169 FERC ¶ 61,109
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

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

Enbridge Energy, Limited Partnership — Docket No. IS19-231-000

ORDER ON TARIFF FILING FOLLOWING SUPPLEMENTAL COMMENTS

(Issued November 18, 2019)

1. On March 1, 2019, Enbridge Energy, Limited Partnership (Enbridge) filed FERC Oil Tariff No. 43.29.0 in Docket No. IS19-231-000,[1] to implement the annual change to its Facilities Surcharge (2019 Facilities Surcharge). On March 29, 2019, the Commission issued an order accepting and suspending the tariff filing effective April 1, 2019, subject to refund and conditions, and pending further review.[2] The Commission directed Enbridge to file a further explanation of its filing in response to a protest by the Canadian Association of Petroleum Producers (CAPP), and allowed CAPP to file a further response to Enbridge's further explanation. As discussed below, upon consideration of the initial protest and Enbridge's answer thereto, as well as the further explanation and comments on the filing, we reject CAPP's protest, and accept Enbridge's filing subject to Enbridge revising the 2019 Facilities Surcharge tariff by removing the income tax allowance and ADIT balance in the 2018 true-up cost of service beginning January 1, 2018, instead of March 21, 2018.

Background

2. The Facilities Surcharge was established in June 2004, when the Commission approved a settlement between Enbridge and its producer-shippers in Docket No. OR04-2-000.[3] The Facilities Surcharge allows Enbridge to recover the costs associated with particular shipper-approved projects as a surcharge rather than as part of the base rates

[1] Enbridge Energy, Limited Partnership, FERC Oil Tariff, Pipeline Tariffs, Local Rates, FERC No. 43.29.0, 43.29.0.

[2] *Enbridge Energy, Limited Partnership*, 166 FERC ¶ 61,237 (2019) (March 29 Order).

[3] *Enbridge Energy, Limited Partnership*, 107 FERC ¶ 61,336 (2004).

subject to indexing. The Facilities Surcharge is a cost-of-service tariff mechanism that is trued-up each year to reflect actual costs and throughput.

3. The proposed 2019 Facilities Surcharge reflects (a) the projected costs for 2019 and (b) the true-up of the difference between estimates and actual cost and throughput data in 2018.

4. Enbridge states that the proposed 2019 Facilities Surcharge incorporates changes that resulted from the Commission's Revised Policy Statement on the income tax allowance for master limited partnership (MLP) pipelines and the Commission's order on the treatment of Accumulated Deferred Income Taxes (ADIT) for MLPs.[4] For the purpose of determining its true-up of the 2018 cost estimates, Enbridge calculated its actual 2018 costs by eliminating its income tax allowance and ADIT balance as of March 21, 2018, the date the Revised Policy Statement issued.

5. Enbridge states that on December 20, 2018, it completed a corporate restructuring process and is no longer an MLP. Enbridge is now wholly owned by Enbridge Inc. corporate subsidiaries. Enbridge states that it therefore reinstituted the income tax allowance to recover its corporate income tax costs and began accumulating ADIT balances from a starting point of zero as of January 1, 2019.[5]

6. Enbridge states that all transportation rates in FERC Tariff No. 43.29.0 have decreased approximately 4 percent, unless otherwise noted.

Intervention and Initial CAPP Protest, and Enbridge's Answer

7. Comments to Enbridge's March 1, 2019 filing were due on March 18, 2019. On March 18, 2019, CAPP filed a motion to intervene and protest. CAPP challenges the validity of the Commission's policy guidance on which Enbridge states it based its elimination of the ADIT balance. CAPP argues that the application of the policy guidance in the Revised Policy Statement Rehearing Order that MLPs should eliminate their ADIT balances is inappropriate as applied to Enbridge. CAPP proposes instead that the ADIT balances be amortized and flowed-back through Enbridge's cost of service over a five-year period beginning with Enbridge's cancellation of an income tax allowance on

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[4] *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, Revised Policy Statement, 162 FERC ¶ 61,227 (2018), *order on reh'g*, 164 FERC ¶ 61,030 (2018) (Revised Policy Statement Rehearing Order).

[5] Transmittal at 3.

March 21, 2018. CAPP alternatively argues that the ADIT balances should be maintained through the time periods at issue.[6]

8. CAPP essentially rejects the Commission's rationales of (1) income tax normalization principles, (2) "ownership" of the collected ADIT funds, and (3) "retroactive ratemaking" for elimination of the ADIT balances.[7]

9. CAPP maintains that tax considerations should play no role in addressing the specific issue of how certain balances should be treated.[8] CAPP claims that there are no apparent "principles" of Internal Revenue Service (IRS) regulation or practice that apply to non-taxable entities.[9] CAPP also argues that the "retroactive ratemaking" principle is inapplicable where the amounts flowed back or credited to the cost of service are not based on a re-computation of rates for a prior period.[10]

10. CAPP states that the very purpose of the Facilities Surcharge mechanism is to function as a tracker with neither Enbridge nor its counterparty/shippers being exposed to the traditional vagaries of stated rates. CAPP argues that this undermines one of the Commission's reasons for declining to adopt a policy of flowing back or amortizing ADIT, namely that ADIT, as an accounting mechanism, does not operate as a "tracker." Further CAPP states that the rates are computed by applying both a retrospective and prospective examination of costs and revenues, the essential elements of a tracker.[11]

11. CAPP proposes that the ADIT balances be amortized and flowed-back through Enbridge's cost of service over a five-year period beginning with Enbridge's cancellation of an income tax allowance on March 21, 2018. CAPP states that if the Commission declines to adopt an amortization of ADIT balances, judicial precedent in *Public Utilities Comm'n of State of Cal. v. FERC* [12] should be applied. CAPP argues that the

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[6] CAPP protest at 2-3.

[7] *Id.* at 16-17.

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

[9] *Id.* at 23.

[10] *Id.* at 17.

[11] *Id*. at 26-27.

[12] *Public Utilities Comm'n of State of Cal. v. FERC*, 894 F.2d 1372 (D.C. Cir. 1990) (*CPUC*).

Commission construes *CPUC* as holding "that requiring a pipeline to credit ratepayers for earnings on an excess ADIT balance or refund the balance to ratepayers where the pipeline switched from cost-of-service rates to ceiling prices violated the rule against retroactive ratemaking."[13] CAPP states there is no such issue of cross-contamination of rate base and assets presented here: the ADIT account of an entity that has ceased to operate under an income tax allowance relates to the same assets and rate base as it did under both the 2005 Policy Statement and the Revised Policy Statement. CAPP argues that "[p]roposals for an amortization of ADIT amounts would not violate the holding of *CPUC* for the simple but important reason that they would generate credits exactly in the same way that the rates had generated charges, simply in reverse."[14]

12. Enbridge filed an answer on March 22, 2019. In its answer Enbridge explains that it applied the Commission's decisions with respect to both income tax allowances and ADIT balances effective March 21, 2018.

13. Enbridge states that the purpose of ADIT and tax normalization "is matching the pipeline's cost-of-service expenses in rates with the tax effects of those same cost-of-service expenses[,]"[15] and ADIT and tax normalization are intended to ensure that "customers who pay an expense … get the tax benefit that accompanies the expense," and do not "subsidize present customers at the expense of future ones."[16]

14. Enbridge states that the Commission has unequivocally rejected the suggestion that ratepayers have an "equitable interest or ownership claim in ADIT."[17] Enbridge maintains that ADIT is not a true-up or tracker of money owed to shippers, and there is

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[13] CAPP Protest at 32-33 (citing Revised Policy Statement Rehearing Order, 164 FERC ¶ 61,030 at P 18).

[14] *Id.* at 34.

[15] Enbridge Response at 9 (quoting *SFPP, L.P.*, Opinion No. 511-D, 166 FERC ¶ 61,142, at P 91 (2019); Revised Policy Statement Rehearing Order, 164 FERC ¶ 61,030 at P 14).

[16] *Id.* at 11-12 (quoting *Public Systems v. FERC*, 709 F.2d 73, 80 (D.C. Cir. 1983)).

[17] *Id.* at 13 (quoting Opinion No. 511-D, 166 FERC ¶ 61,142 at P 92).

no reason to require a pipeline that is no longer entitled to an income tax allowance to refund its historical ADIT balance to shippers or to continue to deduct it from rate base.[18]

15. Enbridge points out that the Commission has made clear that a request to return ADIT to shippers "violates the doctrine against retroactive ratemaking" and therefore rejected the argument that the ADIT balance that existed when the MLP income tax allowance was eliminated should be flowed back to shippers.[19] According to Enbridge, CAPP's proposal *does* implicate the rule against retroactive ratemaking because CAPP is not, as it claims, proposing "a re-computation of rates for a prior period."[20] Enbridge argues that the Commission may not "force a utility to reduce its current rates to make up for over collections in previous periods," which is precisely what CAPP urges the Commission to do here.[21]

16. Enbridge states that CAPP attempts to distinguish the *CPUC* decision on which the Commission relied for its ADIT rulings by claiming it means the opposite of what the court actually held. CAPP, according to Enbridge, ignores the court's reasoning on retroactive ratemaking and instead argues that the *CPUC* decision merely held that it was impermissible for the Commission to require ADIT balances related to gas production assets to be credited against transmission rate base.[22] While the court held that it was improper for the Commission to credit ADIT related to gas production assets against transmission rate base, the court also plainly held that the Commission's proposal violated the rule against retroactive ratemaking.[23]

17. Enbridge states that CAPP's argument that the Commission's ADIT precedent should not apply here because the Facilities Surcharge settlement includes a true-up mechanism lacks merit. Enbridge states that the true-up mechanism is a method for setting forward looking rates that is intended to ensure that rates are based on actual costs and throughput instead of projections. It does not undo the filed-rate doctrine protections

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[18] *Id.* at 13-14.

[19] *Id.* at 14 (quoting Opinion No. 511-D, 166 FERC ¶ 61,142 at P 93).

[20] *Id.* at 15 (quoting CAPP Protest at 17).

[21] *Id.*

[22] *Id.* at 17.

[23] *Id.*

for past rates or override the rule against retroactive ratemaking.[24] According to Enbridge, once the rates for a given year take effect without suspension, they are final rates that are protected by the filed-rate doctrine and the rule against retroactive ratemaking. Those protections do not evaporate simply because the forward-looking rate is established using a mechanism that trues-up the prior year's estimates to actuals.[25]

March 29 Order, Enbridge's Further Explanation, and CAPP Response

18. As discussed above, on March 29, 2019, the Commission issued an order accepting and suspending Enbridge's Oil Tariff Filing 43.29.0 effective April 1, 2019, subject to refund and conditions, and further review.[26] The Commission required further information from Enbridge in order to evaluate Enbridge's treatment of the tax allowance during the first quarter of 2018. Specifically, the Commission directed Enbridge to file an explanation as to why Enbridge eliminated the income tax allowance and ADIT commencing on March 21, 2018, as opposed to January 1, 2018, which is the start of the true-up period for the Facilities Surcharge. The Commission also allowed CAPP to file a response to Enbridge's further explanation.

19. On April 5, 2019, Enbridge filed its supplemental explanation in response to the March 29 Order. In the response, Enbridge states that it removed the income tax allowance and ADIT effective March 21, 2018 because that was the effective date of the Commission's new policy that MLP pipelines were not entitled to an income tax allowance. Enbridge further states that if the Commission determines that the income tax allowance should have been eliminated as of January 1, 2018, Enbridge is prepared to refile its 2019 Facilities Surcharge tariff to remove both the income tax allowance and the ADIT balance from the 2018 true-up cost of service as of that date.[27]

20. On April 25, 2019, CAPP replied to Enbridge's response. CAPP responds to Enbridge's statement that it removed the income tax allowance and ADIT in the computation of the 2018 true-up of the Facilities Surcharge mechanism to conform to the effective date of the Commission's new policy. CAPP questions when the Commission's new policy became effective and argues that the policy must be applied in order to be effective. CAPP argues that the policy should be applied at the conclusion of the time period for which retrospective and prospective rates are being derived under the Facilities

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

[25] *Id.* at 21.

[26] March 29 Order, 166 FERC ¶ 61,237.

[27] Enbridge Supplemental Response at 3.

Surcharge, which is when the test period ended. As Enbridge had reorganized as a corporate entity at that point in time, CAPP argues any adjustment to the ADIT balance is obviated. CAPP further points out that Enbridge's response makes clear that Enbridge is agreeable to applying the policy at the point at which the Commission directs. CAPP argues that this reinforces the point that the revised policy is not a rule, but a guideline subject to review and application to the facts and circumstances presented in this proceeding.[28]

Discussion

21. For the reasons discussed below, Enbridge's filing is accepted subject to Enbridge revising the 2019 Facilities Surcharge tariff by removing the income tax allowance and ADIT balance in the 2018 true-up cost of service beginning January 1, 2018, instead of March 21, 2018.

22. We reject CAPP's arguments that previously accumulated sums in ADIT should be amortized to the shippers over a five-year period, or alternatively maintained for purposes of calculating the Facilities Surcharge in Enbridge's rates. CAPP's arguments are inconsistent with the Commission's prior precedent holding that an MLP such as Enbridge that eliminates its income tax allowance from its cost of service as a result of the Commission's post-*United Airlines*, *Inc. v. FERC*,[29] policy should also eliminate ADIT.[30] We agree that, as CAPP argues, the Revised Policy Statement Rehearing Order itself is not binding and the Commission must "fully support and justify the application of this guidance in individual cases."[31] We therefore address CAPP's arguments below, taking into account the Commission's precedent in Opinion No. 511-D.[32]

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[28] CAPP Response at 2-3.

[29] 827 F.3d 122 (2016).

[30] *See* Opinion No. 511-D, 166 FERC ¶ 61,142.

[31] Revised Policy Statement Rehearing Order, 164 FERC ¶ 61,030 at P 6 ("The Revised Policy Statement and the guidance provided in this order do not establish a binding rule, but are instead expressions of general policy intent designed to provide guidance by notifying entities of the course of action the Commission intends to follow in future adjudications. The Commission will have to fully support and justify the application of this guidance in individual cases."); *id.* P 7.

[32] Opinion No. 511-D, 166 FERC ¶ 61,142.

23. In Opinion No. 511-D, the Commission found that an MLP pipeline that eliminated its income tax allowance from its cost of service following *United Airlines* also may make an appropriate corresponding adjustment to eliminate its ADIT balance. The Commission explained that the pipeline's previously accumulated sums in ADIT were properly eliminated because "(1) the income tax allowance was removed from cost of service, (2) shippers have no right to the sums previously accumulated in ADIT, and (3) requiring [the pipeline] to return the previously accumulated sums in ADIT would be retroactive ratemaking."[33] CAPP argues against the Commission's findings regarding ADIT in Opinion No. 511-D, but does not challenge the correctness of Enbridge's application of the Commission's post-*United Airlines* issuances, including Opinion No. 511-D, to remove the income tax allowance. As Opinion No. 511-D is controlling, and Enbridge appropriately eliminated ADIT based on the Commission's findings in Opinion No. 511-D, we reject CAPP's attempt to reargue issues that the Commission has already addressed and rejected in Opinion No. 511-D.

24. We are also not persuaded by CAPP's argument that the Commission's tax normalization policies provide that when a pipeline's ADIT balance is overfunded and not needed to recover future tax liability, the excess balance should be amortized to ratepayers. As the Commission explained in rejecting the same argument in Opinion No. 511-D, as a result of normalization ADIT is a regulatory construct to ensure that regulated entities do not earn a return on cost-free capital based on timing differences between federal and state tax liability and Commission ratemaking.[34] The purpose of normalization is to match up the pipeline's cost-of-service expenses in rates with the tax effects of those same cost-of-service expenses.[35] Where there is no income tax allowance in a company's rates, there is no basis for the "matching" function of normalization, and no liability for the deferred taxes reflected in ADIT.[36] In sum, in the absence of an income tax allowance, there is no ADIT adjustment to be made to rate base, or any amortization allowance to be reflected in cost-of-service rates. Under normalization,

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[33] *Id.* P 90.

[34] *Id.* PP 62-63, 91.

[35] The Commission's primary justification for its decision to adopt tax normalization was "the matching principle: as a matter of fairness, customers who pay an expense should get the tax benefit that accompanies the expense.... To do otherwise would subsidize present customers at the expense of future ones." *Public Systems*, 709 F.2d at 80; *see also CPUC*, 894 F.2d at 1382 ("every [prior ratepayer] received the full tax benefit associated with every expense that it bore").

[36] Opinion No. 511-D, 166 FERC ¶ 61,142 at P 91.

shippers that paid past rates for service on the pipeline under which the ADIT balance was accumulated paid their properly allocated share of the pipeline's costs for the transportation service they received.[37]

25. We agree with CAPP that a change in the federal tax rates giving rise to excess deferred taxes would trigger Commission and IRS normalization requirements. This is because when income tax rates are merely reduced and an income tax allowance remains in the future cost of service, it is appropriate to credit any excess in ADIT in the future cost of service. Rather than returning the excess amounts to shippers related to past service, the pipeline's cost of service would be adjusted on a going forward basis to reflect the fact that it now needs to collect less than what it anticipated to cover its future tax liabilities. However, this is not the situation here. As the Commission explained in Opinion No. 511-D, where there is no income tax allowance component in cost-of-service rates, there is no rationale for requiring a pipeline to continue to account for ADIT in rates. We reject CAPP's argument that Enbridge's elimination of the income tax allowance is analogous to a reduction in tax rates.[38] As explained above, when the income tax allowance is eliminated due to the post-*United Airlines* policy, there are no income tax costs recognized in rates at all. That means the income tax allowance must be completely removed and there is no excess or deficient ADIT balance to amortize in the cost of service.[39]

26. Further, we reject CAPP's notion that there are no apparent "principles" of IRS regulation or practice that apply to non-taxable entities.[40] CAPP does not reference any principles of IRS regulation or practice that require Enbridge's ADIT balance to be amortized or maintained for purposes of calculating the Facilities Surcharge rate. As Opinion No. 511-D explained, rates designed pursuant to the normalization principles described above do not "over-collect" the pipeline's tax expenses in the early years. Rather, such rates require shippers receiving service in the early years to pay their properly allocated share of the pipeline's tax expenses for the period of their service. For example, if a shipper only takes service in the early years and then leaves the system, it has paid its appropriate share of the pipeline's tax expenses; the shipper has not paid an excessive amount that it could recoup by remaining on the system into the later years. It follows that, if the Commission determines part way through the overall normalization period that the pipeline is not entitled to any tax allowance, the Commission cannot

[37] *Id.* PP 94, 97, 105.

[38] CAPP Protest at 23.

[39] Opinion No. 511-D, 166 FERC ¶ 61,142 at PP 97-98.

[40] CAPP Protest at 23.

require the pipeline to return to shippers ADIT amounts collected in prior rates without engaging in retroactive ratemaking. That is because those ADIT amounts represent tax expenses that the Commission previously found were properly allocated to the approved rates in effect prior to the Commission's finding that the pipeline is not entitled to a tax allowance.[41]

27. For the same reasons, the fact that Enbridge underwent a corporate reorganization and claims an income tax allowance as of January 1, 2019, does not require Enbridge to amortize or continue to maintain the previous ADIT balance (that accrued under the Commission's pre-*United Airlines* policies)[42] for the period from January 1, 2018 to January 1, 2019 for purposes of calculating the Facilities Surcharge.[43] As discussed above, Enbridge was an MLP during this period and appropriately eliminated the income tax allowance and ADIT consistent with the Commission's post-*United Airlines* policy. Enbridge also followed Commission policy in claiming an income tax allowance as of January 1, 2019, after Enbridge became wholly-owned by a corporation.[44] Correspondingly, once Enbridge included an income tax allowance in its cost of service, Enbridge was required to begin reflecting ADIT in rate base under longstanding Commission precedent and normalization principles.[45] There is no basis for finding that Enbridge's previously eliminated ADIT balance must be amortized or maintained for

[41] Opinion No. 511-D, 166 FERC ¶ 61,142 at P 94; *see also CPUC*, 894 F.2d at 1381 ("just because [the pipeline] may draw on these funds to pay future costs does not mean that the funds should be treated as having been collected in the period in which they are spent").

[42] The Commission's policy prior to *United Airlines* allowed MLP pipelines to recover an income tax allowance and accordingly also account for deferred taxes under the Commission's normalization policy. Opinion No. 511-D, 166 FERC ¶ 61,142 at P 102.

[43] *See* CAPP protest at 2-3, 26, 28, 35-36.

[44] Enbridge response at 4-5; *see also Trailblazer Pipeline Co. LLC*, 166 FERC ¶ 61,141, at P 5 (2019) ("for a regulated entity organized as a corporation or as a wholly owned subsidiary of a corporation, longstanding policy permits the recovery of corporate income tax costs from the regulated entity's income"); *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031, at PP 3, 32, 56 (2018); *City of Charlottesville v. FERC*, 774 F.2d 1205, 1207-1208 (D.C. Cir. 1985); *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1289 (D.C. Cir. 2004).

[45] *See* Opinion No. 511-D, 166 FERC ¶ 61,142 at P 63.

ratemaking purposes simply because Enbridge subsequently underwent a reorganization. Instead, Enbridge appropriately followed the Commission's policies in calculating the Facilities Surcharge.[46]

28. Accordingly, we reject CAPP's argument that flowing the excess ADIT balance to shippers by crediting Enbridge's cost of service prospectively is not retroactive ratemaking, whereas extinguishing the ADIT balance is retroactive ratemaking.[47] In fact, the opposite is true. To require Enbridge to return or continue to maintain for purposes of ratemaking either the income tax allowance expenses or deferred tax reserves recovered under previously approved rates to shippers would violate the doctrine against retroactive ratemaking. As the Commission found in Opinion No. 511-D, this would amount to "a post hoc finding that [the pipeline's] past rates were not just and reasonable."[48]

29. Contrary to CAPP's arguments,[49] the *CPUC* decision supports Enbridge's proposed treatment to eliminate, rather than amortize or maintain, the ADIT balance.[50] *CPUC* held that requiring a pipeline to credit ratepayers for earnings on an excess ADIT balance or refund the balance to ratepayers where the pipeline switched from cost-of-service rates to ceiling prices violated the rule against retroactive ratemaking.[51] The D.C. Circuit found that ADIT "is composed entirely of rate revenue that [the pipeline] has already collected. Refund of such property, or its earnings, would effectively force [the

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[46] *See Trailblazer*, 166 FERC ¶ 61,141 at PP 5-14.

[47] CAPP Protest at 17-19.

[48] Opinion No. 511-D, 166 FERC ¶ 61,142 at P 93 (citing *CPUC*, 894 F.2d at 1382-84, and *Associated Gas Distributors v. FERC*, 989 F2d. 809, 810 (D.C. Cir. 1990) (*per curiam*) (Williams, J. concurring) (the Commission may not "force a utility to reduce its current rates to make up for overcollections in previous periods")); *see also id.* P 101; *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979).

[49] CAPP Protest at 32-37.

[50] *See* Opinion No. 511-D, 166 FERC ¶ 61,142 at PP 95, 101-103.

[51] The Commission allowed the pipeline to retain (rather than refund) previously accumulated ADIT, but directed the pipeline to reduce rates to credit customers for earnings from the retained ADIT balances. The D.C. Circuit found that the Commission's adjustment of the pipeline's rates to return either the ADIT balance or to credit its earnings to customers would violate the doctrine of retroactive ratemaking because it would effectively force the pipeline to return a portion of the pipeline's previously approved and collected rates.

pipeline] to return a portion of rates approved by FERC, and collected by [the pipeline]."[52] The D.C. Circuit explained that to the extent any basis for requiring the credit to ratepayers rested on the view that the pipeline's prior cost-of-service rates were "in retrospect too high"[53] or "unjust and unreasonable,"[54] then the credit for earnings on previously accumulated ADIT sums violated the rule against retroactive ratemaking. Here, Enbridge's filing removed the income tax allowance to reflect the Commission's post-*United Airlines* policy, and CAPP does not contest such removal. Where Enbridge's income tax allowance has been eliminated, requiring Enbridge to continue reducing its rates to reflect previously accumulated ADIT balances would amount to little more than returning amounts collected under prior rates for providing prior-period service, which is retroactive ratemaking.[55]

30. The fact that the Facilities Surcharge mechanism includes an annual true-up, unlike traditional stated and indexed rates for oil pipelines, does not negate the above findings regarding retroactive ratemaking, nor does it provide a compelling basis for departing from the Commission's precedent in Opinion No. 511-D.[56] Unlike traditional cost-of-service rates for oil pipelines, the Facilities Surcharge mechanism requires Enbridge to project costs and throughput for the year in which the rate is filed and to true-

[52] *CPUC*, 894 F.2d at 1383.

[53] *Id.* at 1380.

[54] *Id.* at 1382.

[55] Opinion No. 511-D, 166 FERC ¶ 61,142 at P 95; *CPUC*, 894 F.2d at 1379, 1382-1384. The D.C. Circuit's findings in *CPUC* made no distinction between refunding the ADIT balance to customers, as opposed to crediting customers for the ADIT fund's earnings. The D.C. Circuit noted that its findings did "not focus[] separately on the fund or its interest" because "we see no basis for distinguishing between the two." *CPUC*, 894 F.2d at 1384. The D.C. Circuit further stated: "[T]he rule against retroactive ratemaking prevents the Commission not only from forcing a utility to disgorge the proceeds of rates that have been finally approved and collected, but also from denying a producer the fruits of those proceeds. A contrary result would make the prohibition against retroactive ratemaking a sham, by allowing the Commission indirectly to deny a party the benefits of filed rates despite the prohibition against doing so directly." *Id.*

[56] *See* CAPP Protest at 3, 26-28.

up costs and throughput for the preceding year.[57] Consistent with this, Enbridge's 2019 Facilities Surcharge filing updated the surcharge to reflect actual costs and throughput for the prior year only (in this case the period beginning January 1, 2018).[58] The existence of an annual true-up does not permit the Commission to amortize the historical ADIT balance accumulated in years prior to 2018 under the Commission's then-existing policy of permitting an income tax allowance and ADIT in cost-of-service rates for MLP pipelines.[59] However, we find that Enbridge should have removed the income tax allowance and ADIT as of the start of the true-up period on January 1, 2018, rather than the March 21, 2018 effective date of the Commission's Revised Policy Statement.[60] Because the cost-of-service calculation was subject to a true-up extending back to January 1, 2018, implementing the Commission's precedent to eliminate the income tax allowance and ADIT beginning on that date is appropriate. Enbridge states that if the Commission determines that the income tax allowance and ADIT should be removed effective January 1, 2018, Enbridge is prepared to refile its 2019 Facilities Surcharge and refund to shippers any excess amounts.[61] We direct Enbridge to file a revised tariff consistent with this approach and refund to shippers, with interest, any excess amounts collected under the 2019 Facilities Surcharge for the period from April 1, 2019 through the effective date of the revised tariff and file a refund report with the Commission.

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[57] Enbridge Response at 21 (citing *Enbridge Energy, Limited Partnership*, 150 FERC ¶ 61,253, at P 3 (2015); *Enbridge Energy, Limited Partnership*, 162 FERC ¶ 61,293, at PP 2, 10 (2018)).

[58] *Enbridge Energy*, 166 FERC ¶ 61,237 at PP 2-3.

[59] *See* Opinion No. 511-D, 166 FERC ¶ 61,142 at P 106 (rejecting a similar argument that amortizing a pipeline's previously accumulated ADIT balance would not constitute retroactive ratemaking because the pipeline's rates were subject to a refund obligation).

[60] Enbridge represented in its April 5, 2019 response that if the Commission determines that the income tax allowance and ADIT should have been eliminated as of January 1, 2018, it is prepared to refile its 2019 Facilities Surcharge tariff to remove both the income tax allowance and ADIT balance from the 2018 true-up cost of service as of that date. Enbridge Response at 3.

[61] Enbridge Supplemental Response at 2-3.

31. Contrary to CAPP's claims, ratepayers have no equitable interest or ownership claim in ADIT.[62] Rather, the Commission and the D.C. Circuit have rejected such claims.[63] Consistent with these holdings, the Commission has also explained that ADIT is not a true-up or tracker of money owed to shippers.[64] Rather, ADIT records the amount of income taxes that the pipeline has collected due to normalization and which it will eventually owe the federal government (not ratepayers) but which have been deferred pending the reversal of the timing difference such as accelerated depreciation. The balances recorded in ADIT accounts reflect deferred taxes that are ultimately owed to the IRS. Once the tax obligations are settled, the associated ADIT amounts are eliminated. For example, when the pipeline must pay these deferred taxes to the federal government as a result of a sale of the asset, the ADIT associated with the asset is eliminated (not returned to shippers).[65] Therefore, we find that Enbridge, save for its choice of implementation date under the Facilities Surcharge settlement, appropriately eliminated ADIT from its cost of service in calculating the Facilities Surcharge consistent with the Commission's policy.

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[62] CAPP Protest at 19-22.

[63] Opinion No. 511-D, 166 FERC ¶ 61,142 at PP 92, 100; *Public Systems*, 709 F.2d at 85 (rejecting the notion "that ratepayers have an ownership claim" to the ADIT balance); *CPUC*, 894 F.2d at 1381 ("The Commission and this Court have both rejected" "the notion that under normalization accounting customers enjoy an equitable interest in a utility's deferred tax account"); *Regulations Implementing Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes*, Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,539 (1981) (cross-referenced at 15 FERC ¶ 61,133) (addressing the "erroneous premise that a loan is being made by ratepayers to utilities" through the normalization process and stating that ratepayers do not "have an ownership claim or equitable entitlement to the 'loaned monies'"); *id.* at 31,539 n.75 ("This is not to say that customers do not pay rates that recover deferred taxes. They do. But paying deferred taxes in rates does not convey an ownership or creditor's right.").

[64] Opinion No. 511-D, 166 FERC ¶ 61,142 at P 92 (citing *Lakehead Pipe Line Co. L.P.,* 75 FERC ¶ 61,181, at 61,594 (1996)).

[65] *Id.* (citing *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260, at PP 158-162 (2002)).

<u>The Commission orders:</u>

(A) Enbridge's filing is accepted subject to Enbridge revising the 2019 Facilities Surcharge tariff by removing the income tax allowance and ADIT balance in the 2018 true-up cost of service beginning January 1, 2018, instead of March 21, 2018.

(B) Within 60 days of the date of this order, Enbridge shall refund to shippers, with interest computed in accordance with the Commission's regulations, any excess amounts collected under the 2019 Facilities Surcharge for the period from April 1, 2019 through the effective date of the revised tariff, and file a refund report with the Commission.[66]

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[66] Enbridge should file its refund report through eTariff using Type of Filing Code 1210. *See* Office of the Secretary, *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings* (Nov. 14, 2016).