151 FERC ¶ 63,002
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Old Dominion Electric Cooperative Docket No. ER13-2483-001

INITIAL DECISION

(Issued April 13, 2015)

APPEARANCES

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H. PETER YOUNG, Presiding Administrative Law Judge

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FACTUAL AND PROCEDURAL BACKGROUND

1. Old Dominion Electric Cooperative (ODEC) is a public utility operating as a not-for-profit electric generating and transmission cooperative. ODEC provides full requirements generation, transmission, ancillary and other related services to eleven (11) member electric distribution cooperatives that serve retail customers in Virginia, Delaware and Maryland.[1] ODEC filed a superseding cost-of-service rate schedule pursuant to Federal Power Act (FPA) section 205[2] on September 30, 2013. The filing proposed various revisions to ODEC's formula rate, which has been on file with the Commission since 1992.[3] By order issued December 2, 2013, the Commission accepted the proposed revisions for filing, suspended them for a nominal period to become effective (subject to refund) January 1, 2014, and established hearing and settlement judge procedures in Docket No. ER13-2483-000. *Old Dominion Electric Coop.*, 145 FERC ¶ 61,189 (2013) (Hearing Order).

2. Settlement judge procedures proved unsuccessful. The Chief Judge consequently terminated those procedures and instituted a hearing in Docket No. ER13-2483-001 by order issued May 19, 2014. After conducting a prehearing conference, I established a procedural schedule for the hearing phase on June 4, 2014. I also implemented parallel

[1] The ODEC member distribution cooperatives are A&N Electric Cooperative, BARC Electric Cooperative, Choptank Electric Cooperative, Community Electric Cooperative, Delaware Electric Cooperative, Mecklenburg Electric Cooperative, Northern Neck Electric Cooperative, Prince George Electric Cooperative, Rappahannock Electric Cooperative, Shenandoah Valley Electric Cooperative, and Southside Electric Cooperative (collectively, Class A members or Member Cooperatives). Each Class A member is a consumer-owned distribution cooperative that purchases its full energy requirement from ODEC under a bilateral full requirements wholesale power contract (WPC). ODEC also has a single Class B member—TEC Trading, Inc. (TEC). TEC is a taxable corporation wholly owned by ODEC's Class A members. TEC primarily markets excess energy ODEC does not require to serve its Class A members.

[2] 16 U.S.C. § 824d (2012).

[3] The Commission accepted ODEC's most recent prior formula rate revision by letter order issued March 18, 2011. *Old Dominion Electric Coop.*, Docket No. ER10-2607-002 (Mar. 18, 2011) (delegated letter order). The WPCs between ODEC and its member distribution cooperatives incorporate the ODEC formula rate, and also have been on file with the Commission since 1992. The Commission accepted the currently-effective WPCs by letter order issued November 4, 2008. *Old Dominion Electric Coop.*, Docket No. ER08-1498-000 (Nov. 4, 2008) (delegated letter order).

dispute resolution procedures intended to facilitate a consensual resolution of the case short of hearing. The supplemental dispute resolution procedures proved unsuccessful as well, and were terminated by order issued September 19, 2014.

3. A Preliminary Joint Statement of Contested Issues submitted by the participants on June 6, 2014 reflected issues I considered well beyond the Hearing Order's scope. It also misconstrued certain burdens of proof. I immediately sent an e-mail to all counsel, directing their attention to Hearing Order paragraphs 13, 14 and 16, emphasizing that those paragraphs expressly confined the issues set for hearing to the justness/ reasonableness of "ODEC's proposed rate schedule revisions". Accordingly, I advised them that *unrevised* elements of ODEC's formula rate necessarily would continue to be deemed just and reasonable—unless ODEC's proposed tariff revisions also materially changed or impacted unrevised elements of the tariff. I informed counsel that I would not permit the parallel settlement procedures I had implemented to be derailed by extraneous issues or burden of proof disputes, indicating I would intervene if necessary to make scope of proceeding rulings.[4]

4. The dispute resolution specialists I designated on June 3, 2014 reported on August 19, 2014 that their efforts had failed. In addition, despite my June 6, 2014 e-mail advisory, narrative testimony and supporting exhibits filed in the interim still reflected extraneous issues and misapplied burdens of proof. I anticipated impendent narrative testimony and supporting exhibits would follow suit. I therefore issued an immediate order scheduling a prehearing conference and oral argument to conclusively resolve all scope of proceeding and burden of proof issues, advising the participants that any narrative testimony or supporting exhibit(s) filed on or before August 22, 2014[5] that fell beyond my scope of proceeding rulings would be struck.

5. Exhaustive oral argument was conducted August 27, 2014. *See* Tr. 63-175. I issued bench rulings that the Hearing Order expressly confined this proceeding to an examination of "ODEC's proposed rate schedule revisions"—which ODEC bore an affirmative burden to prove are just, reasonable and not unduly discriminatory. I also ruled unrevised elements of the tariff could be addressed *only* insofar as some proposed

[4] I did not require the Preliminary Joint Statement of Contested Issues to be revised at that time because it had served its primary purpose as an informal/non-binding mechanism to alert the presiding judge to potential scope of proceeding disputes before participant resources were unnecessarily wasted on overbroad discovery and case preparation.

[5] The deadline for the next set of narrative testimony and supporting exhibits to be filed in accordance with the procedural schedule was August 22, 2014.

tariff revision(s) materially changed or impacted unrevised elements as well. I ruled a participant seeking to address any unrevised element(s) of the tariff bore a threshold burden to prove ODEC's proposed tariff revisions also materially changed or impacted the unrevised element(s) at issue. The burden then would shift to ODEC to affirmatively prove the resulting change or impact also was just, reasonable and not unduly discriminatory. I specifically rejected the Commission Trial Staff (Trial Staff) position that the Hearing Order opened the entire ODEC formula rate to examination in this proceeding. Tr. 148-49. I also rejected a more limited Bear Island Paper WB LLC (Bear Island) position that specific issues beyond ODEC's proposed tariff revisions could be considered. The June 6, 2014 Preliminary Joint Statement of Contested Issues was then reviewed issue-by-issue to determine which specified issues should be struck in accordance with my rulings. The participants were directed to file[6] a revised Preliminary Joint Statement of Contested Issues in compliance with those determinations. In addition, the participants were directed to submit a joint specification of any pre-filed testimony and supporting exhibits (to date) to be struck in compliance with the rulings by September 10, 2014.[7]

6. The participants filed a revised Preliminary Joint Statement of Contested Issues on September 8, 2014. But contrary to my corollary directive, they did not submit a joint specification of pre-filed testimony and supporting exhibits to be struck on September 10, 2014.[8] Instead, ODEC re-submitted a document identifying Bear Island material (and

[6] I purposefully directed the Revised Joint Statement of Contested Issues to be "filed" (Tr. 164) rather than "submitted" so it would become part of the official record for Commission review in this proceeding. I note the Joint Stipulation of Issues filed November 25, 2014/adopted December 9, 2014 (*id*. at 359-363) is distinguished from the Preliminary Joint Statement of Contested Issues in that the Joint Stipulation of Issues conclusively defines the scope of the hearing and Initial Decision, and is binding on the participants. Since Trial Staff and Bear Island formally objected to my scope of proceeding rulings, the Joint Stipulation of Issues should not be construed as a waiver of their rights to challenge those rulings in briefs on exceptions to the Commission. *Id.* at 359.

[7] I also granted a participant request to reinstate the parallel settlement facilitation based on a representation that they remained committed to consensual resolution. The reinstated settlement facilitation was terminated due to lack of meaningful progress by order issued September 19, 2014.

[8] This was just the first of numerous occasions throughout the proceeding on which Trial Staff and—to a lesser degree—Bear Island simply ignored/affirmatively violated my directives because they disagreed with them. See footnote 23 *infra*.

ODEC responsive material) that ODEC originally proposed to strike at the August 27, 2014 oral argument, explaining ODEC was compelled to re-submit that document in an effort to comply with my directive because the other participants would not agree that any pre-filed materials whatsoever should be struck pursuant to the August 27, 2014 rulings.[9] I immediately responded to all counsel via e-mail, informing them that their unwillingness to comply with my unambiguous rulings and directives was unprofessional—arguably unethical. I therefore directed them to *file* a joint *stipulation* specifying all pre-filed materials falling outside the August 27, 2014 scope of proceeding rulings no later than noon (EDT) on September 12, 2014. I cautioned them that any failure to comply in good faith would trigger an immediate order to show cause why they should not be excluded from further participation in the proceeding.

7. The participants filed a document designated "Joint Stipulation With Respect to Pre-Filed Materials That Fall Outside the Scope of This Proceeding" within the specified timeframe. A cursory review of the document, however, confirmed it was a compliant stipulation in title alone. The joint narrative portion consisted of counsel representations that they had cooperated in good faith to reach an agreement on materials to be struck in accordance with the August 27, 2014 rulings, but once again had been unable to agree that any pre-filed materials whatsoever should be struck. An ODEC Attachment A to the document again identified/proposed to strike the same Bear Island material and responsive ODEC material ODEC had proposed to strike at the August 27, 2014 oral argument. A Bear Island Attachment B defended Bear Island's continued refusal to strike any of the ODEC-identified material based on an unsubstantiated claim that all the material supported Bear Island allegations that ODEC's proposed tariff revisions materially impacted unrevised tariff provisions in addition to issues that had been struck from the Preliminary Joint Statement of Contested Issues on August 27, 2014. The document did specify a Trial Staff position.[10] My immediate e-mail reply informed the

[9] The participants had agreed at conclusion of the August 27, 2014 oral argument to use the ODEC document as a starting point in identifying the universe of pre-filed material to be struck in accordance with my rulings. Bear Island gave no indication it would continue to refuse to strike any substantial portion of the material specified in the ODEC document, let alone all of it. *See* Tr. 167-173.

[10] Although Trial Staff supported—and attempted to expand—Bear Island's broad Hearing Order interpretation at the August 27, 2014 oral argument, Trial Staff was not required to file any narrative testimony/supporting exhibits until September 29, 2014. Trial Staff therefore was concerned with the scope of Bear Island materials ODEC sought to strike only insofar as it had implications for what Trial Staff intended to file on September 29, 2014.

participants I would issue a formal response well in advance of the September 29, 2014 due date for Trial Staff's narrative testimony and exhibits.

8. On September 19, 2014, I issued an order to show cause at oral argument why counsel should not be excluded from further participation in the proceeding for repeatedly and willfully failing to comply with a presiding judge's rulings and directives.[11] At oral argument on September 25, 2014, I accepted ODEC's explanation that it once again had been compelled to re-submit its previous specification of pre-filed Bear Island material and responsive ODEC material to be struck because Bear Island would not concede the August 27, 2014 rulings required any of that material to be struck. I also accepted ODEC and Bear Island counsel representations that opposing counsel had cooperated in good faith, but fundamentally disagreed with respect to whether the Bear Island material ODEC sought to strike remained relevant to issues not struck from the Preliminary Joint Statement of Issues on August 27, 2014. As a consequence, I ruled there was inadequate basis to exclude ODEC or Bear Island counsel from further participation in the proceeding at that time.[12] Tr. 200. I then conducted item-by-item oral argument addressing the materials reflected in ODEC Appendix A, striking any Bear Island material/ODEC responsive material violating the August 27, 2014 scope of proceeding rulings.[13]

9. Trial Staff filed its narrative testimony and supporting exhibits on September 29, 2014. ODEC filed a motion to strike significant portions of those materials on October

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[11] The order to show cause did not apply to Trial Staff. Although Trial Staff counsel participated in the "joint stipulation" negotiations, and Trial Staff was a signatory to the document, no Trial Staff material was at issue at that point.

[12] The September 25, 2014 session also included oral argument on an ODEC motion to compel Bear Island discovery responses. Bear Island's clear failure to satisfy its obligations to comply in good faith with Commission discovery regulations, coupled with its prior failures to comply with my scope of proceeding rulings and directives, compelled me to make an 18 C.F.R. § 385.504 (14) (i) (2014) record notation. Tr. 255-58. I am gratified to report that Bear Island counsel thereafter conducted itself in full compliance with Commission regulations, as well as its professional and ethical obligations.

[13] To protect the participants' rights to the greatest possible degree, I implemented a "strike-through" protocol to preserve the struck materials' readability in the event of Commission review. Tr. 216, 223, 240. This protocol was applied to all materials struck during the course of the proceeding. It is distinguished from the text *shading* protocol implemented to indicate Protected materials.

15, 2014, arguing the identified portions patently violated my August 27, 2014 rejection of Trial Staff's contention that the Hearing Order opened the entire ODEC formula rate to examination in this proceeding. Trial Staff and Bear Island filed answers opposing the ODEC motion, each of which argued positions at odds with the August 27, 2014 scope of proceeding rulings. I therefore was compelled to convene yet another oral argument to define the scope of the proceeding in the context of ODEC's motion to strike on October 23, 2014.[14] In the course of that oral argument, I concluded Trial Staff and Bear Island continued to insist on expanding the scope of the proceeding beyond "ODEC's proposed rate schedule revisions", as consistently referenced throughout the Hearing Order —and to misapply the burdens of proof—due a fundamental confusion between FPA sections 205 and 206. Tr. 281. I emphasized ODEC filed its proposed tariff revisions under FPA section 205 and, as a consequence, ODEC bore an affirmative section 205 burden to prove the proposed tariff revisions are just and reasonable. *Id*. at 311. I ruled the Hearing Order's consistent references to "ODEC's proposed rate schedule revisions" (rather than the "revised formula rate" or similar terminology) confirmed the Commission contemplated this proceeding would be conducted exclusively in accordance with FPA section 205. *Id.* at 315. I noted it is not uncommon for the Commission to institute an FPA section 206 investigation in response to a section 205 filing, but in such instances the Commission invariably includes specific references to section 206 and to the "investigation" it is ordering. *Id*. at 314-15. I observed the Hearing Order reflects no such references.[15] *Id.* at 315. More important, I observed the Trial Staff material ODEC sought to strike proposed to require ODEC to make substantial *additions* to its formula rate.[16] I ruled Commission authority to require additional tariff provisions not proposed in an FPA section 205 application derives from FPA section 206, not section 205. I suggested the indicated consequence of "ODEC's proposed rate schedule revisions" being found unjust, unreasonable or unduly discriminatory due to inadequacy or incompleteness would be rejection and reversion to the previously-effective tariff. *Id*. at 314. I therefore struck Trial Staff's narrative

[14] I had to expedite ruling on the motion because ODEC and Bear Island Cross-Answering and Rebuttal materials were due October 31, 2014.

[15] I dismissed a single Hearing Order reference to FPA section 206 because it was subsumed within a general boilerplate recitation of Commission jurisdiction and authority routinely included in ordering paragraphs. Tr. 315.

[16] I made the same observation with respect to a Bear Island-proposed notice requirement Bear Island defended in its answer to the ODEC motion to strike.

testimony and supporting exhibits to the extent those materials proposed to require ODEC to include additional tariff provisions.[17]

10. Trial Staff filed a November 7, 2014 motion ostensibly seeking "clarification" that Trial Staff was permitted to present evidence demonstrating unrevised elements of ODEC's tariff were unjust or unreasonable without demonstrating the alleged unjustness/ unreasonableness was a direct consequence of ODEC's proposed tariff revisions. Trial Staff alternately requested permission to take interlocutory appeal of the question, as well as the October 23, 2014 ruling that the Hearing Order did not initiate an FPA section 206 investigation.[18] I issued an order granting Trial Staff's motion in part on November 19, 2014.[19] The order indicated my review of the August 27, 2014 and October 23, 2014 oral argument transcripts confirmed the bench rulings were clear and unambiguous: the participants *could not* address unrevised elements of ODEC's tariff without first demonstrating ODEC's proposed tariff revisions materially impacted or altered the unrevised element(s) at issue. Instead, the scope of the proceeding was limited to "ODEC's proposed rate schedule revisions"—as consistently prescribed throughout the Hearing Order. Unrevised elements of the formula rate could be addressed *only* insofar as Trial Staff (or Bear Island) could affirmatively demonstrate ODEC's proposed tariff revisions also had a material impact on specific unrevised element(s) of the formula rate. In that event, ODEC also would be required to prove the impacted unrevised element(s) remained just, reasonable and not unduly discriminatory. The order also confirmed my

[17] I specifically noted the participants had a right to seek interlocutory appeal of the October 23, 2014 rulings—including those addressing FPA section 205/206 implications. Tr. 321-22. I also advised that any failure to do so would not extinguish their rights to challenge the rulings in briefs on exceptions to the Initial Decision. *Id*. at 322. In addition, I offered the participants the opportunity to include a section 205/206 implications issue in the November 25, 2014 Joint Stipulation of Issues, thus permitting them to address the issue in post-hearing briefs and requiring me to formally address it in this Initial Decision. *Id*. The issue is addressed at Issue I (A), *infra*.

[18] Bear Island filed an answer supporting Trial Staff's requests for clarification or, alternately, for permission to take interlocutory appeal. Bear Island also requested clarification that reversion to the previously-effective tariff was a remedy available to the Commission in this proceeding.

[19] The "clarification" request was a patently specious attempt to misconstrue my scope of proceeding rulings dating back to the August 27, 2014 oral argument. I granted Trial Staff's motion (in part) only to confirm the August 27, 2014 and October 23, 2014 bench rulings in the form of a written order that no participant reasonably could continue to misconstrue.

previous ruling that this proceeding falls exclusively under FPA section 205.

11. The November 19, 2014 order denied Trial Staff's request for permission to take interlocutory appeal of the August 27, 2014 and October 23, 2014 bench rulings (as reiterated in the written order). And while the order expressly stated the participants were permitted to challenge the ruling that this proceeding falls exclusively under FPA section 205 in post-hearing briefs to the presiding judge and to the Commission, it also stated the participants were *not* permitted to propose additional or alternative tariff revisions as if this were an FPA section 206 proceeding.[20] Trial Staff did not take interlocutory appeal of the November 19, 2014 order's denial of Trial Staff's request for permission to take interlocutory appeal.

12. The participants filed a Revised Joint Stipulation of Issues on November 25, 2014.[21] On the same date, ODEC filed a motion to strike Trial Staff and Bear Island pre-filed narrative testimony ODEC characterized as proposing additional or alternate tariff revisions in violation of the November 19, 2014 order.[22] Trial Staff and Bear Island filed substantive answers in opposition to the ODEC motion on December 5, 2014. I conducted extensive oral argument on the motion immediately prior to the first hearing session on December 9, 2014. *See* Tr. 368-456. Once again, the pre-filed narrative testimony at issue was examined line-by-line. Testimony proposing additional or alternate tariff provisions was differentiated from testimony describing defects or deficiencies in ODEC's proposed tariff revisions. The former was struck because it fell outside the scope of an FPA section 205 proceeding;[23] the latter was not.

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[20] I indicated I considered it inappropriate in the context of the November 19, 2014 order to address whether reversion to ODEC's previously-effective tariff is an available remedy. I instead granted the participants permission to address the issue at hearing and in post-hearing briefs to the presiding judge and to the Commission.

[21] November 25, 2014 was the Joint Stipulation of Issues filing deadline specified in the procedural schedule. The participants had filed a "Joint Stipulation of Contested Issues" on November 18, 2014, but that document was mistitled and required issues to be deleted in accordance with the November 19, 2014 order.

[22] Since the hearing was scheduled to commence December 9, 2014, ODEC requested a December 2, 2014 answer deadline, expedited consideration and a ruling prior to hearing commencement. Trail Staff and Bear Island immediately filed a joint answer opposing ODEC's answer deadline request, proposing December 5, 2014 instead.

[23] I again invoked the text "strike-through" protocol to preserve the struck materials' readability in the event of Commission review. Tr. 430-31. *See also id*. at

(continued)

13. The evidentiary hearing was conducted December 9, 2014 through December 17, 2014. Post-hearing initial briefs (IB) were filed January 16, 2014. Post-hearing reply briefs (RB) were filed January 30, 2014.[24]

ISSUE ANALYSES

I. Threshold Legal Issues

A. Should this Hearing also be an FPA section 206 Proceeding?

14. As the procedural history demonstrates, the participants have vigorously disputed the appropriate scope of this proceeding from the outset. Bear Island and—especially—Trial Staff have advocated an expansive Hearing Order interpretation. ODEC has argued for a narrower interpretation. Although my pre-hearing rulings consistently interpreted the Hearing Order as necessarily limiting the scope of the proceeding to "ODEC's proposed rate schedule revisions", the November 19, 2014 order expressly granted the participants permission to challenge that interpretation, as well as the corollary ruling that this proceeding falls exclusively under FPA section 205, in post-hearing briefs to the presiding judge and to the Commission. See footnote 17 *supra*.

Participant Positions

ODEC

15. ODEC argues this proceeding is properly confined to "ODEC's proposed rate schedule revisions" in accordance with FPA section 205 because: (1) ODEC's rate filing

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1593-94.

Trial Staff continued to disregard my scope of proceeding rulings. *See, e.g.*, Tr. 408, 413-14, 417-422. And while Bear Island also continued to advocate expanding the scope of the proceeding beyond ODEC's proposed tariff revisions (*see, e.g.*, *id*. at 426-28), Bear Island appropriately objected and thereafter abided by my rulings. Trial Staff, by contrast, continued to flout the rulings throughout the hearing. *See, e.g.*, *id*. at 826-27, 840, 857-58, 1298-99, 1304-06, 1536. Contumacy aside, Trial Staff's conduct in this regard arrogated authority that even the Commission cannot legitimately exercise in the context of an FPA section 205 proceeding. Such overreach is troubling in itself—and even more so when it violates repeated presiding judge rulings to the contrary.

[24] Although the Office of the Attorney General of Virginia, Division of Consumer Counsel intervened as a party, it did not submit any evidence, participate in the hearing or file any briefs in this proceeding.

was made under section 205; (2) the Hearing Order explicitly limited the scope of the proceeding to "ODEC's proposed rate schedule revisions"; (3) the Hearing Order reflects no Commission intention to institute an FPA section 206 investigation; and (4) the Hearing Order does not satisfy the statutory requirements for instituting a section 206 investigation. ODEC emphasizes FPA sections 205 and 206 are parts of a single statutory scheme under which rates initially are established by the utility. An existing rate is subject to Commission modification only after a determination that the rate has become unlawful. ODEC explains it is the utility that decides in the first instance whether to propose to revise an existing rate schedule in the context of an FPA section 205 application. ODEC contrasts this scenario with Commission action under FPA section 206, which ensures an existing rate schedule remains just and reasonable by providing a mechanism for the Commission to re-examine it and to prescribe revisions if necessary. ODEC submits the circumstance that it proposed the rate schedule revisions at issue pursuant to FPA section 205 necessarily limits this proceeding to an examination of the rate schedule revisions ODEC proposed. Unrevised elements of the rate schedule generally cannot be examined because the condition precedent—a Commission determination that unrevised elements of the tariff may have become unjust, unreasonable or unduly discriminatory—has not been satisfied. And while ODEC concedes unrevised tariff provisions may be examined for the limited purpose of ensuring proposed revisions are not incompatible with them, ODEC characterizes as overbroad the presiding judge's rulings that unrevised provisions of ODEC's tariff may be examined insofar as ODEC's proposed revisions also materially impact or change unrevised tariff provisions.

16. ODEC highlights the fact that the Hearing Order explicitly references "ODEC's proposed rate schedule revisions" throughout. ODEC submits the Hearing Order's unvarying reference to "ODEC's proposed rate schedule revisions" in itself confirms the Commission intended to confine this proceeding to an examination of ODEC's proposed revisions rather than the entire formula rate. ODEC also maintains the Hearing Order's consistent reference to "ODEC's proposed rate schedule revisions" is an express Commission acknowledgement of the limitations FPA section 205 imposes. ODEC submits the Hearing Order reflects no Commission intention to institute an FPA section 206 investigation, stressing the Hearing Order fails to satisfy the statutory requirements to do so in any event because it reflects neither (i) a finding that ODEC's existing tariff might be unjust or unreasonable nor (ii) a section 206 refund effective date. ODEC also observes the Hearing Order was not docketed under the "EL" prefix customarily used for FPA section 206 investigations.

17. ODEC argues that since this proceeding falls exclusively under FPA section 205, no opposing participant may either (i) challenge unchanged elements of ODEC's formula rate or (ii) propose additional or alternate tariff revisions as if this were an FPA section 206 proceeding—unless the challenging/proposing participant first affirmatively

demonstrates the proposed revision(s) also materially impact unrevised elements of the formula.[25] ODEC concedes it bears an FPA section 205 burden to prove in the context of this proceeding that its proposed tariff revisions are just, reasonable and not unduly discriminatory or preferential. ODEC asserts that once it has satisfied that burden, however, its revised formula rate must be approved regardless of whether what it describes as "a *more* just and reasonable rate, or favorable alternative to ODEC's proposal, might exist." ODEC IB, 9 (emphasis in original).

Bear Island

18. Bear Island does not address this issue.

Trial Staff

19. Trial Staff continues to argue it is both necessary and appropriate to conduct a comprehensive review of ODEC's entire formula rate in this proceeding. Trial Staff complains that ODEC's September 30, 2013 formula rate filing proposed extensive revisions to the formula rate, but failed to conform the rate to current Commission policy in various respects. Trial Staff asserts it "has the duty and the right to explain how [ODEC's formula rate] could (and should) be brought into line with Commission policy and precedent." Trial Staff IB, 20. Trial Staff objects that the presiding judge's pre-hearing scope of proceeding rulings inappropriately undermined this duty and right, and exempted ODEC's formula rate from complete Commission review.

20. Trial Staff underscores the Hearing Order ordering paragraph (B) reference to FPA section 206 in addition to section 205. Trial Staff contends the section 206 reference confirms the Commission intended to exercise its section 206 authority to conduct a comprehensive investigation of ODEC's entire formula rate in this proceeding

[25] ODEC cites the November 19, 2014 order, but notes it considers the standard expressed in the order to be too expansive. ODEC IB 8, fn. 29. ODEC cites *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988), which expresses the standard as "could not coexist with proposed changes without producing an unjust and unreasonable rate." ODEC states it considers it unnecessary to address whether this "more restrictive" standard governs because neither Trial Staff nor Bear Island has identified any unrevised tariff element(s) to which the standard would apply. ODEC IB 8, fn. 29. Although I do not address ODEC's distinction in this Initial Decision, I reject its characterization of the November 19, 2014 order insofar as ODEC states the order permitted Trial Staff or Bear Island to propose alternate tariff revisions or additional provisions in the context of this proceeding if they assumed and satisfied an FPA section 206 burden of proof. See Paragraph 31 *infra*.

rather than the more limited section 205 review of "ODEC's proposed rate schedule revisions" referenced throughout the Hearing Order. It claims the presiding judge determined the ordering paragraph (B) reference to "proposed rate schedule revisions" rather than "proposed filing" or "formula rate" negated the section 206 reference and confined this proceeding to a section 205 review. This is critical according to Trial Staff because the effect was to negate an express Commission "direction" that the hearing was to be conducted under both FPA section 205 and section 206. *Id*. at 11. Nevertheless, Trial Staff submits it was unnecessary for the Commission to expressly institute a section 206 investigation in any event because: (1) the ordering paragraph (B) reference to both FPA sections 205 and 206 permits the Commission to address interrelated issues throughout the tariff, and to require changes where necessary to ensure a just and reasonable rate; and (2) FPA section 205 by itself authorizes the Commission to review unchanged tariff elements whenever they are included in a revised tariff filing.

21. Trial Staff stresses that under the FPA the Commission has the authority—and the duty—to ensure a jurisdictional public utility's rates, charges, terms and conditions are just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. Trial Staff notes this duty applies whether a case arises out of an FPA section 205 filing by a utility, or from a complaint or *sua sponte* Commission action under FPA section 206. It follows on Trial Staff's account that the Commission has investigative authority even in the context of a section 205 proceeding. Trial Staff adds that the Commission has on many occasions confirmed that when a section 205 filing is set for hearing the presiding judge is permitted to consider all components of the rate—including unchanged ones—bearing on the filing's justness/reasonableness.

22. Trial Staff observes the Hearing Order summarized the Virginia Consumer Counsel and Bear Island responses to ODEC's September 30, 2013 filing. It claims the circumstance that the Hearing Order did not expressly limit, exclude or summarily dismiss any issue(s) raised in those responses, and did not specifically address any of ODEC's proposed rate schedule revisions, demonstrates the Commission intended nothing less than a full review of ODEC's formula rate under FPA sections 205 and 206. Trial Staff submits it is axiomatic when the Commission sets the justness/reasonableness of a rate or tariff for hearing, as Trial Staff asserts the Commission did in this proceeding, it sets for hearing all questions relevant to that determination whether it discusses them or not. Moreover, the Commission's failure to explicitly set issues for hearing should not automatically be construed as a final determination that the presiding judge is foreclosed from assessing whether unspecified issues are relevant to the judge's justness/ reasonableness evaluation. Trial Staff therefore concludes the presiding judge had both the authority and the obligation "to address all issues relevant to justness and reasonableness" (*id*. at 13), notwithstanding the Commission's specific references to "ODEC's proposed rate schedule revisions" throughout the Hearing Order.

Analysis

23. The Hearing Order confirms the Commission is sufficiently familiar with both ODEC's not-for-profit cooperative structure and its formula rate. *See* Hearing Order at PP 2-4 and n. 3-7. Moreover, it is beyond dispute that the Commission thoroughly understands its current formula rate policies. And it conclusively must be presumed that in setting ODEC's September 30, 2013 filing for hearing the Commission satisfied its statutory obligation to ensure ODEC's revised formula rate would continue to be just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. It follows that any concern(s) the Commission might have had with respect to ODEC's September 30, 2013 formula rate filing would have been reflected—at least in *general* terms—in the Hearing Order.

24. The Hearing Order gives no indication whatsoever that the Commission was addressing anything beyond the formula rate *revisions* ODEC proposed in its September 30, 2013 filing. The Hearing Order specifically and uniformly references "ODEC's proposed rate schedule revisions" throughout. *Id.* at PP 14, 16, ordering para. (A), (B).[26] This is consistent with the circumstance that ODEC proposed its rate schedule revisions in an FPA section 205 filing. It also supports a conclusion that the Commission intended the filing to be reviewed exclusively in accordance with section 205.

25. Trial Staff's reliance on the single reference to FPA section 206 in ordering paragraph (B) is unavailing. The preceding analysis demonstrates it would be completely inconsistent with the Hearing Order, considered as a whole, to interpret the ordering paragraph (B) reference to section 206 as indicating the Commission intended to initiate a section 206 investigation.[27] Moreover, considered on the whole, ordering paragraph (B) cannot reasonably be interpreted that way even in isolation. Read in context, the ordering paragraph (B) reference to section 206 is simply part of a general boilerplate recitation of Commission authority and jurisdiction routinely included in Commission orders.

26. This conclusion is buttressed by the fact that the Hearing Order reflects no other reference to FPA section 206 or to any "investigation" being initiated by the Commission. While it is not uncommon for the Commission to institute an FPA section

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[26] Hearing Order paragraph 13 references "ODEC's proposed *tariff revisions*". Hearing Order at P 13 (emphasis added). The Hearing Order expresses absolutely no Commission concern over unrevised elements of ODEC's formula rate.

[27] Trial Staff's claim that the presiding judge's October 23, 2014 bench ruling concerning ordering paragraph (B) was based exclusively on that paragraph's internal reference to "proposed rate schedule revisions" (Trial Staff IB, 10) grossly mischaracterizes the ruling—which explicitly was based on Hearing Order paragraphs 13, 14, 16 and ordering paragraph (A). *See* Tr. 282-83, 292, 314-15.

206 investigation in response to a section 205 filing, the Commission invariably includes specific references to section 206 and to the "investigation" it is ordering when it does so. *Compare* Hearing Order *with Kentucky Utilities Co.*, 148 FERC ¶ 61,225, at PP 1, 23-25, ordering para. (F), (G) (2014). The Commission also routinely assigns an "EL" prefix to the investigation docket.[28] *See, e.g., id*. at P 1, ordering para. (F).

27. More important, as ODEC emphasizes, FPA section 206 imposes conditions precedent to any investigation into unrevised elements of ODEC's formula rate that the Hearing Order fails to satisfy. The Hearing Order reflects no Commission determination that unrevised elements of the formula rate were—or might be—unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful. That determination was prerequisite to an FPA section 206 investigation into unrevised elements of the rate. *See* 16 U.S.C. § 824e (a) (2012); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). *See also Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993) (analyzing Commission authority under Natural Gas Act (NGA)); *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 456 (D.C. Cir. 1988) (same).[29] In addition, FPA section 206(b) expressly requires the Commission to establish a refund effective date in any order in which the Commission institutes an investigation on its own initiative. *See* 16 U.S.C. § 824e (b) (2012). *Accord Kentucky Utilities Co.*, 148 FERC ¶ 61,225, at P 24, ordering para. (F), (G) (2014). The Hearing Order neither acknowledges this requirement (as is customary) nor establishes the required refund effective date.[30] As a consequence,

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[28] While the Hearing Order's "ER" docket prefix is, by itself, a relatively minor indicator of Commission intent, it is consistent with the other factors supporting a conclusion that the Hearing Order did not institute a section 206 investigation.

[29] Courts and the Commission interpret FPA section 206 (and section 205) *in pari materia* to—i.e. the same way as—NGA section 5 (and section 4) because NGA section 5 is the natural gas pipeline equivalent to FPA section 206 (and NGA section 4 is the equivalent to FPA section 205). *See, e.g., New Dominion Energy Coop.*, Opinion No. 499, 122 FERC ¶ 61,174, P 61 and n. 91 (2008) (Opinion No. 499).

[30] I also note FPA section 206(b) requires the Commission either (i) to render a final decision within 180 days of the order initiating the investigation or (ii) to state both the reason the Commission failed to do so and the Commission's best estimate of the date by which it will render a final decision. *See* 16 U.S.C. § 824e (b) (2012). The Commission not only did not expedite this case, it held the hearing in abeyance pending the outcome of settlement judge procedures. It therefore could not reasonably have anticipated an Initial Decision—let alone a final Commission decision—within 180 days of the December 2, 2013 Hearing Order date. The Hearing Order, however, does not indicate a date by which the Commission anticipated it would render a final decision, as FPA section 206(b) requires. This circumstance further undermines any claim that the

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the Hearing Order does not satisfy the statutory requirements to initiate an FPA section 206 investigation even assuming, *arguendo*, the Commission intended to do so.

28. Trial Staff's alternate argument that the Commission has independent FPA section 205 authority to examine unchanged elements of ODEC's formula rate—and to require ODEC to modify or supplement them—in the context of this proceeding is equally unavailing. The courts consistently have rebuked Commission attempts to expand its authority to review/modify rate filings in the manner Trial Staff advocates.[31]

29. It is virtually axiomatic that FPA sections 205 and 206 are "parts of a single statutory scheme under which all rates are established *initially by the utility*" under section 205. *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (quoting *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956)) (emphasis in original). Once accepted, however, "[t]he statutory obligation of the utility . . . is not to prove the continued reasonableness of *unchanged* rates or *unchanged* attributes of its rate structure." *City of Winnfield, La. v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984) (emphasis in original) (punctuation omitted). In other words, the FPA section 205 "emphasis is on making the petitioner justify the changes in rates, not the constant elements." *Pub. Serv. Comm'n. of N.Y. v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980). "Unchanged tariff provisions are not subject to revision as part of an FPA section 205 filing." *Pepco Holdings, Inc.*, 125 FERC ¶ 61,130, at P 113 (2008). It follows that only the rate schedule *revisions* ODEC proposed in its September 30, 2013 FPA section 205 filing may be reviewed in the context of this FPA section 205 proceeding. The uniform references to "ODEC's proposed rate schedule revisions" reflected throughout the Hearing Order are completely consistent with this statutory limitation.

30. The preceding analysis notwithstanding, the statutory limitation on Commission authority to review unrevised elements of ODEC's formula rate in this proceeding is not absolute. Unrevised elements of the formula rate may be examined, but only insofar as Trial Staff (or Bear Island) first demonstrates the proposed tariff revisions also have a

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Hearing Order initiated a section 206 investigation.

[31] *See, e.g.*, *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993) ("This court 'has consistently disallowed attempts to blur the line between [FPA equivalent NGA] §§ 4 and 5.'" (quoting *Pub. Serv. Comm'n. of N.Y. v. FERC*, 866 F.2d 487, 491 (D.C. Cir. 1989))). "As we complained four years ago, '[o]n four occasions in the last three years this court has reviewed Commission efforts to compromise § 5's limits on its power to revise rates. On each the court has repelled the Commission's gambit. This is number five.' We now make it an even six." *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993) (internal citation omitted).

material impact on unrevised elements that might render the rate unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful in some respect. *See, e.g.*, *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988) (Commission may examine whether interaction between revised and unrevised tariff elements produces unjust or unreasonable effect); *Cities of Batavia v. FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982) (Commission not precluded from reviewing revised rate to assure old and new parts operate in tandem to produce just and reasonable result). *Accord Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986). In that event, ODEC not only would be required to affirmatively prove its proposed rate schedule revisions are just and reasonable, but also that the revisions do not interact/operate in tandem with unrevised elements of the formula rate to produce an unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful rate. Neither Trial Staff nor Bear Island made any attempt in this proceeding to demonstrate ODEC's proposed rate schedule revisions interacted or operated in tandem with unrevised elements of the formula rate to produce an unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful rate. They instead proposed *alternate* tariff revisions and *additional* provisions they claimed were required to make the formula rate just and reasonable. Those proposals do not satisfy the Trial Staff/Bear Island threshold burden to demonstrate ODEC's proposed tariff revisions have at least some direct impact on unrevised tariff elements that might render the amalgamated rate unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful in some respect. They also fall completely outside the parameters of an FPA section 205 proceeding.[32]

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[32] Trial Staff complains the presiding judge's pre-hearing scope of proceeding rulings precluded Trial Staff, Bear Island and the Commission from addressing unchanged elements of the tariff. Trial Staff IB at 18. That complaint is baseless. My pre-hearing bench rulings and November 19, 2014 order expressly permitted Trial Staff and Bear Island to address any unrevised element(s) of the tariff which they could demonstrate the proposed tariff revisions might materially impact or alter. See Paragraph 10 *supra*. The rulings only precluded Trial Staff or Bear Island from proposing alternate tariff revisions or additional provisions they claimed were required to make the tariff just and reasonable. That preclusion is not a consequence of my bench rulings. It is a statutory prohibition, and applies to Trial Staff and Bear Island (as well as the Commission) because this is exclusively an FPA *section 205 proceeding*. As Trial Staff emphasizes, the Commission does not hesitate to institute FPA section 206 investigations into existing formula rates it considers deficient. *Id*. at 15 (citing six (6) orders to show cause issued by the Commission on July 17, 2014 alone). Since the Commission did not institute a section 206 investigation in response to ODEC's section 205 filing in this case, the logical implication is the Commission did not consider any unrevised elements of ODEC's formula rate to be deficient. Moreover, the Commission has unencumbered authority to institute a section 206 investigation into ODEC's formula rate at any time.

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31. Moreover, the FPA section 205/206 dichotomy is not simply a burden of proof allocator. It fundamentally defines Commission authority. In the section 205 context, the Commission "plays 'an essentially passive and reactive' role". *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (quoting *City of Winnfield, La. v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984)). The Commission cannot under any circumstance unilaterally revise or supplement unchanged tariff provisions within the confines of a section 205 proceeding. *See, e.g.*, *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986). *Accord Pepco Holdings, Inc.*, 125 FERC ¶ 61,130, at P 113 (2008). I therefore reject any suggestion that Trial Staff, Bear Island or the Commission may propose/impose alternate tariff revisions or additional tariff provisions if, in the context of this section 205 proceeding, they were to assume and satisfy the burden of proof FPA section 206 would impose. And since the Hearing Order did not institute a section 206 investigation in response to ODEC's September 30, 2013 filing, consideration of any tariff revisions or provisions not proposed in the filing would require the Commission to institute a section 206 investigation in a new separate proceeding. *See, e.g.*, *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1579 (D.C. Cir. 1993); *Pub. Serv. Comm'n. of N.Y. v. FERC*, 642 F.2d 1335, 1343-44 (D.C. Cir. 1980). *Accord Consumers Energy Co. v. FERC*, 226 F.3d 777, 780-81 (D.C. Cir. 1980) (remanding case to provide opportunity for Commission to initiate new proceeding under proper statutory authority).

B. How, if at all, does Opinion No. 499 apply to this proceeding?

Participant Positions

ODEC

32. ODEC contends Opinion No. 499 is inapplicable to this proceeding because Opinion No. 499 reflects no directive ODEC is required to follow. ODEC submits the September 30, 2013 filing attempted to closely align ODEC's formula rate with the PJM demand cost allocation methodology, but that attempt was not an effort to comply with any Commission requirement. ODEC characterizes Opinion No. 499 footnote 64 as a

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No presiding judge ruling can restrain that authority. But the fact of the matter is the FPA simply does not allow the Commission to require ODEC to revise or supplement unchanged elements of its formula rate in the context of this section 205 proceeding—even if Trial Staff or Bear Island had conclusively *proven* ODEC's proposed rate schedule revisions somehow interacted or operated in tandem with unrevised elements of the rate to produce an unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful amalgamated rate. In that event, the only available *section 205* remedy would be for the Commission to reject the offending revision(s) and reinstate the previously-effective provision(s). See Issue IV analysis *infra*.

"mere suggestion" and "advisory dictum…at best". It observes Opinion No. 499 did not include an ordering paragraph or otherwise refer to footnote 64 in any way that suggested ODEC had an affirmative obligation to conform its demand cost allocation to the PJM methodology.

33. ODEC also emphasizes it made two interim FPA section 205 filings that modified its formula rate subsequent to Opinion No. 499, neither of which complied with Opinion No. 499. ODEC argues the circumstance that the Commission accepted those filings by letter orders without reference to Order No. 499 indicates ODEC was not required to comply with footnote 64 in the September 30, 2013 filing. These points notwithstanding, ODEC contends the September 30, 2013 filing complied with Opinion No. 499 footnote 64 in any event.

Bear Island

34. Bear Island argues Opinion No. 499 applies to this proceeding. Bear Island emphasizes ODEC's filing letter in this case specifically indicated the proposed rate formula was revised pursuant to Opinion No. 499. Bear Island also stresses this is the first FPA section 205 filing in which ODEC has sought to change its demand cost allocation since Opinion No. 499 was issued.

35. Bear Island adds that ODEC fails to explain how its two interim FPA section 205 filings relieved ODEC of its obligation to comply with Opinion No. 499 footnote 64 in the September 30, 2013 filing. Bear Island underscores that ODEC indicated in one of the interim filings that it would address its demand cost allocation methodology at a more appropriate time. The September 30, 2013 formula rate filing was the appropriate time according to Bear Island.

Trial Staff

36. Trial Staff agrees that Opinion No. 499 applies to this proceeding. Trial Staff stresses the Commission has never decided on the merits whether ODEC's Opinion No. 499 obligation has been satisfied. Moreover, Trial Staff notes ODEC's two interim FPA section 205 filings were unprotested and non-precedential. In addition, Trial Staff notes the Commission never "approved" those filings; it merely "accepted" them.

37. Trial Staff maintains Opinion No. 499 footnote 64 is no mere "suggestion", as ODEC claims. Instead, footnote 64 clarified that the Commission was not ordering ODEC to comply in the context of that proceeding only because the merits of ODEC's demand cost allocation methodology had not been raised.

Analysis

38. I am compelled to conclude Opinion No. 499 does not impose a filing requirement

on ODEC in this proceeding—though not for any of the reasons ODEC suggests. First, any assertion that Opinion No. 499 footnote 64 was not intended to impose a filing requirement on ODEC is untenable. Footnote 64 states:

> No party in this proceeding has sought to modify the Applicants' proposed method of allocating demand costs among firm non-interruptible services so that it would exactly match PJM's demand cost allocation method. Because the parties did not raise or discuss that issue at the hearing, we will not pursue that matter *in this proceeding*. However, *the Applicants should address this matter in their next section 205 filing* and either modify their demand cost allocation method to match PJM's or explain why such a modification would not be just and reasonable.

Opinion No. 499 at n.64 (emphasis added). Whether footnote 64 reflects a suggestion, as ODEC maintains—or a directive, as Bear Island and Trial Staff contend—hinges on the meaning of the word "should." A representative common-use dictionary indicates "should" is "used…to express obligation". *Should Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/should (last visited Apr. 10, 2015). The most commonly referenced legal dictionary defines "should" as "ordinarily implying duty or obligation" and "not normally synonymous with 'may[]'". *Black's Law Dictionary* 1237 (Special Deluxe 5th ed. 1979). In both common and legal use, then, the word "should" indicates obligation. It follows that the word "should", as reflected in Opinion No. 499 footnote 64, reasonably must be construed as intended to impose an obligation on ODEC. I therefore find and conclude Opinion No. 499 footnote 64 intended to require ODEC's next FPA section 205 filing to address the disparity between ODEC's 2005 demand cost allocation and the PJM allocation methodology either (i) by modifying its demand cost allocation method to match PJM's demand cost allocation method or (ii) by explaining why it would not be just and reasonable to do so.

39. Second, the circumstance that the Commission accepted two (2) interim ODEC section 205 filings that did not satisfy the Opinion No. 499 directive did not excuse ODEC from satisfying the directive in the September 30, 2013 filing. ODEC accurately notes the Commission accepted both interim filings without enforcing the directive. *See Old Dominion Elec. Coop.*, Docket No. ER08-1498-000 (Nov. 4, 2008) (delegated letter order); *Old Dominion Elec. Coop.*, Docket No. ER10-2607-002 (Mar. 18, 2011) (delegated letter order). But there is no evidence the Commission ever vacated or explicitly waived the Opinion No. 499 directive. And the circumstance that the Commission accepted ODEC's interim section 205 filings without reference to Opinion No. 499 establishes nothing more than unexplained Commission forbearance. It certainly cannot reasonably be interpreted as waiving ODEC's obligation to satisfy Opinion No. 499 at some later time—particularly when ODEC specifically argued in the 2008 interim filing that it would be appropriate for ODEC to comply with Opinion No. 499 in the context of a more comprehensive section 205 rate filing. *See Old Dominion Elec. Coop.*,

Application for Acceptance of Second Amended and Restated Wholesale Power Contract and Changes to Rate Formula, Docket No. ER08-1498-000, at 13 (filed Sept. 4, 2008).[33] On this point, I observe that ODEC's section 205 filings in Docket Nos. ER08-1498-000 and ER10-2607-002 were narrowly focused. The ER08-1498-000 filing revised the WPCs—by extending their duration, allowing more power supply flexibility and providing some additional clarification. The ER10-2607-002 filing was confined to depreciation rates. Neither filing proposed changes comparable to the extensive formula rate revisions ODEC proposed in the September 30, 2013 filing.

40. Last, the circumstance that Opinion No. 499 lacks an ordering paragraph or other specific reference to footnote 64 is of no consequence. Footnote 64 in itself clearly was intended to impose a compliance obligation on ODEC. Moreover, the Commission had no reason to include an ordering paragraph/other specific reference to footnote 64 in an order in which it pointedly deferred examining ODEC's demand cost allocation methodology to a subsequent section 205 filing.[34]

41. I therefore find and conclude ODEC has completely failed to demonstrate that Opinion No. 499 footnote 64 should not be interpreted as intended to impose a continuing obligation on ODEC to address the disparity between ODEC's demand cost allocation and the PJM allocation methodology in a section 205 filing. I further find and conclude ODEC's September 30, 2013 filing should be considered the "next section 205 filing" specified in footnote 64. Accordingly, I find and conclude footnote 64 was intended to require ODEC's September 30, 2013 filing either (i) to modify ODEC's demand cost allocation method to match PJM's demand cost allocation method or (ii) to explain why it would not be just and reasonable to do so. These determinations notwithstanding, I am compelled to find and conclude ODEC is not required to comply with the Opinion No. 499 footnote 64 directive.

42. The Issue I (A) analysis demonstrates the Commission cannot require ODEC to file specific tariff revisions solely in reliance on its FPA section 205 authority. *Accord Pub. Serv. Comm'n. of N.Y. v. FERC*, 866 F.2d 487, 488-491 (D.C. Cir. 1989). *See also Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 453-56 (D.C. Cir. 1988)

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[33] The 2008 interim filing expressly stated ODEC had established a Rate Design Committee that was "conducting a comprehensive rate design review", and ODEC therefore "[did] not believe that a rate design modification intended to address only its demand cost allocation method would be the most reasonable or appropriate course at [that] time." *Id*.

[34] Whether ODEC intended the September 30, 2013 filing to satisfy an Opinion No. 499 requirement is irrelevant. The issue is whether Opinion No. 499 *directed* ODEC to satisfy a requirement.

(Commission must exercise authority under appropriate statutory provision). As the court explained in *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182 (D.C. Cir. 1986):

> The Commission is not free to blend, or pick and choose at will between, its [FPA section 205 and 206 equivalent NGA] section 4 and 5 authority; FERC must use the appropriate authorization in the appropriate way in order to remain within the bounds Congress has set for the agency.

Id. at 183. Although the Commission indisputably has the authority to impose the directive reflected in Opinion No. 499 footnote 64, that authority derives exclusively from FPA section 206. The Commission cannot exercise it in response to a section 205 filing unless the Commission first (i) institutes a section 206 investigation—which it routinely does in response to section 205 filings—and (ii) determines the existing rate is unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful.[35] Neither the Hearing Order nor the order instituting the Opinion No. 499 proceeding[36] satisfied these requirements. And since the FPA section 205/206 dichotomy defines Commission authority—as opposed to simply allocating burdens of proof—the Commission cannot exercise its section 206 authority to enforce the Opinion No. 499 directive simply by assuming and satisfying the burden of proof FPA section 206 would impose. It must impose the directive in full compliance with section 206.

43. Neither may the Commission impose on ODEC the burden of proof reflected in Opinion No. 499 footnote 64 pursuant to its FPA section 205 authority. Footnote 64 prescribes that ODEC's next section 205 filing must either (i) modify its demand cost allocation method to match PJM's method or (ii) explain why it *would **not** be* just and reasonable to do so. This reflects a subtle but significant variation on the burden of proof ODEC otherwise would be required to satisfy for a section 205 filing—which would be for ODEC to affirmatively prove why any demand cost allocation it proposed *would be* just and reasonable. And in the event ODEC's proposed methodology does not match the PJM methodology, footnote 64 requires ODEC to demonstrate in the first instance that the PJM methodology is somehow unjust and unreasonable. Only after satisfying this

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[35] The Commission is not required to satisfy these requirements before it reviews rate revisions filed pursuant to FPA section 205, but in that circumstance the Commission only may either accept or reject the proposed revisions. *See, e.g.*, *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 183 (D.C. Cir. 1986). *See also Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993).

[36] *See generally New Dominion Energy Coop.*, 110 FERC ¶ 61,275 (2005) (confirming underlying filing made/Opinion No. 499 proceeding conducted under FPA section 205).

threshold requirement would ODEC be permitted to affirmatively prove its proposed methodology is just and reasonable—which is all section 205 requires. It follows that footnote 64 imposes a significantly higher burden of proof on ODEC than section 205 requires.

44. This circumstance indicates the Commission intended to establish a presumption in favor of the previously-accepted PJM methodology. But while the Commission clearly has FPA authority to specify the use of a particular ratemaking methodology (such as the PJM demand cost allocation methodology) so long as the Commission's preference for it is not arbitrary and capricious (*see, e.g., Southern California Edison Co. v. FERC*, 717 F.3d 177, 182 (D.C. Cir. 2013)), that authority must be exercised pursuant to FPA section 206.[37] It cannot be exercised in the context of a section 205 proceeding to impose on ODEC a higher burden of proof than section 205 imposes.[38] I therefore find and conclude ODEC is not required to satisfy the burden of proof specified in Opinion No. 499 footnote 64. Instead ODEC bears the section 205 burden to affirmatively prove its proposed demand cost allocation methodology is—in itself—just and reasonable. In the event ODEC satisfies that burden, section 205 requires the Commission to accept ODEC's proposed methodology despite the circumstance that the Commission might prefer the PJM methodology. *See, e.g., Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 9

[37] Contrary to ODEC's apparent concern (*see* ODEC IB at 9), Opinion No. 499 footnote 64 does not indicate the Commission considers the PJM methodology "*more* just and reasonable" than alternative methodologies. As I am obliged to underscore with distressing frequency, "*more* just and reasonable" is a fallacious concept that fundamentally misconstrues the just and reasonable standard. A rate or rate element either is just and reasonable or it is not. And since more than one alternative may be just and reasonable under any specific circumstances, all a Commission presumption in favor of a particular alternative establishes is that the Commission has determined that alternative is just and reasonable. Any presumption in favor of it may be overcome only by demonstrating in the first instance that it is *not* just and reasonable. It cannot be overcome by comparison to an allegedly (or even demonstrably) superior alternative—i.e. the "*more* just and reasonable" alternative the fallacy presumes. Section 205 only requires ODEC to affirmatively prove its proposed demand cost allocation methodology is just and reasonable in itself. If ODEC satisfies this requirement, the similarly just and reasonable PJM methodology cannot be used in comparison to undermine ODEC's methodology—even if the PJM methodology is demonstrably superior or preferable some respect(s).

[38] To be clear, nothing in Opinion No. 499 suggests the Commission knowingly was attempting to exceed its section 205 authority when it imposed the footnote 64 directive/burden of proof.

(D.C. Cir. 2002) (citing section 205 (e); *Cities of Campbell v. FERC*, 770 F.2d 1180, 1184-85 (D.C. Cir. 1985); *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 952-53 (D.C. Cir. 1983)).

II. Whether ODEC has met its burden of proof to demonstrate that its proposed changes to its rate schedule are just, reasonable and not unduly discriminatory or preferential

A. Demand Charges

45. ODEC's previously-effective formula rate (Prior Formula Rate) recovered all of ODEC's demand costs[39] from its Class A member distribution cooperatives (Member Cooperatives) through a single demand rate calculated under a "12 coincident peak" methodology.[40] The Revised Formula Rate recovers ODEC's demand costs through three (3) discrete rates designated Transmission Service, Regional Transmission Operator (RTO) Capacity Service and Remaining Owned Capacity Service.[41]

46. The Transmission Service rate subsumes both a Transmission Service Rate and a Distribution Service Rate. Any Member Cooperative receiving transmission service from ODEC at a "transmission voltage" (69 kV or above) service point pays the Transmission Service Rate. Any Member Cooperative receiving transmission service from ODEC at a "distribution voltage" (below 69 kV) service point pays the Distribution Service Rate. The Transmission Service rates are allocated based on each Member Cooperative's contribution to the single coincident peak for the previous PJM Transmission Year

[39] Demand costs consist primarily of fixed costs that typically do not vary based on use. Demand costs specified in both the Prior Formula Rate and the revised formula rate reflected in the September 30, 2013 filing (Revised Formula Rate) include ODEC's fixed costs associated with capacity purchases, transmission, distribution, depreciation, nuclear decommissioning, amortization, taxes, interest, administrative & general expenses and margins. Ex. ODC-3 at 19-20. The other major cost category included in both the Prior Formula Rate and the Revised Formula Rate is energy, which varies based on use and includes ODEC's fuel (coal, natural gas, nuclear) costs and bulk power purchase costs. Ex. ODC-1 at 7-8.

[40] The 12 coincident peak (12 CP) methodology derived each Member Cooperative's demand rate based on the member's peak demand over a twelve (12) month period, coincident with its monthly service zone peak. Ex. ODC-2 at 8.

[41] ODEC, Bear Island and Trial Staff routinely state ODEC "proposes . . ." when they reference elements of the Revised Formula Rate. Everything ODEC proposed in the September 30, 2013 filing went into effect (subject to refund) January 1, 2014.

(November 1—October 31) in each of the four (4) PJM Transmission Zones in which ODEC receives transmission service.[42]

47. RTO Capacity Service is a proxy rate derived as a four (4) year average of the applicable PJM capacity prices. RTO Capacity Service charges are allocated based on each Member Cooperative's contribution to total load in the five (5) peak demand hours (5 CP) over the previous PJM Capacity Year (June 1—May 31).[43] Ex. ODC-2 at 10. The RTO Capacity Service rate incorporates a direct assignment of capacity "add-backs"—which are a consequence of load curtailments by participants in PJM's Economic and Emergency Demand Response programs.[44]

48. The Remaining Owned Capacity Service rate recovers any demand costs not recovered under the Transmission Service Rate or the RTO Capacity Service rate, but primarily is intended to recover demand costs associated with ODEC-owned generating/transmission assets. Remaining Owned Capacity Service charges are allocated under the same 12 CP methodology the Prior Formula Rate used to recover all of ODEC's demand costs.

49. The most controversial demand charge elements are included in the RTO Capacity Service rate. But the Joint Stipulation of Issues sub-categorizes these elements with such specificity that it is unwieldy to present and analyze them on an item-by-item basis.[45] Accordingly, I address some of the elements together here (and throughout this Initial Decision).

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[42] These PJM Transmission Zones are the Virginia Electric and Power Company Zone, the Delmarva Power and Light Company Zone, the Allegheny Power Zone and the AEP East Zone.

[43] PJM determines the 5 CP hours based on the highest total loads across the entire PJM Region. Ex. ODC-8 at 7.

[44] PJM Demand Response program participants may nominate a load quantity they agree not to take during peak load hours at PJM's request. These voluntary "load drops" help PJM satisfy system demand in those hours. Since PJM has no assurance load drops in one year will be repeated the next year, PJM must "add back" those quantities when it calculates the next year's total system capacity requirements. PJM charges ODEC the capacity demand costs associated with any add-backs allocated to ODEC. The Prior Formula Rate socialized those costs among the Member Cooperatives.

[45] The participants' post-hearing briefs confirm they encountered the same difficulty.

(1) RTO Capacity Service

a. Add-Backs

i. As a result of ODEC's proposal, some costs are socialized and others are not. Is this proposed different treatment unjust, unreasonable, unduly discriminatory or preferential, specifically with respect to ODEC's proposal to allocate and bill add-backs to the Member Cooperative(s) whose end-use customers' participation in PJM demand response programs cause ODEC to incur the add-backs from PJM?

ii. Has ODEC met its burden of proof with respect to its add-back proposal, taking into account that it may impact demand response behavior?

iii. Should ODEC's proposal to allocate and bill add-backs to the Member Cooperative(s) whose end-use customers' participation in PJM demand response programs cause ODEC to incur the add-backs from PJM, on the basis of past usage when the pricing signals and [t]he new rate were not in effect, be allowed?

iv. Has ODEC met its burden of proof with respect to its proposal to use its proxy rate to charge for add-backs versus charging at actual costs?

Participant Positions

ODEC

50. ODEC explains that PJM uses a Reliability Pricing Model (RPM) to ensure it has adequate resources to satisfy its system-wide energy demand at all times. Based on PJM load forecasts, RPM employs an auction process conducted three (3) years in advance of each Delivery Year[46] to secure adequate resources to serve every Load Serving Entity (LSE) in the PJM Region throughout the Delivery Year. ODEC is a PJM Region LSE. It therefore is required to purchase the entire capacity requirement PJM establishes for it through RPM. ODEC also is required to offer any eligible ODEC-owned resources into RPM.

51. ODEC further explains demand response is a voluntary reduction in a customer's expected energy consumption in response to an energy price increase or incentive payment intended to reduce consumption. Demand response in the PJM energy market

[46] A Delivery Year runs from June 1st through May 31st of the following year.

commonly is described as "economic" demand response. Demand response in the PJM capacity market (i.e. RPM) commonly is described as "emergency" demand response. Participating demand responders (Demand Resources) compete against other Demand Resources through nominating auctions in both the economic demand response market and the emergency demand response market. Any Demand Resource PJM actually calls on to reduce its load—effectively providing PJM with an equivalent amount of capacity/ energy to serve other demands—receives a demand response payment from PJM. Every PJM LSE—including ODEC—funds these payments either by paying PJM a Locational Reliability Charge (for capacity payments) or (for energy payments) through payments for bulk power purchased in PJM energy markets.

52. ODEC continues to explain that PJM measures the total amount of capacity it has purchased for each PJM Zone[47] approximately six (6) months in advance of every Delivery Year. This comprises each Zone's Final Zonal Unforced Capacity (UCAP) Obligation—which reflects the total amount of capacity PJM actually purchased for each Zone. Each Zone's primary Electric Distribution Company (EDC) is responsible for allocating the Zone's Final Zonal UCAP Obligation among its customers in accordance with rules established by the primary EDC's regulators. These allocations constitute the customers' Peak Load Contributions (PLCs), which reflect each customer's share of its Zone's total capacity requirement. ODEC's Member Cooperatives operate in four (4) Zones, but while ODEC is an EDC, it is not the primary EDC in any of the four Zones. The primary EDC in each Zone therefore treats ODEC as a large single customer for PLC allocation purposes. ODEC then reallocates the four Zone PLC allocations among its Member Cooperatives. Each Member Cooperative, in turn, reallocates its PLC allocation among its end-use customers.

53. ODEC next explains the PJM demand response capacity add-back procedure, emphasizing add-backs impose additional capacity costs on LSEs with customers that provide demand response to PJM because the add-backs increase the LSEs' capacity obligations/costs for the following Delivery Year. ODEC notes, however, that not all demand response program participation generates add-backs. While emergency (capacity) demand response in any of the 5 CP hours in one Delivery Year necessarily results in both capacity and energy add-backs for the following Delivery Year, hour-to-hour economic (energy) demand response is optional. Thus, a Demand Resource may avoid add-backs simply by declining to provide economic demand response in the 5 CP hours (and foregoing the relatively small payments it would receive for reducing consumption in those few hours). As an example, ODEC explains that Bear Island participated in both the PJM economic and emergency demand response programs in

[47] A PJM Zone is a defined area within the PJM Region used for planning purposes. There are twenty (20) Zones in the PJM Region. Ex. ODC-10.

2014. But had Bear Island participated only in the economic (energy) program, it would have received most of its total (economic plus emergency) 2014 demand response payments from PJM without generating any add-backs.

54. Turning to the Revised Formula Rate's add-back direct assignment, ODEC notes the Prior Formula Rate socialized the cost associated with add-backs among all Member Cooperatives. Thus, the Prior Formula Rate required all Member Cooperatives to pay a share of the add-back cost (i) whether or not their customers generated any of the cost and (ii) despite the fact that they already paid their full shares of PJM's demand response program costs through PJM capacity and energy charges. The Prior Formula Rate therefore not only failed to reflect cost causation, but also required the Member Cooperatives to double pay PJM demand response costs. Conversely, the Prior Formula Rate doubly benefitted end-use customers participating in the PJM demand response programs by permitting them to receive substantial payments for their participation while paying only a small fraction of the additional (add-back) cost their participation imposed. ODEC states the Revised Formula Rate corrects the Prior Formula Rate's unreasonable add-back allocation by directly assigning add-backs to the Member Cooperative(s) whose end-use customer(s) actually cause them. It maintains this direct assignment more closely aligns with the manner in which PJM assigns add-backs to ODEC, and also is consistent with the manner in which wholesale LSEs assign add-backs to their customers.

55. ODEC disputes Bear Island's contention that directly assigning add-backs constitutes undue discrimination because it "cherry picks" a single rate component while continuing to socialize other demand/energy-related costs that also could be directly assigned. ODEC first emphasizes the Revised Formula Rate continues the Prior Formula Rate's direct assignment of the Excess Facilities Charge, Power Factor Correction Charges and the Transition Fee. Any claim that the Revised Formula Rate singles out add-backs for unique treatment therefore is incorrect. In addition, ODEC asserts direct assignment is particularly appropriate for add-backs because, in contrast to costs properly socialized through the formula rate, add-backs are not a consequence of ODEC's obligation to provide service to its Member Cooperatives under the WPCs. ODEC emphasizes the Member Cooperatives have agreed to share most costs reflected in the Revised Formula Rate in exchange for the shared benefits they receive. Insofar as add-backs are concerned, however, the principal benefit accrues solely to end-use customers—who receive 100% of any demand response payments from PJM. ODEC concedes the Member Cooperatives might receive at least some benefit from end-use customer demand response, but again underscores the Member Cooperatives already pay their full shares of PJM's demand response program costs through PJM capacity and energy charges.

56. ODEC characterizes any Bear Island claim that directly assigning add-backs will have a negative impact on demand response as completely speculative. ODEC asserts the evidence demonstrates directly assigning add-backs simply corrects an unreasonable and

unduly discriminatory Prior Formula Rate subsidy. It maintains direct assignment has not negatively impacted demand response and should not reasonably be expected to do so. As confirmation, ODEC notes Bear Island admits it did not modify its participation in the PJM demand response programs even after it knew ODEC intended to directly assign any consequent add-backs.

57. Turning to RTO Capacity Service rate reliance on 2013 billing determinants (including add-backs) to establish the rate, ODEC states it understands Bear Island opposes this aspect of the rate, but Bear Island's position is otherwise unclear. ODEC offers that Bear Island initially argued add-back charges should not be imposed (i) before January 2015 if the proxy rate is used to calculate the charges or (ii) before June 2015 if actual PJM add-back charges to ODEC are used. But ODEC states Bear Island now argues add-backs should be entirely disallowed (rather than deferred from the Revised Formula Rate's January 1, 2014 effective date) because the add-back component violates both the filed rate doctrine and Commission policy ensuring adequate notice of rate changes. Whatever its position, Bear Island is wrong on all counts according to ODEC.

58. ODEC submits neither the rule against retroactive ratemaking nor the filed rate doctrine prohibits basing rates on prior use. It maintains the add-back direct assignment is not a surcharge to recoup past losses, as Bear Island alleges. It therefore does not constitute retroactive ratemaking. Instead, the add-back direct assignment relies on prior billing determinants to set future rates—a methodology that matches PJM's capacity cost allocation on ODEC's account. Focusing on the filed rate doctrine, ODEC protests that Bear Island mischaracterizes the 2014 add-back charge as a charge for service rendered in 2013, when the Prior Formula Rate was in effect. ODEC distinguishes that scenario from the Revised Formula Rate reliance on 2013 add-backs to establish a rate for service to be rendered in the 2014 Delivery Year.

59. Insofar as notice is concerned, ODEC stresses it had no obligation to provide any notice beyond what the FPA and Commission regulations require for rate filings. ODEC argues the fact that it indisputably satisfied these is requirement overrides any Bear Island allegation that inadequate notice of the Revised Formula Rate's add-back provision rendered the provision unjust and unreasonable because Bear Island had no meaningful opportunity to modify its demand response behavior in time to avoid or mitigate its 2014 add-back liability under the new provision. In addition, ODEC maintains the record belies Bear Island's claim that it had no knowledge of the add-back proposal until September 19, 2013. ODEC contends the evidence demonstrates Rappahannock Electric Cooperative (REC), the Member Cooperative serving Bear Island, provided materials detailing ODEC's Revised Formula Rate (including the add-back provision) to Bear Island on July 29, 2013—the same day REC filed the materials in a retail rate proceeding before the Virginia State Corporation Commission (VSCC). This is important in ODEC's view because it undermines Bear Island's claim that ignorance of its potential 2014 add-back liability deprived Bear Island of any opportunity to mitigate the liability.

ODEC suggests Bear Island simply could have declined to settle its 2013 Delivery Year load reductions with PJM, foregoing its 2013 demand response payments and the consequent 2014 add-backs. ODEC argues Bear Island's notice complaint rings hollow in any event because Bear Island continued to participate in the PJM demand response programs throughout the 2014 Delivery Year with full knowledge its participation could generate further add-back liability in 2015.

60. ODEC defends using the four (4) year proxy rate rather than actual costs to impose add-back charges because, as ODEC claims to demonstrate under Issue II (A)(1)(b)(i), the proxy rate is otherwise just and reasonable to use for RTO Capacity Service and it is more efficient to use the proxy rate for every RTO Capacity Service component—including add-backs.

Bear Island

61. Bear Island submits as a threshold principle that ODEC cannot establish the Revised Formula Rate is just and reasonable on the ground that the Member Cooperatives are ODEC's only customers and those customers agreed to the tariff revisions incorporated into the Revised Formula Rate. Bear Island complains any such argument implies ODEC and the Commission may ignore end-use customer impacts.

62. Turning to specifics, Bear Island maintains the RTO Capacity Service rate is unjust, unreasonable and unduly discriminatory because it directly assigns an add-back charge to Bear Island. Bear Island protests that the add-back charge is the only directly assigned demand charge in a rate structure otherwise predicated on socialized costs. It further protests that the direct assignment does not reflect actual costs because the proxy rate makes it likely Bear Island will overpay (on average) for several years the add-back charges attributable to Bear Island's participation in the PJM demand response programs. This selective direct assignment conflicts with Commission precedent on Bear Island's account.

63. Bear Island highlights a number of other large costs it maintains the Revised Formula Rate also could socialize but does not. It suggests this circumstance supports an inference that the ODEC Board of Directors (Board) privately conspired to "cherry pick" the add-back charge for direct assignment to Bear Island in order to reap rate reductions for the Member Cooperatives represented by the Board. According to Bear Island, Commission precedent only supports direct cost assignment when *all* directly assignable costs are directly assigned; it prohibits selecting a single cost for direct assignment. In addition, the RTO Capacity Service rate doesn't directly assign actual add-back costs. It charges add-backs at a proxy rate that socializes cost differences among four (4) PJM Zones over four (4) years. Bear Island complains the proxy rate results in a $3.2 million add-back charge to Bear Island in 2014 when PJM's actual 2014 add-back charge to ODEC for Bear Island's demand response was only $2.5 million. Further, ODEC offered

no explanation why it is just and reasonable to charge add-backs at the proxy rate—except that it is more efficient to allocate add-backs the same way the RTO Capacity Service rate allocates every other component. Bear Island contends this rationale fails to satisfy ODEC's burden of proof, particularly when ODEC must convert the actual add-back charge it receives from PJM into the more complex proxy rate to allocate it. Moreover, insofar as Bear Island's add-back liability is concerned, the RTO Capacity Service rate does not provide the rate stability ODEC claims.

64. Bear Island argues directly assigning add-backs is unduly discriminatory as well—at least insofar as Bear Island is impacted. Bear Island first compares the add-back charges REC allocated to its Bear Island service point in 2014 with the socialized add-back charges REC allocated to the Bear Island service point in 2013, emphasizing the 2014 allocation is much higher. Bear Island further compares this increase to the approximately 0.4% increase across all Member Cooperatives that would have resulted if ODEC had continued to socialize the 2014 add-backs. Bear Island contends these comparisons demonstrate unduly discriminatory impacts on Bear Island. Bear Island also contends the evidence demonstrates ODEC systematically considered Bear Island separately from REC and the other Member Cooperatives as ODEC sought ways to change its rate design without significantly impacting the Member Cooperatives. It emphasizes all three (3) impact analyses ODEC performed prior to the September 30, 2013 filing illustrate the impacts on only one end-use customer—Bear Island—and also illustrate the impacts on REC with Bear Island removed. Bear Island observes only the third of these analyses illustrates the impact of directly assigning add-backs to Bear Island at the proxy rate, which is multiple times the impact on any Member Cooperative.

65. Bear Island dismisses what it characterizes as ODEC's attempts to justify its discriminatory RTO Capacity Service rate design in responsive testimony and exhibits. It first distinguishes the three (3) other costs ODEC directly assigns (Excess Facilities Charge, Power Factor Correction Charges, Transition Fee) from add-backs because add-backs represent a power supply capacity cost and the other costs do not. It also stresses the Excess Facilities Charge, Power Factor Correction Charges and Transition Fee are relatively minor compared to the $3.2 million 2014 add-back charge imposed on Bear Island. Next, Bear Island disputes ODEC's justification that add-backs are unique, countering that PJM treats add-backs the same as any other load. Bear Island interprets ODEC's observation that Bear Island does not share any of its demand response revenue to suggest it should, which Bear Island considers a ludicrous proposition. Last, Bear Island argues the circumstance that PJM develops PLCs using add-backs does not support the RTO Capacity Service add-back because the RTO Capacity Service does not follow the PJM rate design.

66. Bear Island maintains ODEC concedes charging add-backs at the proxy rate is a demand response disincentive. Worse, in Bear Island's narrative, add-backs punish it for engaging in permissible and beneficial demand response behavior. Bear Island also

emphasizes it incurs significant capital, personnel and logistics costs in order to provide demand response. It protests that assigning add-backs on top of those costs imposes an undue burden on its beneficial demand response activity.

67. Bear Island also argues the RTO Capacity Service rate violates the filed rate doctrine. It stresses this is because add-backs constitute a demand surcharge on capacity fully paid in the prior year, not because the rate relies on prior use to set future rates. Bear Island first explains the Prior Formula Rate in effect throughout 2013 charged all demand costs on a prospective basis—a customer would incur (or avoid) demand charges based on its use in the monthly CP hour. This rate design promoted use reductions in the CP hour of each month. Bear Island states it responded to this price signal by curtailing its use in a number of hours in an effort to reduce its demand charges. It further states it paid all the charges it was required to pay—and all charges REC and ODEC were entitled to collect—for service at the Bear Island service point in 2013. In sum, Bear Island was billed in accordance with the filed rate, paid REC what the filed rate required, and ODEC accepted the payment passed on by REC. Bear Island contrasts this scenario with 2014. According to Bear Island, the Revised Formula Rate imposes an additional add-back charge in 2014 for the service Bear Island took and paid for in 2013. The add-back restates Bear Island's 2013 load as if Bear Island had not reduced its load. Bear Island claims the 2014 add-back charge violates the filed rate doctrine because it imposes a huge 2014 surcharge on Bear Island's 2013 use.

68. Turning to notice, Bear Island first emphasizes the Prior Formula Rate gave no indication Bear Island might be charged a second time in 2014 (and on a different basis) for its 2013 use. Bear Island distinguishes this 2013/2014 scenario from 2014/2015. While it maintains directly assigning 2015 add-backs would remain inappropriate for other reasons, Bear Island concedes any such assignment would not violate the filed-rate doctrine because ODEC's September 30, 2013 filing constituted adequate notice to Bear Island insofar as its 2014 demand response is concerned. Insofar as 2013/2014 is concerned, however, Bear Island reiterates that ODEC did not file the Revised Formula Rate—thus satisfying the FPA section 205(d) sixty (60) day notice requirement—until September 30, 2013. Bear Island submits that despite ODEC's "tortured" efforts to demonstrate indirect notice to Bear Island prior to that date, September 30, 2013 is the earliest date on which Bear Island reasonably could be considered to have been on notice of the Revised Formula Rate's add-back proposal. As a consequence, Bear Island had no prior notice that its July 2013 demand response could result in add-backs. In addition, Bear Island emphasizes the Commission considered section 205's sixty (60) day notice requirement insufficient for demand response purposes when it approved PJM's initial proposal to include add-backs in determining LSE peak load requirements in 2011. Bear Island submits its 2013 demand response is analogous to the 2011 PJM scenario.

69. Bear Island states ODEC admits it gave Bear Island no advance notice of the add-back proposal. And insofar as ODEC claims the July 29, 2013 REC filing with

VSCC constituted constructive notice, Bear Island responds: (1) the filing occurred after the Bear Island demand response that generated the 2014 add-backs; (2) REC expressly stated in a data response that the filing did not make any change to the "LP-2" rate under which REC served Bear Island; and (3) upon inquiry from Bear Island, the REC representative in charge of Bear Island's account assured Bear Island the filing reflected no change to the LP-2 rate; and (4) the earliest notice Bear Island received from REC and ODEC indicating Bear Island could be directly assigned 2014 add-backs came in the course of a (delayed) September 19, 2013 meeting. Bear Island dismisses ODEC's suggestion that Bear Island could have avoided the add-backs by declining to settle its curtailments with PJM, noting the suggestion presumes such procedure was appropriate, that Bear Island itself submitted the curtailments to PJM for payment, and that Bear Island knew the add-back consequences of doing so—none of which is true. Bear Island also dismisses ODEC's assertion that Bear Island's notice complaints ring hollow in consideration of its continued participation in the PJM demand response programs throughout the 2014 Delivery Year. First, this is no defense to the Revised Formula Rate's violation of the filed rate doctrine insofar as Bear Island's 2013 use is concerned. Moreover, Bear Island states it was compelled to continue to participate in the 2014 demand response programs to offset the unexpected costs the 2014 add-backs imposed.

70. Bear Island contends it is unjust and unreasonable to use a four (4) year proxy rate rather than actual costs to impose any add-back charges because, as Bear Island claims to demonstrate under Issue II (A)(1)(b)(i), the proxy rate is otherwise unjust and unreasonable to use for RTO Capacity Service.

Trial Staff

71. Trial Staff states ODEC has adequately supported its proposal to allocate and bill add-backs to any Member Cooperative whose end-use customer participation in the PJM demand response programs causes ODEC to incur add-backs from PJM. It agrees ODEC incurs capacity-related costs ODEC must recover from customers, and those costs include add-backs. It also agrees directly assigning add-backs to the Member Cooperative whose end-use customer caused the add-back follows cost causation.

72. Trial Staff explains that add-backs ensure PJM will have sufficient generating capacity in its annual capacity markets by restoring load to ODEC's Delivery Year capacity obligation that was reduced in the previous Delivery Year by demand response. It adds that while Bear Island may interrupt its own service, RTO Capacity Service itself is not interruptible. It notes Opinion No. 499 found Member Cooperative demand costs relate to service that is firm and non-interruptible. Trial Staff also notes an ODEC member cooperative at the time (Northern Virginia Electric Power Cooperative or NOVEC) raised the same undue discrimination concern in the Opinion No. 499 proceeding that Bear Island raises here. On Trial Staff's account, the Commission determined NOVEC's concern was unwarranted because ODEC had a contractual right

under a demand side management agreement with (REC customer) Bear Island to interrupt Bear Island's load. Trial Staff explains this allowed ODEC to control ODEC's (and by extension NOVEC's) add-back exposure by ordering Bear Island to interrupt. Trial Staff further explains ODEC no longer has a contract with Bear Island that allows ODEC to control Bear Island's load.

73. Trial Staff takes no position with respect to whether the potential impact on demand response behavior affects ODEC's add-back direct assignment burden of proof. It nevertheless notes the Commission has allowed PJM to include add-backs in its PLC calculation. It further notes the Commission found this is consistent with the purpose of capacity procurement in PJM. Trial Staff therefore states it appears the Commission has concluded adds-backs have an acceptable impact on demand response.

74. Trial Staff does not oppose using past period billing determinants to calculate add-backs. It states ODEC is correct that this procedure follows cost causation, given that PJM's capacity cost allocation methodology also uses past billing determinants to calculate future charges. But Trial Staff opposes what it describes as the mismatch created by using prior period billing determinants to calculate add-back charges that are then allocated using a proxy rate instead of actual costs.

75. Trial Staff considers ODEC's notice arguments "troubling" in light of what it describes as ODEC's "eleventh hour" presentation of the underlying facts at hearing. Trial Staff submits ODEC properly established pre-filing notice to its Member Cooperatives, but not to Bear Island. It protests that ODEC introduced evidence inappropriately withheld from Bear Island and Trial Staff until hearing—violating evidentiary filing deadlines established in the procedural schedule—and this "trial by ambush" deprived Bear Island and Trial Staff of the opportunity to conduct discovery, analyze, testify and advise the Commission about those exhibits.

76. General support for add-back direct assignment notwithstanding, Trial Staff opposes ODEC's proposal to use the RTO Capacity Service proxy rate rather than actual costs to impose any add-back charges because, as Trial Staff claims to demonstrate under Issue II (A)(1)(b)(i), the proxy rate does not follow cost causation and may over-collect add-back costs.

Analysis

77. As a threshold matter, I reiterate that ODEC is not required to satisfy the burden of proof specified in Opinion No. 499 footnote 64. Instead ODEC must satisfy the FPA section 205 burden to affirmatively prove its proposed demand cost allocation methodology is—in itself— just, reasonable and not unduly discriminatory, preferential

or otherwise unlawful. In the event ODEC satisfies that burden, section 205 requires the Commission to accept ODEC's proposed methodology despite the circumstance that the Commission might prefer the PJM (or other) methodology.[48] See Paragraph 44 *supra*.

78. The circumstance that section 205 precludes Opinion No. 499 footnote 64 from imposing a compliance directive or elevated burden of proof on ODEC in this proceeding does not preclude relying on Opinion No. 499 for other purposes. Opinion No. 499 expresses a clear Commission preference for ODEC to match its demand cost allocation to PJM's method. Moreover, the PJM method is Commission-approved—hence presumptively just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. To the extent the RTO Capacity Service rate add-back provision matches PJM's add-back method, it follows that the match constitutes support for finding the RTO Capacity Service rate add-back provision is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful as well.[49]

79. The previously referenced common-use dictionary defines "match" as "to cause to correspond" and "to harmonize with". *Match Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/match (last visited Apr. 10, 2015). Accordingly, while the "match" benchmark expressed in Opinion No. 499 would not

[48] In the event the Commission disagrees with my analysis of the burden of proof implications arising from the interplay among FPA sections 205 & 206 and the Commission order initiating the Opinion No. 499 proceeding, I find and conclude ODEC made no apparent attempt to satisfy the second prong of the burden of proof specified in Opinion No. 499 footnote 64—that is, ODEC did not explain why it would not be just and reasonable for ODEC to modify its demand cost allocation method to match PJM's demand cost allocation method in the event ODEC failed to do so. ODEC instead attempted to satisfy the FPA section 205 burden to affirmatively prove its proposed demand cost allocation methodology is itself just, reasonable and not unduly discriminatory, preferential or otherwise unlawful—which my analysis indicates is the applicable standard.

[49] Any such match would not *in itself* establish the RTO Capacity Service rate add-back provision is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful, but it would be a strong supporting consideration. Similarly, while unanimous Member Cooperative support for the add-back provision (and the Revised Formula Rate as a whole) buttresses a conclusion that the provision/Revised Formula Rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful—particularly in light of ODEC's not-for-profit cooperative structure—unanimous Member Cooperative support does not in itself establish the provision or the Revised Formula Rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful.

require ODEC's RTO Capacity Service rate add-back method to be identical to PJM's method, it would require ODEC's method to closely correspond/harmonize with the PJM method. *Accord* Opinion No. 499 at P 41 (quoting *Alabama Electric Coop., Inc. v. FERC*, 684 F.2d 20, 26 (D.C. Cir. 1982)).

80. The record confirms PJM directly allocates to ODEC in the current Delivery Year any add-backs attributable to demand response provided by a Member Cooperative's end-use customer(s) in the previous Delivery Year. Ex. ODC-2 at 13-15; Ex. ODC-8 at 2-3, 8, 12-13; Ex. S-1 at 22-24. Since the RTO Capacity Service rate add-back provision simply reallocates—i.e. passes through—PJM's add-back allocation to ODEC to any Member Cooperative(s) whose end-use customer demand response was responsible for the add-back(s),[50] the RTO Capacity Service rate add-back provision matches the PJM add-back method in this respect. And since (i) the PJM add-back allocation to ODEC is based on actual demand response provided in the previous Delivery Year—i.e. prior year billing determinants—and (ii) ODEC simply passes through the PJM allocation, the RTO Capacity Service rate add-back provision matches the PJM add-back method in this respect as well. In addition, since both the PJM method and the RTO Capacity Service rate add-back provision allocate capacity add-backs to the entity responsible for causing them (from the PJM/primary EDC and ODEC perspectives), both methods allocate add-backs in a manner that accurately tracks cost causation. Opinion No. 499 therefore supports a conclusion that the RTO Capacity Service rate add-back provision is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in these three (3) respects. But while PJM and the primary EDCs allocate add-backs to ODEC at actual cost, the RTO Capacity Service rate add-back provision allocates add-back costs to ODEC Member Cooperatives through a proxy rate that does not match the actual add-back capacity charge PJM and the primary EDCs impose on ODEC in any Delivery Year. Opinion No. 499 consequently fails to support a conclusion that the RTO Capacity Service rate add-back provision is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in this respect.

81. As previously explained, the Prior Formula Rate socialized the cost associated with add-backs among all Member Cooperatives. Thus, the Prior Formula Rate required

[50] Bear Island routinely suggests ODEC directly assigns capacity add-backs to Bear Island and directly imposes the resulting costs on Bear Island. That is inaccurate. There is no contractual relationship between ODEC and Bear Island, and ODEC provides no service to Bear Island. ODEC provides service only to Member Cooperatives under the WPCs. Accordingly, ODEC directly assigns any capacity add-backs attributable to Bear Island's demand response to REC, and charges REC the resulting costs, under the ODEC/REC WPC. REC then directly assigns/charges the add-backs to its end-use retail customer Bear Island.

each Member Cooperative to pay a share of any annual add-back costs (i) irrespective of whether its end-use customers actually generated any of the cost by providing demand response and (ii) despite the fact that each Member Cooperative already paid its full indicated share of PJM's demand response program costs through PJM capacity and energy charges. Ex. ODC-8 at 4, 6-7. ODEC essentially argues it determined the Prior Formula Rate had become unjust, unreasonable and unduly discriminatory in these respects because socializing add-back costs among the Member Cooperatives not only imposed costs on them that they neither caused nor benefitted from, but also permitted end-users to profit from demand response while paying only a small fraction of the associated add-back costs. Put differently, the Prior Formula Rate provided a double demand response subsidy—one of which ODEC determined was just, reasonable and not unduly discriminatory and another that ODEC determined was unjust, unreasonable and unduly discriminatory. ODEC agrees it is just, reasonable and not unduly discriminatory for each Member Cooperative to continue to subsidize demand response through PJM capacity and energy charges because demand response produces certain system-wide benefits. *Id*. at 19. ODEC distinguishes these benefits from the financial benefit of demand response resulting in add-backs, which inure exclusively to the end-use customer providing the demand response. ODEC argues the RTO Capacity Service rate add-back provision is appropriate because it eliminates (through direct assignment) what ODEC determined to be an unjust, unreasonable and unduly discriminatory add-back subsidy in the Prior Formula Rate. It also argues the provision is just, reasonable and not unduly discriminatory because it accurately tracks cost causation and sends a significantly more accurate demand response price signal.

82. I find and conclude ODEC has satisfied the burden to affirmatively prove the RTO Capacity Service rate add-back provision is just, reasonable and not unduly discriminatory insofar as direct assignment is concerned. First, as Bear Island emphasizes, the record confirms ODEC conducted three (3) separate rate impact studies in anticipation of the September 30, 2013 filing. Ex. ODC-3 at 72-84; Ex. BI-5 **[CONTAINS PROTECTED MATERIAL]**; Ex. BI-22 **[PROTECTED]**; Ex. BI-23 **[CONTAINS PROTECTED MATERIAL]**; Tr. 468-470. The studies illustrate the rate impacts of various filing alternatives on each Member Cooperative. While each study illustrates the specific rate impacts on REC with its end-use customer Bear Island broken out, the third study also illustrates the rate impact on REC and Bear Island with directly assigned add-backs. Bear Island alleges the Bear Island break-outs demonstrate that ODEC and its Member Cooperatives privately conspired to discriminate against Bear Island for their own benefit, but there is no other evidentiary support for that allegation.[51]

[51] Bear Island emphasizes it was not privy to the rate impact studies or the ODEC Board meetings considering what rate structure ultimately to propose in the September 30, 2013 filing, but that is unsurprising since Bear Island is not an ODEC Member Cooperative.

A more reasonable interpretation would be that in preparation for the September 30, 2013 filing ODEC and the Member Cooperatives simply had identified and were trying to reconcile the obvious circumstance that a single Member Cooperative (REC) and a single REC end-use customer (Bear Island) were responsible for ODEC's entire add-back allocation from PJM. Viewed from this perspective, it is difficult to conceive how ODEC could have *continued* to socialize add-back costs among all the Member Cooperatives without violating the "just, reasonable and not unduly discriminatory" rate requirements.

83. Moreover, direct assignment under the RTO Capacity Service rate add-back provision is not confined to REC and Bear Island. It applies to any Member Cooperative with an end-use customer whose demand response causes add-backs. The circumstance that Bear Island was the only end-use customer whose 2013 demand response actually resulted in an add-back direct assignment does not render direct assignment unduly discriminatory. Any other end-use customer whose demand response resulted in add-backs would have received—and will receive for 2014 and beyond—the same direct assignment. And if Bear Island is so uniquely situated within the entire ODEC service territory that it is the only end-use customer whose demand response possibly could result in add-backs, that unique status favors direct assignment all the more.

84. The immediately preceding point underscores the fact that directly assigning add-backs perfectly matches cost to causation. It also matches cost to benefit. As previously noted, the total financial benefit of any demand response resulting in add-backs inures exclusively to the end-use customer providing the demand response. Bear Island infers that ODEC suggests Demand Resources should share this benefit. That is incorrect. ODEC instead reasons that Demand Resources receive 100% of the financial benefit resulting from their demand response and, as a consequence, they also should pay 100% of any additional (i.e. add-back) costs incurred to generate the benefit. That reasoning is sound. Matching cost to causation and cost to benefit are fundamental ratemaking objectives.

85. In addition, an accurate correlation between expected costs and expected benefits is essential to appropriate demand response. A skewed price signal—i.e. one that artificially suppresses the indicated demand response cost by subsidizing it through socialization—necessarily will result in inappropriate demand response behavior, as it apparently has done in Bear Island's case. The record indicates the demand response price signal was so skewed under the Prior Formula Rate that Bear Island found itself compelled to continue to participate in PJM's demand response markets throughout the 2014 Delivery Year just to defray the 2014 add-back costs from its 2013 participation. Ex. BI-9 at 15 **[CONTAINS PROTECTED MATERIAL]**; Tr. 1408-1412, 1448-1453. It follows that contrary to Bear Island's speculation that directly assigning add-back costs

will be a disincentive to demand response,[52] the record confirms directly assigning the add-backs will encourage *appropriate* demand response by correcting the Prior Formula Rate's inaccurate cost signal.

86. Bear Island's protest that the add-back charge is the only directly assigned demand charge in a rate structure otherwise predicated on socialized costs is unpersuasive. The record confirms the Excess Facilities Charge, Power Factor Correction Charges and the Transition Fee also (i) were directly assigned under the Prior Formula Rate and (ii) continue to be directly assigned under the Revised Formula Rate. Ex. ODC-13 at 14-15; Ex. ODC-3 at 22-23, 55-56. Any claim that the Revised Formula Rate singles out add-backs for unique rate treatment therefore is incorrect.[53] More important, the underlying rationale for any Commission reluctance to accept a proposed change to a single formula rate component does not apply here. The rationale is that changing any single formula rate component may have unanticipated or unidentified consequences for other rate components. The formula rate consequence of directly assigning add-backs is clear: it eliminates an inappropriate demand response subsidy by precisely matching cost to causation. There is no other apparent rate consequence insofar as direct assignment itself is concerned.[54] Moreover, Bear Island has not identified any other formula rate provision(s) that directly assigning add-backs might impact or alter, as the November 19, 2014 order expressly permitted Bear Island to do. In addition, the circumstance that there may be other formula rate elements ODEC also could directly assign is immaterial. FPA section 205 granted ODEC the exclusive right to determine what to propose in the September 30, 2013 filing. And section 205 imposed a burden on ODEC to affirmatively prove the Revised Formula Rate it proposed—including the demand cost allocation

[52] Bear Island claims ODEC's demand response witness conceded this impact on cross-examination (*see* Tr. 1007-09), but Bear Island cannot legitimately rely on that testimony to support its position. Conversely, in light of the record evidence that Bear Island's 2013 add-backs compelled it continue to provide demand response in 2014 just to defray the 2013 add-back costs, any ODEC reliance on Bear Island's 2014 demand response behavior to demonstrate add-backs do not discourage demand response is questionable. *But see* Ex. ODC-20 **[PROTECTED]** (Bear Island offering different rationale for 2014 demand response program participation).

[53] The circumstance that the Excess Facilities Charge, Power Factor Correction Charges and the Transition Fee may be relatively minor compared to Bear Island's $3.2 million 2014 add-back charge is irrelevant. The issue is whether other charges are directly assigned.

[54] The yet unaddressed consequence of ODEC allocating directly assigned add-backs through the proxy rate is analyzed *infra*.

methodology—is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful *in itself*. Section 205 does not require ODEC to prove its proposed demand cost allocation methodology is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in comparison to an allegedly superior alternative. *See, e.g.*, *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (confirming FPA does not require rate methodology to be the only reasonable methodology, or even the most accurate one).

87. Neither the filed rate doctrine nor the prohibition against retroactive ratemaking precludes ODEC from calculating Bear Island's add-back charges based on the previous year's billing determinants. First, as previously discussed, PJM directly allocates to ODEC in the current Delivery Year any add-backs attributable to demand response provided by a Member Cooperative's end-use customer(s) in the previous Delivery Year. Ex. ODC-2 at 13-15; Ex. ODC-8 at 2-3, 8, 12-13; Ex. S-1 at 22-24. It is undisputed that PJM's entire 2014 add-back allocation to ODEC was attributable to Bear Island's 2013 demand response. Since the RTO Capacity Service rate add-back provision simply passes ODEC's add-back allocation through to REC (and REC passes it through to Bear Island), the add-back allocation to Bear Island is based on the same billing determinants as the PJM allocation to ODEC.[55] And since the PJM demand cost allocation method is Commission approved—preferred, in fact—it must be presumed to be just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. It therefore cannot violate the filed rate doctrine or the prohibition against retroactive ratemaking in any respect, including its reliance on previous Delivery Year billing determinants to allocate current Delivery Year add-backs. The same reasoning applies by extension to the RTO Capacity Service rate add-back provision's reliance on previous Delivery Year billing determinants.

88. Bear Island's contention that the RTO Capacity Service rate add-back provision violates the filed rate doctrine/prohibition against retroactive ratemaking because add-backs constitute a surcharge on capacity fully paid in the previous year is unconvincing.[56]

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[55] That is not to say the add-backs ultimately are *allocated* to REC and Bear Island on the same basis as PJM allocates them to ODEC. PJM allocates them at actual cost. ODEC allocates them through the proxy rate. See proxy rate analysis *infra*.

[56] Bear Island's actual position on this point is confusing. It seems to argue that relying on previous Delivery Year billing determinants to establish the current Delivery Year rate constitutes retroactive ratemaking/violates the filed rate doctrine. But it also argues the RTO Capacity Service rate add-back provision violates the filed rate doctrine/ prohibition against retroactive ratemaking *not* because the rate relies on prior use to set future rates, but because add-backs constitute a surcharge on capacity fully paid in the

(continued)

89. Bear Island correctly states the Prior Formula Rate in effect throughout 2013 charged all demand costs on a prospective basis. An end-use customer like Bear Island would incur (or avoid) demand charges based on its use in the monthly CP hour. Bear Island maintains the Prior Formula Rate promoted use reductions in the CP hour of each month, and Bear Island responded to this price signal by curtailing its use in a number of hours in an effort to reduce its demand charges. It submits that it paid all the charges it was required to pay—and all charges REC and ODEC were entitled to collect—for service at the Bear Island service point in 2013. In sum, Bear Island was billed in accordance with the filed rate, paid REC what the filed rate required, and ODEC accepted the payment passed on by REC. Bear Island contrasts this scenario with 2014, arguing the Revised Formula Rate add-back imposes an additional charge in 2014 for the service Bear Island actually took and fully paid in 2013. The add-back nevertheless restates Bear Island's 2013 load as if Bear Island had not reduced its use. Bear Island claims the 2014 add-back charge violates the filed rate doctrine because it imposes a large 2014 surcharge on Bear Island's actual 2013 use.

90. The principal fallacy in Bear Island's argument is that it conflates Bear Island's actual use/load with its allocated load for PJM *capacity planning* purposes (PLC). PJM uses the RPM in conjunction with load forecasts based on previous demand to secure adequate capacity and energy to satisfy its system-wide demand at all times. Of particular concern to PJM—and of particular relevance insofar as add-backs are concerned—are PJM system peak demand hours. Although PJM attempts to secure in advance sufficient capacity and energy to completely satisfy total system demand in those hours, and actually does secure the maximums it anticipates it will require, demand sometimes outstrips expectations. In those circumstances, it becomes necessary or more cost-effective for PJM to rely on demand response in lieu of purchasing additional capacity/energy to satisfy system demand. What is essential to understand, however, is that while demand response is fungible with additional capacity to satisfy demand, it is not additional capacity. It is *substitute* capacity. As such, any demand response capacity PJM uses to satisfy unanticipated/unplanned excess system demand already had been included in the total system demand PJM anticipated and actually secured the capacity to satisfy. If PJM fails to account for the fact that any current year demand response has the effect of *reducing* the current year's apparent actual capacity requirement by substituting some quantity of capacity that a Demand Resource was willing not to *use* in exchange for

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previous year. In addition, it argues the RTO Capacity Service rate add-back provision violates the filed rate doctrine only in the absence of notice. Whatever Bear Island's actual position, analysis demonstrates the RTO Capacity Service rate add-back provision violates neither the filed rate doctrine nor the prohibition against retroactive ratemaking.

a demand response payment, it will find itself short of the same amount of capacity in the following year(s). Capacity add-backs restore current year billing determinants to the proper level for purposes of establishing the following year capacity requirement.

91. Bear Island did not reduce its allocated 2013 PJM capacity requirement—i.e. its PLC—when it provided demand response to PJM. It simply reduced its real time use/ actual load in exchange for a demand response payment. But in doing so, Bear Island was not selling a portion of its 2013 capacity allocation back to PJM. It was selling its real time entitlement to *use* the capacity and energy it had been allocated so PJM could dedicate it to a different use. Bear Island's 2013 use reduction had absolutely no impact on its 2013 capacity allocation from PJM. The circumstance that Bear Island fully paid for its actual 2013 use therefore is irrelevant to either its 2013 or 2014 allocated capacity requirement/PLC. The 2014 PJM/ODEC/REC capacity add-back to Bear Island simply reconciles the differential between Bear Island's 2013 capacity allocation and its 2013 actual use (reduced through demand response) by restoring Bear Island's 2013 capacity billing determinants to what they were in the absence of Bear Island's demand response. This is required to establish an accurate 2014 Bear Island capacity requirement/ allocation because PJM has no assurance Bear Island will provide the same—indeed, any—quantity of demand response in 2014 that it provided in 2013. Ex. ODC-8 at 9-10. Thus, the 2014 add-backs do not impose a surcharge on Bear Island's 2013 use under the Prior Formula Rate. They simply restore Bear Island's 2013 capacity requirement billing determinants to establish its 2014 capacity requirement/allocation and its 2014 capacity demand charge under the Revised Formula Rate. It follows that the add-backs do not violate the filed rate doctrine/prohibition against retroactive ratemaking.

92. Turning to notice, no participant contends the September 30, 2013 Revised Formula Rate filing did not satisfy the sixty (60) day minimum notice requirements specified in FPA section 205 and Commission regulations. *See* 16 U.S.C § 824d (d) (2012); 18 C.F.R. § 35.3(a) (2014). I therefore find and conclude Bear Island had actual notice of its potential 2014 RTO Capacity Service rate add-back liability no later than September 30, 2013.

93. ODEC argues satisfying the statutory and regulatory notice requirements for a January 1, 2014 Revised Formula Rate effective date was all it was required to do. Accepting this premise, *arguendo*, the only thing it establishes is ODEC satisfied the statutory and regulatory notice requirements for the Revised Formula Rate's proposed January 1, 2014 effective date. The Commission accepted the Revised Formula Rate only "for filing," "subject to refund," and subject to the outcome of "a public hearing . . . concerning the justness and reasonableness of ODEC's proposed rate schedule revisions." *See* Hearing Order at ordering para. (A), (B). The whole purpose of the Commission accepting the Revised Formula Rate for filing subject to refund and the outcome of an evidentiary hearing was to satisfy the Commission's statutory responsibility to confirm ODEC's proposed rate schedule revisions were just and

reasonable in every respect. This includes *in application*. Ensuring that ODEC satisfied the statutory and regulatory notice requirements for a proposed January 1, 2014 effective date is but a single threshold element of that responsibility. ODEC therefore cannot rely on the circumstance that it satisfied the statutory and regulatory notice requirements for a January 1, 2014 effective date to establish that it necessarily is appropriate to pass add-back charges through REC to Bear Island as of that date. If some independent notice concern potentially renders the add-back charge unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful in application, ODEC bears a burden to affirmatively prove the add-back charge is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful despite the concern.

94. Bear Island complains it should not be required to pay add-back charges under the RTO Capacity Service rate add-back provision because the September 30, 2013 filing provided no opportunity (i.e. notice) for Bear Island to modify its 2013 demand response to avoid or minimize add-back charges.[57] ODEC counters that Bear Island had constructive notice of its potential add-back liability before September 30, 2013, and this advance notice provided a meaningful opportunity for Bear Island to mitigate or avoid any add-back liability.

95. The record confirms the 2013 demand response that resulted in Bear Island's 2014 add-backs all occurred on or before July 19, 2013. Ex. ODC-41 **[PROTECTED]**. Bear Island therefore had no prior statutory or regulatory notice that its 2013 demand response could result in add-backs. Bear Island concedes ODEC and REC advised Bear Island of its potential add-back liability under the soon-to-be-filed Revised Formula Rate in a September 19, 2013 meeting (*see* Ex. ODC-75 at 2; Tr. 1462), but that notice also was two (2) full months too late for Bear Island to act to avoid or reduce its 2014 add-back liability. In addition, REC's July 29, 2013 retail rate filing with VSSC—a copy of which the record confirms REC provided to Bear Island on July 29, 2013 (Ex. ODC-64 at 2)—came at least ten (10) days too late for Bear Island to change any of the demand response behavior resulting in the 2014 add-backs.[58]

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[57] Here again, it is unclear whether Bear Island's position is that it should be (i) excused from paying 2014 Delivery Year add-back charges because it had no notice, (ii) excused from paying 2014 and 2015 Delivery Year add-back charges because it had no notice, or (iii) only required to pay its share of the Prior Formula Rate's socialized add-back charges because the RTO Capacity Service rate add-back provision must be rejected as unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful.

[58] The REC filing indicated ODEC intended to change its capacity demand rate design.

96. ODEC essentially acknowledges Bear Island had no opportunity to modify its July 2013 demand response behavior, but suggests Bear Island still could have avoided the consequent 2014 add-backs by not settling the July demand response transactions with PJM—foregoing the demand response revenues, but also avoiding the associated add-backs. This suggestion is completely implausible. The record confirms the transactions were, in fact, settled in early August 2013 (Ex. ODC-71 **[PROTECTED]**)—i.e. a few days after Bear Island received the July 29, 2013 REC filing materials. But there is no evidence Bear Island actually reviewed the filing materials, let alone within those few intervening days or thoroughly enough to have discovered ODEC's subsequent filing could have a significant impact on Bear Island. In fact, the record confirms Bear Island specifically queried REC on July 15, 2013 about any impact the upcoming rate filing might have on Bear Island, and REC assured Bear Island the filing requested no substantial change to the tariff under which Bear Island was served. Ex. ODC-64 at 2. It follows that Bear Island was not aware of the potential consequence of settling its July demand response transactions with PJM. Further, the record establishes Enernoc, Bear Island's curtailment service provider at the time, was responsible for settling the transactions, not Bear Island. Tr. 1370-71. There is no evidence Eneroc knew anything about the REC filing, let alone the add-back consequence to Bear Island the filing implied. Last, the record indicates the "no settlement" gambit ODEC suggests may well be inconsistent with the PJM tariff, and definitely would have resulted (at minimum) in PJM imposing imbalance penalties on Bear Island. Tr. 1025-26, 1464-65. I therefore find and conclude Bear Island had absolutely no plausible means to avoid or mitigate the 2014 add-back liability the RTO Capacity Service rate add-back provision imposed on its 2013 demand response.[59] I further find and conclude this circumstance renders it unjust,

[59] ODEC cites *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 579 (D.C. Cir. 1990) for the proposition that a charge is not unjust or unreasonable simply because a customer cannot respond in some way that allows the customer to avoid it. ODEC IB at 26, n.117. My review of that opinion confirms it is inapposite to the circumstances presented here.

In fairness to ODEC, I am compelled to note I consider Trial Staff's criticism of what it describes as ODEC's "eleventh hour" "trial by ambush" insofar as ODEC's evidentiary presentation on the notice issue is concerned (Trial Staff RB at 10-11) to be completely baseless and a gross mischaracterization. My review of the hearing transcript confirms ODEC appropriately introduced at hearing the three (3) exhibits Trial Staff protests—two (2) without objection and the third as witness rehabilitation clearly within the confines of opposing counsel cross-examination. *See* Tr. 767, 1368, 1020. ODEC did not improperly withhold those exhibits until hearing or in any way violate the evidentiary filing deadlines established in the procedural schedule.

unreasonable and inequitable to directly assign any 2014 Delivery Year add-back charges to REC/Bear Island.[60]

97. The 2013 Bear Island demand response/2014 add-back scenario contrasts markedly with the 2014 Bear Island demand response/2015 add-back scenario. Bear Island admits it was fully aware of the add-back consequences of its 2014 Delivery Year demand response in time to completely avoid any 2015 add-back costs. Ex. BI-9 at 14; Tr. 1448-49. Further, while the record indicates Bear Island made a "difficult" financial decision to continue to offer demand response throughout the 2014 Delivery Year to offset/mitigate the financial impact of the 2014 add-back charges (Tr. 1449-1450), the record confirms the decision also was based on Bear Island's expectation that the Commission ultimately would not approve the RTO Capacity Service rate add-back provision. Ex. BI-9 at 14; Ex. ODC-20 **[PROTECTED]**; Tr. 1452-53. Bear Island cannot evade the consequences of its own financial and regulatory calculi/risk assessments by claiming the 2014 add-back charges *compelled* it to continue to incur 2015 add-back charges. And to the extent Bear Island's 2014 Delivery Year demand response maximized Bear Island's demand response revenue instead of optimizing it,[61] Bear Island cannot legitimately claim it was mitigating its 2014 add-back costs at all. In sum, I find and conclude it is just and reasonable to directly assign any 2015 add-back charges attributable to Bear Island's 2014 demand response to REC/Bear Island—but not at the proxy rate ODEC proposes.

98. ODEC defends using the four (4) year proxy rate rather than actual costs to impose add-back charges because, as ODEC claims to demonstrate under Issue II (A)(1)(b)(i), the proxy rate otherwise is just and reasonable to use for RTO Capacity Service, and it is more efficient to use the proxy rate for every RTO Capacity Service component. Deferring whether it is just and reasonable to use the proxy rate for RTO Capacity Service in general to subsequent analysis, using it to impose add-back charges in particular is not. That procedure is fundamentally inconsistent with the rationales supporting add-back direct assignment.

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[60] This determination is strictly confined to the *2014 direct assignment to Bear Island*. It may not be construed as a general determination that the RTO Capacity Service rate add-back provision itself is unjust, unreasonable or inequitable in any other respect.

[61] I.e. generating as much demand response revenue as possible irrespective of the associated add-back costs rather than balancing demand response revenue against the associated add-back costs to achieve the greatest *net* revenue. The record does not indicate which strategy Bear Island employed.

99. As previously explained, the RTO Capacity Service proxy rate is derived as a four (4) year average of the applicable PJM capacity costs allocated over the Member Cooperative footprints in four (4) different PJM Zones. RTO Capacity Service charges are allocated based on each Member Cooperative's contribution to total load in the 5 CP hours over the previous PJM Capacity Year, which covers the same June 1—May 31 period as a Delivery Year. PJM, in contrast, allocates Delivery Year add-backs at actual cost. So while ODEC receives an actual cost add-back allocation from PJM in each Delivery Year, any add-back cost "directly assigned" to REC (and ultimately to Bear Island) via the proxy rate necessarily will not mirror PJM's direct assignment to ODEC.

100. The primary rationale for any direct cost assignment is that it *perfectly* matches cost to causation. It is fundamentally inconsistent to achieve this perfection through add-back direct assignment, only to immediately sunder the perfect cost/causation symmetry by quasi-socializing the cost element through a proxy allocation. This is not direct cost assignment at all; it is direct *liability* assignment. Bear Island's 2013/2014 situation illustrates the point: Bear Island is held 100% liable for all 2013 capacity add-backs whether the associated costs are passed through in 2014 at actual cost or allocated through the proxy rate in 2014. But Bear Island is *billed* approximately $700,000 more in 2014 under the proxy rate than PJM billed ODEC. Ex. BI-7 at 30. Any such result is patently unjust and unreasonable. It is doubly so in the case of demand response add-backs because it sends an inaccurate price signal—i.e. one that substantially overstates the indicated demand response cost through quasi-socialization.

101. In summation, I find and conclude ODEC has satisfied its burden to affirmatively prove the RTO Capacity Service rate add-back provision is generally just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. I nevertheless find the provision unjust and unreasonable insofar as it uses the proxy rate to pass through add-back charges. Any capacity add-back charges allocated to ODEC by PJM should be directly assigned at actual cost to the Member Cooperative(s) whose end-use customer demand response caused the add-backs. This includes add-back charges allocated to REC (and Bear Island) during the 2015 Delivery Year and beyond. The add-back charges allocated to REC (and Bear Island) during the 2014 Delivery Year—attributable to Bear Island's 2013 demand response—should be allocated in accordance with the Prior Formula Rate.[62]

[62] Again, this is because the RTO Capacity Service rate add-back provision gave Bear Island no opportunity to avoid or mitigate its 2014 add-back liability, not because the provision violated the filed rate doctrine/prohibition against retroactive ratemaking.

b. Has ODEC shown that its proposed RTO Capacity Service is just, reasonable and not unduly discriminatory or preferential including its proposal to

i. base it on a proxy rate

ii. base it on 5 CP billing determinants on a calendar year basis instead of the corresponding PJM Capacity Delivery Year

Participant Positions

ODEC

102. ODEC reiterates that PJM determines ODEC's capacity obligation based on its contribution to the five (5) hourly coincident peaks (5 CP). ODEC explains the Prior Formula Rate nevertheless collected ODEC's capacity costs from its Member Cooperatives under a comprehensive 12 CP demand rate. ODEC further explains the Revised Formula Rate attempts to more closely align ODEC's demand cost allocation with the PJM method by allocating the RTO Capacity Service charge on the basis of each Member Cooperative's contribution to PJM's 5 hourly CPs. But ODEC notes the RTO Capacity Service rate differs from PJM's capacity cost allocation in three (3) material respects: (i) it uses a proxy rate based on a rolling four (4) year average of the capacity price for the applicable PJM Local Deliverability Areas (LDAs) rather than the annual (June 1—May 31) Delivery Year price PJM uses; (ii) it resets the RTO Capacity Service rate on January 1 each year instead of June 1; and (iii) it charges the same RTO Capacity Service rate across all four (4) PJM Zones in which Member Cooperatives provide service instead of charging a different capacity rate for each Zone, as PJM does.

103. ODEC maintains the RTO Capacity Service rate conclusively should be considered just, reasonable and not unduly discriminatory or preferential insofar as it matches PJM's 5 CP demand cost allocation methodology. Insofar as the rate deviates from the PJM methodology, ODEC submits ODEC's rate design need not precisely match the PJM rate design to be just and reasonable. ODEC distinguishes itself from PJM in that ODEC is an LSE while PJM is not. It emphasizes PJM's role *qua* RTO is to ensure regional reliability, which PJM accomplishes by procuring sufficient system capacity and allocating the associated costs. ODEC, in contrast, is a cooperative LSE whose Member Cooperatives have established a socialized cost structure under a "postage stamp" rate that is fundamental to their cooperative service structure. So while it makes sense for PJM to allocate capacity costs among geographically-defined Zones based on each Zone's indicated contribution to system-wide demand costs, it alternately makes sense for ODEC to allocate capacity costs among its Member Cooperatives in accordance with the WPCs. PJM averages capacity costs geographically. ODEC averages capacity costs cooperatively. Put differently, the PJM Region is appropriately

defined by geographic Zones; ODEC is appropriately defined as the composite of its eleven (11) Member Cooperatives, irrespective of the PJM Zone in which any of them is located.

104. Focusing specifically on the proxy rate's rolling four (4) year average capacity price, ODEC explains the ODEC Board implemented the averaging to mitigate extreme annual/Zonal capacity price volatility experienced by the Member Cooperatives in recent years. ODEC additionally explains the Board implemented the January 1 RTO Capacity Service rate reset date to reconcile the reset date with the calendar year budget that establishes ODEC's annual projected loads and revenue requirements. The January 1 date simply synchronizes ODEC's rate year with its budget year.

Bear Island

105. Bear Island chiefly objects to the proxy rate's impact on add-back charges.[63] It also objects the proxy rate violates the Opinion No. 499 prescription for ODEC to match the PJM demand cost allocation method. In addition, Bear Island asserts the proxy rate is unduly discriminatory to end-use customers in three (3) Zones, and highly preferential to end-use customers in the fourth (Delmarva) Zone. This impact artificially depresses capacity payments for demand response in the three (3) negatively-affected Zones on Bear Island's account. Last, Bear Island asserts the four (4) year rate averaging element simply shifts any RTO Capacity Service rate instability to the Remaining Owned Capacity Service rate.

Trial Staff

106. Trial Staff maintains ODEC has not satisfied its affirmative burden to prove charging for RTO Capacity Service through the proxy rate is just and reasonable. Trial Staff states it (i) agrees it is appropriate for ODEC to allocate the RTO Capacity Service charge on the basis of each Member Cooperative's contribution to PJM's 5 hourly CPs and (ii) does not oppose ODEC resetting the RTO Capacity Service rate on January 1 each year to synchronize ODEC's rate year with its budget year. Trial Staff nevertheless takes the position the proxy rate otherwise must be rejected because it fails to track cost causation and is inconsistent with Opinion No. 499.

107. Trial Staff argues averaging the proxy rate over four (4) years considerably inflates the RTO Capacity Charge. It explains PJM purchases capacity through RPM in one (1) year segments for any given Delivery Year. It further explains PJM pays for the

[63] Bear Island's position in this regard was summarized and addressed under the capacity add-back issue *supra*. Accordingly, it is not summarized/addressed again here.

capacity at Zone rates. Trial Staff contrasts PJM's procedure with the proxy rate, which averages the PJM capacity prices over four (4) years and four (4) Zones. It follows on Trial Staff's account that the proxy rate never will reflect PJM's actual annual capacity charge to ODEC. It also follows that the proxy rate never will impose on any Member Cooperative the actual capacity cost PJM charges ODEC for capacity in the Member Cooperative's Zone. Trial Staff maintains these disparities are compounded by the circumstance that capacity costs charged to one Member Cooperative on a 5 CP basis under the RTO Capacity Service rate may be refunded to a different Member Cooperative on a 12 CP basis under the Remaining Owned Capacity Service rate.

Analysis

108. I reiterate that ODEC is not required to satisfy the burden of proof specified in Opinion No. 499 footnote 64. Instead ODEC must satisfy the FPA section 205 burden to affirmatively prove its Revised Formula Rate demand cost allocation methodology—the proxy rate in this instance—is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. Accordingly, I reject any contention that the proxy rate is unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful simply because it does not satisfy Opinion No. 499 footnote 64.

109. I also reiterate the circumstance that FPA section 205 precludes Opinion No. 499 footnote 64 from imposing a compliance directive or elevated burden of proof on ODEC in this proceeding does not preclude relying on Opinion No. 499 for other purposes. Opinion No. 499 expresses a clear Commission preference for ODEC to match its demand cost allocation to PJM's method. And the PJM method is Commission-approved—hence presumptively just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. To the extent the RTO Capacity Service proxy rate matches PJM's demand cost allocation method, the match constitutes support for finding the proxy rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful as well.[64] But while the "match" benchmark expressed in Opinion No. 499 would not require the proxy rate methodology to be identical to PJM's demand cost allocation, it would require the proxy rate methodology to closely correspond/harmonize with the PJM demand cost allocation.

[64] Similarly, while unanimous Member Cooperative agreement to the proxy rate supports a conclusion the proxy rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful—particularly in light of ODEC's cooperative structure—unanimous Member Cooperative support does not in itself establish the proxy rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful.

110. No participant disputes the proxy rate matches PJM's demand cost allocation inasmuch as both are based on PJM's five (5) hourly coincident peaks (5 CP).[65] And neither Trial Staff nor Bear Island appears to have any specific objection to ODEC resetting the RTO Capacity Service rate on January 1 each year to synchronize ODEC's rate year with its budget year.[66] Moreover, the synchronization does not appear to have any objectionable rate impacts, and has a rational basis in light of the circumstance that ODEC's calendar year budget forms the entire basis for its projected loads and revenue requirements. Ex. ODC-31 at 24-27. I therefore find and conclude the proxy rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in these two (2) respects.

111. Nevertheless, simply providing a rational basis for a rate revision does not satisfy the FPA section 205 burden to affirmatively prove the revision is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. This is all ODEC has done insofar as the remaining elements of the proxy rate are concerned. ODEC's primary justification for averaging PJM's capacity prices over four (4) years and four (4) Zones is that the ODEC Board determined it was in the Member Cooperatives' best interests to do so to mitigate extreme annual/Zonal capacity price volatility. This objective is perfectly legitimate. Standing alone, however, it does not satisfy ODEC's burden to prove the proxy rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in every respect.

112. The record supports ODEC's contention that there has been significant volatility in PJM capacity prices from year to year and between the four (4) relevant Zones. Ex. ODC-2 at 11-12; Ex. ODC-4.[67] This circumstance establishes the ODEC Board decision to try to temper the volatility in an effort to achieve rate stability/predictability for its

[65] ODEC claims basing the proxy rate on 5 CP is an "improvement" over the Prior Formula Rate (which relied on a comprehensive 12 CP demand rate) because basing the proxy rate on 5 CP instead of 12 CP more closely aligns ODEC's demand cost allocation methodology with the PJM allocation method. *See* ODEC IB at 31. This claim is otherwise unsupported and is not a factor in my proxy rate evaluation.

[66] Bear Island objects that changing the rate period to a calendar year "contributes to the discrimination inherent in the proxy rate" (Bear Island IB at 36), but expresses no specific objection to ODEC synchronizing its rate and budget years.

[67] While ODEC stresses the year to year volatility has been as much as 354% (ODEC IB at 32), my review of Ex. ODC-4 indicates the (2013/2014 vs. 2014/2015 Delivery Years) 354% differential is an extreme outlier. The differentials in the other five (5) comparison years range (+/-) between 7% and 102%. *See* Ex. ODC-4.

Member Cooperatives was reasonable. It does not establish the *method* the Board chose to achieve that objective was reasonable.

113. Trial Staff and Bear Island contend the proxy rate inflates the annual PJM capacity charge to ODEC. *See* Ex. S-1 at 21; Ex. BI-7 at 29-30 **[CONTAINS PROTECTED MATERIAL]**. ODEC counters that while it is true the proxy rate will over-collect PJM's actual capacity charge to ODEC in some years, it is similarly true the proxy rate could under-collect PJM's actual capacity charge to ODEC in others. Ex. ODC-2 at 12-13. But the fundamental ratemaking requirement is to produce revenues that match the cost to serve as closely as practicable. *See, e.g.*, Opinion No. 499 at P 41. The proxy rate is not designed to achieve that objective (*see* Tr. 1104, 1149)—and certainly never will achieve it on an annual basis. The proxy rate never will be based on PJM's actual annual capacity charge to ODEC. Nor will it ever impose on any Member Cooperative the actual capacity cost PJM charges ODEC for capacity in the Member Cooperative's Zone. It is no excuse that over-collections in some years may be accompanied by under-collections in others. Under-collection by design is equally objectionable to over-collection by design in this context. This is particularly true insofar as the proxy rate is concerned because, as ODEC concedes (*see, e.g.*, Ex. ODC-2 at 13, Tr. 1151), neither over-collections nor under-collections through the proxy rate are reconciled through the proxy rate. They are reconciled through the Remaining Owned Capacity rate. Thus, as Trial Staff underscores, capacity costs charged to one Member Cooperative on a 5 CP basis under the RTO Capacity Service rate could be refunded to a different Member Cooperative on a 12 CP basis under the Remaining Owned Capacity Service rate. This circumstance raises yet another concern: isn't at least some of any RTO Capacity Service rate instability that was intended to be tempered by the proxy rate simply shifted to the Remaining Owned Capacity rate? If so, even the rational basis the ODEC Board had for adopting the proxy rate is suspect.

114. ODEC places great emphasis on the circumstance that it is a *cooperative* LSE whose Member Cooperatives have established a socialized cost structure among themselves through a "postage stamp" rate. ODEC suggests the Member Cooperatives consequently should be permitted to select the rate design that best suits their collective circumstances and unique structure. Although this reasoning has some merit, it ignores the fact that neither ODEC nor any Member Cooperative ultimately pays the cost of the services they provide. Those costs are borne by the Member Cooperatives' end-use customers. So while ODEC and its Member Cooperatives may be willing to socialize ODEC's capacity costs over four (4) years and (4) Zones, it is doubtful any end-use customers knowingly/willingly would pay more than the actual annual PJM capacity cost attributable to the Zone in which they take service. ODEC has provided no evidence they would, and Bear Island's proxy rate opposition is strong indication they would not.

115. I find and conclude ODEC failed to satisfy the FPA section 205 burden to affirmatively prove the RTO Capacity Service rate is just, reasonable and not unduly

discriminatory, preferential or otherwise unlawful insofar as the proxy rate averages PJM's capacity prices over four (4) years or over four (4) Zones. I further find and conclude ODEC failed to satisfy its affirmative burden to prove the RTO Capacity Service rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful despite the Trial Staff/Bear Island criticisms levied against the proxy rate.[68]

c. Should ODEC's proposed RTO Capacity Service charges be allowed for calendar year 2014 given its proposal to bill based on usage prior to January 1, 2014?

116. This issue is resolved in accordance with Issue II (A)(1)(a) and Issue II (A)(1)(b) *supra*.

(2) Remaining Owned Capacity Service

a. Has ODEC demonstrated that its proposed Remaining Owned Capacity Service is just and reasonable and not unduly discriminatory or preferential?

b. Has ODEC demonstrated that its proposal to price RTO Capacity Service differently than its Remaining Owned Capacity charge, and its proposal to allocate true-ups related to RTO Capacity Service charges and Transmission Service charges based on the Remaining Owned Capacity allocator, are just and reasonable and not unduly discriminatory or preferential?

Participant Positions

ODEC

117. ODEC explains the Remaining Owned Capacity Service rate recovers any demand costs not recovered under the RTO Capacity Service rate or the Transmission Service rate—primarily capacity costs associated with ODEC-owned generating/transmission assets. ODEC emphasizes the RTO Capacity Service rate only recovers a portion of the fixed capacity costs associated with those assets. Since the remaining costs are not tied to any PJM capacity cost allocation, ODEC concludes there is no reason the Remaining Owned Capacity Service rate must follow any PJM capacity cost allocation methodology. Accordingly, the Member Cooperatives elected to continue the Prior Formula Rate's 12

[68] ODEC had no obligation to address any criticism advocating an alternate methodology.

CP cost allocation for this rate. ODEC maintains continuing to use the 12 CP allocation for Remaining Owned Capacity Service constitutes an unchanged rate element that FPA section 205 precludes Bear Island and Trial Staff from challenging in this proceeding. It also emphasizes the Revised Formula Rate contains a Margin Stabilization provision (i.e. a demand true-up) that ensures the Remaining Owned Capacity Service rate recovers no more or less than the actual capacity costs not otherwise recovered under the RTO Capacity Service rate or the Transmission Service rate. ODEC submits the Remaining Owned Capacity Service rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful on these bases, and neither Bear Island nor Trial Staff presented any credible evidence or argument to the contrary.

Bear Island

118. Bear Island maintains ODEC failed to satisfy its burden to prove the Remaining Owned Capacity Service rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. It emphasizes the rate's 12 CP methodology does not match PJM's 5 CP methodology in accordance with the Opinion No. 499 footnote 64 directive. It also asserts the rate has no relation to cost causation. Bear Island argues that since ODEC obtains 100% of its capacity requirement through PJM, the circumstance that ODEC owns some of the assets providing the capacity it purchases from PJM is irrelevant. All of ODEC's capacity costs already are included in PJM's capacity price, which is set in accordance with the 5 CP methodology. The inappropriateness of using a 12 CP methodology for the Remaining Owned Capacity Service rate is exacerbated on Bear Island's account by the circumstance that any RTO Capacity Service rate over/under-collections (through the 5 CP proxy rate) are reconciled through the Remaining Owned Capacity Service rate.

Trial Staff

119. Trial Staff also maintains ODEC failed to satisfy its burden to prove the Remaining Owned Capacity Service rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. Trial Staff argues the reason Opinion No. 499 footnote 64 stated ODEC should adopt PJM's 5 CP capacity demand cost allocation method is because ODEC offers 100% of its capacity into the PJM capacity market and purchases 100% of its capacity requirement from the PJM capacity market. It therefore concludes 100% of any capacity cost associated with ODEC-owned assets is recovered in the capacity payments ODEC receives under the RTO Capacity Service rate. Trial Staff maintains ODEC has failed to prove otherwise. Moreover, in contrast to the Prior Formula Rate, there is no equation in the Revised Formula Rate illustrating how ODEC subtracts: (1) the costs it recovers from PJM's capacity market or (2) demand costs ODEC doesn't recover under the RTO Capacity Service rate or the Transmission Service rate. Neither does the Revised Formula Rate define the services customers receive under the RTO Capacity Service rate and the Remaining Owned Capacity Service

rate or differentiate the two. Thus, on Trial Staff's account, ODEC fails to prove the RTO Capacity Service rate and the Transmission Service rate do not already recover 100% of ODEC's demand costs. And, as Trial Staff previously underscored, the circumstance that any RTO Capacity Service or Transmission Service over/under-collections (through 5 CP and 1 CP allocators) are reconciled through the 12 CP Remaining Owned Capacity Service rate produces a mismatch. Finally, Trial Staff claims the Commission never has *approved* ODEC using a 12 CP allocator for all its demand rates; the Commission merely *accepted* this element of the Prior Formula Rate in a non-precedential 1992 delegated order.

Analysis

120. Here again, ODEC is not required to satisfy the burden of proof specified in Opinion No. 499 footnote 64. Instead ODEC must satisfy the FPA section 205 burden to affirmatively prove the Remaining Owned Capacity Service rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in itself. I therefore reject any contention that the Remaining Owned Capacity Service rate is unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful simply because it does not satisfy Opinion No. 499 footnote 64. I also reject any ODEC suggestion that continuing to use the same 12 CP allocation for Remaining Owned Capacity Service that the Prior Formula Rate used for all demand costs constitutes an unchanged rate element. The Prior Formula Rate incorporated no discrete Remaining Owned Capacity Service or rate. Accordingly, that service/rate and its 12 CP allocation methodology constitute "rate schedule revisions" under the Hearing Order.

121. Bear Island and Trial Staff seem to misconstrue the capacity costs the Remaining Owned Capacity Service rate recovers. As I understand their positions, Bear Island and Trial Staff start from the premise that all PJM capacity is fungible. From this premise they reason: (1) ODEC offers 100% of its owned capacity into the PJM capacity market; (2) ODEC purchases 100% of its capacity requirement from the same PJM capacity market; therefore (3) the capacity cost associated with ODEC's owned capacity assets are irrelevant because ODEC is not purchasing (i.e. buying back) any asset-specific capacity. It is purchasing an equivalent amount of RPM-pooled capacity from PJM. ODEC thereafter recovers 100% of the cost of the capacity it purchases from PJM through the RTO Capacity Service rate. As a consequence, there is no PJM capacity cost to be recovered through the Remaining Owned Capacity rate. The premise is correct; the

follow-on reasoning is basically sound.[69] But, as I understand the Remaining Owned Capacity Service rate, the premise and reasoning simply miss the point.

122. Under the Revised Formula Rate, the RTO Capacity Service rate recovers 100% of ODEC's PJM capacity purchase cost. Ex. ODC-3 at 28. The Transmission Service rate recovers 100% of ODEC's third-party transmission/distribution-related cost. *Id*. at 27-28. Any *remaining* ODEC capacity costs are recovered under the Remaining Owned Capacity Service rate. *Id*. at 29. As the service/rate designation indicates, most of the capacity costs ODEC does not recover through the RTO Capacity Service rate (or through the Transmission Service rate) are associated with ODEC-owned capacity assets (including ODEC-owned transmission assets). Ex. ODC-31 at 49-51.

123. The record establishes ODEC does not recover 100% of the capacity costs associated with ODEC-owned capacity assets through the RTO Capacity Service and Transmission Service rates. *Id*.; Tr. 558, 853. The record also establishes those costs consist primarily of fixed costs associated with two (2) large generating assets: a coal-fired plant producing the equivalent of 22.4% of ODEC's RPM-offered capacity and a nuclear unit producing the equivalent of 13.1% of ODEC's RPM-offered capacity. Ex. ODC-51 at 2. *See also* ODC-3 at 19-20, 29. There is no guarantee PJM will accept all the ODEC-owned capacity offered into RPM, or that the market clearing price ODEC receives for any accepted capacity will cover the underlying assets' fixed costs—particularly in light of the substantial fixed costs ODEC's coal and nuclear units represent. I therefore find and conclude the Remaining Owned Capacity Service rate is sufficiently de-coupled from the PJM-dependent RTO Capacity Service and Transmission Service rates to permit a discrete rate design.

124. The Remaining Owned Capacity Service rate recovers the same non-PJM-related capacity costs the Prior Formula Rate recovered. And it recovers those costs under the identical 12 CP methodology the Prior Formula Rate used to recover them.[70] Contrary to

[69] I say "basically" sound because ODEC's Remaining Owned Capacity Service rate description implies at least some capacity costs not attributable to ODEC-owned assets also are recovered through the rate. The record does not indicate what those costs might be.

[70] I previously rejected any ODEC suggestion that continuing to use the same 12 CP allocation for Remaining Owned Capacity Service that the Prior Formula Rate used for all demand costs constitutes an unchanged rate element. See Paragraph 120 *supra*. As a consequence, ODEC is required to affirmatively prove it is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful to use the 12 CP methodology for the Remaining Owned Capacity Service rate. *Id*. Nevertheless, the circumstance that the Commission has permitted ODEC to use the 12 CP rate design to recover these costs (continued)

Trial Staff's allegations, there is no material difference between the Prior Formula Rate and the Revised Formula Rate insofar as the costs the Remaining Owned Capacity Service rate recovers are concerned. My review of the red-line comparison between the two confirms the Revised Formula Rate eliminated no "equation" included in the Prior Formula Rate to calculate those costs. *See* Ex. ODC-3 at 44-47, 65-67. *Accord* Tr. 853 (explaining Remaining Owned Capacity Service rate methodology "describe[d] in words" rather than mathematical equation). Moreover, the Revised Formula Rate incorporates a new Margin Stabilization provision—i.e. a demand cost/revenue true-up mechanism—that ensures the Remaining Owned Capacity Service rate recovers no more or less than the actual capacity costs not otherwise recovered under the RTO Capacity Service rate or the Transmission Service rate. Ex. ODC-3 at 17; Ex. ODC-31 at 52. I therefore find and conclude ODEC has satisfied its burden to prove the Remaining Owned Capacity Service rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful.

125. The mismatch between any RTO Capacity Service over/under-collections through the 5 CP proxy rate and the 12 CP Remaining Owned Capacity Service rate refund mechanism appears to be a moot problem. The RTO Capacity Service proxy rate has been rejected. Although the 5 CP methodology the proxy rate employed was not rejected, it is unclear whether it is possible to reconcile rejecting the proxy rate element with retaining the 5 CP methodology. And ODEC could not be required to accept that result in the context of this proceeding in any event: the RTO Capacity Service rate incorporates *both* elements in conjunction. A different rate design cannot be imposed on ODEC in the context of this FPA section 205 proceeding. These circumstances suggest the indicated consequence for the service the Revised Formula Rate categorizes as RTO Capacity Service is reversion to the Prior Formula Rate. Since the Prior Formula Rate is based on 12 CP, there would be no methodological mismatch between any "RTO Capacity Service" over/under-collections and the 12 CP Remaining Owned Capacity Service rate refund mechanism.

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since 1992 is a factor supporting the appropriateness of ODEC continuing to do so under the Remaining Owned Capacity Service rate. Trial Staff's attempt to distinguish prior Commission "acceptance" of the 12 CP methodology from "approval" (Trial Staff IB at 35) is a distinction without a difference. It must be presumed the Commission at all times since 1992 satisfied its statutory obligation to ensure ODEC's formula rate was just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. At very least, ODEC's 12 CP rate design must be considered a "long standing practice", as that concept is applied in *Pub. Serv. Comm'n. of N.Y. v. FERC*, 642 F.2d 1335, 1346 (D.C. Cir. 1980).

(3) Transmission Service: Has ODEC demonstrated that its proposed Transmission Service is just and reasonable and not unduly discriminatory or preferential?

126. As previously explained, the Transmission Service rate subsumes both a Transmission Service Rate and a Distribution Service Rate. Any Member Cooperative receiving transmission service from ODEC at a "transmission voltage" (69 kV or above) service point is charged the Transmission Service Rate. Any Member Cooperative receiving transmission service from ODEC at a "distribution voltage" (below 69 kV) service point is charged the Distribution Service Rate.[71]

Participant Positions

ODEC

127. ODEC states the Transmission Service rate recovers transmission-related expenses and distribution-related expenses incurred by ODEC for third-party service taken by ODEC to satisfy its WPC obligations to the Member Cooperatives. It further states the Transmission Service rate is billed to each Member Cooperative based on the Member Cooperative's contribution to the single coincident peak (1 CP) in the previous PJM Transmission Year (November 1—October 31) for the PJM Transmission Zone in which the Member Cooperative takes service from ODEC.

128. ODEC then launches into a series of rebuttal arguments directed to the various Transmission Service rate critiques levied by Bear Island and (particularly) Trial Staff. It first focuses on Trial Staff allegations that: (1) the Transmission Service Rate and Distribution Service Rate are not linked to any FERC Form 1 data, and instead are simply a function of ODEC's annual budgeted expenses; (2) ODEC did not prove it provides any distribution services or incurs any distribution costs; (3) the Transmission Service Rate and Distribution Service Rate lack sufficient transparency; and (4) ODEC might recover the same costs under the Transmission Service rate that it recovers under Attachment H-3F to the PJM OATT.

129. ODEC underscores the Revised Formula Rate is identical to the Prior Formula Rate in that neither rate specifically references FERC Form 1 data. Nevertheless, since Trial Staff concedes ODEC's FERC Form 1 includes distribution-related expense, any

[71] I repeat this explanation because it is not always clear whether a participant is addressing the Transmission Service Rate, the Distribution Service Rate or the Transmission Service rate (which subsumes both the Transmission Service Rate and the Distribution Service Rate) in general.

Trial Staff allegation that ODEC has not demonstrated it incurs distribution expenses is incorrect. Insofar as services provided are concerned, ODEC emphasizes the Revised Formula Rate is incorporated into the WPC ODEC has with each Member Cooperative. The service ODEC provides to each Member Cooperative in accordance with its WPC is full Requirements Service. Any claim the transmission and distribution services provided under the Transmission Service rates are undefined therefore is specious.

130. ODEC notes it addresses Trial Staff's lack of transparency arguments more thoroughly under Issue II (D) *infra*. But insofar as Trial Staff suggests the source of the expenses collected under the Transmission Service rate is simply a matter of discretionary budgeting, ODEC underscores the budget inputs are derived from the Network Integration Transmission Service Agreements (NITSAs) under which ODEC secures third-part transmission and distribution service for the Member Cooperatives. ODEC also emphasizes the NITSAs contain specific provisions covering distribution service. Further, ODEC contrasts the NITSAs with PJM OATT Attachment H-3F, which recovers costs associated with ODEC-owned transmission facilities. In addition, ODEC maintains Trial Staff's potential double-recovery concern is baseless because the FERC Uniform System of Accounts Account 456.1 reflected in Attachment H-3F to the PJM OATT is reconciled as a rate credit in Transmission Service rate Account 456.1.

131. Turning to Bear Island, ODEC dismisses any transmission/distribution cost socialization challenge as yet another impermissible attack on an unchanged element of ODEC's postage stamp rate design. It emphasizes Bear Island made no attempt to demonstrate how this unchanged rate element might be impacted by any rate change reflected in the Revised Formula Rate in accordance with the November 19 Order.

Bear Island

132. Bear Island argues ODEC failed to demonstrate the Transmission Service rates are just, reasonable and not unduly discriminatory, preferential or otherwise unlawful for two (2) principal reasons. First, the rates deviate from PJM's cost allocation methodology. Second, they are not transparent.

133. Bear Island claims the Transmission Service rate deviates from PJM's method by (i) socializing the NITSA rates PJM charges in the Virginia Electric and Power Company Zone, the Allegheny Power Zone and the AEP East Zone; (ii) including the NITSA rate PJM charges in the Delmarva Power and Light Company (Delmarva) Zone in the socialized rate even though PJM does not charge ODEC the Delmarva Zone rate; and (iii) charging in the Delmarva Zone based on 1 CP billing determinants instead of the 5 CP billing determinants PJM uses. Following up on point (iii), Bear Island repeats its refund mismatch objection, highlighting the disparity between calculating Transmission Service rate over/under-collections based on a 1 CP methodology and refunding/collecting the differential through the Remaining Owned Capacity Service rate's 12 CP methodology.

In addition, Bear Island complains the formulas for computing both the Transmission Service Rate and the Distribution Service Rate are not adequately transparent because the rates specify the constituent cost components only by account numbers. Bear Island concedes this is not a change from the Prior Formula Rate, but argues Opinion No. 499 footnote 64 requires ODEC to conform this aspect of the formula rate to the PJM methodology.[72] It also argues general Commission policy and precedent required ODEC to modify the Prior Formula Rate to reflect actual cost figures.

Trial Staff

134. Trial Staff maintains the Transmission Service Rate should be rejected for several reasons: (1) the rate schedule does not state the services provided; (2) it does not state what specific costs are being recovered; (3) it provides no means to calculate the actual rate; and (4) it is not reconciled with the OATT rate ODEC has on file with PJM. This last discrepancy is especially problematic in Trial Staff's view because both ODEC's PJM OATT and the Transmission Service rate include some of the same accounts, and therefore might recover some of the same costs. Trial Staff also emphasizes the Transmission Service Rate does not expressly state that any Member Cooperative receiving transmission service from ODEC at a 69 kV or above service point pays the Transmission Service Rate and that any Member Cooperative receiving transmission service from ODEC at a service point voltage below 69 kV pays the Distribution Service Rate. Thus, on Trial Staff's account, the 69 kV voltage split between Transmission Service and Distribution Service exists only in the minds of ODEC officials.

135. Trial Staff maintains the Distribution Service Rate should be rejected because ODEC did not prove it has any distribution expense to recover. Trial Staff contends the Transmission Service rate schedule does not distinguish between distribution services and transmission services, and it does not specify the facilities those services use. And the circumstance that ODEC's FERC Form 1 reflects expenses ODEC classifies as distribution does not prove the expenses actually are distribution expenses rather than transmission expenses. Nor has ODEC proved the NITSAs establish that ODEC incurs distribution rather than transmission expenses. Moreover, on Trial Staff's account, ODEC should have recovered all its NITSA costs under its OATT with PJM.

Analysis

136. ODEC is not required to satisfy the burden of proof specified in Opinion No. 499 footnote 64. Instead ODEC must satisfy the FPA section 205 burden to affirmatively

[72] Neither Bear Island nor Trial Staff explains what the PJM methodology is in this respect.

prove the Transmission Service rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in itself. I therefore reject any contention that the Transmission Service rate is unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful simply because it does not satisfy Opinion No. 499 footnote 64.

137. The Prior Formula Rate incorporated no discrete Transmission Service or rates. Accordingly, the Transmission Service rate (including the Transmission Service Rate and the Distribution Service Rate) and the 1 CP allocation methodology constitute "rate schedule revisions" under the Hearing Order.

138. Most of the Trial Staff and Bear Island challenges to the Transmission Service rate are meritless. First, the Hearing Order and FPA section 205 prohibit Trial Staff and Bear Island from challenging unrevised elements of the ODEC formula rate—except insofar as Trial Staff or Bear Island affirmatively demonstrates some proposed tariff revision also has a material impact the unrevised element(s) of the formula rate. Since neither Trial Staff nor Bear Island attempted any such demonstration, the prohibition is absolute.

139. The Transmission Service rate recovers the same transmission/distribution-related costs the Prior Formula Rate recovered. It identifies the cost components the same way (i.e. in accordance with FERC Uniform System of Accounts) and identifies the services provided the same way (i.e. Requirements Service, as defined in the WPCs[73]). The only material differences are the Revised Formula Rate (i) sub-categorizes the Requirements Service "transmission" component into transmission and distribution, charging separate defined rates for each, and (ii) calculates the rates on a 1 CP basis. Ex. ODC-3 at 27-28.

140. None of the specific criticisms Trial Staff levies against the Transmission Service Rate/Distribution Service Rate differentiation is legitimate. The record indicates a 69 kV differentiation point between transmission/distribution-voltage facilities and service is fairly common. Tr. 826. Moreover, in this instance, the circumstance that ODEC provides the transmission and distribution services only to Member Cooperatives under the WPCs is highly pertinent.[74] Each Member Cooperative reasonably must be presumed to understand the services it has contracted to receive from ODEC under its WPC—particularly since the formula rate is an integral part of the contract. Each Member Cooperative similarly must be presumed to know what facilities ODEC uses to provide

[73] The WPCs define "Requirements Service" as "electric capacity, energy, transmission service and ancillary services". Ex. ODC-34 at 2.

[74] I reject any Trial Staff suggestion that it is plausible to assume a non-Member Cooperative customer could obtain direct transmission/distribution service from ODEC. See Paragraph 208 *infra*.

the services. In addition, each Member Cooperative is represented on the ODEC Board that decided what to incorporate into the Revised Formula Rate. All these considerations support a conclusion that each Member Cooperative fully understands and accepts the Revised Formula Rate's Transmission Service specification and rate structure. It follows there is no legitimate need for additional formula rate specificity in this regard.

141. Neither is there any legitimate concern with respect to underlying cost identification. The preceding analysis is equally applicable to costs as it is to service and facilities. In addition, ODEC has demonstrated the expenses collected under the Transmission Service rate are not a matter of discretionary budgeting, as Trial Staff alleges. The budgeted costs are sourced from the NITSAs (third-party facility charges) and PJM OATT Attachment H-3F (ODEC-owned transmission facility costs). Ex. ODC-2 at 6, 8; Ex. ODC-31 at 19, 22. Some of these costs clearly are distribution-related. Ex. ODC-33 at 13; ODC-38 at 10, 17-18. *See also* Ex. ODC-37 at 2. Finally, there is no double recovery. The record confirms the formula rate includes the same FERC Uniform System of Accounts Account 456.1 reflected in Attachment H-3F to the PJM OATT, but reconciles the two through a transmission expense credit. Ex. ODC-31 at 22.

142. The 1 CP allocator is problematic. A 1 CP Transmission Service rate allocator matches PJM's Network Integration Transmission Service allocation methodology. Ex. ODC-2 at 8. It nevertheless creates the same kind of mismatch between any Transmission Service rate over/under-collections (using 1 CP) and the 12 CP Remaining Owned Capacity Service rate refund mechanism that the RTO Capacity Service 5 CP allocator creates. In contrast to the RTO Capacity Service proxy rate, however, there is no other reason to find the Transmission Service rate unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful. It is perfectly acceptable on a stand-alone basis. But it is unclear whether it is possible to reconcile the 1 CP Transmission Service rate allocator with the 12 CP Remaining Owned Capacity Service rate refund mechanism. If not, the indicated consequence for the services the Revised Formula Rate categorizes as "Transmission Service" is reversion to the Prior Formula Rate. Since the Prior Formula Rate is based on 12 CP, there would be no methodological mismatch between any "Transmission Service" over/under-collections and the 12 CP Remaining Owned Capacity Service rate refund mechanism.

B. Energy Rates

(1) Has ODEC met its burden of proof with respect to its proposed formula to calculate the flat Base Energy Rate?

143. The Prior Formula Rate relied on a stated energy rate of 18.15 mills per kWh. Ex. ODC-3 at 34. The stated energy rate was used to derive a High Voltage Energy Rate and a Low Voltage Energy Rate. The High Voltage Energy Rate was derived by multiplying the base energy rate by a transmission loss factor. The Low Voltage Energy Rate was

derived by multiplying the base energy rate by a distribution loss factor. *Id*. at 58 (Note J). Any ODEC energy costs above or below the derived High Voltage Energy Rate and the derived Low Voltage Energy Rate were recovered/credited through an Energy Adjustment Factor.

144. The Revised Formula Rate eliminated the stated energy rate and implemented a formula to develop an annual Base Energy Rate. *Id*. at 29. The Base Energy Rate includes any amounts remaining in ODEC's Deferred Energy account from the previous year. It is calculated by first adding or subtracting the Deferred Energy account balance from ODEC's Annual Budgeted Energy Expense. This amount is divided by the sum of ODEC's Annual Budgeted Transmission kWh plus ODEC's Annual Budgeted Distribution kWh adjusted to Transmission. *Id*.

Participant Positions

ODEC

145. ODEC explains that approximately 90% of the energy it provides to its Member Cooperatives is provided at transmission level voltages (69 kV or above) and approximately 10% of the energy it provides to its Member Cooperatives is provided at distribution level voltages (below 69 kV). Ex. ODC-2 at 17-18. It further explains the Revised Formula Rate implemented the annual Base Energy Rate to reduce ODEC's historical reliance on the Energy Adjustment Factor to reconcile its actual energy costs with budgeted energy costs. ODEC's Initial Brief states that no party challenged the Base Energy Rate formula. Its Reply Brief complains that Trial Staff raised concerns about the formula for the first time in Trial Staff's (post-hearing) Initial Brief.

Bear Island

146. Bear Island did not address this issue in its Initial Brief. Bear Island's Reply Brief, however, disputes ODEC's Initial Brief characterization of Bear Island's (non-)position. Bear Island states ODEC's Base Energy Rate is unjust and unreasonable because, like other elements of the Revised Formula Rate, it does not satisfy minimum requirements for formula rates to have transparent inputs (referencing Bear Island IB at 51-53). It protests that the Base Energy Rate inputs are non-public and, as such, are unknown to anyone except ODEC's Board members, who owe their fiduciary duty to ODEC alone. Bear Island maintains ODEC should be required to "share the inputs with retail customers and other interested persons such as state public advocates." *Id*. at 34. Otherwise, end-use customers like Bear Island are harmed because they cannot know what portion of the rate is the annual budgeted energy expense and what portion is the "make-up" that recovers any deferred energy balance. Bear Island complains this precludes end-use customers from being able to assess rate accuracy or to properly budget and plan.

Trial Staff

147. Trial Staff generally argues on brief that the Base Energy Rate does not comply with Commission formula rate policy because it does not contain a formula that permits anyone other than ODEC to calculate the actual energy rate. It specifically complains the Rate Schedule merely lists account numbers without explaining the basis for their inclusion in the rate derivation numerator. It further complains the only source for the numerator inputs is ODEC's budget.

Analysis

148. The Hearing Order and FPA section 205 prohibit Trial Staff and Bear Island from challenging unrevised elements of the ODEC formula rate—except insofar as Trial Staff or Bear Island affirmatively demonstrates some proposed tariff revision also has a material impact the unrevised element(s) of the formula rate. Neither Trial Staff nor Bear Island attempted any such demonstration insofar as the Base Energy Rate is concerned. The Hearing Order/section 205 prohibition therefore is absolute.

149. Neither did Trial Staff or Bear Island present any testimony or other evidence specifically addressing this issue. Trial Staff addressed it for the first time in its post-hearing Initial Brief.[75] Bear Island addressed it for the first time in its post-hearing Reply Brief. Post-hearing briefs do not constitute evidence. Accordingly, I find and conclude ODEC presented the only record evidence in this proceeding that specifically addresses the Base Energy Rate. The circumstance that Trial Staff and Bear Island presented no evidence specifically addressing the Base Energy Rate, however, does not preclude them from arguing the Base Energy Rate is unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful on some other basis.

150. Trial Staff argues the Base Energy Rate does not comply with Commission formula rate policy because it does not contain a formula that permits anyone other than ODEC to calculate the actual energy rate. It complains the Rate Schedule merely lists account numbers without explaining the basis for their inclusion in the rate derivation numerator. It further complains the only source for the numerator inputs is ODEC's budget. Each of these complaints has been discredited elsewhere.

[75] Trial Staff apparently does not have the same concern about "eleventh hour" "trial by ambush" (*see* Trial Staff RB at 10-11) when its own behavior is involved as it does when complaining about others.

151. As I observed under Issue I (A) (see Paragraphs 23-24 *supra*), the Hearing Order confirms the Commission was thoroughly familiar with the Prior Formula Rate.[76] *See* Hearing Order at PP 2-4 and n. 4-7. This familiarity specifically included ODEC's cooperative structure and the circumstance that its formula rate recovers *budget-based* revenue requirements. *Id*. at PP 3-5. Moreover, it is beyond dispute that the Commission thoroughly understands its current formula rate policies. And it conclusively must be presumed that in setting ODEC's September 30, 2013 filing for hearing the Commission satisfied its statutory obligation to ensure ODEC's revised formula rate would continue to be just, reasonable and not unduly discriminatory, preferential or otherwise unlawful. As a consequence, any concern(s) the Commission might have had with respect to the Revised Formula Rate would have been reflected—at least in general terms—in the Hearing Order.

152. The Hearing Order gives no indication whatsoever that the Commission was addressing anything beyond the formula rate revisions ODEC proposed in its September 30, 2013 filing. The Hearing Order specifically and uniformly references "ODEC's proposed rate schedule revisions" throughout. *Id.* at PP 14, 16, ordering para. (A), (B).[77] It expresses absolutely no Commission concern over any unrevised element of ODEC's formula rate—including its budget-based methodology.[78] This is consistent with the circumstance that ODEC proposed its rate schedule revisions in an FPA section 205 filing. It also supports a conclusion that the Commission intended the filing to be reviewed exclusively in accordance with section 205. Section 205 does not require ODEC to defend unchanged elements of the formula rate.

153. The Revised Formula Rate recovers the same budget-based revenue requirements the Prior Formula Rate recovered. The Revised Formula Rate specifies the constituent costs by FERC Account numbers, just as the Prior Formula Rate did. *Compare* Ex. ODC-3 at 19-20 *with Id*. at 44-47. It follows that the general complaints Trial Staff raises in specific opposition to the Base Energy Rate address unchanged elements of the

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[76] Opinion No. 499 confirms this conclusion.

[77] The lone exception is Hearing Order paragraph 13's reference to "ODEC's proposed *tariff revisions*" (Hearing Order at P 13 (emphasis added)), which amounts to the same thing.

[78] FPA section 205/206 implications aside, this is such a fundamental element of ODEC's formula rate methodology that it is utterly implausible to conclude the Commission could have neglected to specifically include it in the matters set for hearing had the Commission intended to do so—particularly when the Hearing Order included it in the formula rate description.

formula rate. As such, they fall beyond the scope of the Hearing Order/this section 205 proceeding. The same holds true for Bear Island's complaints.

154. The record indicates the 18.15 mills per kWh stated energy rate reflected in the Prior Formula Rate no longer aligns with ODEC's actual energy costs. Ex. ODC-2 at 17. As a consequence, ODEC had to rely on the Energy Adjustment Factor to collect a significant portion of its energy costs under the Prior Formula Rate. *Id.* The Revised Formula Rate's Base Energy Rate substitutes ODEC's actual budgeted annual energy cost (adjusted +/- by a Deferred Energy Balance carried over from the previous year) for the stated rate.[79] *Id.* The Base Energy Rate's Annual Budgeted Transmission kWh and Annual Budgeted Distribution kWh are comparable in operation to the High Voltage Energy Rate (multiplied by the transmission loss factor) and Low Voltage Energy Rate (multiplied by the distribution loss factor) reflected in the Prior Formula Rate. *Id*. at 16-17. Thus, the Base Energy Rate is calculated under a similar methodology to the Prior Formula Rate, but more accurately reflects ODEC's actual annual energy cost, trued-up to the prior year. There is no basis to conclude these improvements do not produce a just, reasonable and not unduly discriminatory, preferential or otherwise unlawful result—and there is no record evidence to the contrary.

(2) Has ODEC met its burden of proof with respect to its proposed Energy Adjustment?

Participant Positions

ODEC

155. ODEC explains the Prior Formula Rate included an Energy Adjustment mechanism that permitted the Board to adjust the fixed base energy rate in April and October each year. It states the Revised Formula Rate retains the Energy Adjustment mechanism, but permits the Board to make any necessary adjustments throughout the year.

Bear Island

156. Bear Island objects to permitting the ODEC Board to change the Energy Adjustment charge for three (3) reasons: (i) the Energy Adjustment does not satisfy minimum formula rate requirements because it does not specify the amortization period; (ii) the policy for determining the amortization period is not specified in the formula rate;

[79] I note that ODEC's budgeted energy (and other) costs are derived from actual past demands and projected energy requirements rather that the discretionary estimate Trial Staff and Bear Island imply.

and (iii) the policy may be changed at any time without a Commission filing. Bear Island states ODEC already has the opportunity to adjust the energy rate in January, April and October each year. Unlimited discretion to do so destroys rate change predictability.

Trial Staff

157. Trial Staff objects that permitting unlimited Energy Adjustments will not provide rate stability. It also objects that the Rate Schedule does not include a formula with which to calculate the Energy Adjustment. Trial Staff claims this is a matter of "secret" Board policy. Trial Staff vigorously disputes ODEC's assertion that the Revised Formula Rate "retains" the Prior Formula Rate's Energy Adjustment mechanism and simply expands Board discretion with respect to when an adjustment may be implemented. Trial Staff emphasizes the Prior Formula Rate reflected a detailed Energy Adjustment calculation that was replaced with a condensed narrative in the Revised Formula Rate.

Analysis

158. As a threshold matter, I agree with Trial Staff inasmuch as it disputes ODEC's assertion that the Revised Formula Rate "retains" the Prior Formula Rate's Energy Adjustment mechanism, "the only difference [being] one of timing." *See* ODEC IB at 40; ODEC RB at 20. Although neither ODEC's pertinent testimony nor its argument on brief *technically* is inaccurate, both are misleading—purposefully so in my estimation.[80]

159. The Prior Formula Rate included an Energy Adjustment *Factor*, which was a detailed formula based on the 18.15 mills per kWh stated energy rate. Ex. ODC-3 at 34-35 (September 30, 2013 redline); Ex. S-4 at 2-3 (clean copy original). The Energy Adjustment Factor included any energy revenue over/under-collections as an expense adjustment. Ex. ODC-2 at 19. The record indicates the Prior Formula Rate also provided that ODEC's fuel costs would be examined monthly to determine if an adjustment to the Energy Adjustment Factor was warranted in order to better match revenues to actual fuel costs. *Id*. Adjustments deemed warranted by the ODEC Board could be made only as of April 1 and October 1.[81] Ex. S-4 at 2.

160. The Revised Formula Rate includes an Energy Adjustment *Rate*. The Energy Adjustment Rate is a narrative-defined mechanism applied to the Base Energy Rate. Ex.

[80] I am obliged to note ODEC is not alone in its willingness to engage in this sort of linguistic sleight of hand. I caution the Commission to bear this circumstance in mind as it considers the participants' briefs on/opposing exceptions to this Initial Decision.

[81] I see nothing in the Prior Formula Rate that permitted ODEC to make an adjustment in January.

ODC-3 at 29-30. If the ODEC Board determines the Base Energy Rate does not accurately reflect ODEC's actual energy costs at any point during the year, it may implement an Energy Adjustment Rate. The Energy Adjustment Rate initially is set at zero, and only implemented if, in ODEC Board judgment, ODEC's actual energy costs unacceptably deviate from Base Energy Rate revenues. Ex. ODC-2 at 19. Any implemented Energy Adjustment Rate is set in accordance with a formal, but non-public, ODEC Board policy. *Id*. at 19-20; Ex. ODC-3 at 29-30.

161. There is no material difference between the purpose and operation of the Energy Adjustment Factor and the Energy Adjustment Rate. Neither is there any material difference between the two insofar as each was/is implemented (i) as an exercise of ODEC Board judgment and (ii) only in response to a mismatch between ODEC's actual energy costs and its energy revenues. And since the timing of any mismatch between ODEC's actual energy costs and its energy revenues is by definition unpredictable, it makes more sense for the ODEC Board to have the ability to react to the mismatch when it is identified rather than up to six (6) months after the fact.[82]

162. The Energy Adjustment Factor was a detailed formula, but that appears to have been a function of the Prior Formula Rate's 18.15 mills per kWh stated energy rate. The Energy Adjustment Rate is applied to the Revised Formula Rate's Base Energy Rate—which, by design, is not a fixed rate. Since the Base Energy Rate has been accepted, any objection to the Energy Adjustment Rate grounded in objections to the Base Energy Rate or its implications must be rejected. Finally, the circumstance that the ODEC Board policy governing energy revenue collection through the Energy Adjustment Rate is non-public does not make it unreasonable. The record confirms it is a formal written policy. *See* Ex. ODC-3 at 30; Ex. BI-29 [**PROTECTED**]; Tr. 596, 1168. And while it is not a public document (Tr. 1169), it cannot legitimately be characterized as "secret" or otherwise unavailable to public advocates, government representatives or regulators on request.[83] *Id*. at 596-97. All these factors lead me to find and conclude the Energy Adjustment Rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful.

[82] For example, the record indicates the Board's ability to implement an Energy Adjustment Rate in response to the January 2014 polar vortex mitigated a significant energy cost true-up. Ex. ODC-31 at 56.

[83] The record also indicates ODEC might be willing to provide it to end-use customers like Bear Island on request. *See, e.g.*, Tr. 596.

C. Loss Factor: Has ODEC met its burden of proof with respect to its proposed loss factors?

ODEC

163. ODEC explains the circumstance that approximately 10% of its energy deliveries to Member Cooperatives occur at distribution-level voltages (below 69 kV) creates the need to include a Distribution Loss Factor in the formula rate. It further explains the higher losses distribution-level voltage service creates vis-à-vis transmission-level voltage (69 kV and above) service are specified in the two (2) FERC-approved agreements under which ODEC secures transmission service for the Member Cooperatives: a NITSA between ODEC and Virginia Dominion Power and an interconnection agreement between ODEC and Delmarva Power and Light. ODEC stresses the loss factors specified in the agreements represent losses charged to ODEC by these third-party transmission service providers; the loss factors do not represent losses over ODEC-owned transmission or distribution facilities.

164. ODEC continues to explain the Prior Formula Rate accounted for these distribution losses through rate credits to ODEC's transmission-level customers. In contrast, the Revised Formula Rate accounts for distribution losses by applying the Distribution Loss Factor to the rate ODEC charges its distribution-level customers. ODEC explains the Revised Formula Rate defines the Distribution Loss Factor as "an average loss factor calculated based on loss factors provided in FERC-approved agreements". It states this definition accounts for the circumstance that the underlying agreements change from time to time and therefore obviates the need to revise the formula rate each time the agreements change. It also notes every Member Cooperative customer has access to all loss factor details. ODEC maintains applying the average loss factor to all customers served at distribution-level voltages is consistent with ODEC's postage stamp rate philosophy and also accords with the Distribution Loss Factor's purpose as a measure of the losses charged to ODEC by Virginia Dominion Power and Delmarva Power and Light.

Bear Island

165. Bear Island argues the Distribution Loss Factor should be rejected because it only applies to the Base Energy Rate. Bear Island contends ODEC also should be required to (i) apply the Distribution Loss Factor to the RTO Capacity Service rate, the Transmission Service rate, the ROC Capacity Service rate and the Energy Adjustment Rate, or (ii) explain why it would not be just and reasonable to do so. In addition, Bear Island maintains the Distribution Loss Factor does not satisfy minimum formula rate requirements because it neither states a numerical loss factor nor provides a formula with the detail a customer or other interested party would need to calculate it.

Trial Staff

166. Trial Staff maintains the Distribution Loss Factor should be rejected because it is unsupported, undefined and uncalculated. It also maintains ODEC has not demonstrated it does not already recover these costs via the PJM OATT.

Analysis

167. ODEC bears an affirmative burden to prove the Distribution Loss Factor is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in itself. It does not bear a burden to prove the Distribution Loss Factor is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in comparison to any alternative such as the ones proposed by Bear Island.

168. The record establishes the Distribution Loss Factor only covers distribution-level (below 69 kV) losses charged to ODEC by third-party transmission service providers for distribution-level service ODEC secures for its distribution-level customers. Ex. ODC-3 at 29; Ex. ODC-31 at 60. The Distribution Loss Factor therefore matches cost to causation. The record also establishes the Distribution Loss Factor is determined exclusively in accordance with the loss factors specified in the two (2) FERC-approved agreements under which ODEC secures distribution-level service for the Member Cooperatives taking that service: a NITSA between ODEC and Virginia Dominion Power and an interconnection agreement between ODEC and Delmarva Power and Light.[84] Ex. ODC-31 at 60. *See also* Ex. ODC-38 at 10 (ODEC/Virginia Dominion Power NITSA). The Distribution Loss Factor therefore recovers 100% pass-through costs specified in Commission-approved agreements. Since those costs are Commission-approved, it is unnecessary for the Distribution Loss Factor to be numerically specified. It is reasonable to identify them by reference to the source agreements in which they are specified (*see, e.g., id.* (specifying 0.06924% loss factor))—particularly in light of the circumstances that (i) the numerical factors are readily available to the affected Member Cooperatives and (ii) the source agreements change from time to time, so specifying the numerical factors in the Distribution Loss Factor would require the formula rate to be revised any time the numerical factor in either agreement changed. A primary advantage to a formula rate structure is that it permits the underlying rate inputs to change without requiring a formula rate revision. In sum, I find and conclude ODEC has satisfied its

[84] This circumstance confirms any Trial Staff double recovery concern is baseless. As previously explained at Paragraph 141 *supra*, PJM OATT Attachment H-3F recovers costs associated with ODEC-owned transmission facilities, not the third-party facilities implicated through the Distribution Loss Factor.

affirmative burden to prove the Distribution Loss Factor is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful.

D. Other proposed rate schedule changes: Has ODEC met its burden of proof with respect to the following proposed rate schedule changes? Are its changes just, reasonable, and not unduly discriminatory or preferential, including but not limited to:

(1) Proposed changes regarding delivery point billing

ODEC

169. ODEC explains the Prior Formula Rate billed all charges at the service point level.[85] The Revised Formula Rate continues to bill multiple charges at the service point level, but bills Transmission Service (1 CP), Distribution Service (1 CP) and RTO Capacity Service (5 CP) charges at the Member Cooperative level—which is an aggregation of the Member Cooperative's various service points.

170. ODEC states Bear Island and Trial Staff oppose Member Cooperative level billing due to an apparent confusion between service levels for charge allocation/collection purposes and service level information reflected on bills to Member Cooperatives. The Revised Formula Rate specifies the service levels for charge allocation/collection purposes, but not the information reflected on the Member Cooperatives' bills. ODEC explains that while all Member Cooperative charges are calculated/allocated the same way, the level of detail included in the various Member Cooperatives' bills differs—typically, in accordance with Member Cooperative preferences. It continues to explain that if it is required to include in the formula rate the detailed information provided in each Member Cooperative's bill, it also will have to make a filing with the Commission every time any of the bill information changes—even in response to a Member Cooperative request. ODEC protests this result would be unreasonable, particularly since (i) no Member Cooperative has raised any concern(s) about the level of information provided on its monthly bill, and (ii) ODEC confirmed on the record in this proceeding that the change in the way charges are presented on Member Cooperative bills does not change the way the charges are calculated/allocated.

[85] A Member Cooperative's service point is where ODEC takes service on behalf of the Member Cooperative.

Bear Island

171. Bear Island maintains the only rationale ODEC has offered to support Member Cooperative level billing is to accommodate the new separate demand charges within ODEC's current billing process and infrastructure. Bear Island emphasizes ODEC historically billed at the service point level and has offered no legitimate reason why it cannot continue to do so. Although Bear Island acknowledges ODEC has continued to provide service point billing information to REC and Bear Island under the Revised Formula Rate, it underscores the Revised Formula Rate does not require ODEC to continue do so if it decides to stop. In Bear Island's view, there is no reasonable justification for the Revised Formula Rate not to require ODEC to provide service point billing instead of leaving it to ODEC's discretion.

Trial Staff

172. Trial Staff concedes neither the Prior Formula Rate nor the Revised Formula Rate require(d) ODEC to provide monthly billing point data to the Member Cooperatives. It also acknowledges ODEC stated on the record in this proceeding that ODEC Member Cooperatives would continue to receive detailed load files with a summary of all service point data in their monthly bills from ODEC, just as they did under the Prior Formula Rate. Nevertheless, Trial Staff submits ODEC should amend the Revised Formula Rate to require ODEC to provide this information.

Analysis

173. I discern no Bear Island or Trial Staff confusion on this issue. They essentially argue ODEC should be required to supplement the Revised Formula Rate to specify that ODEC must provide detailed service point level information in its monthly invoices to Member Cooperatives. Insofar as this understanding is correct, it is easy to address.

174. As I have repeated *ad nauseum* at this point, ODEC bears an affirmative burden to prove the Revised Formula Rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful in itself. It cannot be required in the context of this FPA section 205 proceeding to make any formula rate revision/addition it did not propose in the September 30, 2013 filing. The issue, assuming there is one, is whether ODEC has proven the Revised Formula Rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful insofar as it addresses or revises delivery point billing.

175. My review of the Revised Formula Rate reveals no reference to delivery point billing. The Revised Formula Rate clearly distinguishes between Service Point Level *Charges* and Member Distribution Cooperative Level Demand *Charges* (Ex. ODC-2 at 30 (emphasis added)), but charges are not the issue here—at least as Bear Island and Trial Staff frame it in their testimony and briefs. Neither Bear Island nor Trial Staff argues the

service point level/Member Cooperative level charges or allocations are problematic. Moreover, neither the Prior Formula Rate nor the Revised Formula Rate addresses service point level/Member Cooperative level billing at all. It follows there is no burden of proof for ODEC to satisfy here. This is a non-issue.[86]

(2) Proposed timing for Energy Adjustment and January 1 annual rate change effective date

176. These issues are resolved at Paragraphs 110, 160 and 161 *supra.*

(3) Proposed discretion regarding retention of margins

177. In contrast to rate structures designed to provide a return on common equity (ROE) to profit-making utilities, ODEC's not-for-profit formula rate is designed to produce a "net margin"—which is simply any demand revenue in excess of demand expense. Ex. ODC-48 at 3. Both the Prior Formula Rate and the Revised Formula Rate allow ODEC to retain a specified amount of its net margin as "patronage capital", ODEC's only source of equity. *Id*. Each rate specifies ODEC must collect a Margin Requirement equal to 20% of its gross interest charges,[87] and may retain a "Times Interest Earned Ratio" (TIER) between 1.1 and 1.2. Ex. ODC-3 at 23 (Revised Formula Rate Note F), 57 (redline Prior Formula Rate Note G). A 1.1 TIER represents a 10% net margin over gross interest cost. A 1.2 TIER represents a 20% net margin over gross interest cost. Tr. 1163.

Participant Positions

ODEC

178. ODEC explains both the Prior Formula Rate and the Revised Formula Rate allow ODEC to retain up to a 1.2 TIER. It further explains the Revised Formula Rate differs from the Prior Formula Rate in that Margin Requirement Note F grants the ODEC Board the option to either return any net margin above 1.2 TIER to the Member Cooperatives (as it did under the Prior Formula Rate) or to retain the excess margin as additional

[86] The circumstance that ODEC historically has/voluntarily continues to provide detailed service point level information in its monthly invoices to Member Cooperatives (including REC) is beside the point. The Prior Formula Rate did not require ODEC to provide that information. Neither does the Revised Formula Rate.

[87] The underlying charges are reflected in FERC Accounts 427 through 431, which are the accounts in which ODEC reports gross interest expense on its outstanding debt. *See* Ex. ODC-1 at 18.

capital. ODEC submits Board discretion to retain net margin in excess of 1.2 TIER allows the Board to optimize ODEC's financial condition. It notes that while ODEC already has the ability to budget for additional equity to be collected prospectively during the year under Revised Formula Rate Equity Contribution Note E, Board flexibility to retain additional margin at specific times throughout the year enhances the Board's ability to respond to ODEC's actual (vs. budgeted) financial performance and capital needs. It adds that financial ratings agencies regard such flexibility as credit-positive, enhancing ODEC's access to capital on favorable terms.

Analysis

179. Both Bear Island and Trial Staff oppose Revised Formula Rate Margin Requirement Note F insofar as it grants the ODEC Board the option to retain any net margin above 1.2 TIER as additional capital. There is no need to detail their specific objections because ODEC clearly has failed to satisfy its affirmative burden of proof in this instance. ODEC acknowledges its minimum Margin Requirement is 1.1 TIER. Ex. ODC-1 at 18; Ex. ODC-48 at 4. ODEC also acknowledges it already has the ability to budget for additional equity to be collected prospectively during the year under Revised Formula Rate Equity Contribution Note E. Ex. ODC-1 at 20. *See also* Ex. ODC-3 at 23 (Note E). ODEC has completely failed to demonstrate that a 1.1 TIER coupled with Equity Contribution Note E are in any way inadequate to meet ODEC's capital needs. Moreover, ODEC already may retain up to a 1.2 TIER (Ex. ODC-1 at 18), which gives it an additional 10% margin over its 1.1 TIER minimum capital requirement. ODEC has presented no evidence that this additional 10% margin is inadequate to satisfy its stated purpose of "respond[ing] to the requirements of the credit rating agencies and to attract capital in the markets." *See id*. *See also* Ex. ODC-3 at 57 (redline Prior Formula Rate Note G). The rational bases ODEC submits in support of Board discretion to retain net margin in excess of 20% (1.2 TIER)—i.e. enhanced ability to respond to ODEC's actual (vs. budgeted) financial performance/capital needs and a potentially more favorable financial rating—simply do not satisfy ODEC's burden to affirmatively prove the Revised Formula Rate Margin Requirement Note F is just and reasonable insofar as it grants the ODEC Board the option to retain net margin above 1.2 TIER as additional capital.

> (4) Proposed discretion regarding timing and number of rate changes (Board authority to revise the budget, which may result in new rates and charges)

180. Bear Island does not address this issue.[88] Trial Staff addresses it only insofar as it

[88] Here, as elsewhere, Bear Island states it "does not take a position on this issue in its initial or reply briefs." Bear Island RB at 38. This language may simply be an attempt (continued)

implicates the Base Energy Rate Energy Adjustment. Accordingly, this issue is resolved in accordance with Paragraph 161 *supra*. I also observe ODEC Board discretion with respect to budget changes is the same under the Revised Formula Rate as it was under the Prior Formula Rate. The Board discretion at issue therefore constitutes an unrevised element of the formula rate. It follows that Board discretion with respect to budget changes falls beyond the scope of the Hearing Order and FPA section 205.

(5) Proposed elimination of Commission oversight

181. The Prior Formula Rate listed various circumstances that required ODEC to make a rate change application to the Commission. Ex. ODC-3 at 50. The Revised Formula Rate omits the list. *Id.*

Participant Positions

ODEC

182. ODEC generally argues it is unnecessary to include a list of circumstances requiring ODEC to make a rate change application to the Commission in the formula rate because the FPA and the Commission, not the formula rate, establish the circumstances under which ODEC is required to file a rate change application. ODEC emphasizes the entire rate schedule is ODEC's filed rate. As such, no element can be modified without a prior FPA section 205 filing and Commission acceptance/approval. ODEC adds that no Commission authority requires a rate schedule to specify the circumstances requiring a rate change application.

183. Insofar as the Revised Formula Rate omits the Prior Formula Rate provision covering Penalties, Property Losses and Extraordinary Losses, ODEC emphasizes those costs are recovered from the Member Cooperatives—either through the formula rate or as unrecovered expenses. ODEC states the ODEC Board (comprised of Member Cooperative representatives) decided to omit the provision requiring a Commission filing, presumably because the Member Cooperatives were responsible for the costs in any event. ODEC notes the Prior Formula Rate provided for recovery of extraordinary

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to comply with the presiding judge's briefing protocols, but it suggests Bear Island might have taken a position on the issue in its testimony that it did not present on brief. A presiding judge drafting an Initial Decision does not have the luxury of scouring the record evidence to determine whether a participant took a position on every issue. It is incumbent on any participant to make all its positions known on brief. It would be preferable for a participant taking no position on an issue to unequivocally state it "takes no position on this issue."

losses through a specific rider but did not include a specified account for such losses. ODEC explains the Revised Formula Rate includes a new Account 435 (Extraordinary Deductions) to recover extraordinary losses.

Bear Island

184. Bear Island maintains the rate change application provision cannot be omitted from ODEC's formula rate because a formula rate is complex and, as a consequence, it is impossible to remove certain parts and expect the formula rate to work as intended. Bear Island maintains it is "critical" for the Commission to have oversight over a formula rate through provisions like the one at issue to ensure customers are protected. Focusing on Penalties, Property Losses and Extraordinary Losses specifically, Bear Island repeats its argument that the circumstance all Member Cooperatives agree to a formula rate revision does not satisfy ODEC's burden to prove the revision is just and reasonable. Bear Island also argues omitting the rate change application provision undermines the openness and transparency required of formula rates. Thus, it is fair and reasonable for ODEC to be required to identify its costs and request Commission approval prior to making changes to its formula rate.

Trial Staff

185. Trial Staff emphasizes the Prior Formula Rate included a list of circumstances requiring ODEC to file a rate change application with the Commission. It objects that the Revised Formula Rate deletes this Commission "oversight" language. It further objects that adding Account 435 to the Revised Formula Rate does nothing to mitigate deleting the Penalties, Property Losses and Extraordinary Expenses provision because it is merely a "placeholder" account. It states ODEC has never filed for any extraordinary losses and does not anticipate ever doing so. It takes the position placeholder accounts are never appropriate, and ODEC's Account 435 should be disallowed as a consequence. It complains ODEC's formula rate already is woefully inadequate in terms of customer protections and transparency. It characterizes the Prior Formula Rate Penalties, Property Losses and Extraordinary Losses provision as a lonely and insufficient protection against possible abuse of discretion. Trial Staff concludes by emphasizing extraordinary property losses are one-time expenses and, as such, cannot be passed through without initial Commission review.

Analysis

186. Bear Island and Trial Staff apparently have become so entrenched in their opposition to the Revised Formula Rate that they adamantly oppose every revision irrespective of impact. It is axiomatic that FPA and Commission filing requirements cannot be created, extinguished, modified, waived or evaded by means of a rate provision/revision. ODEC therefore is correct that it is unnecessary to include a list of

circumstances requiring it to make a rate change application to the Commission in the formula rate. The FPA and the Commission—not the formula rate or the ODEC Board—dictate the circumstances under which ODEC is required to file a rate change application. Specifying some of those circumstances in the formula rate has no impact whatsoever on Commission oversight. Nor does omitting them. Moreover, I am unaware of any Commission order or policy requiring a rate schedule to specify the circumstances under which a rate change application must be made, and neither Bear Island nor Trial Staff cites any. Finally, insofar as the Penalties, Property Losses and Extraordinary Expenses provision is concerned, Trial Staff itself emphasizes the Commission treats extraordinary property losses as one-time expenses that cannot be passed through without initial Commission review. *See* Trial Staff IB at 47 (quoting *Trans-Allegheny Interstate Line Co.*, 119 FERC ¶ 61,219, at P 55 (2007)). It follows there is no need to confirm this requirement in the Revised Formula Rate.[89]

187. Bear Island's claim that the rate change application provision cannot be omitted from ODEC's formula rate because the rate is too complex is artifice. While it often is the case that adding, altering or omitting elements of a formula rate could have unanticipated/unintended impacts on other rate elements, omitting the narrow rate change application provision at issue clearly will not have any impact on other elements of ODEC's formula rate. This assessment aside, it was Bear Island's burden to specifically identify any alleged impact(s). Bear Island failed to satisfy that burden.

(6) Revisions to the Development and Implementation of the Formula Rate

Participant Positions

ODEC

188. ODEC explains both the Prior Formula Rate and the Revised Formula Rate contain an Executive Summary that includes a section designated "Development and Implementation of the Formula Rate". It further explains the section is largely

[89] The circumstance that the Commission treats extraordinary property losses as one-time expenses that cannot be passed through without Commission review also dispels any concern over including Account 435 in the Revised Formula Rate. The record indicates the Prior Formula Rate provided for recovery of extraordinary losses through a specific rider but did not include a specified account for such losses. Ex. ODC-7 at 4-5. Account 435 was included in the Revised Formula Rate to correct that deficiency. *Id*. at 5. In addition, extraordinary property losses are by definition rare and unanticipated. It therefore is unremarkable that ODEC neither has filed to pass through any extraordinary losses to date nor anticipates it will do so in the future. *Id*.

descriptive in both versions of the formula rate, outlining the three (3) step process ODEC employs to develop and implement the actual rate each year. It states that while the Revised Formula Rate reflects a number of revisions to this section, the revisions generally are not substantive. The bulk of them consist of deleting descriptive language. ODEC maintains deleting the unnecessary descriptive language makes the Revised Formula Rate clearer by reducing the potential confusion between the formula rate's descriptive and functional provisions. ODEC also maintains any functional aspects of the formula rate referenced under this heading are specifically addressed under other issues specified in the Joint Stipulation of Issues.

Bear Island

189. Bear Island states it addresses minimum standards for formula rates in sub-issue (9) (Proposed changes to the formula rate, *infra*).

Trial Staff

190. Trial Staff states its concern over the Executive Summary section designated "Development and Implementation of the Formula Rate" is the manner in which ODEC actually develops and implements the various rates reflected in the Revised Formula Rate. According to Trial Staff, these new substantive elements produce such a change from the Prior Formula Rate that a complete Commission review is warranted.

Analysis

191. The participants appear to agree that the Revised Formula Rate Executive Summary section designated "Development and Implementation of the Formula Rate" is merely descriptive/explanatory of the substantive processes ODEC employs to develop and implement the rates each year. My comparison of the section with the same section in the Prior Formula Rate confirms this is the case. *Compare* Ex. ODC-3 at 16-17 *with id*. at 40-42. The substantive elements of the Revised Formula Rate described in the section are addressed under more specific issues throughout this Initial Decision. The Executive Summary section designated "Development and Implementation of the Formula Rate" may need to be modified to conform to the rulings on those issues, but it is not otherwise objectionable.

> (7) The proposed use of placeholder accounts in the rate schedule (Accounts 551 and 553 for Energy, Account 408.2, Accounts 409.3 through 411.5, Account 435)

Participant Positions

ODEC

192. ODEC explains the costs recovered through the formula rate generally are defined by reference to FERC Uniform System of Accounts. ODEC states the Revised Formula Rate revised or added a number of these accounts. Specifically, it revised Accounts 551 and 553 to accommodate energy-related expenses associated with a new 1000 MW natural gas-fired combined cycle generating plant (Wildcat Point Facility). It added Accounts 408.2, 409.3 through 411.5 and 435.

193. ODEC maintains it is appropriate to include costs associated with the Wildcat Point Facility in Accounts 551 and 553 because (i) the costs are predominantly variable, and therefore should be classified as energy-related O&M costs in accordance with the Commission's "predominance" classification system; and (ii) the Wildcat Point Facility's projected mid-2017 operational date is no reason to postpone revising the accounts since ODEC already has all the necessary information to do so. It maintains it is appropriate to add Accounts 408.2, 409.3 through 411.5 and 435 because ODEC discovered those accounts were missing from the Prior Formula Rate when ODEC was preparing the Revised Formula Rate filing. ODEC explains its formula rate approach consistently has been to include all accounts falling within the Statement of Income listed in the FERC Uniform System of Accounts. ODEC submits it is appropriate to include in the formula rate all accounts in which ODEC may incur costs now or in the future. It challenges Trial Staff's claim that Commission policy prohibits what Trial Staff characterizes as "placeholder accounts". It also challenges Trial Staff's contention that any account not currently used should be populated with a "hard zero"—that is, the account balance may not be changed without an FPA section 205 or 206 filing seeking permission from the Commission.

Bear Island

194. Bear Island protests that ODEC will not start booking energy-related costs associated with the Wildcat Point Facility until it goes into service. As a consequence, revised Accounts 551 and 553 will serve as "placeholders" until that time. The problem with using placeholder accounts for Wildcat Point Facility-related costs, according to Bear Island, is the exact nature of those costs is purely speculative until the facility comes on line. Bear Island argues ODEC's "bald assertion" the facility will operate as a base load unit is the only evidence ODEC provided to support the claim. And assuming the assertion is correct, ODEC has not established 100% of the associated O&M costs are

either variable or energy-related. Bear Island submits the Commission requires costs within any account to be allocated to demand or energy, but not to both.[90]

Trial Staff

195. Trial Staff states formula rate accounts with zero balances and in which costs never will be booked or recovered are "placeholder" accounts. Trial Staff notes the ODEC formula rate has many such accounts, including Accounts 535 through 545 (covering hydro plant O&M) and Accounts 580 through 598 (covering distribution O&M). It says ODEC has no hydro plant and no distribution plant or costs. It notes the only account among these examples in which ODEC booked any expense was Account 582 (Station Expense). It maintains ODEC is required to make a separate FPA section 205 filing to recover that expense.

196. Focusing on new Accounts 408.2, 409.3 through 411.5 and 435, Trial Staff states ODEC's reason for adding Account 408.2 was because the formula rate already included Accounts 415 through 426.5, and Account 408.2 was added to capture any taxes associated with those accounts. It claims any taxes other than income (including property, FICA and unemployment taxes) are listed under Account 408.1. Thus, Account 408.2 is unused and unnecessary, and should be deleted. Trial Staff adds that ODEC included new Accounts 409.3 through 411.5 simply to supplement the two (2) income tax accounts (409.1 and 409.2) reflected in the Prior Formula Rate. It complains these additional accounts are unnecessary and confusing. Trial Staff emphasizes ODEC is a not-for-profit, non-taxable entity, and the only way ODEC might lose its non-taxable status (and require the additional tax accounts) would be if its non-Member Cooperative income exceeds 15%. This unlikely scenario does not support including the accounts in the formula rate in Trial Staff's view. And since ODEC has never had nor expects any extraordinary loss covered by Account 435, that account should be deleted as well. In the event the new accounts are not disallowed, Trial Staff advocates requiring ODEC to populate them with a "hard zero", which would prevent ODEC from changing the account balance unless it made an FPA section 205 or 206 application and received Commission authorization to do so.

197. Trial Staff acknowledges Accounts 551 and 553 (covering combined-cycle generating facilities) were included in the Prior Formula Rate, but stresses they were classified as demand-related. It underscores the fact that ODEC proposes to include energy-related costs associated with the Wildcat Point Facility in these accounts. Trial Staff cites a number of Commission opinions for the proposition that costs within any

[90] Bear Island raises this objection for the first time in its Reply Brief, apparently adopting it from Trial Staff, who raised it for the first time in its Initial Brief.

FERC account must be allocated either to demand or energy in accordance with the predominance method, but not to both. It also argues the Account 551 and 552 revisions are inappropriate because ODEC currently has no combined-cycle generating facilities.

Analysis

198. To the extent Bear Island or Trial Staff challenges FERC Accounts reflected in the Prior Formula Rate, the challenges are directed to unrevised elements of the formula rate. Those challenges fall beyond the scope of the Hearing Order and FPA section 205 and must be dismissed as a consequence. Any challenge to Account 435 is dismissed in accordance with footnote 89 *supra*.

199. Although Accounts 551 and 553 (covering combined-cycle generating facilities) were included in the Prior Formula Rate, the Revised Formula Rate modified those accounts by introducing sub-accounts for demand and energy costs. The sub-accounts therefore constitute a formula rate revision under the Hearing Order. The Account 551 and 553 revision objections, however, are baseless. Contrary to Trial Staff's assertion, there is no evidence the Commission *requires* the costs within a FERC account to be allocated entirely to either demand or energy. My review of the opinions Trial Staff cites to support that proposition reveals the Commission (and in two (2) cases, a presiding judge) simply found *the Staff proposal* to allocate the costs at issue at 100% was preferable to an alternate proposal under the circumstances presented.[91] And since there is no requirement for ODEC to allocate Account 551 and 553 costs associated with the Wildcat Point Facility entirely to either demand or energy (or as fixed or variable) when it eventually comes on line, any criticism that the exact nature of those costs is speculative at this point is irrelevant. The record indicates ODEC reasonably anticipates bringing the Wildcat Point Facility—a new 1000 MW natural gas-fired combined cycle generating plant—on line on or before June 1, 2017. Ex. ODC-1 at 4; Ex. ODC-7 at 3. Accounts 551 and 553 cover combined-cycle generating units like the Wildcat Point Facility. It follows that those accounts are where the associated costs should be booked. Since there is no suggestion the Wildcat Point Facility will not be completed/come on line as projected, it is a relative certainty ODEC actually will need to book the costs—albeit in what are now indeterminate proportions—in the demand and energy sub-accounts it has included in the Revised Formula Rate. I therefore find and conclude it is just and reasonable for ODEC to include the sub-accounts in the formula rate at this time. There is no legitimate reason to defer that inclusion.

[91] It also is curious that Trial Staff was compelled to reach back in the annals of FERC Reports an average 35 years to find authority to support its position. One would expect a broadly-applicable Commission accounting "requirement" to have been confirmed at least occasionally over the intervening period.

200. Any objection to the Revised Formula Rate grounded in unpopulated (aka "placeholder") accounts is meritless. As Trial Staff emphasizes, the Prior Formula Rate incorporated many such accounts. Since the Prior Formula Rate is presumptively just and reasonable—and the presumption cannot be challenged in the context of this FPA section 205 proceeding—it conclusively must be presumed here that: (1) any unpopulated accounts carried forward from the Prior Formula Rate to the Revised Formula Rate remain just and reasonable and (2) including unpopulated accounts in the formula rate is not unjust or unreasonable in principle. *Accord Xcel Energy Southwest Transmission Co., LLC*, 149 FERC ¶ 61,182, at P 96 (2014) (confirming placeholders reflect common practice in Commission-accepted formula rates). Further, the record establishes ODEC's consistent formula rate approach since 1992 has been to include all accounts falling within the Statement of Income listed in the FERC Uniform System of Accounts. Ex. S-2 at 1. The record also indicates ODEC added Accounts 408.2, 409.3 through 411.5 and 435 to the Revised Formula Rate because ODEC discovered those accounts were missing from the Prior Formula Rate when ODEC was preparing the September 30, 2013 filing. *Id*.; Ex. ODC-44 at 12. ODEC therefore was simply correcting a Prior Formula Rate oversight/incongruity. In reaction to Trial Staff's "transparency" objection (*see, e.g.*, Trial Staff RB at 33), I fail to understand how including the universe of FERC Accounts in a formula rate undermines its transparency. It would make more sense to conclude the opposite is true.

201. Similar reasoning applies to Trial Staff's insistence on ODEC populating accounts reflecting no current costs with a "hard zero". This insistence seems to be grounded in a concern that ODEC surreptitiously might include and recover inappropriate costs without Commission review. But there is no evidence the Commission requires "hard zeroes" in unpopulated FERC Accounts. More important to the instant case, ODEC is a not-for-profit cooperative utility. Its formula rate therefore is designed to recover its actual costs—no more, no less. Ex. ODC-44 at 11. ODEC simply has no incentive to over-recover its costs. And as previously noted, a primary formula rate objective is to obviate the need to seek Commission approval every time formula rate inputs change. Further, formula rate inputs are not part of the formula rate itself. *See, e.g., PJM Interconnection, LLC*, 110 FERC ¶ 61,053, at P 120 and n.105 (2005). Input changes are always reviewable, but not in the context of an FPA section 205 proceeding. *Id*.

(8) Proposed changes to the Executive Summary

Participant Positions

ODEC

202. ODEC reiterates that both the Prior Formula Rate and the Revised Formula Rate contain an Executive Summary that describes/explains the overall formula rate and its implementation. It states a comparison of the two in redline format evidences extensive

revisions, but most of the revisions are merely organizational. It submits that a comparison between the clean versions demonstrates the structure and substance of the two are largely the same. It stresses that any aspect of the Revised Formula Rate Executive Summary that arguably has a substantive effect on the development or implementation of the rate is specifically addressed under a dedicated topic reflected elsewhere in the Joint Stipulation of Issues.

203. ODEC complains Trial Staff seizes on the Executive Summary's organizational revisions to launch sweeping claims that the long-standing structure and implementation of ODEC's formula rate are deficient and must be comprehensively revised. ODEC states the precise scope of Trial Staff's recommendations are unclear, but suggest the formula rate is deficient because it lacks the detailed protocols adopted by the Commission for the Midwest (now Midcontinent) ISO open access transmission formula rates.[92] For example, Trial Staff argues ODEC's formula rate should be based on FERC Form 1 data or other publicly available/verifiable information despite the fact that ODEC's formula rate always has been based on budget information.

204. ODEC emphasizes the Prior Formula Rate did not contain any formal protocols. And to the extent Trial Staff argues ODEC should be required to supplement the Revised Formula Rate with the kind of detailed formal protocols adopted in the MISO Orders, ODEC protests that any such requirement only may be imposed in accordance with FPA section 206, not in the context of this section 205 proceeding. ODEC also protests that adopting Trial Staff's protocols position would require ODEC to completely rewrite long-standing fundamental aspects of the formula rate in ways that are wholly unnecessary in consideration of the circumstance that it is confined to the bilateral WPCs between ODEC and its Member Cooperatives. ODEC emphasizes the MISO Orders apply to formula rates for *open access transmission service* under the MISO OATT. It distinguishes the MISO scenario from its own by underscoring that the ODEC formula rate is not part of any tariff of general applicability. It is restricted to the bilateral WPCs between ODEC and its eleven (11) Member Cooperatives. Those eleven (11) Member Cooperatives are the only customers that conceivably may take service under ODEC's formula rate.

Bear Island

205. Bear Island states it addresses minimum standards for formula rates and transparency issues related to the Executive Summary in sub-issue (9) (Proposed changes

[92] *See Midwest Independent Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 (2013), *reh'g denied*, 146 FERC ¶ 61,209 (2014), *order on compliance*, 146 FERC ¶ 61,212 (2014) (MISO Orders).

to the formula rate, *infra*).

Trial Staff

206. Trial Staff alleges ODEC claims it does not have/has never had what the Commission calls "protocols" and, if true, this claim alone would be sufficient reason for the Commission to reject the Revised Formula Rate and direct ODEC to file protocols that comply with current Commission policy.[93] Trial Staff nevertheless states it disagrees that ODEC has no "protocols" because both the Prior Formula Rate and the Revised Formula Rate include an Executive Summary. According to Trial Staff, each Executive Summary includes some of the same sort of provisions generally found in formula rate "protocols". Trial Staff cites the provisions designated "Development and Implementation of the Formula Rate" (addressed *supra* under sub-issue (6)) as an example. But what the Executive Summary does *not* include, in Trial Staff's narrative, are the protections the Commission currently requires of formula rates/tariffs of general applicability. Trial Staff emphasizes the MISO Orders directed MISO to revise its formula rate protocols to: (1) include all interested parties as eligible participants in the formula rate information exchange and review process; (2) improve transparency by making revenue requirements, inputs, calculation and other information publicly available and submitting an annual information filing to the Commission; and (3) afford parties the opportunity to engage in a well-defined informal challenge process. Trial Staff emphasizes the Revised Formula Rate Executive Summary does none of these things. It states the circumstance that ODEC provides service only to its Member Cooperatives is of no consequence. Trial Staff therefore concludes the Executive Summary is insufficient to ensure just and reasonable rates. It submits the Executive Summary should be disallowed without prejudice to provide ODEC the opportunity to re-file an Executive Summary incorporating appropriate protocols.[94]

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[93] *See* Trial Staff IB at 51 (citing Tr. 274). This characterization is consistent with ODEC's position, but Trial Staff's reliance on Tr. 274 as support for it is a misrepresentation. Tr. 274 consists entirely of an ODEC counsel pre-hearing oral argument summation of pre-filed Trial Staff testimony ODEC sought to strike in accordance with my previous scope of proceeding rulings. It is not evidence and it does not express ODEC's own position. Neither does it reference any Commission definition of "protocols".

[94] Trial Staff states that although it normally would not propose actual tariff language, it would make recommendations as to what ODEC should include in the replacement Executive Summary to bring it into compliance with current Commission requirements. It notes it did not do so in this case because the presiding judge determined it cannot. I acknowledge I expressly/repeatedly prohibited both Trial Staff and Bear

(continued)

Analysis

207. There is little need to belabor this issue. Trial Staff's opposition to the Revised Formula Rate Executive Summary is grounded in its stubborn refusal throughout this proceeding to accept/respect the limitations FPA section 205 imposes. Any cursory examination of the Executive Summar[ies] included in the Prior Formula Rate and the Revised Formula Rate confirms that neither Executive Summary incorporates anything that legitimately may be characterized as formula rate protocols.[95] The Executive Summary included in the Revised Formula Rate has been extensively revised from the Executive Summary included in the Prior Formula Rate, but both are fundamentally descriptive/explanatory in nature. And both describe/explain essentially the same rate elements, development and implementation procedures. Moreover, any element of the Revised Formula Rate Executive Summary that actually might have a substantive impact on the development or implementation of the rate is specifically analyzed under a dedicated topic, as the "Development and Implementation of the Formula Rate" analysis (see Issue II (D)(6) *supra*) demonstrates.[96]

208. ODEC's cooperative structure is highly pertinent to any formula rate protocol evaluation. The ODEC formula rate clearly is not a tariff of general applicability/open access tariff. The record confirms the rate is strictly confined to the bilateral WPCs between ODEC and its eleven (11) Member Cooperatives. *See* Ex. ODC-1 at 3-6; Ex. ODC-2 at 1-3; Ex. ODC-3 at 15-16, 18, 27-28; Ex. ODC-31 at 66-67. *See also* Ex. ODC-34. No non-Member Cooperative entity is eligible to secure service from ODEC under ODEC's formula rate.[97] Tr. 1498. Further, nothing in either the Prior Formula Rate or

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Island from proposing alternate or additional formula rate provisions based on my evaluation that FPA section 205 does not allow the Commission to require ODEC to implement alternate or additional formula rate provisions in the context of this proceeding. See Paragraphs 3-13, 23-31, 42-44 *supra*.

[95] I note in this regard that I have been extensively involved in the formula rate protocol drafting process as a settlement judge in two (2) cases in which entirely new formula rates were crafted from scratch over periods exceeding twelve (12) months each. I am thoroughly familiar with what constitutes a formula rate protocol for Commission purposes and what does not.

[96] The analyses conducted under Issue II (B)(2) (Energy Adjustment), Issue II (D)(4) (Board authority to revise the budget, which may result in new rates and charges) and Issue II (D)(5) (Proposed elimination of Commission oversight) are additional examples.

[97] I therefore reject any Trial Staff claim that ODEC's formula rate is "offered on a (continued)

the Revised Formula Rate appears to contemplate the possibility that any new member may be added. There certainly is no provision covering that possibility, and adding a new member would require an FPA section 205 filing in any event.

209. The formula rates the MISO Orders address contrast markedly with ODEC's formula rate. First, a review of those orders confirms they identify deficiencies in detailed formal *pre-existing/previously approved* protocols. *See, e.g., Midwest Independent Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at PP 6, 35-37 (2013).[98] Neither the Prior Formula Rate nor the Revised Formula Rate incorporates any formal protocols. Second, the MISO Orders address OATTs—i.e. tariffs of general applicability. *Id*. at P 36. The ODEC formula rate is not an OATT/tariff of general applicability. Third, the MISO Orders distinguish the tariffs at issue from "contract rates". *Id*. The WPCs incorporating the ODEC formula rate establish contract rates between ODEC and the Member Cooperatives. Fourth, the MISO Orders are based at least in part on changed circumstances. *Id*. at P 35. Neither Trial Staff nor Bear Island alleges any changed circumstances here, except an evolution in Commission formula rate protocol policy that is inapposite to ODEC's formula rate.[99] In sum, none of the Commission concerns expressed in the MISO Orders is implicated here. And to close the circle, FPA section 205 would not permit the Commission to direct ODEC to re-file the Revised Formula Rate in a form incorporating the protocols contemplated in the MISO Orders in the context of this proceeding even if it considered such protocols necessary or appropriate. The preceding analysis demonstrates they are not. But in the event the Commission were to disagree, the indicated remedy would be for the Commission to initiate an FPA Section 206 investigation.

(9) Proposed changes to the formula rate

210. My review of the participants' briefs indicates any issues presented there are redundant/addressed under other issues in this Initial Decision.

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generally applicable basis," as that standard is expressed at 18 C.F.R. § 35.2(c)(1) (2014).

[98] The orders also were issued in the context of an FPA section 206 investigation. *See Midwest Independent Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 1 (2013).

[99] Trial Staff's FERC Form 1 protocol objection is addressed at Paragraphs 141, 153 and 162 *supra*.

III. Whether additional provisions of ODEC's rate schedule are unchanged aspects of the formula rate, or changed aspects of the formula rate

A. With respect to unrevised elements of the formula rate, have Trial Staff or Bear Island demonstrated that revised elements of the formula rate also materially impact, alter or change specific unrevised elements of the formula rate?

211. I have consistently ruled throughout this proceeding that the FPA section 205 limitation on Commission authority to review unrevised elements of ODEC's formula rate is not absolute. Unrevised elements of the formula rate may be examined, but only insofar as Bear Island or Trial Staff first demonstrates some revised element of the formula rate has a material impact on unrevised elements that might render the rate unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful in some respect. *See, e.g.*, *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988) (Commission may examine whether interaction between revised and unrevised tariff elements produces unjust or unreasonable effect); *Cities of Batavia v. FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982) (Commission not precluded from reviewing revised rate to assure old and new parts operate in tandem to produce just and reasonable result). *Accord Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986). In that event, ODEC not only would be required to affirmatively prove its formula rate revisions are just and reasonable, but also that the revisions do not interact/operate in tandem with unrevised elements of the formula rate to produce an unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful rate.

212. Neither Bear Island nor Trial Staff made any identifiable attempt in this proceeding to demonstrate ODEC's formula rate revisions interact or operate in tandem with unrevised elements of the formula rate to produce an unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful rate. They instead propose *alternate* rate revisions and *additional* provisions they claim are required to make the formula rate just and reasonable. Such proposals do not satisfy the Bear Island/Trial Staff threshold burden to demonstrate ODEC's formula rate revisions have at least some direct impact on unrevised formula rate elements that might render the amalgamated rate unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful in some respect. They also fall completely outside the parameters of this FPA section 205 proceeding.

B. With respect to unrevised elements of the formula rate for which Trial Staff or Bear Island have made the demonstration required in III.A., has ODEC demonstrated that any such impacts, alterations or changes are just, reasonable and not unduly discriminatory or preferential?

213. This issue is moot.

IV. RELIEF

214. I cannot determine the composite result of the rulings reflected in this Initial Decision. I determined ODEC satisfied its affirmative burden to prove many elements of the Revised Formula Rate are just, reasonable, and not unduly discriminatory, preferential or otherwise unlawful. I also determined ODEC failed to satisfy its affirmative burden to prove other elements of the Revised Formula Rate are just, reasonable, and not unduly discriminatory, preferential or otherwise unlawful. Within this latter category are: (1) the 2014 add back costs attributable to Bear Island's 2013 demand response; (2) the RTO Capacity Service proxy rate; (3) the 1 CP Transmission Service rate allocator; and (4) Margin Requirement Note F insofar as it grants the ODEC Board the option to retain net margin above 1.2 TIER.

215. Margin Requirement Note F is easy to reconcile with the Revised Formula Rate as a whole. Note F simply must delete the language granting the ODEC Board the option to retain net margin above 1.2 TIER reflected in clause (2). Any retained net margin above 1.2 TIER must be returned to the Member Cooperatives in accordance with clause (1).

216. The 2014 add back costs attributable to Bear Island's 2013 demand response are more difficult—but seemingly possible—to reconcile with the Revised Formula Rate as a whole by re-allocating those specific costs among the Member Cooperatives in the *same manner* as the Prior Formula Rate would have done.[100] Bear Island would receive appropriate refunds through REC, ultimately only paying REC's socialized share of the 2014 add-back costs charged to ODEC by PJM. This procedure would restore ODEC, the Member Cooperatives and Bear Island to the *status quo ante* insofar as those specific costs are concerned.

217. The RTO Capacity Service proxy rate (including the 5 CP allocator) and the 1 CP Transmission Service rate allocator appear to be significantly more problematic. Although the 5 CP RTO Capacity Service proxy rate allocator is not objectionable in itself (because PJM uses the same allocator), it is integrally tied to the proxy rate, which has been rejected. This disconnect is compounded by the circumstance that neither over-collections nor under-collections through the proxy rate are reconciled through the proxy rate. They are reconciled through the 12 CP Remaining Owned Capacity rate. Thus, capacity costs charged to one Member Cooperative on a 5 CP basis under the RTO Capacity Service rate could be refunded to a different Member Cooperative on a 12 CP basis under the Remaining Owned Capacity Service rate. A similar problem bedevils the

[100] Not *under* the Prior Formula Rate because the add-back provision is otherwise just, reasonable, and not unduly discriminatory, preferential or unlawful, and therefore retains a January 1, 2014 effective date.

1 CP Transmission Service rate allocator. A 1 CP Transmission Service rate allocator matches PJM's Network Integration Transmission Service allocation methodology, but it creates the same kind of mismatch between any Transmission Service rate over/under-collections (using 1 CP) and the 12 CP Remaining Owned Capacity Service rate refund mechanism that the RTO Capacity Service 5 CP allocator creates. But in contrast to the RTO Capacity Service proxy rate, there is no other reason to find the Transmission Service rate unjust, unreasonable or unduly discriminatory, preferential or otherwise unlawful. It is perfectly acceptable on a stand-alone basis. The circumstance that the Remaining Owned Capacity Service rate is just, reasonable and not unduly discriminatory, preferential or otherwise unlawful on a stand-alone basis further compounds the issue.

218. Whether it is possible to reconcile these problematic Revised Formula Rate elements is unclear. Moreover, ODEC cannot be required to accept a presiding judge or Commission reconciliation in the context of this proceeding in any event. The Revised Formula Rate was filed as an integrated whole. A different rate design cannot be imposed on ODEC in the context of this proceeding. The courts have been adamant that administrative efficiency/convenience provides inadequate basis for the Commission to exercise its FPA section 206 authority in the context of a section 205 proceeding. *See, e.g., Pub. Serv. Comm'n. of N.Y. v. FERC*, 866 F.2d 487, 490-91 (D.C. Cir. 1989).[101] These circumstances suggest two (2) potential resolutions. The first is reversion/default to the Prior Formula Rate insofar as the services the Revised Formula Rate categorizes as RTO Capacity Service and Transmission Service are concerned. Since the entire Prior Formula Rate was based on 12 CP, there would be no methodological mismatch between any "RTO Capacity Service" or "Transmission Service" over/under-collections and the 12 CP Remaining Owned Capacity Service rate refund mechanism.[102] A second potential resolution is to permit ODEC to determine whether these problematic elements of the Revised Formula Rate can be reconciled and, if so, to propose how to accomplish it within the strictures of the Revised Formula Rate. Since I consider the second alternative preferable under the circumstances, I encourage ODEC to indicate in its brief on or opposing exceptions to this Initial Decision whether (and generally how) it believes these rate elements can be reconciled while keeping the Revised Formula Rate substantially intact. Any actual reconciliation could be deferred to/made in the context of a compliance filing if the Commission considers the proposed reconciliation appropriate.

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[101] Also see Paragraph 28 and footnote 31 *supra*.

[102] The Commission may accept an FPA section 205 rate proposal in whole or in part. *See, e.g., Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1574 (D.C. Cir. 1993); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 183 (D.C. Cir. 1986).

A substantially less attractive and more problematic third alternative would be wholesale reversion/default to the Prior Formula Rate.

A. With respect to each of the issues above, should the Commission order refunds? If so, how should they be calculated?

219. The Commission should order refunds in accordance with Paragraphs 215 and 216 *supra*. Additional refunds may be warranted depending on the ultimate resolution of the issues discussed in Paragraphs 217 and 218 *supra*.

B. If the Commission set this proceeding for hearing only under FPA section 205, with respect to each of the issues above, what should the Commission order and, if changes are approved, when should those changes become effective?

220. This issue is resolved under other issues.

V. MATTERS NOT DISCUSSED

221. This Initial Decision's failure to discuss any matter raised/argument made by the participants, or any portion of the record, does not indicate it has not been considered. Rather, any such matter(s), argument(s) or portion(s) of the record has/have been determined to be irrelevant, of no consequence, unsupported, meritless or otherwise beyond the scope of issues set for hearing in this investigation. Arguments made on brief which otherwise were unsupported by record evidence or relevant authority have been accorded no weight, except as specifically addressed.

VI. ORDER

222. Wherefore, it is ordered, subject to review by the Commission on exceptions or on its own motion, as provided by Commission Rules of Practice and Procedure, that within thirty (30) days of the issuance of the final Commission order in this proceeding, the participants shall comply with the findings and conclusions reflected in this Initial Decision, as adopted or modified by the Commission.

H. Peter Young
Presiding Administrative Law Judge