy. *See*, *e.g.,* Ex. LC-0001 at 19:10-12 (Sisung) (listing $147,349,112 and stating agreement with its calculation); Ex. S-0004 REV at 33:18-22 (Nicholas).

[293] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at P 33.

[294] UPSA Complaint Opinion, 181 FERC ¶ 61,243 at P 336.

[295] Initial Decision, 172 FERC ¶ 63,003 at P 151.

[296] *Id.* P 152.

return current receipts or revenues to customers as a result of a regulator's ratemaking actions. Account 236 is the liability account that must be credited with the amounted of taxes accrued during the accounting period, i.e., taxes incurred during that year not yet paid.[297]

120. The Initial Decision states that the 1993 Accounting Guidance and 2007 Accounting Guidance address GAAP accounting standards issued by the FASB and include direction on "how these standards should be implemented for FERC accounting and reporting purposes," and states that these directions are necessary where the Commission's accounting methodologies significantly diverge from GAAP.[298] The Initial Decision states that the 2007 Accounting Guidance prohibits application of GAAP's FIN 48's "more-likely-than-not" threshold for recognizing uncertain tax positions and instead requires utilities to recognize deferred income taxes based on the positions taken in their filed tax returns and directs that utilities "should not remove from [ADIT] and reclassify as a current liability the amount of deferred income taxes payable within 12 months of the balance sheet date."[299]

121. The Initial Decision states that excess ADIT resulting from a tax rate change must be recorded in Account 254 when it is probable that the utility will have to return the amount to ratepayers. The Initial Decision further states that the effect of the change in tax law amounts to $147.3 million derived by comparing SERI's FIN 48 liabilities as measured at the prior rate versus the remeasured level under the TCJA's new lower tax rate.[300] The Initial Decision states that because SERI had recorded its FIN 48 deferred tax liabilities in Account 283, it must reduce this balance by $147.3 million. While SERI complied with this initial directive, the Initial Decision states that the 1993 Accounting Guidance requires that this amount be recorded in Account 254 because "as a result of action by a regulator," (in this case, the Commission), SERI was mandated to practice tax normalization and adhere to its excess ADIT requirements and disregard the uncertainty status of deductions under FIN 48 and simply review what deductions it took on its own filed tax returns.[301] The Initial Decision states that instead SERI recorded the $147.3 million in Account 236, a decision that, according to the Initial Decision "confuses the

[297] *Id.* P 153.

[298] *Id.* P 155 (citing Ex. S-0004 REV at 16:2-7).

[299] *Id.* P 156 (citing 2007 Accounting Guidance, 119 FERC at 64,454).

[300] *Id.* P 158.

[301] *Id.* P 159.

governing probability analysis given that the Commission's 2007 Accounting Guidance prohibits the application of FIN 48's probability analysis here."[302]

122. The Initial Decision finds that that the USofA and other governing accounting authorities specifically preclude recording the $147.3 million in Account 236. It reasons that this amount represents the excess portion of a deferred tax liability, which is categorically not a current tax amount.[303] The Initial Decision also states that the fact that the IRS may reject all or part of SERI's deductions at some future date does not mean that the TCJA's new lower tax rate failed to impact SERI's FIN 48 liabilities.[304]

123. The Initial Decision also states that SERI did not obtain prior Commission approval required for its accounting entries that transferred the $147.3 million from Account 283 to 236. The Initial Decision notes that Account 283's instructions expressly impose this requirement and Opinion No. 545, a proceeding in which SERI's witness Mr. Roberts testified reinforces this requirement.[305]

124. While the Initial Decision notes that accounting does not control Commission ratemaking, particularly with regard to GAAP financial accounting,[306] and the Commission has stated that the Chief Accountant's guidance letters "are not controlling for ratemaking purposes,"[307] the Commission has emphasized that uniformity in accounting and financial reporting is central to carrying out its regulatory functions as good ratemaking requires good inputs, which the USofA and accounting guidance are "designed to deliver."[308]

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[302] *Id.*

[303] *Id.* P 161.

[304] *Id.* P 162.

[305] *Id.* P 166 (citing 18 C.F.R. pt. 101, Account 283(E) and *Entergy Servs., Inc.*, Opinion No. 545, 153 FERC ¶ 61,303, at P 78 (2015)).

[306] *Revisions to Uniform System of Accounts to Account for Allowances under the Clean Air Act Amendments of 1990 and Regulatory-Created Assets and Liabilities to Form Nos. 1, 1-F, 2 and 2-A*, Order No. 552, FERC Stats. & Regs. ¶ 30,967, at 30,801 (1993) (cross-referenced at 62 FERC ¶ 61,299).

[307] Order No. 552, FERC Stats. & Regs. ¶ 30,967 at 30,801.

[308] Initial Decision, 172 FERC ¶ 63,003 at P 169.

125. The Initial Decision states that Issue 1.A presents a ratemaking question and 1.B an accounting question. The Initial Decision notes, however, that formula rates, like the UPSA are dependent upon amounts recorded in the correct USofA accounts.[309] In response to SERI's contention that the 2007 Accounting Guidance does not control the appropriate ratemaking treatment of ADIT balances after a change in tax rates, the Initial Decision states that while the 2007 Accounting Guidance "*does not alone and exclusively control* the outcome of this case," it rightly applies to facets of the required analysis and has a "defined but significant role" in conjunction with other governing authorities.[310]

126. The Initial Decision states that the 2007 Accounting Guidance expressly preempts and disavows the application of certain aspects of FIN 48.[311] Consequently, the Initial Decision argues that the 2007 Accounting Guidance's instruction to implement accounting based on the positions taken in the tax returns filed and to disregard uncertainty "must serve as the antecedent to, and inform the application of the Commission's tax normalization ratemaking principle that excess ADIT be returned to customers."[312] The Initial Decision further states that this legal authority "cannot be dislodged" from its Commission-intended role of assuring the validity and uniformity of the data on which this ratemaking inquiry relies.[313] For this reason, the Initial Decision states that the 1993 Accounting Guidance and the 2007 Accounting Guidance hold particular importance to both issues and serve as controlling accounting guidance for regulated entities unless or until superseded by other Commission action and that the legal conclusions in issues 1.A and 1.B operate in tandem and reinforce each other.[314]

b. Brief on Exceptions

127. SERI argues that the Initial Decision erred in determining that SERI incorrectly accounted for the $147.3 million related to its nuclear decommissioning tax deductions. SERI maintains that this is a case of first impression wherein the Initial Decision's identification of the "Governing Commission Authorities" as relevant to these matters is wrong since the governing Commission authorities do not address accounting for a

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[309] *Id.* P 171 (citing Arkansas Public Service Commission Reply Brief 22).

[310] *Id.* P 174 (emphasis in original).

[311] *Id.* P 175.

[312] *Id.* P 176.

[313] *Id.*

[314] *Id.* P 179.

change in FIN 48 deferred tax liabilities following a reduction in federal tax rates.[315] SERI explains that the Commission should recognize that the governing Commission authorities do not require that the $147.3 million be recorded in Account 254.[316] SERI asserts that the Commission should not mandate that $147.3 million be recorded in Account 254 since FIN 48 deferred tax liabilities did not exist when the 1993 Accounting Guidance was issued.[317] Additionally, SERI agrees that the 2007 Accounting Guidance required the recording of FIN 48 liability in Account 283 before tax rate changes, but SERI argues the 2007 Accounting Guidance "does not speak to the appropriate accounting for any excess amounts that result from a change in tax rates."[318]

128. SERI avers that the Initial Decision errs in stating that the Governing Authorities preclude recording the $147.3 million in Account 236.[319] SERI claims that the Cost Of Goods Sold Tax Position has become further clarified since materially changing.[320] SERI also claims that when the TCJA became effective, the $147.3 million amount ceased to be ADIT and the TCJA did not create a set of circumstances for future returns of the $147.3 million amount which is why SERI adjusted Account 283 balances at that time.[321] SERI claims it removed $147.3 million from Account 283 because it was *not* ADIT under any scenario.[322] SERI agrees with the Initial Decision's statement that the 1993 Accounting Guidance lists six accounts utilities may record entries in response to tax rate changes,[323] but claims those are not the only accounts a change in tax rates on a deferred tax liability balance may be recorded.[324]

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[315] SERI Brief on Exceptions at 86-88 (citing Initial Decision, 172 FERC ¶ 63,003 at PP 150-57).

[316] *Id.* at 88-92.

[317] *Id.* at 89-90.

[318] *Id.* at 90.

[319] *Id.* at 92.

[320] *Id.*

[321] *Id.* at 92-93.

[322] *Id.* at 94.

[323] *Id.* at 95 (citing Initial Decision, 172 FERC ¶ 63,003 at P 165).

[324] *Id.*

129. SERI argues that the governing Commission authorities provided the authorization necessary to record the $147.3 million in Account 236 – no separate approval was necessary. SERI contends that the Governing Authorities do not limit the universe of accounts that a re-measured balance can be recorded in, principally because this novel fact pattern did not exist in 1993. SERI notes that Trial Staff witness Miller testified in Docket No. EL18-152-001 that recording the $147.3 million amount in Account 253, for example, would be appropriate.[325] SERI states that the Commission's regulations and the 1993 Accounting Guidance require an adjustment to the Account 283 balance permitting SERI's accounting change.[326]

130. SERI argues that the Initial Decision erred in determining that the accounting affects the inputs to the UPSA in SERI's section 205 filing. SERI states that the Initial Decision's discussion of the relevance of the accounting on ratemaking is faulty.[327] SERI maintains that the Initial Decision determined incorrectly that the $147.3 million amount is excess ADIT that requires recording in Account 254 which then becomes an input to the UPSA per SERI's section 205 filing.[328] SERI states there is a 50% or more probability that this amount would go to the IRS through the ETAA following the change in federal taxes.[329] SERI affirms that none of its proposed TCJA amendments to the UPSA are "accounting-driven."[330]

c. Briefs Opposing Exceptions

i. Mississippi and Arkansas Commissions

131. The Mississippi and Arkansas Commissions state that the 2007 Accounting Guidance rejects the "uncertainty" of a tax deduction as a distinction applicable to permitting SERI to record the excess ADIT in Account 236.[331] The Mississippi and Arkansas Commissions maintain that SERI was incorrect to shift FIN 48 ADIT into

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[325] *Id.* at 97.

[326] *Id.* at 97-98.

[327] *Id.* at 99.

[328] *Id.*

[329] *Id.*

[330] *Id.*

[331] Mississippi and Arkansas Commissions Brief Opposing Exceptions at 22.

Account 236 due to the adoption of the TCJA.[332] The Mississippi and Arkansas Commissions assert that the Initial Decision recognized that no Commission action authorized the transfer from Account 283 to Account 236.[333]

132. The Mississippi and Arkansas Commissions reason that the Initial Decision was correct in finding that SERI's filing provided for the return of all excess ADIT to ratepayers by December 31, 2018.[334] The Mississippi and Arkansas Commissions assert that SERI must return $147.3 million in excess ADIT associated with the uncertain tax position.[335]

ii. Louisiana Commission

133. The Louisiana Commission states that when SERI moved $147.3 million of its decommissioning ADIT from Account 283 to Account 236, an account for current tax accruals, SERI reduced the likelihood the amount would be recognized in the examination of its excess tax filing.[336] The Louisiana Commission contends that SERI's argument that crediting excess decommissioning ADIT to benefit customers is premature simply reflects a problem of SERI's own making because SERI moved the amount purposefully into the wrong account.[337] The Louisiana Commission agrees with the Initial Decision given the facts of SERI's filing and requests that the Commission dismiss SERI's reliance on decisions made in *Tennessee Gas Transmission Co.*, 18 FPC 428 and *Alaskan Northwest Natural Gas Transportation Co.*, 19 FERC ¶ 61,218 which involved going-forward rates.[338]

134. The Louisiana Commission claims that SERI's accounting of excess ADIT violated the USofA as well as the 1993 Accounting Guidance.[339] The Louisiana

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[332] *Id.* at 23.

[333] *Id.* at 24 (citing Initial Decision, 172 FERC ¶ 63,003 at P 167).

[334] *Id.* at 25 (citing Initial Decision, 172 FERC ¶ 63,003 at PP 207-11).

[335] *Id.*

[336] Louisiana Commission Brief Opposing Exceptions at 61 (citing Initial Decision, 172 FERC ¶ 63,003 at PP 154, 159).

[337] *Id.*

[338] *Id.* at 62.

[339] *Id.* at 63-64.

Commission asserts that SERI's accounting went against the USofA's prohibition on transferring amounts recorded in Account 283 to other accounts without the Commission's approval.[340]

135. The Louisiana Commission also alleges that SERI violated the USofA by recording excess decommissioning ADIT in an account for the recordation of current taxes rather than Account 254, which maintains amounts the utility may have to return to customers thereby recording it as a regulatory liability as stated in the Initial Decision.[341]

136. The Louisiana Commission notes that the Commission has granted authorization for utilities to transfer excess ADIT amounts in Account 283 to Account 254, but never to Account 236.[342] The Louisiana Commission states that the Commission reaffirmed this authorization in Order No. 864 and the *2018 Tax Cuts Policy Statement* with the same language provided in the 1993 Accounting Guidance.[343]

137. The Louisiana Commission disputes SERI's argument that it was not probable that excess ADIT would be returned to ratepayers due to the IRS's rejection of SERI's decommission deduction.[344] The Louisiana Commission asserts that SERI's uncertainty claims are irrelevant to the analysis of regulatory liability because the probability of action by the IRS does not determine whether ADIT is reflected in rates.[345] The Louisiana Commission contends that SERI witness Mr. Roberts agreed that the relevant regulator in this proceeding is the Commission.[346]

138. The Louisiana Commission highlights the 2007 Accounting Guidance's instructions for utilities to ignore uncertainty for Commission accounting and reporting to facilitate the correct reflection of the benefits of tax deductions that create timing

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[340] *Id.* at 64.

[341] *Id.* at 63-65.

[342] *Id.* at 66.

[343] *Id.* (citing *Accounting & Ratemaking Treatment of Accumulated Deferred Income Taxes & Treatment Following the Sale or Retirement of an Asset*, 165 FERC ¶ 61,115, at PP 9, 35 (2018)).

[344] *Id.* at 67.

[345] *Id.* at 68.

[346] *Id.* (citing Tr. 189-90 (Roberts) (agreeing that "[the Commission] . . . decides whether amounts go to ratepayers or don't go to ratepayers.")).

differences on wholesale rates.[347] The Louisiana Commission notes that SERI witness Mr. Roberts conceded to this fact by stating during the hearing that "the 2007 guidance [says to] ignore the FIN 48 guidance."[348]

139. In response to SERI's claim that it did not record the $147.3 million in Account 254 because it adjusted the amount in Account 283 for the effect of a change in tax law or rates in compliance with the 1993 Accounting Guidance, the Louisiana Commission states that there is an "effect" of the TCJA only if it lowers the tax obligation. The Louisiana Commission notes, however, that SERI states that it could not record the $147.3 million in Account 254 because it is likely to be paid to the IRS or through the ETAA at the old rate, but if that were the correct probability analysis, the excess ADIT could not be adjusted out of Account 283.[349] The Louisiana Commission also contends that SERI erroneously recorded excess decommissioning ADIT in Account 236, a current tax account.[350] Since the excess decommissioning ADIT is not a current tax for 2017, the Louisiana Commission believes that the Initial Decision in Docket No. EL18-152-001 properly recognized that SERI could not transfer the $147.3 million amount to Account 236 because the amount represents a deferred tax liability.[351] The Louisiana Commission disagrees with SERI's statement that the USofA allows for the inclusion of amounts payable more than 12 months after the date of the financial statement. The Louisiana Commission contends that the instructions state that current taxes "shall be classified as accrued liabilities even though payable more than one year from date"[352] The Louisiana Commission explains that taxes due for the current month might well become payable more than 12 months from the current month, which does not preclude accruing the tax liability, but under Account 236 instructions, it must still be a tax accrued "during the accounting period" and reflect "in each year the taxes applicable thereto."[353] Thus, the Louisiana Commission argues that the Initial Decision should be upheld due to SERI's

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[347] *Id.* at 68-69 (citing SER-0008 (2007 Accounting Guidance)).

[348] *Id.* at 69 (citing Tr. 183, 186 (Roberts)).

[349] *Id.* at 70 (citing SERI Brief on Exceptions 89-90).

[350] *Id.* at 70-71.

[351] *Id.* at 71.

[352] *Id.* at 72 (citing 18 C.F.R. pt. 101, Special Instructions for Current and Accrued Liabilities).

[353] *Id.*

inability to provide arguments to overturn the decision that SERI violated Commission accounting requirements.[354]

iii. Trial Staff

140. Trial Staff states the Presiding Judge correctly found that SERI improperly accounted for the $147.3 million and that Commission policy requires excess ADIT to be recorded in Account 254. Trial Staff notes that in the 1993 Accounting Guidance, the Chief Accountant directed regulated entities, when recording "the effect of a change in tax law or rates," to "adjust its deferred tax liabilities and assets for the effect of the change in tax law or rates in the period that the change is enacted,"[355] which means the $147.3 million should be transferred from Account 283 into Account 254.[356] Trial Staff notes that SERI argues that the 1993 Accounting Guidance could not require uncertain tax positions to be returned to customers because "FIN 48 deferred tax liabilities did not exist when the 1993 Accounting Guidance was issued."[357] Trial Staff argues that, if SERI were correct, none of the Commission's precedent, regulations, or guidance documents issued before 2007 would apply to uncertain tax positions.[358]

141. Trial Staff notes further that the 2007 Accounting Guidance specifically informed regulated entities not to treat uncertain tax positions differently for accounting purposes.[359] Trial Staff notes that SERI emphasizes the statement in the 1993 Accounting Guidance expressly requiring "a probability analysis in order to determine whether a regulatory liability must be recorded in Account 254."[360] Trial Staff states that SERI believes that this statement invited SERI's subjective assessment of its likelihood of success with the IRS. Trial Staff argues that SERI's interpretation is inconsistent with the 2007 Accounting Guidance, as well as Order No. 552, where the Commission made clear that the term "probable" as used "for regulatory assets and liabilities, refers to that

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[354] *Id.*

[355] Trial Staff Brief Opposing Exceptions at 21 (citing Ex. SER-0009 at 10).

[356] *Id.*

[357] *Id.* at 22 (citing SERI Brief on Exceptions at 89).

[358] *Id.*

[359] *Id.* at 22-23 (citing Ex. SER-0008 at 3-4).

[360] *Id.* at 23 (citing SERI Brief on Exceptions at 90).

which can reasonably be expected or believed on the basis of available evidence or logic but is neither certain nor proved."[361]

142. Trial Staff notes that SERI contends that the Presiding Judge "erred in determining that SERI was *precluded* from recording the $147.3 million in Account 236" because, in SERI's view, the $147.3 million was "probable to be owed, in whole or majority part, to the IRS."[362] Trial Staff argues, however, that Account 236 is not the appropriate account for the $147.3 million because these are not accrued taxes. Trial Staff argues that the amounts in Account 236 are intended to pay taxes due in the current account period (*i.e.*, within the next twelve months). Trial Staff argues that the $147.3 million is not an accrued tax but following enactment of the TCJA, is instead an amount that never will be due to the IRS.[363] Trial Staff states that SERI's insistence that Account 236 is the appropriate place to record the $147.3 million and that prior approval was not necessary is mistaken as Commission regulations and precedent prohibit such action. Trial Staff notes, as an example, that the 2007 Accounting Guidance specifically prohibits transferring ADIT amounts a company believes to be uncertain to current liability accounts and that transfers to Account 236 are not contemplated in the instructions for Account 283 or the 1993 Accounting Guidance.[364]

143. Trial Staff asserts that the Presiding Judge was correct to find that SERI's accounting affects the inputs to SERI's formula rate. Trial Staff explains that the Presiding Judge did not find that Accounts 253 and 254 were inputs to Attachment E of SERI's formula rate template but rather that rates in the formula template "flow from and [are] supported by accounting determinations."[365] Trial Staff states that the Presiding Judge properly found that SERI's ratemaking should be supported by accounting.[366]

iv. New Orleans Council

144. The New Orleans Council argues that the Initial Decision correctly faulted SERI with failure to comply with clear and authoritative Commission accounting regulations

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[361] *Id.*

[362] *Id.* at 24 (citing SERI Brief on Exceptions at 92-93 (emphasis in original)).

[363] *Id.* (citing Ex. S-0004 at 28; 18 C.F.R. pt. 101, Account 236; 18 C.F.R. pt. 101, Special Instructions for Current and Accrued Liabilities).

[364] *Id.* at 25-27.

[365] *Id.* at 27-28 (citing Initial Decision, 172 FERC ¶ 63,003 at P 172).

[366] *Id.* at 28.

and guidance. The New Orleans Council states that at hearing SERI's witnesses were evasive about how the $147.3 million excess ADIT that resulted from the TCJA recalculation was moved from Account 283 to Account 236. The New Orleans Council notes that the 1993 Accounting Guidance does not list Account 236 as one of the accounts to which deferred taxes are to be recorded.[367]

145. The New Orleans Council states that SERI also seems to find the 1993 Accounting Guidance to be ambiguous with respect to "action by a regulator" that would make it probable that excess taxes must be returned to customers. The New Orleans Council states, however, that the Commission has specifically indicated that as a result of the TCJA reducing 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."[368]

146. The New Orleans Council asserts that SERI bases its justification for excluding the $147.3 million from the other excess ADIT returned to customers following enactment of the TCJA on its assertion that FIN 48 ADIT is treated differently for GAAP accounting and reporting purposes. The New Orleans Council states, however, that the Commission does not distinguish between ADIT that arises from uncertain tax positions and other ADIT. The New Orleans Council also argues that SERI's position that the transfer to Account 236 was necessary for SEC reporting purposes is undermined by the fact that the nuclear decommissioning deduction amounts were recorded in Account 283 for eleven years without preventing SERI from reporting the amount to the SEC.[369]

d. Commission Determination

147. We affirm the Initial Decision's finding that SERI did not correctly account for the $147.3 million of excess ADIT related to its nuclear decommissioning tax deductions, and that the governing Commission authorities required the excess ADIT to be recorded in Account 254, rather than Account 236. In the UPSA Complaint Opinion, the Commission finds that SERI erroneously transferred the $147.3 million of excess ADIT associated with its nuclear decommissioning tax deductions to an accrued tax liability account. The Commission also directs SERI to reverse the transfer of excess ADIT recorded in Account 236, and to further reclassify this amount from Account 283 to

[367] New Orleans Council Brief Opposing Exceptions at 20-21 (citing 1993 FERC Guidance Letter Order, Ex. SER-0009 at 10)).

[368] *Id.* at 22.

[369] *Id.* at 22-23.

Account 282.[370] The Commission also finds that SERI was required to follow the Commission's guidance for remeasuring its FIN 48 ADIT and recognizing deficient or excess ADIT as a regulatory asset or liability, as appropriate.[371] In the instant proceeding, we find that it is appropriate to direct SERI to properly record a regulatory liability in Account 254 for excess ADIT, in order to comply with Commission's normalization requirements. As discussed under Issue 1.A, we find that it is appropriate to require a recomputed amount of excess ADIT, consistent with the Commission's directive in the UPSA Complaint Opinion.

148. We also reiterate here that jurisdictional entities are restricted in their ability to adjust deferred tax accounts without prior approval of the Commission;[372] thus, for any subsequent period for which SERI believes it is appropriate to adjust its ADIT balances, SERI must make a request with the Commission to adjust such ADIT balances with all necessary and proper support.

3. Issue 1.C. If any return to customers is required under Issue 1.A, how should such return be implemented?

a. Initial Decision

149. The Initial Decision states that, while the TCJA provides a method of general applicability for the return of protected excess ADIT, it does not specify a method for the amortization and return of unprotected excess ADIT, and the Commission evaluates amortization periods for unprotected excess and deficient ADIT on a case-by-case basis.[373] The Initial Decision finds that pronouncements in Order No. 864, which applies specifically to transmission formula rates, are instructive here, particularly the requirement that utilities are not required to include interest when returning excess ADIT resulting from the TCJA, as other imposed requirements "will ensure that the full

[370] UPSA Complaint Opinion, 181 FERC ¶ 61,243 at P 340.

[371] *Id.* P 338.

[372] *See* paragraph D to Account 281, *Accumulated Deferred Income Taxes—Accelerated Amortization Property*, paragraph D to Account 282, *Accumulated Deferred Income Taxes—Other property*, paragraph E to Account 283, *Accumulated Deferred Income Taxes—Other*, and paragraph D to Account 190, *Accumulated Deferred Income Taxes* in 18 C.F.R. pt. 101.

[373] Initial Decision, 172 FERC ¶ 63,003 at P 204 (citing Order No. 864, 169 FERC ¶ 61,139 at P 44).

regulatory liability for excess ADIT is returned to transmission formula rate customers and that rate base neutrality is preserved going forward."[374]

150. The Initial Decision states that, pursuant to FPA section 205, if the utility consents, the Commission may approve the proposed filed rate with minor changes but modifications that constitute a different rate design or different scheme cannot be approved.[375] The Initial Decision notes, however, that for formula rates, the rate is the formula itself, and FPA section 205 does not foreclose the Commission from correcting errors in the implementation of or inputs underlying the formula rates, including those related to amortization of excess ADIT.[376]

151. The Initial Decision states that the filing underlying this proceeding proposed a methodology and rate schedule to return to customers unprotected excess ADIT resulting from the TCJA in UPSA Attachment E, which is part of the currently effective rate on file. The Initial Decision states that the filing included no provision to distinguish different types of unprotected excess ADIT or subject them to differential treatment or return methods.[377]

152. The Initial Decision states that SERI's filing committed to a March 15, 2019 informational filing to true-up its unprotected excess ADIT balance based on its final calendar year 2017 tax return and the amounts that it actually returned to customers via the UPSA during June through December 2018. The Initial Decision states that this informational filing identified another $5,550,439 of unprotected excess ADIT, which resulted in an additional $7,395,655 revenue requirement reduction incorporated as a one-time adjustment in its customers' May 2019 UPSA bill. Thus, the Initial Decision states that the total revenue requirement reduction associated with SERI's return of unprotected excess ADIT to date is $88,178,697.[378] According to the Initial Decision, had it not been for SERI's formula input error, the $147.3 million would have been returned to customers under Attachment E during the seven-month amortization period between June and December 2018. The Initial Decision states that because it determined in Issue 1.A that the $147.3 million is unprotected excess ADIT and constitutes a corrective adjustment to an input to the UPSA formula rate, there already exists a return methodology to govern the return of this amount identified in SERI's original rate filing

[374] *Id.* (citing Order No. 864, 169 FERC ¶ 61,139 at P 44).

[375] *Id.* P 205 (citing *NRG*, 862 F.3d at 114-15).

[376] *Id.* P 206.

[377] *Id.* P 208.

[378] *Id.* P 210.

that is "largely compatible" with the positions advocated by the[Retail Regulators and Trial Staff.[379]

153. The Initial Decision states that there is already on file a seven-month amortization schedule effective June 1, 2018, from which the $147.3 million was erroneously excluded and should have been returned to customers beginning June 1, 2018; therefore, the return must be delayed no further.[380] It also notes that SERI, not customers, committed the exclusion that caused the delay. The Initial Decision therefore finds that within 60 days of a final Commission decision in this proceeding, SERI must make a compliance filing that includes an attached calculation worksheet consistent with the final rulings in this proceeding and identifying the next available monthly billing cycle in which the return can be effectuated as a lump sum revenue requirement reduction.[381]

154. The Initial Decision states that FPA section 205 precludes the adoption of other amortization periods since SERI has not consented to a minor departure from its original rate proposal including SERI's return methodology and seven-month amortization, which was incorporated as part of the UPSA formula rate in Attachment E.[382] The Initial Decision states, however, that SERI has the discretion to consent and provide the Commission authority in accordance with FPA section 205 and *NRG* to consider for approval a more expansive range of minor return methodology modifications.[383]

155. The Initial Decision states that, because the unprotected excess ADIT should have been returned beginning in June 2018, a time value of money adjustment must be made to account for this delay but the Commission's pending review of the Initial Decision in Docket No. EL18-152-001 may require the Commission to review the totality of the two records and rate treatments to ensure that there is no disproportionate recovery.[384]

156. The Initial Decision states, however, that customers are prohibited from receiving a certain type of interest in conjunction with the return of unprotected excess ADIT and

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[379] *Id.* P 211.

[380] *Id.* P 214.

[381] *Id.*

[382] *Id.* P 217.

[383] *Id.* P 218.

[384] *Id.* P 220.

declines to award such interest in accordance with Commission policy.[385] More specifically, the Commission stated in Order No. 864 that utilities are not required to include interest when returning to customers excess ADIT resulting from the TCJA.[386]

157. The Initial Decision states, however, that SERI's customers are entitled to a time value of money adjustment effective from the June 2018 start date of the seven-month amortization period through the date SERI ultimately returns the remaining unprotected excess ADIT to make these customers whole for the time value of money loss caused by SERI's erroneous calculation of its excess ADIT balance.[387] The Initial Decision states that, because of the overlap of issues in this proceeding with the proceeding in Docket No. EL18-152-001, the record here includes arguments that the structuring of the award of time value of money here depends on how the Commission decides on the rate base issue in Docket No. EL18-152-001. The Initial Decision states, therefore, that its determination is "limited to the record presented in this proceeding and declines to speculate or prejudge how the Commission may ultimately rule . . . in Docket No. EL18-152-001" and thus finds that its time value of money treatment may be subject to modification based on the Commission's review of both records and Initial Decisions to avoid disproportionate recoveries.[388]

158. The Initial Decision states that this return methodology nonetheless complies with FPA section 205's limitations. It states that, while this provision limits the Commission's ability to alter the formula, it does not foreclose adjustments to correct errors in the inputs underlying the formula, including the $147.3 million, as documented by the mechanics of the UPSA provisions proposed by SERI's March 2018 Filing.[389]

159. The Initial Decision further states that the filed rate doctrine forbids utilities from charging rates for their services other than those properly filed, as required by the FPA.[390] The Initial Decision further states that because FPA section 205 includes statutory notice requirements and that the Commission requires that rate filings be filed electronically in eTariff format and notice is only provided by the Secretary by publication in the Federal Register, none of SERI's alternative proposals for modifying the UPSA satisfy these

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[385] *Id.* P 221.

[386] *Id.*

[387] *Id.* P 222.

[388] *Id.* P 224.

[389] *Id.* P 226.

[390] *Id.* P 236.

requirements.[391] The Initial Decision also states that SERI has not consented to its preferred return methodology as required by FPA section 205 and *NRG.*[392]

160. Thus, the Initial Decision finds that the adjudication of Issue 1.A requires a return to customers and that the additional $147.3 million of unprotected excess ADIT must be subject to the governing return methodology from the Filing and the accompanying implementation details necessary to correct SERI's erroneous exclusion of this input from the UPSA formula rate.[393]

b. Brief on Exceptions

161. SERI argues that Attachment E is not a formula with variable inputs and that the existing tariff includes no provision for appending additional subaccounts of excess ADIT. Instead, SERI states that Attachment E is simply a stated amount of dollars to be credited to customers over a seven-month period, and because this is not an FPA section 206 proceeding, the Commission cannot add additional amounts or sub-accounts to be included in Attachment E.[394] Therefore, SERI states that the Initial Decision's direction that SERI add $147.3 million to the fixed amount set forth in Attachment E requires the Commission to adopt a new rate,[395] which constitutes a new rate design and strategy.[396]

162. As noted above, SERI asserts that the Initial Decision incorrectly concludes that omission of the $147.3 million is a formula input error and that Attachment E can be modified to add the $147.3 million recorded in Account 236.[397] SERI states that there was no error as it intentionally excluded the $147.3 million.[398] SERI states that the Initial Decision excerpts language from the transmittal letter accompanying the Filing as evidence of a commitment by SERI to include every type of excess ADIT resulting from

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[391] *Id.* PP 236-38.

[392] *Id.* PP 240-50.

[393] *Id.* P 251.

[394] SERI Brief on Exceptions at 23-25.

[395] *Id.* at 27 (citing *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,553 (1994)).

[396] *Id.* at 27-28.

[397] *Id.* at 28 (citing Initial Decision, 172 FERC ¶ 63,003 at PP 1, 33, 124, 208, 211, 214, 215, 217, 226-29, 251 & 266).

[398] *Id.*

the TCJA, rather than a proposal to flow the specifically calculated excess ADIT credit balance of $58,970,779 to customers.[399] SERI states that it identified the specific amount of unprotected excess ADIT included in its proposal and the precise amount to which its proposed return methodology applied. SERI states that it supplied the underlying calculation that delineated the sub-accounts upon which the sum was based.[400]

163. SERI states, however, that its Attachment F rate proposal accounts for the $147.3 million recorded in Account 236 and constitutes the terms by which SERI has granted qualified consent to credit the IRS-approved portion of that amount to customers (*i.e.*, approximately $14 million) in this docket. SERI argues that, under the controlling legal standard, the Commission is precluded from simply adding to Attachment E sub-accounts excess ADIT that was not included in the Filing.[401] SERI argues that its Attachment E rate proposal must be accepted or rejected as just and reasonable on its own terms, which intentionally excluded the $147.3 million.[402] SERI asserts that in lieu of approving Attachment F[403] as just and reasonable, the Commission cannot simply add the $147.3 million as an "input" to Attachment E.[404] SERI asserts that under section 205,

[399] *Id.* at 29 (citing Initial Decision, 172 FERC ¶ 63,003 at P 3).

[400] *Id.* at 29-30.

[401] *Id.* at 33 (citing *NRG*, 862 F.3d 108, 110, 114-15; *City of Winnfield*, *La. v. FERC*, 744 F.2d 871, 875-77 (D.C. Cir. 1984)) .

[402] *Id.* at 34.

[403] In response to the July 9, 2019 Order on Preliminary Questions Submitted for Adjudication, SERI put forward the proposed rate provisions in Attachment F and Alternative Attachment F. SERI's Attachment F proposal would, upon resolution of the decommissioning tax deduction before the IRS, credit customers with the portion of the $147.3 million allowed by the IRS over a period of ten years with the customers receiving a return on any unamortized balance during that period. SERI's Alternative Attachment F would provide customers with an amount equal to 40% of the $147.3 million, subject to a true-up for the outcome of the IRS audit process. SERI later withdrew its Alternative Attachment F proposal due to the IRS's decision in the NOPA, which found that only 10% of the $147.3 million has become excess ADIT. SERI Brief on Exceptions at 18-19 & n.8.

[404] *Id.* at 35 (citing Initial Decision, 172 FERC ¶ 63,003 at P 211).

the Commission lacks authority to reduce SERI's rate lower than its filed rate absent SERI's consent.[405]

164. SERI argues that the Commission's refund authority under section 205(e) is limited to the difference between the rate proposed by SERI and the "last clean rate,"[406] which in this case is the UPSA on file with the Commission immediately prior to the June 1, 2018, effective date of SERI's proposed amended UPSA accepted by the Commission in the Hearing Order. SERI states that a public utility's last clean rate is "the last rate that is in effect and not subject to a refund obligation."[407] SERI argues that the Commission may only adopt a lower rate through a section 206 proceeding. SERI states that no FPA section 206 proceeding has been ordered by the Commission and initiated through a complaint regarding the treatment of the $147.3 million.

165. SERI argues that the Initial Decision erred in finding that its Attachment F proposals are not properly before the Commission in this proceeding. SERI asserts, however, that, given the IRS NOPA and resolution of the uncertain tax position, the question of whether the Commission can adopt Attachment F in this docket is moot. SERI states that it is now certain that only approximately $14 million of excess ADIT has been created by the uncertain tax position, and that the balance of the $147.3 million is not excess ADIT and will never become excess ADIT. SERI states that it presented its Attachment F proposals only because the Presiding Judge's July 9, 2019 order determined that the $147.3 million potential excess ADIT was within the scope of issues and must be addressed in this docket.[408]

166. SERI asserts that it is wrong to argue that the parties did not have adequate notice of the issues surrounding SERI's Attachment F proposals. SERI states that the parties had the opportunity to review and examine the proposals, conduct discovery, and fully litigate any issues or concerns throughout the course of the hearing process.[409] SERI contends that the Commission has accepted modifications to an originally filed rate much later even where the proposed revision occurred at the exceptions (to the Initial Decision)

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[405] *Id.*& n. 96 (citing *Cal. Pub. Util. Comm'n.*, 163 FERC ¶ 61,113 at P 1 & n.3 (2018) (explaining the "last clean rate" doctrine)).

[406] *Id.* at 36-37 (citing *Cal. Pub. Util. Comm'n*, 163 FERC ¶ 61,113 at P 1 & n.3).

[407] *Id.* at 37 (citing *Cal. Pub. Util. Comm'n*, 163 FERC ¶ 61,113 at P 1 & n.3).

[408] *Id.* at 39 (citing *Sys. Energy Res., Inc.*, 168 FERC ¶ 63,001, at P 23 (2019)).

[409] *Id.* at 40 (citing *Old Dominion Elec. Coop.*, 162 FERC ¶ 61,262, at P 46 (2018)).

stage of the proceeding.[410] SERI argues that the parties were able to address SERI's Attachment F proposals at all stages of development of the evidentiary record, during the hearing and in post-hearing briefing and there was no failure to meet the notice and filing requirements of the FPA.[411] SERI notes that the Initial Decision relied on the *NRG* decision in rejecting the Attachment F proposals. SERI states that the court in *NRG* held that the Commission can adopt only minor modifications to the utility's filing and only with the utility's consent. SERI states that here it expressly consented to adoption of the terms of Attachment F.[412]

167. In response to the Initial Decision, SERI asserts that its separate Attachment E and Attachment F proposals are intended to distinguish between different types of excess ADIT and propose different treatments for them. Specifically, SERI states that its proposals distinguished between the excess ADIT included in Attachment E and the alternative treatments in the Attachment F proposal to address the $147.3 million.[413]

168. SERI asserts that the Attachment E methodology is just and reasonable only with respect to the amount specifically identified in Attachment E (derived from the sub-accounts specifically identified in the supporting Exhibit A, which detailed the calculation of the amount specifically identified in Attachment E) and that the $147.3 million is distinct and different from the unprotected excess ADIT included in Attachment E. SERI asserts that adding the $147.3 million to Attachment E was unsupported by the evidentiary record and that no party proposed to add the $147.3 million to Attachment E or to amortize it over a seven-month period. SERI asserts that Commission cannot implement a credit of the $147.3 million to customers via Attachment E. SERI argues that if the Commission wants to credit customers with the portion of the $147.3 million approved by the IRS (i.e., approximately $14 million), it must do so either by approving a separate 205 proposal to credit customers with that

[410] *Id.* (citing *Old Dominion Elec. Coop.*, 162 FERC ¶ 61,262 at P 34).

[411] *Id.* at 41 (citing *Old Dominion Elec. Coop.*, 162 FERC ¶ 61,262 at P 46).

[412] *Id.* (citing Initial Decision, 172 FERC ¶ 63,003 at PP 36, 206, & 217-18; *NRG*, 862 F.3d at 115-16).

[413] *Id.* at 44-45.

portion,[414] SERI's Attachment F proposal, or by initiating a new section 206 proceeding.[415]

169. SERI asserts that proposed Attachment F is a just and reasonable rate treatment following the approach prescribed in Order No. 864 because it properly accounts for the uncertainty that the IRS would approve the full decommissioning deductions, as borne out by the NOPA.[416] SERI states that the Commission reiterated that it would determine whether the proposed amortization period for excess ADIT resulting from the TCJA is just and reasonable in each case presented. SERI asserts that Order No. 144 and the tax normalization rule adopted thereunder in Rule 35.24 required that excess ADIT be addressed on a case-by-case basis.[417] SERI notes that the Commission has permitted companies to amortize excess ADIT over much longer periods on a case-by-case basis when it was just and reasonable to do so.[418]

170. SERI argues that the Initial Decision incorrectly concluded that SERI's customers are entitled to a time value of money adjustment effective from the June 2018 start of the seven-month amortization period. SERI states that decision is unfounded because SERI did not make an "erroneous calculation of its excess ADIT balance,"[419] as the $147.3 million was intentionally and properly excluded from Attachment E. SERI asserts that there was no productive use of those funds denied customers and the Commission has acknowledged that ADIT does not constitute a loan from customers and the $147.3 million could not have been invested by SERI in long-term rate base assets due to the likelihood of disallowance of the decommissioning deduction.[420] SERI also asserts that the time value of money component in Attachment E cannot be applied to amounts SERI intentionally excluded from its section 205 filing. SERI states that the $147.3 million

[414] SERI indicated that it would make an upcoming FPA section 205 filing to credit approximately $14 million to customers. *See id*. at 16.

[415] *Id.* at 45-46.

[416] *Id.* at 47-48 (citing Tr. 415:18-416:17 (Hunt Re-Direct)).

[417] *Id.* at 49 (citing Ex. LC-0026 at (c)(3) (18 C.F.R. § 35.24, Tax Normalization for Public Utilities)).

[418] *Id.* at 51 (citing *Ameren Ill. Co*., 163 FERC ¶ 61,163 (2018)).

[419] *Id.* at 54 (citing Initial Decision, 172 FERC ¶ 63,003 at P 222).

[420] *Id.* at 54-55.

was not included in Attachment E and cannot be simply added to the amount proposed to be credited to customers under Attachment E.[421]

c. Briefs Opposing Exceptions

i. Louisiana Commission

171. The Louisiana Commission asserts that the correct method to return SERI's $147.3 million excess ADIT is through the methodology currently filed as Attachment E to the UPSA, not through SERI's new Attachment F and Alternative Attachment F rate proposals that are not within the scope of this proceeding.[422] The Louisiana Commission attests that SERI witness David Hunt's direct testimony proves that Attachment F would (1) add an entirely new rate schedule to the UPSA; (2) delay the return by years; and (3) adopt a new amortization schedule.[423] The Louisiana Commission notes that SERI does not mention Alternative Attachment F in its Brief on Exceptions.[424] The Louisiana Commission argues that the $147.3 million in excess taxes should instead be returned to ratepayers in a lump sum to reflect how it should have been returned under Attachment E in 2018.[425]

172. The Louisiana Commission claims that section 205 does not contemplate multiple alternate rate proposals, rather it allows SERI to notify the Commission and public of its changed rate.[426] Therefore, the Louisiana Commission asserts that the rate contained in SERI's March 2018 Filing with the variable added to the UPSA titled "Adjustment to Reflect Unprotected Excess ADIT per Tax Cuts and Jobs Act of 2017" and an Attachment E with a methodology to return the excess taxes over seven months is the effective rate that SERI failed to follow. The Louisiana Commission contends that SERI did not include, in its Filing, Attachment F or Alternative Attachment F.[427] Therefore,

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[421] *Id.* at 55.

[422] Louisiana Commission Brief Opposing Exceptions at 38.

[423] *Id.* at 40-41.

[424] *Id.* at 41.

[425] *Id.*

[426] *Id.* at 41-43.

[427] *Id.* at 43 (citing *Sys. Energy Res., Inc.*, 168 FERC ¶ 63,001 at PP 25-26).

the Louisiana Commission argues that the alternative proposals offered by Mr. Hunt in pre-filed testimony should be rejected.[428]

173. The Louisiana Commission argues that SERI's alternate proposal for returning excess decommissioning ADIT is not a rate filing and cannot be effectuated due to the drastic changes to the rate proposed in the Filing.[429] The Louisiana Commission asserts that the Attachment F proposal constitutes an entirely new rate scheme that the Commission cannot implement during this proceeding but rather in a separate section 205 filing.[430]

ii. Trial Staff

174. Trial Staff argues that the Presiding Judge correctly ruled that the Commission has the authority to return the $147.3 million to customers. Trial Staff notes that SERI argues that the Commission "may not unilaterally impose a new rate schedule under Section 205 [of the Federal Power Act (FPA)]."[431] Trial Staff responds that the Presiding Judge has not imposed a new rate schedule on SERI but is holding SERI accountable and "requiring a subsequent adjustment due to SERI's error in calculating the amount of unprotected excess ADIT to be flowed through the methodology [originally proposed by SERI]."[432] Trial Staff asserts that the Initial Decision's action is permissible under Commission precedent.[433] Trial Staff states that SERI's argument that "the Commission lacks authority to reduce SERI's rate lower than its filed rate absent SERI's consent" is incorrect as SERI uses a formula rate and correction of the inputs to SERI's formula rate will not result in a reduction to SERI's rate, but rather change the output from the correct implementation of that rate.[434] Trial Staff argues that SERI's contention that correcting the input for unprotected excess ADIT violates the last clean rate doctrine[435] fails because

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[428] *Id.*

[429] *Id.* at 43-44 (citing *NRG*, 862 F.3d at 115-16).

[430] *Id.* at 45-46.

[431] Trial Staff Brief Opposing Exceptions at 28 (quoting SERI Brief on Exceptions at 20).

[432] *Id.* at 28-29 (citing Initial Decision, 172 FERC ¶ 63,003 at P 217).

[433] *Id.* at 29 (citing *Pub. Serv. Elec. & Gas Co.*, 124 FERC ¶ 61,303, at P 17 (2008)).

[434] *Id.* at 29-30 (citing SERI Brief on Exceptions at 20).

[435] The last clean rate doctrine applies when a company has filed under FPA

if it is determined that the unprotected excess ADIT input SERI provided to its formula rate was incorrect, then the Commission can always direct refunds with interest, since, in such an event, the company would have violated the terms of its filed rate.[436]

175. Trial Staff notes SERI's argument that its filing merely "proposed to credit customers with a very specific and limited quantity of dollars" and that the $147.3 million was not among those amounts.[437] Trial Staff responds that SERI's decision to "intentionally exclude[] the $147.3 million" from its filing was intentional but not appropriate.[438] Trial Staff asserts that it was appropriate for the Presiding Judge to examine the accuracy of SERI's assertions and determine whether SERI's proposed input represents all of the excess unprotected ADIT resulting from the lower tax rate.[439]

176. Trial Staff notes SERI's argument that Attachment E is a fixed component within the formula rate that cannot be changed absent a section 205 filing or a section 206 investigation.[440] Trial Staff responds that the figures contained in Attachment E are not fixed components that will persist throughout the existence of the formula rate but that the formula rate input from Attachment E is formulaic and changes from month to month. Trial Staff states that SERI improperly concludes that because the amount of unprotected

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section 205 for an increase in a previously-accepted rate (referred to as the underlying rate). If the rate increase is permitted to take effect and the Commission subsequently approves a rate lower than the underlying rate, the Commission can only order refunds equal to the difference between the increased rate and the underlying rate. As an outgrowth of the prohibition against retroactive ratemaking, the FPA section 205 last clean rate doctrine is effectively a statutory limitation on the Commission's ability to order refunds in applicable cases. *Bangor-Hydro Elec. Co.*, 120 FERC ¶ 61,093, at P 16 (2007).

[436] Trial Staff Brief Opposing Exceptions at 30 (citing SERI Brief on Exceptions at 35-37; *Alamito Co.*, 42 FERC ¶ 61,254, at 1 n.6 (1987); *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,598 n.15 (1992)).

[437] *Id.* (citing SERI Brief on Exceptions at 21).

[438] *Id*.

[439] *Id.* at 31 (citing Ex. SER-0012 at 2).

[440] *Id.* at 32 (citing SERI Brief on Exceptions at 24-25).

excess ADIT that resulted from the TCJA is a fixed amount that must also mean that the entirety of Attachment E is a fixed component of the UPSA.[441]

177. Trial Staff asserts that the Presiding Judge correctly found that the $147.3 million should be returned to customers immediately and that SERI's Attachment F proposals are not properly before the Commission in this proceeding. Trial Staff argues that following the Presiding Judge's July 9, 2019 order that the $147.3 million potential excess ADIT was to be addressed in this proceeding,[442] SERI should have submitted testimony defending its exclusion of the $147.3 million from its proposed formula rate input. Trial Staff states that instead SERI proposed further amendments to its formula rate in its testimony.[443] Trial Staff argues that SERI is mistaken in relying on *Old Dominion Elec. Coop.*, in which the Commission held that proposed revisions were properly considered despite having been filed after the Initial Decision because the proposed revisions did not result in "'an entirely new rate scheme' or 'completely different strategy'"[444] Trial Staff argues, however, that SERI's Attachment F proposals constitute entirely new rate designs that can only be implemented by amending UPSA Attachment A and that SERI should have filed under section 205.[445]

178. Trial Staff asserts that the $147.3 million can and should be returned using the same methodology that SERI proposed for other unprotected excess ADIT. Trial Staff states that while SERI has accepted the IRS NOPA as it relates to the 2015 CAM deductions, the entirety of Entergy's 2015 consolidated tax return has not been resolved and the audit of the remainder of the tax return remains ongoing. Trial Staff states that the 2015 tax return that gave rise to the ADIT and excess ADIT remains unchanged and there is still a book-tax difference that requires the return of unprotected excess ADIT following the enactment of the TCJA.[446]

179. Trial Staff asserts that the Presiding Judge was correct to require a time value of money treatment. Trial Staff states that SERI should have begun returning the $147.3 million of additional unprotected excess ADIT to customers more than two years ago.

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[441] *Id.* at 32-33 (citing SERI Brief on Exceptions at 24-26).

[442] *Sys. Energy Res., Inc.*, 168 FERC ¶ 63,001.

[443] Trial Staff Brief Opposing Exceptions at 34-35.

[444] Trial Staff Brief Opposing Exceptions at 36 (quoting *Old Dominion Elec. Coop.*, 162 FERC ¶ 61,262 at PP 35-36).

[445] *Id.* at 36-38.

[446] *Id.* at 38-39.

Trial Staff notes that SERI argues that "there was no productive use of those funds denied customers" because the Commission has "acknowledged that ADIT does not constitute a loan from customers."[447] Trial Staff responds that while ADIT does not constitute a loan from customers, excess ADIT represents amounts that are owed to customers because they are no longer owed to the IRS.[448] Trial Staff states that SERI failed to comply with governing Commission authorities and acted without Commission authorization when it excluded $147.3 million of unprotected excess ADIT from its UPSA formula rate. Trial Staff argues that refunds based on time value of money adjustments are fully consistent with Commission precedent.[449]

d. Commission Determination

180. Given that the Commission finds, in the UPSA Complaint Opinion, that FIN 48 ADIT is subject to the Commission's tax normalization policy, we find here that it is appropriate for excess ADIT to also be subject to the Commission's tax normalization policy. As discussed under Issue 1.A, we find that prior to the IRS resolution of SERI's nuclear decommissioning tax deductions, SERI failed to make the appropriate rate base adjustments and resulting return of the $147.3 million of excess ADIT to customers. However, we disagree with the Initial Decision's finding that UPSA Attachment E, as part of the effective rate on file with the Commission,[450] should be utilized to return excess ADIT. We agree with SERI that Attachment E provides a stated amount of dollars to be credited to customers over a seven-month period from June through December 2018, subject to true-up based on SERI's 2017 Federal Income Tax Return, and the Commission cannot simply add additional amounts to be included in Attachment E pursuant to FPA section 205 as it could if this simply involved a correction to an input to a formula rate variable. Moreover, because SERI proposed a rate decrease in its FPA section 205 filing, any revisions to the UPSA required by the Commission to amortize and return the excess ADIT associated with the nuclear decommissioning expense deduction to customers must be made pursuant to FPA section 206 procedures, and can

[447] *Id.* at 40 (citing SERI Brief on Exceptions at 54).

[448] *Id.* (citing Order No. 864, 169 FERC ¶ 61,139 at P 45).

[449] *Id.* at 41 (citing *Carolina Power & Light Co.*, 84 FERC ¶ 61,103 (1998); *El Paso Electric Co.*, 105 FERC ¶ 61,131 (2003); *Consumers Energy Co*., 148 FERC ¶ 63,012 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,164 (2015)).

[450] Initial Decision, 172 FERC ¶ 63,003 at P 207 (citing Tr. 293:18-21 (Hunt)).

only take effect prospectively.[451] Therefore, we will not require the adoption of the Attachment E seven-month amortization period for returning excess ADIT.

181. SERI contends that the unique nature of the $147.3 million precludes it from being returned using the UPSA Attachment E schedule and advocates that newly proposed alternative Attachment F should be used.[452] Under this alternative, SERI proposes to credit "amounts related to an uncertain tax deduction associated with nuclear decommissioning recorded in Account 236 as a result of the TCJA,"[453] only after final IRS disposition of the 2015 CAM deductions,[454] over an amortization period of ten years.[455] However, we note that this proposed Attachment F alternative is inconsistent with the Commission's tax normalization requirements as discussed under Issue 1.A.

182. As a result of a tax rate change companies are required to increase or decrease their existing ADIT balances in rate base for both deficient or excess ADIT and also to include in rate base the associated regulatory assets or liabilities representing the reclassified deficient or excess ADIT.[456] Additionally, the Commission does not permit interest to be computed on deficient or excess ADIT, in order to further preserve rate base neutrality.[457] However, in the instant proceeding, SERI has historically excluded FIN 48 ADIT from rate base and the associated excess ADIT as a result of the TCJA has also been excluded from rate base and not returned to customers. Due to SERI's improper exclusion of FIN 48 ADIT from rate base, in the UPSA Complaint Opinion, the Commission requires SERI to compute a refund amount, with interest, that appropriately captures the revenue requirement impact as a result of the exclusion of all ADIT amounts resulting from SERI's decommissioning uncertain tax positions during the entire 2004 to present period.[458] Additionally, in the UPSA Complaint Opinion, the Commission finds that SERI's accounting and reporting has not been appropriately updated to reflect changes in its ADIT balances and required SERI to refile its FERC Form No. 1s to

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[451] *See Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 949-50 (D.C. Cir. 2016).

[452] Initial Decision, 172 FERC ¶ 63,003 at P 181.

[453] *Id.*

[454] *Id.* P 183.

[455] *Id.*

[456] Order No. 864, 169 FERC ¶ 61,139 at P 28.

[457] *Id.* at P 114.

[458] UPSA Complaint Opinion, 181 FERC ¶ 61,243 at P 318.

properly reflect all ADIT adjustments as a result of the Commission's determination, as well as the ADIT adjustment as a result of the TCJA.[459] The Commission expects that this outcome will result in a *prospective* inclusion in rate base of FIN 48 ADIT balances, including the adjustment to FIN 48 ADIT as a result of the TCJA, with a corresponding regulatory liability in Account 254 for such excess ADIT.

183. As discussed under Issue 1.A and 1.B, we find that SERI's UPSA rate appears to be unjust and unreasonable because it does not return to customers the excess ADIT associated with SERI's nuclear decommissioning tax deductions giving rise to ADIT. We find that it is appropriate to direct SERI to make a compliance filing within 60 days of the issuance of this show cause order in this proceeding as discussed further below, to recompute the amount of excess ADIT consistent with the Commission' directive in the UPSA Complaint Opinion. In this compliance filing, we direct SERI to produce the corrected entry and computation of excess ADIT resulting from the TCJA that considers the resolution of its 2015 tax position. In addition, as discussed above, pursuant to FPA section 206, we direct SERI within 60 days of the date of this order either: (1) to show cause why the UPSA remains just and reasonable and not unduly discriminatory or preferential absent a mechanism to amortize and return the excess ADIT associated with SERI's nuclear decommissioning tax deductions giving rise to ADIT and adjust rate base to deduct the unamortized balances of such excess ADIT; or (2) to explain what changes to its UPSA would remedy the identified concerns if the Commission were to determine that the UPSA has in fact become unjust and unreasonably or unduly discriminatory or preferential, and therefore proceed to establish a replacement UPSA rate. Upon initial review, given that the excess ADIT associated with SERI's nuclear decommissioning tax deductions relate to expenses associated with decommissioning Grand Gulf after it is retired from service, the concerns identified by the Commission might be addressed by revising the UPSA to allow SERI to amortize and return the excess ADIT prospectively over a period not exceeding the remaining life of Grand Gulf, and deduct unamortized balances of such excess ADIT from rate base.[460]

184. If SERI prefers to propose revisions to its UPSA on the subject of this order, then it may do so pursuant to its applicable FPA section 205 filing rights. In such a filing, SERI should state explicitly that it is submitting its proposal under section 205. If SERI wishes to have the Commission hold this proceeding in abeyance pending the Commission's consideration of any such FPA section 205 filing, SERI should submit an appropriate motion in this docket explaining the basis for the abeyance.

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[459] *Id.* P 321.

[460] *S. Cal. Edison Co.*, 166 FERC ¶ 61,006, at PP 16 & 23 (2019).

185. Interested parties may respond within 30 days of SERI's filing, addressing either or both of: (1) whether SERI's proposed UPSA changes would remedy the identified concerns if the Commission were to determine that the UPSA has in fact become unjust and unreasonably or unduly discriminatory or preferential; or (2) if not, what changes to the UPSA should be implemented as a replacement rate.

186. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date. In such cases, in order to give maximum protection to customers, and consistent with our precedent, we have historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206**,** and we do so here as well.[461] That date is the date of publication of notice of initiation of the section 206 proceeding in Docket No. EL23-11-000 in the Federal Register**.**

187. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. Assuming that SERI files revisions to its UPSA, we estimate that we would be able to issue our decision within approximately three months of the filing of these revisions.

B. Issue 2: Should an order in this proceeding include provisions concerning a potential disallowance of SERI's nuclear decommissioning tax deductions by the IRS, and if so, what should such provisions state?

a. Initial Decision

188. The Initial Decision states that the FPA and filed rate doctrine require that new rates be filed with the Commission, and the Commission has established procedures governing how such filings are made.[462] It also states that the Commission may consider and adopt minor adjustments to such filings if the utility consents to such adjustments, but this flexibility does not extend to modifications that constitute new rate schemes or designs. Furthermore, the Initial Decision states that presiding judges only have jurisdiction over issues set for hearing by the Commission, and the hearing order is the

[461] *See*, *e.g.*, *Idaho Power Co*., 145 FERC ¶ 61,122 (2013); *Canal Electric Co*., 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

[462] Initial Decision, 172 FERC ¶ 63,003 at P 264.

starting point for determining the scope of a proceeding. The Initial Decision states, however, that interpreting the scope is not just an exercise in identifying those issues expressly discussed in the hearing order but must consider all issues that are relevant to an assessment of justness and reasonableness of the proposed rates.[463]

189. The Initial Decision states that ordering the inclusion of provisions that address a potential disallowance of SERI's nuclear decommissioning tax deductions by the IRS is outside the scope of this proceeding because SERI's Filing did not propose any rate revisions to govern the scenario of speculative future disallowance, and while some disallowance proposals are reflected in the record, they were included as part of procedurally deficient new rate proposals never filed under FPA section 205 and instead put forth through record testimony.[464] Thus, the Initial Decision concludes that this proceeding should not include provisions concerning a potential disallowance of SERI's nuclear decommissioning tax deductions by the IRS.[465] The Initial Decision reiterates that the relief it orders relates to the identification of a formula rate input error committed by SERI and the corrective action necessary to remedy it.

b. Commission Determination

190. We agree with the Initial Decision's finding that ordering the inclusion of provisions that address a potential disallowance of SERI's nuclear decommissioning tax deductions by the IRS is outside the scope of this proceeding because the Filing did not propose any rate revisions to govern any future disallowance, and the disallowance proposals reflected in the record are only included as part of SERI's UPSA Attachment F proposals which was not proposed in the Filing pursuant to FPA section 205. However, we conclude here, and as determined in the UPSA Complaint Opinion[466] and as discussed under Issue 1.A, the Commission does not authorize what amounts to *probability assessments* in the computation of a utility's income tax allowance, ADIT, or excess or deficient ADIT in cost of service rates.

The Commission orders:

(A) The Presiding Judge's findings are hereby affirmed in part and modified in part, as discussed in the body of this order.

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[463] *Id.* P 265 (citing *City of Freeport v. Consol. Edison Co. of N.Y.*, 91 FERC ¶ 61,003, at 61,012 (2000)).

[464] *Id.* P 266.

[465] *Id.* P 275.

[466] UPSA Complaint Opinion, 181 FERC ¶ 61,243 at PP 308 & 338.

(B) SERI's motion to vacate the Initial Decision is denied, as discussed in the body of this order.

(C) SERI's request for privileged treatment for specified portions of the NOPA is granted, as discussed in the body of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL23-11-000 concerning the justness and reasonableness of the UPSA's lack of a mechanism to amortize and return the excess ADIT associated with SERI's nuclear decommissioning tax deductions giving rise to ADIT and adjust rate base to deduct the unamortized balances of such excess ADIT **[**, as discussed in the body of this order.

(E) Pursuant to FPA section 206, SERI is hereby directed to submit a filing within 60 days of the date of this order as discussed in this order either: (1) to show cause why the UPSA remains just and reasonable and not unduly discriminatory or preferential; or (2) to explain what changes to its UPSA would remedy to the identified concerns if the Commission were to determine that the UPSA has in fact become unjust and unreasonably or unduly discriminatory or preferential, and therefore proceed to establish a replacement UPSA rate.

(F) Any interested person desiring to be heard in Docket No. EL23-11-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), within 21 days of the date of issuance of this order. The Commission encourages electronic submission of interventions in lieu of paper using the "eFiling" link at http://www.ferc.gov. Persons unable to file electronically may file by U.S. mail addressed to Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426, or by hand (including courier) delivery to Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

(G) Interested parties may respond within 30 days of SERI's filing, addressing either or both of: (1) whether SERI's proposed UPSA changes would remedy the identified concerns if the Commission were to determine that the UPSA has in fact become unjust and unreasonably or unduly discriminatory or preferential; or (2) if not, what changes to the UPSA should be implemented as a replacement rate.

(H) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL23-11-000

(I) The refund effective date in Docket No. EL23-11-000 established pursuant to section 206 of the FPA shall be the date of publication in the Federal Register of the notice discussed in Ordering Paragraph (G) above.

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

System Energy Resources, Inc. Docket Nos. ER18-1182-001
EL23-11-000

(Issued December 23, 2022)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I concur in part and dissent in part from today's order[1] affirming in part and modifying in part the Initial Decision issued by the Presiding Judge in the captioned proceeding.[2] I concur in part to the extent that the order finds that the Commission may not lawfully direct a refund based on factual premises now known to be untrue. According to the Initial Decision, "[t]he central question in this proceeding is whether $147.3 million related to nuclear decommissioning tax deductions, now under [U.S. Internal Revenue Service (IRS)] audit, constitutes unprotected Accumulated Deferred Income Taxes (ADIT) required to be returned to customers pursuant to the filing."[3] I dissent to the extent the Commission did not find this proceeding mooted as a result of the change in circumstances brought about by the resolution of SERI's uncertain tax position following the completion of the IRS audit.

2. This issuance institutes a proceeding in Docket No. EL23-11-000 to determine whether it is unjust and unreasonable that System Energy Resource, Inc. (SERI) has failed to return to customers the value of excess ADIT prior to IRS resolution of SERI's nuclear decommissioning tax deductions. It directs SERI to either: (1) propose revisions to its Unit Power Sales Agreement (UPSA) to return the appropriate amounts to customers; or (2) show cause why it should not be required to do so.[4]

3. I write separately to note that the issuance acknowledges that the IRS has now resolved SERI's 2015 uncertain tax position regarding its nuclear decommissioning tax deductions.[5] According to SERI, it is now established that its tax position resulted in

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[1] *Sys. Energy Res., Inc.*, 181 FERC ¶ 61,244 (2022) (Order).

[2] *Sys. Energy Res., Inc.*, 172 FERC ¶ 63,003 (2020) (Initial Decision).

[3] *Id.* P 1.

[4] Order, 181 FERC ¶ 61,244 at P 2.

[5] *Id.* P 116.

approximately $13.4 million of unprotected excess ADIT and that there is thus no set of circumstances that could result in SERI being found to have the entire $147.3 million in unprotected excess ADIT that was identified by the Initial Decision issued in the captioned proceeding.[6] Thus, the majority is quite correct to state that it "is now only required to return the recomputed amount of excess ADIT."[7] However, despite the acknowledged resolution of this issue, the order nevertheless states that the amortization of the ADIT is to be determined later and may share issues in common with those raised in Docket No. ER21-129-000.[8]

4. Yet, the *very filing* SERI is directed to make here has already been made and has been pending before the Commission since the fall of 2020. As SERI explained in its Motion to Vacate in this proceeding, it had already "filed in Docket No. ER21-129-000 to return to customers approximately $13.4 million in excess ADIT related to the *actual resolution* of that formerly uncertain tax position. The Commission should, therefore, vacate the Initial Decision because it has been rendered moot by the resolution of the formerly uncertain tax position."[9] As SERI further explained, "[r]endering a decision on the Initial Decision that has been overtaken by changed circumstances would serve no useful purpose and would create significant administrative inefficiencies without providing any advantages to the public interest."[10]

5. In its December 8, 2020 filing in Docket No. ER21-129-00, SERI stated that:

> when the Tax Cuts and Jobs Act of 2017 was enacted, SERI re-measured the Account 283 balance to reflect the lower federal income tax rate (21%). The difference between the original balance and the post-Tax Cuts Act balance was approximately $147.3 million. This amount was not considered excess ADIT owed to customers because of the expectation that the underlying [Cost of Goods Sold] Tax Position would require SERI to pay taxes at the

[6] *Id.* P 38.

[7] *Id.* P 116.

[8] *Id.* P 117.

[9] System Energy Resource, Inc. November 24, 2020 Motion to Vacate at 1 (emphasis in original).

[10] *Id.* at 1-2.

federal income tax rate in effect in 2015. Consequently, SERI expected that some or all of the $147.3 million would be owed to the IRS.[11]

6. SERI explained that it made the October 16, 2020 filing to provide the "concrete and quantifiable" unprotected excess ADIT of $13,353,906 to customers as soon as possible following resolution of its uncertain tax position by the IRS.[12]

7. Yes, SERI is also directed to provide documentation in its compliance filing regarding whether its uncertain tax positions from tax years 2016 and 2017 have also been resolved by the IRS. But, again, the majority has also already directed SERI to address this very issue in Docket No. EL18-152-001: "If uncertain tax positions taken in tax years 2016 and 2017 have each individually been resolved by taxing authorities, then all necessary and proper documentation supporting the resolution for each tax year shall also be provided as required under Issue 6, to support the computation of excess ADIT."[13]

8. According to the majority also in Docket No. EL18-152-001, "[t]he record indicates that SERI's uncertain tax positions taken in prior tax years (2004 to 2014) have been resolved, but SERI has never made a request to change those resulting ADIT balances for accounting and reporting purposes."[14] The majority there too "require[s] a refund amount that appropriately captures the revenue requirement impact resulting from the exclusion of *all* ADIT amounts resulting from SERI's decommissioning uncertain tax positions during the entire 2004 to present period of noncompliance."[15] SERI is required to "compute a refund amount that considers all ADIT amounts resulting from SERI's decommissioning uncertain tax positions, and also considers the timing of when such uncertain tax positions were actually resolved by taxing authorities, such that the ADIT balances used to compute the revenue requirement only include those balances for

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[11] System Energy Resource, Inc. December 8, 2020 at 2.

[12] *Id.* at 3.

[13] *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 181 FERC ¶ 61,243 at P 341 (2022).

[14] *Id.* P 324.

[15] *Id.* P 323 (emphasis in original); *cf.* Order, 181 FERC ¶ 61,244 at P 182 ("[T]he Commission requires SERI to compute a refund amount, with interest, that appropriately captures the revenue requirement impact as a result of the exclusion of all ADIT amounts resulting from SERI's decommissioning uncertain tax positions during the entire 2004 to present period.") (citing *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 181 FERC ¶ 61,243 at P [323]).

periods during and until the tax position was actually resolved."[16] "The refund amount shall be clearly computed for each year, with interest, and include all necessary and detailed documentation to support the timing of the taxing authority's resolution of all previous tax positions."[17] Fair enough. And I concur to the extent the order finds that the Commission may not lawfully direct a refund based on factual premises now known to be untrue.

9. But we should pause to ask, what exactly is the Commission trying to accomplish with these duplicative and burdensome inquiries that seek to extinguish uncertainty that no longer exists? Surely it cannot be lost on the majority that its own order recognizes that "because we are directing SERI to recompute excess ADIT in the instant proceeding, and will subsequently determine its amortization . . . the resolution of these issues may *entirely* overlap with the resolution of issues raised in Docket No. ER21-129-000."[18]

10. We should not be wasting everyone's time with these requirements. We already have or will receive answers to all of the questions posed above in other proceedings.

For these reasons, I respectfully concur in part and dissent in part.

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James P. Danly
Commissioner

[16] *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 181 FERC ¶ 61,243 at P 323.

[17] *Id.*

[18] Order, 181 FERC ¶ 61,244 at P 117 (emphasis added).

Document Content(s)