

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Waiver of Tariff Requirements

)

Docket Nos. PL20-7-000

COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association (“EPSA”)¹ hereby comments on the proposed policy statement on waiver of tariff requirements and petitions or complaints for remedial relief² issued by the Federal Energy Regulatory Commission (the “Commission”) in the above-captioned proceeding. As discussed below, EPSA agrees that the Commission should not waive tariff provisions where doing so would violate the filed rate doctrine or the prohibition against retroactive ratemaking. EPSA is concerned, however, that the Proposed Policy Statement does not adequately account for the importance of tariff waivers as a regulatory tool to protect the public interest or for recent Commission precedent that should address the concerns articulated in the Proposed Policy Statement. As a result, the Proposed Policy Statement would unnecessarily and inappropriately constrain the ability of parties to seek, and the Commission to grant, waivers in exceptional circumstances not anticipated by existing tariff language. For the reasons set forth herein, EPSA urges the Commission not to adopt the Proposed Policy Statement.

¹ EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. These comments represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

² *Waiver of Tariff Requirements*, 171 FERC ¶ 61,156 (2020) (the “Proposed Policy Statement”). See also Notice of Extension of Time, Docket No. PL20-7-000 (June 1, 2020) (extending the deadline for initial comments from June 4, 2020 to June 18, 2020).

I. COMMUNICATIONS

EPSA respectfully requests that all communications regarding this proceeding be addressed to the following persons:

Nancy Bagot
Senior Vice President
Electric Power Supply Association
1401 New York Ave, NW, Suite 950
Washington, DC 20005
(202) 349-0141
nancyb@epsa.org

David G. Tewksbury
MCDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, NW
Washington, DC 20001
(202) 756-8230
dtewksbury@mwe.com

II. COMMENTS

A. The Proposed Policy Statement Fails to Account for the Importance of Waivers as a Regulatory Tool and Steps Already Taken to Curb the Misuse of Waivers

As an initial matter, EPSA is concerned that the Proposed Policy Statement gives short shrift to the important role of waivers as a tool for protecting the public interest where general rules, like those set forth in tariffs of general applicability, are concerned. The Commission and the courts have recognized that “waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities,” because an “agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.”³ In this way, the use of waivers can be of

³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”) (citing *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 at 204-205 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *American Airlines v. CAB*, 359 F.2d 624 (D.C. Cir. 1966); *Pikes Peak Broadcasting v. FCC*, 422 F.2d 671 (D.C. Cir. 1969); *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968)). See also *id.* at 1157 (“That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the ‘public interest’ for a broad range of situations, does not relieve it of an obligation to seek out the ‘public interest’ in particular, individualized cases.”); *Columbia Commc’s. Corp. v. FCC*, 832 F.2d 189, 193 (D.C. Cir. 1987) (“*Columbia*”) (stating “that ‘a general rule, deemed valid

“pivotal importance in sustaining the system of administration by general rule.”⁴

To be sure, no agency should – or lawfully can – use waivers to circumvent the statutory constraints on its authority, and the Commission should be cognizant of those constraints whenever it is considering a request for tariff waiver. At the same time, however, the Commission would be doing itself and the public a disservice by locking itself into rigid policies that could impair its ability to make full use of waivers within the confines of its statutory authority. Tariffs, particularly those containing the highly complex rules for regional transmission organization (“RTO”)/independent system operator (“ISO”) markets, which account for a large proportion of the tariff waiver requests filed with the Commission, cannot anticipate every possible eventuality, and waivers are an important tool for addressing unanticipated problems that can result in massive and, with proper use of the Commission’s waiver authority, avoidable harm to regulated entities and consumers.

EPSA certainly agrees with the Commission that waivers should not be granted where waiver would “violate the filed rate doctrine or the rule against retroactive

because its overall objectives are in the public interest,’ may fail to serve that interest if applied inflexibly to parties proposing “a new service that will not undermine the policy [] served by the rule” (quoting *WAIT Radio*, 418 F.2d at 1157)); *P & R Temmer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984) (“Where any administrative rule, although considered generally to be in the public interest, is not in the public interest as applied to particular facts, an agency should waive application of the rule.”); *North Am. Elec. Reliability Corp.*, 146 FERC ¶ 61,092 at P 18 (rejecting a challenge to the Commission’s waiver of a North American Electric Reliability Corporation rule and explaining that “agencies have the authority, in individual cases, to waive or relax regulations provided the waiver does not affect the statutory or constitutional rights of individuals” (footnote omitted)), *on reh’g*, 147 FERC ¶ 61,064 (2014); *Montaup Elec. Co.*, 19 FERC ¶ 61,275 at 61,452 (1982) (stating that “we must be open to waiving the Commission’s regulations when the public interest requires it” (citation omitted)).

⁴ *WAIT Radio*, 418 F.2d at 1158.

ratemaking”⁵ In EPSA’s view, this self-evident proposition reflects a broader (and similarly self-evident) proposition that waivers should not – and, legally, cannot – be used to evade the ratemaking strictures of Sections 205 and 206 of the Federal Power Act (the “FPA”)⁶ and Sections 4 and 5 of the Natural Gas Act (the “NGA”).⁷ While the filed rate doctrine, together with the corollary prohibition against retroactive ratemaking, is important, it “does not have a life of its own,”⁸ and it is just one part of a broader set of ratemaking requirements under the ratemaking provisions of the FPA and the NGA. It is true enough that the Commission cannot grant waivers that modify rates, terms or conditions of jurisdictional service with more retroactive effect than is allowed under Sections 205 and 206 of the FPA⁹ and Sections 4 and 5 of the NGA.¹⁰ But the more fundamental issue is that the Commission cannot change rates, terms or conditions of jurisdictional service, retroactively or prospectively, without adherence to the procedural and substantive requirements of these provisions.

In the Proposed Policy Statement, the Commission fails to give itself the credit it deserves for important steps taken in recent orders to curb the misuse of waivers as a means of evading the ratemaking requirements of the FPA and the NGA. Most notably, in *ISO New England Inc.*,¹¹ the Commission made clear that a waiver request is “an

⁵ Proposed Policy Statement, 171 FERC ¶ 61,156 at P 10. See also *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,160 at PP 44-55 (2019).

⁶ 16 U.S.C. §§ 824d, 824e (2018).

⁷ 15 U.S.C. §§ 717c, 717d (2018).

⁸ *Towns of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992).

⁹ 16 U.S.C. §§ 824d, 824e (2018).

¹⁰ 15 U.S.C. §§ 717c, 717d (2018).

¹¹ 164 FERC ¶ 61,003 (2018) (“*ISO New England*”).

inappropriate vehicle” for proposing “new processes” that should be “filed as proposed tariff revisions” under the applicable statutory provisions.¹² This guidance and application of this precedent in future cases should fully address not only the broader problem of proposed tariff changes masquerading as waiver requests; it should also resolve the subsidiary problem that is the focus of the Proposed Policy Statement: “waiver orders [that] have sometimes drifted beyond the limits imposed by the filed rate doctrine and the rule against retroactive ratemaking.”¹³

As demonstrated in *ISO New England* and other recent orders, the Commission can remain safely within the statutory limits, including (but not limited to) those imposed by the filed rate doctrine and the prohibition against retroactive ratemaking, by only granting waiver requests that genuinely seek waiver of, rather than changes to, tariff provisions. In *ISO New England*, the Commission contrasted the “typical waiver,” which “seeks to suspend a tariff provision,” with the movant’s proposal, which would “effectively create[] an entire process that is not in the [the applicable] Tariff”¹⁴ This characterization of a “typical waiver” is in perfect accord with ordinary meaning of the term “to waive” as “to refrain from pressing or enforcing (something, such as a claim or rule): forgo // waive the fee”¹⁵ It is also consistent with the U.S. Court of Appeals for the District of Columbia Circuit’s observation that “[t]he very essence of waiver is the

¹² *Id.* at P 47. See also *NRG Curtailment Solutions, Inc. v. New York Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,247 at P 36 (2018) (same).

¹³ Proposed Policy Statement, 171 FERC ¶ 61,156 at P 1 (footnote omitted).

¹⁴ *ISO New England*, 164 FERC ¶ 61,003 at P 47.

¹⁵ *Merriam-Webster Dictionary* (definition of “waive”), <https://www.merriam-webster.com/dictionary/waive>.

assumed validity of the general rule,”¹⁶ and its related conclusion that waiver is not appropriate where it would change the general rule.¹⁷ Where there is no change in rates or rate practices, granting waiver does not implicate the filed rate doctrine, the prohibition against retroactive ratemaking, or the other statutory ratemaking requirements, and true waivers of tariff provisions should not, therefore, present any of the concerns that have prompted the Proposed Policy Statement.

B. The Proposed Policy Statement Would Unnecessarily and Inappropriately Constrain the Ability of Parties to Seek, and the Commission to Grant, Waivers

By focusing exclusively on the limits on retroactive ratemaking, rather than the more fundamental issue of compliance with the ratemaking strictures of the FPA and the NGA, the Proposed Policy Statement would create an arbitrary distinction between requests for post-filing waiver of tariff requirements, which would continue to be treated as “waiver requests,” and requests for pre-filing waiver of tariff requirements, which would be reclassified as requests for “remedial relief.”¹⁸ Requests for “remedial relief” would need to be made through petitions for declaratory order, accompanied a filing fee currently set at \$30,060,¹⁹ or complaints,²⁰ and, in either case, the filer would be subject to standards materially more exacting than those for waiver requests.²¹

¹⁶ *WAIT Radio*, 418 F.2d at 1158.

¹⁷ *Columbia*, 832 F.2d at 193.

¹⁸ Proposed Policy Statement, 171 FERC ¶ 61,156 at P 12.

¹⁹ *See Annual Update of Filing Fees*, 169 FERC ¶ 62,167 (2019).

²⁰ *See* Proposed Policy Statement, 171 FERC ¶ 61,156 at P 13.

²¹ *See id.* at PP 19-20.

Although conceding that its “proposal represents a change from the Commission’s past approach, particularly in situations where inadvertent failures to comply with ministerial tariff requirements have not been protested,”²² the Commission fails to justify the radical and, by all appearances, wholly unnecessary departures from precedent contemplated by the Proposed Policy Statement. In particular, the Commission offers no justification for treating requests for waiver or remedial relief differently based solely on whether the request is filed before or after the potential tariff violation. The fact is that the Commission should not be granting any request for waiver or remedial relief that conflicts with the ratemaking requirements of the FPA or the NGA, regardless of whether request is filed before or after the potential violation. Moreover, any party seeking waiver already “faces a high hurdle even at the starting gate,”²³ and it is unnecessary and unfair to make the hurdle even higher for one set of parties based solely on the fact that they are filing after the potential tariff violation.

To be clear, EPSA is not suggesting that the timing of the request may not be a relevant factor in reviewing a request for waiver or remedial relief. But the important timing consideration is when the request is filed relative to the filer’s becoming aware of the potential tariff violation,²⁴ and timeliness in that context has nothing to do with whether

²² *Id.* at P 15.

²³ *WAIT Radio*, 418 F.2d at 1157.

²⁴ The timeliness of a party’s request for waiver can be, and has been, taken into account under Commission’s existing four-pronged waiver standard. *See, e.g., Fresh Air Energy II, LLC*, 168 FERC ¶ 61,074 at PP 27-28 (2019) (finding that the movant’s “delay in filing its waiver request has a negative impact to [the system operator]’s queue management process” and thus had “undesirable consequences and harm[ed] third parties” and distinguishing other cases in which waiver requests were filed more promptly). It could certainly be made a separate prong of the analysis too, as it is for requests for waiver of the operating and efficiency standards for qualifying cogeneration facilities. *See, e.g., Black Hills Ontario, L.L.C.*, 106 FERC ¶ 61,152 at P 13 (2004).

the request is filed before or after the potential violation. A request for waiver filed one day before the tariff deadline in question by a party that has known it will not be able to meet that deadline for a year hardly deserves to be afforded preferential treatment relative to a request for “remedial relief” filed one day after the deadline and within hours of the party’s becoming aware that it missed the deadline. Yet that is exactly what the Proposed Policy Statement contemplates.

For better or worse, the Commission and the parties are often unaware of the need for waiver until deadlines have already passed, and waiver is often the last means available to protect the public interest. For example, the PJM Interconnection, L.L.C. (“PJM”) Open Access Transmission Tariff (the “PJM Tariff”) sets forth a large number of specific deadlines relating to participation in, and the conduct of, the Base Residual Auctions (“BRAs”) through which PJM procures capacity. As general rules, those deadlines are presumptively appropriate and in the public interest, but, on three occasions, the Commission has found it appropriate and in the public interest to waive these deadlines.²⁵ On at least one of those occasions, the Proposed Policy Statement would have significantly limited the Commission’s flexibility and pushed the Commission strongly, if not inexorably, toward exactly what would appear to have been the wrong outcome from a public interest perspective.

²⁵ See *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,067 (2015) (“*PJM*”) (granting tariff waivers to allow PJM to conduct the BRA for the 2018/2019 delivery year (the “2018/2019 BRA”) until as late as August 10-14, 2015); *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,153 (2018) (granting tariff waivers to allow PJM to conduct the BRA for the 2022/2023 delivery year (the “2022/2023 BRA”) as late as August 14-28, 2019); *PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,051 (2019) (ordering PJM to further delay the 2022/2023 BRA).

In the case of the BRA for the 2018/2019 delivery year (the “2018/2019 BRA”), PJM filed a request for waiver of the BRA deadlines on April 7, 2015,²⁶ before the BRA was to be conducted but after a number of significant pre-BRA deadlines had passed. PJM requested waiver after the Commission’s issuance of a deficiency letter regarding PJM’s then-pending “Capacity Performance” proposal made it impossible to implement that proposal before running the 2018/2019 BRA in May 2015, as prescribed by the PJM Tariff.²⁷ Because PJM was seeking waiver after certain of the relevant deadlines had passed,²⁸ strict application of the Proposed Policy Statement would have required PJM to request remedial relief through a petition for declaratory order, and its request for remedial relief would have been evaluated under more stringent standards than those for a waiver request.²⁹ Under these more stringent standards, the Proposed Policy Statement states that, among other things, “remedial relief will generally be denied when a protestor credibly contends that the petition will result in undesirable consequences, such as harm to third parties.”³⁰ In granting PJM’s request for tariff waiver relating to the 2018/2019 BRA, the Commission recognized, and did not question the credibility of,

²⁶ See Request of PJM Interconnection, L.L.C. for Expedited Grant of Tariff Waiver, Docket No. ER15-1470-000 (filed Apr. 7, 2015) (the “ER15-1470 Waiver Request”).

²⁷ See *PJM*, 151 FERC ¶ 61,067.

²⁸ In its waiver request, PJM indicated that “[t]he vast majority of market participants have already taken the steps required under the [PJM] Tariff to participate in the BRA, and will take any remaining Tariff-required steps in the next few weeks, in accordance with currently established deadlines.” ER15-1470 Waiver Request at 9. While stating that delaying the 2018/2019 BRA would “not change those already-completed preparatory actions,” PJM proposed “to allow updates to prior market participant submissions to the extent those can be accommodated within the revised schedule for the BRA.” *Id.* Allowing for updates after the tariff-prescribed BRA deadlines would in most, if not all, cases necessarily require at least partial waiver of the applicable PJM Tariff provisions.

²⁹ Proposed Policy Statement, 171 FERC ¶ 61,156 at PP 13, 20.

³⁰ *Id.* at P 20.

protestors' claims that "delaying the auction will harm them by increasing their costs to participate in the auction."³¹ As a result, the Proposed Policy Statement would have compelled denial of PJM's request, and the Commission would have lacked the flexibility to give itself time "to consider the full record in the Capacity Performance proceeding prior to the PJM running this year's auction."³² This provides a clear example of how the Proposed Policy Statement will unnecessarily limit the Commission's ability to protect the public interest.

C. While Helpful, the Proposed Policy Statement's Suggestions for Mitigating the Impacts of the New Policy are Unlikely to Have Much Practical Effect, Particularly Where RTO/ISO Tariffs are Involved

In an effort to avoid "what otherwise may appear to be harsh outcomes by comparison to past practice," the Commission offers two "suggestions about ways that tariffs may be modified to avoid conflict with the filed rate doctrine and the rule against retroactive ratemaking."³³ Specifically, the Commission suggests that "a tariff may be modified to expressly state that failure to comply with a certain deadline may be waived by order of the Commission,"³⁴ and that tariffs may also "be modified to allow various kinds of errors to be cured by the relevant entities themselves within a reasonable period of time after a default has occurred or an error has been discovered."³⁵ If implemented, such suggestions could very well mitigate the impacts of the Proposed Policy Statement. The big problem is the implementation, particularly in the RTO/ISO markets.

³¹ *PJM*, 151 FERC ¶ 61,067 at P 28.

³² *Id.*

³³ Proposed Policy Statement, 171 FERC ¶ 61,156 at P 15.

³⁴ *Id.* at P 16.

³⁵ *Id.* at P 17.

Unfortunately, RTO/ISO tariffs are thousands of pages long, and the RTOs/ISOs simply do not have the time, resources or foresight to identify each and every provision of their respective tariffs that may need to be modified,³⁶ to conduct the pre-filing stakeholder processes necessary to consider the modifications, and to make the necessary tariff filings with the Commission.

The significant obstacles to identifying and modifying tariff provisions will make the impacts of the Proposed Policy Statement even more arbitrary. Tariff provisions adopted after the announcement of the new policy may very well provide flexibility with respect to key deadlines or at least reflect a deliberate decision not to provide such flexibility. The same will not be true of existing tariff provisions, which will immediately result in an arbitrary difference between deadlines based on vintage. Moreover, whether provisions of RTO/ISO tariffs are modified will inevitably be a function of the extent to which the need for flexibility is foreseeable and whether a majority of stakeholders believe the availability of waivers will be in their financial interest. The first consideration will mean that waiver/remedial relief is least likely to be available when it is most needed: when issues that could not be anticipated arise. The second consideration will simply reward intransigence on the part of stakeholders that stand to benefit from a “gotcha” approach to the enforcement of a given deadline.

³⁶ The Proposed Policy Statement appears to preclude any sort of tariff modification to address the issue on a generic basis. See *id.* at P 16 & n.46.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA requests that the Commission take these comments into account in considering the Proposed Policy Statement.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

By: /s/ David G. Tewksbury
David G. Tewksbury
Stephanie S. Lim
McDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, NW
Washington, DC 20001

Nancy Bagot
Senior Vice President
Sharon Royka Theodore
Senior Director, Regulatory Affairs
Electric Power Supply Association
1401 New York Ave, NW, Suite 950
Washington, DC 20005

On behalf of the **Electric Power Supply Association**

Dated: June 18, 2020