

173 FERC ¶ 61,056
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Service Electric and Gas Company
PECO Energy Company

Docket No. ER20-1812-000

ORDER GRANTING WAIVER REQUEST

(Issued October 16, 2020)

1. On May 12, 2020, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,¹ and the Notice Granting Extension of Time,² Public Service Electric and Gas Company (PSE&G) and PECO Energy Company (PECO) (together, Movants), request a one-time, partial waiver of PSE&G's Electric Tariff No. 111, Second Revised Sheet No. 45 (Tariff No. 111).³ Movants request waiver of certain charges related to the extended maintenance outage of the Metuchen Frequency Converter (MFC) caused by COVID-19 restrictions. As discussed below, we grant the request for waiver, effective April 1, 2020, until the date on which the MFC is returned to service, subject to Movants making certain informational filings.

I. Background

2. PSE&G's Tariff No. 111 is an amended agreement between PSE&G and PECO.⁴ Under Tariff No. 111, PSE&G provides frequency conversion service in connection with power deliveries by PECO to the National Railroad Passenger Corporation (Amtrak) and associated transmission service. PSE&G provides frequency conversion service for PECO through the operation and maintenance of facilities at the PSE&G Metuchen Switching Station in New Jersey and incidental basic wheeling service from PECO's service territory, for the ultimate use by Amtrak. A 2017 amendment to Tariff No. 111

¹ 18 C.F.R. § 385.212 (2020).

² *Extension of Non-Statutory Deadlines, Notice Granting Extension of Time*, Docket No. AD20-11-000 (Mar. 19, 2020).

³ Informational Report of PSE&G, Docket No. ER18-79-000 (Dec. 18, 2019).

⁴ PSE&G, Grandfathered Agreements, PECO PSE&G Amtrak 1932, PECO PSE&G Amtrak Agreement January 12, 1932 (1.0.0).

replaced the variable operation, maintenance, and losses components of the rate with a fixed annual component (Fixed Annual Amount) of \$1,650,000.⁵

II. Waiver Request

3. Movants state that, pursuant to Tariff No. 111, PSE&G owns, operates and maintains the MFC on behalf of Amtrak.⁶ According to Movants, the Fixed Annual Amount is billed at \$137,500 per month, with the majority of such amount attributable to the operation of the MFC.

4. Movants state that, on January 5, 2020, PSE&G began a maintenance outage for the MFC.⁷ Movants state that a significant task to be accomplished during the MFC outage is the installation of two Automatic Voltage Regulators (AVR). According to Movants, due to the complexity of the controls and software used in the AVRs, specially trained technicians from the manufacturer who work out of Canada and Switzerland must inspect and validate that the units are ready to operate and adjust the settings across the full range of generator output.

5. Movants explain that, on or about March 20, 2020 through May 20, 2020, Canada and the United States imposed border restrictions on all non-essential travel in response to the spread of COVID-19. Movants state that these travel restrictions prevented the technicians from travelling to the United States to perform the necessary inspections and commissioning. Movants assert that the earliest the MFC is expected to be returned to service is July 31, 2020.

6. Movants request a one-time, partial waiver of the O&M portion of the Fixed Annual Amount of Tariff No. 111, effective April 1, 2020, or alternatively, prospectively beginning on May 12, 2020, the date Movants submitted the waiver request, if the Commission determines that it is unable to grant the April 1, 2020 effective date.⁸ Movants request that the partial waiver remain in effect until July 31, 2020 or such time that the MFC is returned to service. Movants also commit to making a further filing

⁵ *Pub. Serv. Elec. & Gas Co.*, Docket No. ER18-79-000 (Nov. 21, 2017) (delegated order); *see also* Informational Report of PSE&G, Docket No. ER18-79-000 (Dec. 18, 2019) (setting forth the rates beginning January 1, 2020).

⁶ Waiver Request at 2.

⁷ *Id.* at 3.

⁸ *Id.* at 1, 3, 8.

specifying the exact end-date of the waiver period, if that end date is earlier or later than July 31, 2020.⁹

7. Movants state that waiver is requested only for the O&M portion of the Fixed Annual Amount and only for the time period associated with the extension of the MFC maintenance outage that was caused by COVID-19.¹⁰ Movants state that the waiver request does not apply to any other Tariff No. 111 charges and does not apply to the O&M charge outside of the period when the MFC will be out of service.

8. Movants state that sufficient good cause exists to grant the waiver request. First, Movants state that they acted in good faith by submitting the waiver request soon after learning that the MFC outage would need to be extended due to COVID-19 and after consulting with PECO and Amtrak, the only other parties affected by the waiver request. Second, Movants assert that the waiver is limited in scope as it is a one-time, partial waiver and is limited to only the charges and time period associated with the extension of the MFC maintenance outage that has been caused by COVID-19. Movants state that the waiver is of very limited scope and duration. Third, Movants contend that the waiver addresses a concrete problem. Specifically, Movants state that the waiver addresses the problem caused by the fact that the personnel needed to complete the MFC maintenance outage have been restricted from entering the United States because of travel restrictions necessitated by COVID-19. As a consequence of the MFC not operating, there are no operations services, maintenance services, and losses associated with the MFC during the outage.¹¹ Lastly, Movants state that the waiver does not have undesirable consequences, such as harming third parties.¹² Movants state that the waiver request will have no impact on any party other than PSE&G, PECO, and Amtrak, all of which support the waiver request.

9. Movants request that the partial waiver be made effective April 1, 2020.¹³ Movants explain that the intent of Tariff No. 111 is for PSE&G to provide certain operations and maintenance services, and cover the losses associated with MFC operation, in exchange for the monthly payment toward the Fixed Annual Amount. Movants assert that the waiver gives effect to the intent of Tariff No. 111 that Amtrak pay for operations and maintenance services, and losses, associated with actual operation

⁹ *Id.* at 2.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 4-5.

¹² *Id.* at 5.

¹³ *Id.* at 5-8.

of the MFC.¹⁴ Movants note that, while the express terms of Tariff No. 111 do not provide a formula, Movants and Amtrak have been discussing since mid-March the applicability of the Fixed Annual Amount for an extended MFC maintenance outage. Movants assert that Movants and Amtrak had “adequate notice that resolution [of the Fixed Annual Amount issue] may cause a later adjustment to the rate being collected at the time of service.”¹⁵ Movants also state that Movants and Amtrak have agreed under Tariff No. 111, to authorize this waiver request with an effective date of April 1, 2020.¹⁶ Movants assert that, because the proposed partial waiver and the Tariff No. 111 provision affected are essentially the result of contractual arrangements between parties, the requested April 1, 2020 waiver effective date does not conflict with the rule against retroactive ratemaking.¹⁷ Movants state it is a contractual rate that was negotiated with the effective date of the agreement being April 1, 2020. Movants also state that, with waiver, the ratepayer, Amtrak, is being given relief from a charge for a service that is not being provided. Movants state that no rates charged to any ratepayer are being increased, and no ratepayers are adversely impacted by the waiver. Further, Movants note that the Commission has accepted retroactive changes to this tariff provision in the past. Movants explain that the most recent amendment to Tariff No. 111 were filed on October 16, 2017 in Docket No. ER18-79-000, with a requested effective date of July 1, 2017, which was granted. Movants note that those revisions were filed with the agreement of PECO and Amtrak.

10. Movants alternatively request that, if the Commission determines that it is unable to grant the April 1, 2020 effective date, the Commission grant the partial waiver beginning on the date of this filing, May 12, 2020. Movants request that the partial waiver remain in effect until July 31, 2020, or such time that the MFC is returned to service.¹⁸ Movants state that, if the waiver request is granted, they commit to making a further filing with the Commission specifying the exact end-date of the waiver period, if that end-date is earlier or later than July 31, 2020.

¹⁴ *Id.* at 6.

¹⁵ *Id.* (quoting *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1231 (D.C. Cir. 2018) (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)).

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.* at 1-2, 9.

III. Notice and Responsive Pleadings

11. Notice of Movants' waiver request was published in the *Federal Register*, 85 Fed. Reg. 29,936 (May 19, 2020), with interventions and protests due on or before May 18, 2020. Amtrak filed a timely motion to intervene. No protests were filed.

12. In its intervention, Amtrak states that it purchases frequency conversion service and associated transmission services from PSE&G, through PECO, at Amtrak's Metuchen, New Jersey station. Amtrak states that it pays PECO the charges that are set forth in Tariff No. 111, including the Fixed Annual Charge.¹⁹

IV. Discussion

A. Procedural Matters

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

B. Substantive Matters

14. We grant Movants' request for waiver, effective April 1, 2020, until the date on which the MFC is returned to service, subject to Movants making certain informational filings, as discussed below.

15. The Commission has granted waiver of tariff provisions where: (1) the applicant acted 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.²⁰

16. We find that the circumstances of Movants' waiver request satisfy these criteria. First, we find that Movants have acted in good faith. Movants explain that the outage extension is due to the COVID-19 emergency and related border restrictions on travel preventing necessary technicians from traveling to the United States to perform necessary inspections and commissioning. Movants submitted the request for waiver soon after learning that the maintenance outage would need to be extended.

17. Second, we find that the requested waiver is limited in scope. Movants' request pertains to a one-time partial waiver of a portion of the Fixed Annual Amount charges in

¹⁹ Amtrak Intervention at 1.

²⁰ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

Tariff No. 111 associated with the operation and maintenance of the MFC and only for the time period of the extension of the outage caused by COVID-19.

18. Third, we find that granting the waiver request addresses a concrete problem. Because the technicians necessary to complete the MFC maintenance are prevented from entering the United States, the MFC outage was extended. As a consequence of the MFC not operating, there are no operations, maintenance, or losses associated with the MFC during the outage. Granting waiver will remove charges for services that are not being provided.

19. Fourth, we find that granting the requested waiver will not have undesirable consequences, such as harming third parties. Tariff No. 111 is an agreement between PSE&G and PECO, for services ultimately provided to Amtrak. Movants represent that PSE&G, PECO, and Amtrak are the only affected parties and that all agree with the waiver request. In making this finding of no undesirable consequences, such as harm to third parties, we also note that no party opposes the waiver request.

20. We grant the waiver request, effective April 1, 2020, until the date on which the MFC is returned to service, subject to Movants submitting an informational filing identifying the date on which the MFC is returned to service, within five days of such date or the date of this order, whichever is later. If the MFC is not returned to service by the date of this order, we also direct Movants to submit an informational filing within 30 days of the date of this order identifying the anticipated date that the MFC will be returned to service.

21. We grant the waiver effective April 1, 2020. Section 205 of the Federal Power Act (FPA) requires that public utilities file all rates with the Commission and also file any changes to their existing rates before a proposed change may go into effect.²¹ The FPA prior notice period is 60 days.²² The FPA permits the Commission to waive the prior notice requirement for good cause, but the courts have held that this does not authorize the Commission to permit a rate change to go into effect prior to the date it was filed unless: (i) there was notice that the previously-charged rate was tentative and subject to retroactive adjustment; or (ii) the parties to a contract agreed in advance that the contractual rate could go into effect prior to the filing date.²³ We find that this waiver request satisfies the second exception.

²¹ See 16 U.S.C. § 824d(c)-(d).

²² *Id.* § 824d(d).

²³ See *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (citing *City of Holyoke Gas & Elec. Dep't. v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992) (*City of Holyoke*) (finding the Commission's decision to make the rate change effective

22. Movants state that they reached agreement with Amtrak on the parameters of a waiver request,²⁴ and agreed, under Tariff No. 111, to authorize that waiver request be effective date of April 1, 2020. Thus, Movants argue, the waiver request is “a contractual rate [that] was negotiated with the effective date of the agreement being April 1, 2020.”²⁵ As the U.S. Court of Appeals for the Fifth Circuit explained in *Hall v. FERC*, the Commission’s waiver in that case gave “prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract.”²⁶ The court in *Hall v. FERC*, in reaching that conclusion, explained that the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), in *City of Piqua v. FERC*, “reasoned that it would not constitute retroactive ratemaking, when good cause was shown, for the Commission to give effect to the intent of the parties whose contractually authorized rate schedules called for a rate increase to be effective at a designated time.”²⁷ As the D.C. Circuit found:

[When] two parties agreed on a new rate and on the effective date for the new contract . . . [t]he negotiated rate change was not retroactive; it was prospective from the date of the contract . . . [and m]oreover, the Commission in finding the Agreement reasonable, did not retroactively substitute a rate; it merely approved the rate change and effective date agreed upon by the parties.²⁸

prior to the filing date proper because the parties had contracted to make rate retroactive and a waiver was not against the public interest)); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 795-97 (D.C. Cir. 1990). This second exception was adopted by the court in *City of Piqua v. FERC*, 610 F.2d 950, 954-55 (D.C. Cir. 1979). See also *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 23 n.1 (2014) (“Parties may also mutually agree to give a new rate retroactive effect” (citations omitted)).

²⁴ Waiver Request at 7 (emphasis added).

²⁵ *Id.* at 8; see *id.* 5, 7.

²⁶ 691 F.2d 1184, 1192 (5th Cir. 1983).

²⁷ *Id.* (citing *City of Piqua v. FERC*, 610 F.2d at 954-55).

²⁸ *City of Piqua v. FERC*, 610 F.2d at 955. See also *City of Holyoke*, 954 F.2d at 744 (upholding granting waiver of the notice requirement and approval of agreement reached in April 1990 with an effective date of November 1, 1988, as provided by its terms).

Here, Movants' representations in the waiver request reflect an agreement of Movants and Amtrak, with the agreed-upon waiver of the charges to be effective April 1, 2020. We will thus give effect to their agreement, to be effective April 1, 2020.

The Commission orders:

(A) Movants' request for waiver is hereby granted, effective April 1, 2020 until the date on which the MFC is returned to service, subject to Movants making certain informational filings, as discussed in the body of this order.

(B) Movants are hereby directed to submit an informational filing identifying the date on which the MFC is returned to service, as discussed in the body of this order.

(C) Movants are hereby directed to submit an informational filing within 30 days of the date of this order identifying the anticipated date that the MFC will be returned to service, if the MFC is not returned to service by the date of this order, as discussed in the body of this order.

By the Commission. Chairman Chatterjee is concurring with a separate statement attached.

Commissioner Danly is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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PECO Energy Company

Docket No. ER20-1812-000

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CHATTERJEE, Chairman, *concurring*:

1. I fully support the Commission's determination to grant this uncontested waiver request, which arises due to unforeseen circumstances caused by COVID-19.
2. Public Service Electric and Gas Company's (PSE&G) Metuchen Frequency Converter went on a planned maintenance outage on January 5, 2020, to allow for the installation of two automatic voltage regulators. This process requires specially trained technicians from Canada and Switzerland to inspect and validate the automatic voltage regulators. However, travel restrictions imposed by Canada and the United States to mitigate the spread of COVID-19 prevented these specially trained technicians from traveling to the United States to perform the necessary inspections. Thus, because these technicians were unable to inspect and validate the automatic voltage regulators, PSE&G was unable to return the Metuchen Frequency Converter to service and the outage, which should have been limited, was extended indefinitely on April 1, 2020.¹
3. Under the existing tariff governing PSE&G's and PECO Energy Company's (PECO) service to the National Railroad Passenger Corporation (Amtrak), PSE&G would have had to charge Amtrak for service it was unable to provide. But PSE&G, PECO, and Amtrak negotiated an agreement to give relief to Amtrak so it would not have to pay for service that was not being provided.²
4. I applaud PSE&G, PECO, and Amtrak for their willingness to engage with one another and reach this agreement. The waiver request makes clear that the rate was negotiated to be effective April 1, 2020, and that the parties to the agreement support the waiver request, which is necessary to effectuate the agreement.³
5. This waiver request underscores the need for the Commission to maintain its longstanding policy of considering waiver requests on case-by-case basis. In my opinion,

¹ Waiver Request at 3-4.

² *Id.* at 1 & 7.

³ *Id.* at 7.

as discussed in the order, we have the legal authority to grant this waiver, which I believe clearly satisfies the Commission's waiver criteria. For these reasons, I support granting this waiver.

Thus, I respectfully concur.

Neil Chatterjee
Chairman

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PECO Energy Company

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DANLY, Commissioner, *dissenting*:

1. The Commission's order issued today in this docket addresses a request for a retroactive 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, which I discussed briefly in my dissents to the *Montana-Dakota* and *Lightsource* orders that were issued on September 30 and again in greater detail in my dissent to the *Sunflower* order that is being issued today.

2. I dissent from the Commission's order in this proceeding because, although in this issuance we specifically address and apply the related doctrines prohibiting retroactive waivers, the filed rate doctrine and the rule against retroactive ratemaking, the Commission misapplies the contract exception that has been recognized in case law.⁴ While the order states that the agreement for a retroactive rate reduction is "essentially the result of contractual arrangements between parties,"⁵ there is, in fact, no contract.

¹ *Pub. Serv. Elec. & Gas Co.*, 173 FERC ¶ 61,056 (2020) (PSEG).

² See *Pac. Gas & Elec. Co.*, 173 FERC ¶ 61,051 (2020) (PG&E); *Borrego Solar Sys. Inc.*, 173 FERC ¶ 61,052 (2020); *Mariposa Energy, LLC*, 173 FERC ¶ 61,053 (2020); *Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (Sunflower); *Midcontinent Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,055 (2020); *Upstream Wind Energy LLC*, 173 FERC ¶ 61,057 (2020); *Vineyard Wind LLC*, 173 FERC ¶ 61,058 (2020); *Columbia Gas Transmission, LLC*, 173 FERC ¶ 61,064 (2020); *S. Star Cent. Gas Pipeline, Inc.*, 173 FERC ¶ 61,066 (2020).

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

⁴ See *Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief*, 171 FERC ¶ 61,156, at PP 3, 5 (2020).

⁵ PSEG, 173 FERC ¶ 61,056 at P 9 (emphasis added); see *id.* P 22 (seemingly

The movants have not filed any instrument with the Commission memorializing their agreement and the cases cited do not contemplate allowing retroactive waivers based on any “arrangements” other than contracts.

3. Moreover, the Commission fails to explain why we address these doctrines in our holding in this case but not in ten of the other eleven retroactive waiver orders issued in the last three weeks.⁶ Failing to explain why we apply these doctrines here but not in our other orders results in the same inconsistent decision making and lack of guidance that I discuss in more detail in my dissent in the *Sunflower* order.⁷

4. It may be that the Commission can provide adequate reasoning to arrive at an explanation for why the filed rate doctrine and rule against retroactive ratemaking have exceptions for voluntary rate decreases. No attempt was made to do so here. Instead, the Commission shoehorns acceptance of this waiver request into precedent establishing an exception that cannot apply to the facts at hand.

For these reasons, I respectfully dissent.

James P. Danly
Commissioner

adopting movants’ description of the “agreement”).

⁶ We also apply the filed rate doctrine and rule against retroactive ratemaking in our *PG&E* order issued today.

⁷ See *Sunflower*, 173 FERC ¶ 61,054 (Danly, Comm’r, dissenting).