173 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Sunflower Electric Power Corporation Docket No. ER20-1314-000

ORDER GRANTING WAIVER

(Issued October 16, 2020)

1. On March 16, 2020, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,[1] Sunflower Electric Power Corporation (Sunflower) filed a petition for waiver of Attachment Y, section IV of Southwest Power Pool, Inc.'s (SPP) Open Access Transmission Tariff (Tariff),[2] which describes the acceptance process for a notification to construct network upgrades from SPP. As discussed below, we grant Sunflower's waiver request.

## I. Background

2. Under Attachment Y, section IV of the SPP Tariff, a Designated Transmission Owner is to provide a written commitment to construct within 90 days of receipt of a notification to construct from SPP. On November 18, 2019, Sunflower received a notification to construct, as the Designated Transmission Owner, three new network upgrade projects categorized as economic projects with an estimated total project cost of $3.7 million and with a project need date of January 1, 2025.[3]

3. Sunflower asserts that it expedited its review of the notification to construct the network upgrades in order to meet the 90-day deadline for committing to the notification to construct. Sunflower states that it became aware of a lower cost solution and intended to develop a cost estimate for the lower cost solution for its response to the notification to construct. Sunflower explains that it miscalculated the 90-day period, based in part on the fact that the 90-day period included several holidays and the 90th day fell on Sunday, February 16, 2020. Sunflower states that it responded to the notification to construct by

[1] 18 C.F.R. § 385.207(a)(5) (2020).

[2] SPP, OATT, Sixth Revised Volume No. 1.

[3] Waiver Request at 5.

letter dated February 18, 2020, two days after the 90th day. Sunflower explains that its February 18, 2020 letter accepted the commitment and obligation to construct the network upgrades.[4]

## II. Waiver Request

4. Sunflower requests a limited, one-time waiver of the provisions of Attachment Y, section IV which requires a Designated Transmission Owner to provide a written commitment to construct within 90 days of receipt of the notification to construct. Sunflower argues that its waiver request satisfies the Commission's four criteria for granting waivers.[5]

5. First, Sunflower states that it acted in good faith as it was working toward a timely response to the notification to construct but miscounted the response due date, due in part to the intervening federal holidays (i.e., Thanksgiving, Christmas, and New Year's Day), and the fact that the due date fell on a Sunday.[6] Sunflower states that this is the first time it has failed to timely respond to a notification to construct.[7] Sunflower states that, in order to ensure that this sort of oversight does not recur, it has instituted formalized procedures for tracking and responding to notifications to construct.[8]

6. Second, Sunflower claims that the waiver request from the 90-day notification to construct commitment requirement in Attachment Y is limited and discrete. Sunflower asserts that the waiver would apply to only the November 18, 2019 notification to construct that is the subject of this waiver request.[9]

7. Third, Sunflower asserts that granting the waiver will address a concrete problem by allowing Sunflower and SPP to continue to work on the network upgrade projects that have already been identified as necessary. Additionally, Sunflower states that it has already undertaken approximately 70 hours of post-notification to construct work and failure to grant the waiver will jeopardize the time and resources spent by Sunflower in preparing to honor its notification to construct commitment. Sunflower asserts that, if the

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[4] *Id.* at 5-6.

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

[6] *Id.* at 7.

[7] *Id.*

[8] *Id.* at 2.

[9] *Id.* at 8.

limited request is not granted, SPP and those who submit proposals for the project will have to incur significant costs associated with the industry expert panel and selection of a new Designated Transmission Owner.[10] Sunflower asserts that, if an alternate Designated Transmission Owner is selected, the resulting alternate Designated Transmission Owner would have to work on Sunflower's facilities which can raise reliability and efficiency concerns.[11] Finally, Sunflower notes that the additional time involved with selecting and securing an alternate Designated Transmission Owner could cause delays in the completion of the network upgrade projects.

8. Fourth, Sunflower states that granting the waiver will not have undesirable consequences because the waiver will not affect any notifications to construct or potential Designated Transmission Owners beyond the immediate network upgrade projects contemplated by the November 18, 2019, notification to construct. Sunflower does not expect that network upgrade projects of such limited and narrow scope would be desirable to another Designated Transmission Owner. Sunflower asserts that a refusal to grant the waiver could result in undesirable project delay, reliability and efficiency concerns, and expenditure of SPP resources.[12]

## III. Notice and Responsive Pleadings

9. Notice of Sunflower's filing was published in the *Federal Register*, 85 Fed. Reg. 16,333 (Mar. 23, 2020), with interventions and protests due on or before April 6, 2020. SPP filed a timely motion to intervene and comments in support of the petition.

10. SPP states that Sunflower has commenced planning construction associated with the project in the notification to construct, including approximately 70 hours of post-notification to construct work by Sunflower staff. SPP states that it is not aware of any harm that would be incurred by any third parties as a result of the Commission granting the waiver request. Additionally, SPP asserts that if the Commission does not grant Sunflower's waiver request, SPP will be required to find a replacement Designated Transmission Owner to construct the project, in accordance with section IV.3 of the SPP Tariff. SPP contends that this will be time consuming and expensive. SPP asserts that granting the waiver request will allow Sunflower to continue its work on the project to meet economic needs in a timely fashion and prevent delays in the construction and

[10] *Id.*

[11] *Id.* at 9.

[12] *Id.* at 10.

additional expense that would result from the selection of a replacement Designated Transmission Owner.[13]

## IV. Discussion

### A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), SPP's timely, unopposed motion to intervene serves to make it a party to this proceeding

### B. Substantive Matters

12. We grant Sunflower's waiver request. The Commission has granted waiver of tariff provisions where: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.[14] We find that the circumstances of Sunflower's waiver request satisfy these criteria.

13. First, we find that Sunflower's error was made in good faith. Specifically, Sunflower's failure to comply with the 90-day written commitment period appears to have been inadvertent, and Sunflower states that it provided written commitment on the 92nd day. In addition, this was the first time Sunflower failed to timely respond to a notification to construct. Moreover, Sunflower has since implemented procedures to ensure this will not occur again in the future.

14. Second, we find that the waiver request is limited in scope because it is a one-time waiver of the procedural deadline in Attachment Y, section IV and applies only to the November 18, 2019 notification to construct that is the subject of this waiver request.

15. Third, we find that granting Sunflower's waiver request addresses a concrete problem. Specifically, granting the waiver will not only allow Sunflower to construct projects that have already been deemed necessary and that it has already begun working on, but also will prevent an alternative Designated Transmission Owner from having to work on Sunflower's facilities, which could cause reliability issues.

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[13] SPP Comments at 3-4.

[14] *See, e.g.*, *New Brunswick Energy Mktg. Corp.*, 167 FERC ¶ 61,252, at P 12 (2019); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

16. Finally, we find that granting the waiver request will not have undesirable consequences, such as harming third parties, because the project is specific to Sunflower's facilities. Moreover, granting the waiver will save SPP time and administrative costs and prevent potential delays in construction that could be caused by SPP having to find a replacement Designated Transmission Owner.

The Commission orders:

Sunflower's waiver request is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

( S E A L )

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Sunflower Electric Power Corporation Docket No. ER20-1314-000

(Issued October 16, 2020)

DANLY, Commissioner, *dissenting*:

1. The Commission's order issued in this docket grants a request for a retroactive waiver without ever acknowledging that a retroactive waiver is involved or discussing our legal authority to grant such a waiver.[1] Nine other orders issued at the Commission's October Public Meeting address similar waiver requests.[2] In addition, the Commission issued two such orders on September 30, 2020, shortly before the October Public Meeting.[3] In total, that is twelve orders issued in less than three weeks addressing retroactive waiver requests. I have several concerns about these orders. I discussed some of my concerns briefly in my dissents to the *Montana-Dakota* and *Lightsource* orders that were issued on September 30, 2020. I now want to discuss my concerns in greater detail in light of the large number of waiver orders we are issuing today, which indicates that the *Montana-Dakota* and *Lightsource* orders may represent a change in the Commission's previous approach to retroactive waiver requests.

2. Before discussing my concerns, I want to acknowledge that many of the waiver requests we receive present sympathetic factual situations. Many of the entities requesting a waiver will suffer real harm if the waiver is denied, and often granting the waiver would not harm any third party. It is tempting to find, as the Chairman put it in his concurring statement in *Montana-Dakota*, that the Commission has a "modicum of

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[1] *See Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (Sunflower).

[2] *See Pac. Gas & Elec. Co.*, 173 FERC ¶ 61,051 (2020) (PG&E); *Borrego Solar Sys. Inc.*, 173 FERC ¶ 61,052 (2020) (Borrego); *Mariposa Energy, LLC*, 173 FERC ¶ 61,053 (2020) (Mariposa); *Midcontinent Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,055 (2020) (MISO); *Pub. Serv. Elec. & Gas Co.*, 173 FERC ¶ 61,056 (2020) (PSEG); *Upstream Wind Energy LLC*, 173 FERC ¶ 61,057 (2020) (Upstream); *Vineyard Wind LLC*, 173 FERC ¶ 61,058 (2020) (Vineyard Wind); *Columbia Gas Transmission, LLC*, 173 FERC ¶ 61,064 (2020) (Columbia); *S. Star Cent. Gas Pipeline, Inc.*, 173 FERC ¶ 61,066 (2020) (Southern Star).

[3] *See Montana-Dakota Utils. Co.*, 172 FERC ¶ 61,278 (2020) (*Montana-Dakota*); *Lightsource Renewable Energy Dev., LLC*, 172 FERC ¶ 61,294 (2020) (*Lightsource*).

regulatory flexibility to address ministerial or inadvertent errors on a case-by-case basis."[4] But just because we wish we had such regulatory flexibility does not make it so. And here, as I explain below, we do not have any flexibility *as a legal matter* to grant retroactive waivers that do not fit within well-defined exceptions, even when the waiver request sets forth sympathetic facts. The Supreme Court has spoken in unmistakable terms on this very subject, finding that it is necessary to require "strict adherence to the filed rate . . . despite its harsh consequences in some cases."[5]

3. Any doubt as to whether regulatory exigencies permit us to exceed our legal authority was put to rest this past June when the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *Allegheny Defense Project v. FERC*.[6] There, the Court found that the Commission's decades-long practice of issuing tolling orders in response to rehearing requests exceeded the Commission's statutory authority under the Natural Gas Act. The court acknowledged the Commission's argument that "the Tolling Order was necessary to afford it the time it needed to act in this complicated area of law."[7] But the court declined to allow this practical consideration to afford the Commission "regulatory flexibility" in violation of the law.[8] "While the Commission's responsibilities are substantial, we are bound to enforce the statutory text and its jurisdictional grant as Congress wrote it."[9]

4. The grounds supporting our use of tolling orders in response to rehearing requests in *Allegheny Defense* was much stronger than any argument which could be raised here to support regulatory flexibility in dealing with retroactive waiver requests. Our use of tolling orders was supported by legal precedents upholding such use—albeit precedents the court ultimately found not to be controlling—and decades of Commission practice. By contrast, there is no precedent at all stating that application of the filed rate doctrine and rule against retroactive ratemaking is discretionary. As recently as two years ago, the

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[4] *Montana-Dakota*, 172 FERC ¶ 61,278 (Chatterjee, Chairman, concurring at P 2).

[5] *Maislin Indus., U.S., Inc. v. Primary Steel, Inc*., 497 U.S. 116, 132 (1990); *accord Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc*., 524 U.S. 214, 223 (1998) (explaining the applicability of the filed rate doctrine). These cases involved application of the filed rate doctrine to an industry outside of the Commission's jurisdiction, but the requirement of strict adherence to the doctrine applies equally here.

[6] 964 F.3d 1 (D.C. Cir. 2020) (en banc) (*Allegheny Defense*).

[7] *Id.* at 16.

[8] *Montana-Dakota*, 172 FERC ¶ 61,278 (Chatterjee, Chairman, concurring at P 2).

[9] *Allegheny Defense*, 964 F.3d at 16.

U.S. Court of Appeals for the District of Columbia Circuit held in *Old Dominion Electric Cooperative v. FERC* (*ODEC*) that "[t]he filed rate doctrine and the rule against retroactive ratemaking leave the Commission *no discretion to waive* the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations."[10] The inevitable, if unhappy, conclusion is that if we do not have the legal authority to grant a waiver request, we cannot grant it, no matter how much sympathy we might have for the applicant.

5. As I explained in my dissent in *Montana-Dakota*, and as we explained in great detail in our proposed policy statement on waivers, the Commission's ability to grant retroactive waivers is circumscribed by two legal doctrines: the filed rate doctrine and the rule against retroactive ratemaking.[11] The filed rate doctrine provides that a public utility may not charge any rate other than that which has been filed with the Commission and allowed to go into effect.[12] The rule against retroactive ratemaking further provides that "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but *the Commission itself has no power* to alter a rate retroactively."[13]

6. The doctrines were developed in cases concerning rates, but the logic applies equally to non-rate tariff terms and conditions.[14] Certainly there is no distinction in the FPA itself. FPA section 205(d) requires sixty days' notice prior to changes to "any such rate, charge, *classification, or service, or in any rule, regulation, or contract relating thereto*."[15] In addition, the Commission's regulations implementing FPA section 205

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[10] 892 F.3d 1223, 1230 (D.C. Cir. 2018) (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990)).

[11] *See Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief*, 171 FERC ¶ 61,156, at P 5 (2020) (Proposed Waiver Policy Statement).

[12] *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (*Arkla*); *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

[13] *Arkla*, 453 U.S. at 578 (emphasis added).

[14] *See, e.g.*, *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 139 FERC ¶ 61,254, at P 44 (2012), *reh'g denied*, 153 FERC ¶ 61,037, at P 27 (2015), *aff'd sub nom. Seminole Elec. Coop., Inc. v. FERC*, 861 F.3d 230, 234-35 (D.C. Cir. 2017).

[15] 16 U.S.C. § 824d(d) (emphasis added); *accord* 16 U.S.C. § 824e(a) (providing the Commission with authority to require prospective changes to "any rule, regulation, practice, or contract affecting such rate, charge, or classification").

require the filing of "rate schedules and tariffs,"[16] which both include "all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges."[17] Moreover, the Commission's regulation codifying the filed rate doctrine expressly applies it to non-rate terms and conditions[18] and the Commission has consistently required non-rate terms and conditions to be filed.[19] Any conclusion that a distinction can be drawn regarding the applicability of these doctrines to rate versus non-rate terms is questionable at best. And as if to prove my point, in the *PG&E* order issued at the October meeting, the Commission found that the filed rate doctrine and rule against retroactive ratemaking apply to a non-rate provision of CAISO's tariff because "the CAISO tariff, which is part of the filed rate, terms, and conditions of service and binds both PG&E and CAISO."[20]

7. Because a waiver request is in essence a request that the Commission permit a one-time change to a tariff provision, the Commission is legally barred by the filed rate doctrine and the rule against retroactive ratemaking from granting a retroactive waiver request unless one of two judicially-recognized exceptions applies: (1) the parties had

[16] 18 C.F.R. § 35.1(a) (2020).

[17] 18 C.F.R. § 35.2(b) and (c)(1) (2020).

[18] *See* 18 C.F.R. § 35.1(e) ("No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.").

[19] *See, e.g.*, *Chehalis Power Generating, L.P.*, 152 FERC ¶ 61,050, at P 16 & n.40 (2015) (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,768 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)).

[20] *PG&E*, 173 FERC ¶ 61,051 at P 16.

notice that the tariff provision could be waived retroactively;[21] or (2) the tariff provision is embodied in a private contract between the parties, who have agreed in that contract to make the agreed-upon rate effective prior to filing that contract with the Commission.[22]

8. These doctrines are well-known to the Commission. They were described in detail in the Proposed Waiver Policy Statement and have been cited in numerous Commission decisions, including in the *PG&E* and *PSEG* orders issued by the Commission today.[23] Remarkably, however, in eight of the ten retroactive waiver orders issued by the Commission today, as well as in each of the retroactive waiver orders issued on September 30, the Commission never acknowledges in its holding that a retroactive waiver is even at issue, much less explains why we have the legal authority to grant such a waiver.

9. One explanation for the Commission's approval of the retroactive waivers comes in the Chairman's assertion in his *Montana-Dakota* concurrence that "[t]he Commission has not endorsed the Proposed Waiver Policy Statement in final form."[24] Although it is true that the Proposed Waiver Policy Statement has not been finalized, this cannot justify ignoring the question of whether we have the legal authority to issue retroactive waivers. Unlike the proposed policy statement, the court precedents cited in that statement are all final and those precedents *are* all controlling.

10. I do not see how it could constitute reasoned decision making to grant a retroactive waiver without ever discussing the controlling precedent—both judicial and Commission precedent—governing retroactive waivers.[25] If the Commission believes that the

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[21] *See Nat. Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992).

[22] *See Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 795-97 (D.C. Cir. 1990).

[23] *See PG&E*, 173 FERC ¶ 61,051 at P 14; *PSEG*, 173 FERC ¶ 61,056 at PP 21-22.

[24] *Montana-Dakota*, 172 FERC ¶ 61,278 (Chatterjee, Chairman, concurring at P 3 n.3).

[25] *See, e.g.*, *LeMoyne–Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) ("[W]here . . . a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument."); *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'") (quoting *Columbia Broad. Sys.,*

retroactive waivers we are granting do not exceed our legal authority, it is incumbent on us to explain why that is the case, especially given our reliance on the filed rate doctrine and rule against retroactive ratemaking in numerous Commission orders, including two orders issued today, and the discussion in the Proposed Waiver Policy Statement. Unless and until we issue an order that provides an explanation for approving a retroactive waiver that is consistent with applicable precedent, I will continue to dissent from such orders as exceeding the Commission's legal authority.

11. Another explanation for the Commission's approval of the retroactive waivers comes in the Chairman's assertion in his *PSEG* concurrence that the Commission has a "longstanding policy of considering waiver requests on case-by-case basis."[26] That is also true, but that does not make it legally permissible. As I noted above, although eight of the Commission's retroactive waiver orders issued today do not acknowledge the legal precedents governing retroactive waivers, two of the Commission's orders—the *PSEG* and *PG&E* orders—*do* specifically identify and apply the filed rate doctrine and rule against retroactive ratemaking. Unfortunately, the *PSEG* order cites the relevant doctrines but then misapplies them.[27] In neither of these two orders that actually address the retroactive waiver issue does the Commission provide guidance as to when it believes that the filed rate doctrine and rule against retroactive ratemaking apply and when they are irrelevant and thereby warrant no mention. As far as can be discerned from the orders, the only principle the Commission has applied is that it dispenses with the doctrines prohibiting retroactive waivers when it feels sympathy for the applicant. If indeed this is the guiding principle, then these issuances do not constitute reasoned decision making.

12. I have a somewhat different concern with respect to three waiver orders issued today that dismiss the requested waiver as moot.[28] These orders are being issued long after the date the waivers were needed. The Commission's order dismisses each of these waiver requests as moot because the waiver would no longer provide any relief. What the orders do not say is that the reason the waiver requests are moot is because of the Commission's delay. It must be a bitter pill for the applicants to swallow that their waiver requests have been denied solely because of unexplained Commission inaction.

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*Inc. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)).

[26] *PSEG*, 173 FERC ¶ 61,056 (Chatterjee, Chairman, concurring at P 5).

[27] *See id*. (Danly, Comm'r, dissenting at P 2).

[28] *See Borrego*, 173 FERC ¶ 61,052; *Mariposa*, 173 FERC ¶ 61,053; *Vineyard Wind*, 173 FERC ¶ 61,058.

That pill is made even more bitter by the fact that we also issued several orders on the same day that grant similar retroactive waiver requests.

13. I support the dismissal of these waiver requests, but on different grounds.[29] In my view, we should explain that we never would have granted the requests because we do not have the legal authority to do so. At the very least, after having waited this long, we owe the applicants a better explanation as to why we failed to act in a timely fashion. Our failure to provide such an explanation may not represent legal infirmity, but we owe more to our regulated utilities. This is not how we should discharge our duties.

14. In order to demonstrate how inconsistent our treatment of waiver requests has become, here is a summary of the Commission's recent conflicting issuances: two orders, *PG&E* and *PSEG*, find the filed rate doctrine and rule against retroactive ratemaking to be applicable; *PG&E* correctly denies the waiver request based on the application of those doctrines,[30] but *PSEG* misapplies the doctrines.[31] Three orders, *Borrego*, *Mariposa*, and *Vineyard Wind* ignore the filed rate doctrine and rule against retroactive ratemaking, but dismiss the requests as moot after an unexplained delay in ruling until after the date the waivers were needed.[32] Five orders, *Montana-Dakota*, *Lightsource*, *Columbia*, *Southern Star*, and *Sunflower* (this case) improperly grant retroactive waivers without mentioning retroactivity.[33] Finally, the two remaining cases, *MISO* and *Upstream*, fail to address the retroactive waiver issue but reach the correct result on other grounds.[34] Against the backdrop of this assortment of orders, I do not

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[29] *See Borrego*, 173 FERC ¶ 61,052 (Danly, Comm'r, concurring); *Mariposa*, 173 FERC ¶ 61,053 (Danly, Comm'r, concurring); *Vineyard Wind*, 173 FERC ¶ 61,058 (Danly, Comm'r, concurring).

[30] *See PG&E*, 173 FERC ¶ 61,051 at P 18 (denying waiver as barred by the filed rate doctrine and rule against retroactive ratemaking); *id*. (Danly, Comm'r, concurring at P 3).

[31] *See PSEG*, 173 FERC ¶ 61,056 at P 21 (granting waiver as falling within an exception to the filed rate doctrine and rule against retroactive ratemaking); *id.* (Danly, Comm'r, dissenting at P 2).

[32] *See Borrego*, 173 FERC ¶ 61,052; *Mariposa*, 173 FERC ¶ 61,053; *Vineyard Wind*, 173 FERC ¶ 61,058.

[33] *See Montana-Dakota*, 172 FERC ¶ 61,278; *Lightsource*, 172 FERC ¶ 61,294; *Columbia*, 173 FERC ¶ 61,064; *Southern Star*, 173 FERC ¶ 61,066; *Sunflower*, 173 FERC ¶ 61,054.

[34] *See MISO*, 173 FERC ¶ 61,055 (Danly, Comm'r, concurring); *Upstream*, 173

know how anyone contemplating the submission of a request for a retroactive waiver could possibly predict the principles that would guide our deliberations or have any confidence as to how we would rule. Or even if we would rule at all until it is too late.

15. I also want to point out that there are ways, consistent with the Commission's legal authority, for the Commission and the industry to mitigate the harsh results that otherwise might result from the application of the filed rate doctrine and rule against retroactive ratemaking. *MISO* represents a perfect example. MISO requested a retroactive waiver of that part of its tariff that establishes its filed rate. Granting MISO's request would directly violate the filed rate doctrine and rule against retroactive ratemaking. This did not mean, however, that we were required to order MISO to resettle its markets going back to 2009, something that would be virtually impossible. Instead, the Commission has broad discretion under section 309 of the Federal Power Act (FPA)[35] to fashion remedies for tariff violations.[36] Following our finding that MISO violated its tariff, we exercised our discretion to decline to impose penalties or require that MISO resettle its markets.

16. Resort to FPA 309 (or its equivalent, Natural Gas Act section 16) will work only when a utility has violated its own tariff and requests a retroactive waiver of the tariff provision it has violated. These statutory provisions do not authorize the approval of retroactive waiver requests filed by third parties requesting waiver of the application of a utility tariff provision, such as a deadline to reserve transmission capacity or make a submission to retain an interconnection queue position.[37]

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FERC ¶ 61,057 (Danly, Comm'r, concurring).

[35] 16 U.S.C. § 825h (2018).

[36] *See Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018) (citation omitted); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir.1984) ("The principle fairly drawn from prior cases is that the Commission has broad authority to fashion remedies so as to do equity consistent with the public interest.").

[37] As the D.C Circuit has explained:

> It bears repeating, however, that the Commission does not have the authority *to ignore the law to achieve an equitable result*. Had we found that its actions violated the filed rate doctrine or the rule against retroactive ratemaking, we would not then invoke the Commission's assessment of the equities to overcome those violations.

*Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 168 n.12 (D.C. Cir. 1993) (citation

17. However, utilities have the ability to include provisions in their tariffs that permit consideration of requests to retroactively waive such provisions, and indeed some utilities have done so.[38] In my view, the utilities are in a better position than the Commission to determine which of their own tariff provisions could reasonably be subject to such a waiver. For example, utilities rely on tariff provisions establishing dates by which errors in their rates must be identified, and the Commission has consistently held that these time bar provisions are subject to the filed rate doctrine and rule against retroactive ratemaking and cannot be waived.[39] But, by routinely granting requests for the waiver of tariff provisions, we obviate the need for a utility to ever make such a determination and file the necessary tariff revisions. Only if we cease granting waivers that we are not authorized to issue in the first place will utilities have any incentive to make such filings.

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omitted) (emphasis added).

[38] One such example may be found in the tariff of PJM Interconnection, L.L.C. (PJM), which describes the conditions under which a capacity market seller may seek a remedial waiver from the Commission if the seller does not timely take actions to remove its resource from the capacity market or exempt its resource from the must-offer requirements. *See* PJM, Intra-PJM Tariffs, OATT, Attach. DD, Market Power Mitigation (22.0.0), § 6.6(g) Offer Requirement for Capacity Resources; *see also, e.g.*, *AEP Generation Res. Inc*., 170 FERC ¶ 61,103 (2020) (granting a waiver request in accordance with the remedial waiver provision in PJM's tariff).

[39] *See Seminole*, 139 FERC ¶ 61,254 at P 44 (recognizing that a time bar provision "is itself the filed rate"); *D.C. Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165, at PP 17, 101 (2012) (where duration of tariff violation exceeded two-year limitation on retroactive billing (rebilling) in PJM tariff, Commission required two years of rebilling); *Midwest Indep. Transmission Sys. Operator v. PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,243, at PP 24-25 (2011) (accepting settlement with one-year claim limitation provision as consistent with Commission precedent); *N.Y. State Elec. & Gas. Corp.*, 133 FERC ¶ 61,094, at PP 24-25, 63-64 (2010) (declining to correct 99 months of finalized invoices for meter errors, where NYISO's correction period for metering errors is limited to only 55 days although tariff expressly allows Commission to make further retroactive corrections); *N.Y. Indep. Sys. Operator, Inc*., 128 FERC ¶ 61,086, at PP 19-22 (2009) (enforcing billing limitation in NYISO tariff and refraining from ordering NYISO to reopen its invoices and refund erroneously billed congestion charges to a transmission owner does not violate the filed rate doctrine); *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289, at P 34 (2008) ("As a by-product of the *Exelon* case, PJM filed to impose a two-year limitation on challenges to billing errors, a tariff change accepted by the Commission.") (citing *PJM Interconnection, L.L.C.*, Docket No. ER06-1497-000, at 1 (Nov. 13, 2006) (unpublished letter order)).

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner