UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief	Docket No. PL20-7-000

COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

The Transmission Access Policy Study Group ("TAPS") appreciates the opportunity to comment on the Proposed Policy Statement issued in this proceeding on May 21, 2020.[1] The Proposed Policy Statement proposes significant and unwarranted changes to the Commission's approach to requests for waivers of the prior notice requirements of the Federal Power Act ("FPA") and Natural Gas Act ("NGA") to permit effective dates prior to the date of filing, including FPA section 205(d) waiver requests for remedial relief with respect to failures to comply with tariff[2] requirements that occurred prior to the request. The Proposed Policy Statement (P 1) states that "[t]he Commission's waiver orders have sometimes drifted beyond the limits imposed by the filed rate doctrine and the rule against retroactive ratemaking," and that the Proposed Policy is intended to "ensure compliance with these doctrines" going forward. But that is not the case. Instead, the Proposed Policy would depart from Commission regulations, as well as decades of settled practice and precedent, and restrict the availability of waivers in circumstances where their grant would *not* be prohibited under the filed rate doctrine

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

[2] Consistent with the Proposed Policy Statement (P 1 n.1), these Comments use the shorthand term "tariff" to refer to all documents that the relevant statues and regulations require to be filed with the Commission.

or the rule against retroactive ratemaking. TAPS therefore respectfully requests that the Commission *not* adopt a final policy statement based on this proposal.

TAPS is particularly concerned with the proposal to confine the Commission's ability to waive, for "good cause," the prior notice requirement pursuant to FPA section 205(d) so that going forward such waivers may only be granted "to the extent that entities seek an effective date no earlier than the day after the date a rate change is submitted to the Commission." Proposed Policy Statement P 21 (footnote omitted).[3] This limitation is not supported by either the statute or settled court jurisprudence on the rule against retroactive ratemaking. Moreover, it is directly contrary to Commission regulations that expressly allow the Commission to grant effective dates *prior* to the date of filling and allow service to commence up to thirty days *prior* to the filing of a service agreement, 18 C.F.R. §§ 35.11, 35.3(a)(2). By delaying the effective date of service until a day after a transmission provider submits a service agreement, the Proposed Policy Statement needlessly frustrates key open access reforms and undermines the Commission's fundamental statutory mandate to ensure just, reasonable, and not unduly discriminatory service. It is an unwarranted and unjustified change in practice. It should not be adopted. In any event, such significant changes to the Commission's regulations implementing its

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[3] While footnote 10 of the Proposed Policy Statement (P 3 n.10) refers to footnote 50 (the footnote omitted from the P 21 sentence quoted above) in noting that "several long-standing waiver practices" would not be changed by the Proposed Policy Statement, the concluding clause of P 21 would appear to limit the continued application of those long-standing policies "to the extent that entities seek an effective date no earlier than the day after the date a rate change is submitted to the Commission." The Proposed Policy Statement reinforces this point in footnote 51 and states that even where prior precedent permitted filings to take effect on the date of filing the Commission's "general intent going forward will be to permit new filings to go into effect no earlier than the day after filing, rather than the day of filing, to provide some amount of prior notice." *Id.* P 21 n.51. If the Commission nevertheless intends to preserve "several long-standing waiver practices" (P 3 n.10) notwithstanding the text of P 21, it has provided no discernable line for which waivers of filing requirements are being restricted to the application the day after filing, and which are not; nor does the Commission provide any legal basis or other rationale for distinguishing among such notice requirement waiver requests.

statutory authority to waive the prior notice requirement for good cause cannot be made by policy statement, but instead require a full rulemaking process.

The Proposed Policy Statement is similarly not supported by the filed rate doctrine or the rule against retroactive ratemaking to the extent it seeks to forbid any requests for relief under FPA section 205(d) for tariff-related actions or omissions that have already occurred before a petition or complaint is filed. Again, the courts and Commission have recognized circumstances, such as the enforcement of contract provisions, where such relief is proper and available under the good cause waiver provisions of FPA section 205(d). This new rule is impermissibly promulgated under the guise of a policy statement, and is an unreasoned departure from Commission practice and precedent. The Proposed Policy Statement cites no instance where the Commission has previously foreclosed parties from available relief expressly provided under the FPA. The Commission cannot properly limit the available waiver relief provided under section 205(d) incident to the Proposed Policy Statement or otherwise.

Finally, the Proposed Policy Statement recognizes that its proposed change in approach may cause harsh outcomes and suggests tariff modifications that may mitigate some of these untoward effects. But it does not allow time for such tariff modifications to be developed, filed, accepted, and made effective before the Policy Statement becomes effective. Should a final policy statement be adopted, TAPS requests that the Commission defer its effective date so that entities can develop and secure approval of these tariff changes.

I. INTEREST OF TAPS

TAPS is a trade association of transmission-dependent utilities in thirty-five states, promoting open and non-discriminatory transmission access.[4] TAPS members include municipal utilities, municipal joint action agencies, electric cooperatives, and an investor-owned utility that entirely or predominantly rely on transmission systems owned and controlled by others to gain access to wholesale power markets in which they are active participants. They take transmission service under the rates, terms, and conditions of tariffs on file with the Commission and therefore would be affected by the Proposed Policy Statement's proposed modifications of the Commission's approach to tariff filings predicated upon good cause waiver of the prior notice requirement of FPA section 205(d), 16 U.S.C. § 824d(d).

[4] David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

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II. COMMENTS

A. The Proposed Policy Statement would improperly restrict the Commission's exercise of its statutory authority to waive prior notice requirements.

The Proposed Policy Statement would institute a dramatic change in how the Commission exercises its statutory authority to waive the sixty-day prior notice requirement. It proposes (P 21) to continue its practice of granting waivers of the prior notice requirement pursuant to FPA section 205(d), 16 U.S.C. § 824d(d), only "to the extent that entities seek an effective date no earlier than the day after the date a rate change is submitted to the Commission." This proposed limitation on the effective date the Commission can establish under FPA section 205(d): (1) is not supported by the statute or court precedent; (2) directly contradicts the Commission's regulations; (3) undermines the Commission's ability to ensure just, reasonable, and not unduly discriminatory transmission service; (4) departs from existing precedent without reasoned explanation; and (5) violates the statutory requirement of notice and comment rulemaking.

1. The Proposed Policy Statement is contrary to the statute and precedent on the filed rate doctrine and the prohibition on retroactive ratemaking.

The Proposed Policy Statement's only proffered rationale in support of prohibiting waivers of filings for service agreements commencing on or before the day of filing is "to ensure compliance" with the prohibition against retroactive ratemaking and the filed rate doctrine. *Id.* P 1. But neither the FPA nor court precedent on the filed rate doctrine and rule against retroactive ratemaking requires restricting Commission waivers of the prior notice requirement to "an effective date no earlier than the day after the date a rate change is submitted to the Commission." *Id.* P 21.

The plain language of FPA section 205(d), 16 U.S.C. § 824d(d), grants the Commission broad and flexible authority to waive its sixty-day notice requirements. *See City of Kaukauna v. FERC*, 581 F.2d 993, 996 (D.C. Cir. 1978) ("Section 205 [of the FPA] purports to dictate not *when* contractually-authorized rate increases *can* be made operative but only that they *cannot* become operative at any time without compliance with the statutory procedure.") (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339 (1956)). There is nothing in the statutory language of section 205(d) or elsewhere in the FPA that limits the temporal scope of waiver available under the statute, let alone imposes an absolute, unwaivable requirement that all tariffs and service agreements be on file for at least one day *before* going into effect.

Indeed, the Proposed Policy Statement correctly acknowledges that the courts have long held that the Commission is authorized under FPA section 205(d) to permit rate changes to go into effect *prior* to the date it was filed in certain circumstances. Proposed Policy Statement P 3 & n.10 (citing *Consolidated Edison Co. of N.Y. 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); *City of Piqua v. FERC*, 610 F.2d 950, 954-55 (D.C. Cir. 1979)).[5] Specifically, rate adjustments may take effect prior to their filing with the Commission "when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a rate effective retroactively." *Consolidated Edison Co. of N.Y.*, 347 F.3d at 969 (citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999)).

As the D.C. Circuit explained in *Columbia Gas Transmission Corp. v. FERC*, these circumstances are not exceptions to the prohibition against retroactive ratemaking; rather, they do not involve retroactive changes to rates. 895 F.2d at 796 (citing *City of Piqua v. FERC*, 610 F.2d at 954; *Hall v. FERC*, 691 F.2d 1184, 1192 (5th Cir. 1982)). Where the parties agree to the effective date for a new contract, "[t]he negotiated rate [is] not retroactive; it [is] prospective from the date of the contract." *City of Piqua v. FERC*, 610 F.2d at 954. Likewise, "no violation of the filed rate doctrine occurs when 'buyers are on adequate [advance] notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.'" *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1231 (D.C. Cir. 2018) ("*ODEC*") (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)), *cert denied*, 139 S. Ct. 794 (2019). Again, as the Proposed Policy Statement accurately summarizes (P 7), "[t]he provision of notice of a potential change does not create an exception to the rule against retroactive ratemaking." Rather, in this situation customers have prospective notice "at

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[5] In *City of Piqua*, 610 F.2d at 953, the D.C. Circuit rejected the argument that FPA section 205(d) "only allows the Commission to shorten the thirty days' notice period and to limit rate changes to a post-filing effective date." Consistent with the Commission's rate regulatory authority under the statute, and in furtherance of the FPA's accommodation of negotiated contracts, "[t]he effective date of the rate change is left to the discretion of the Commission." *Id.*

the outset that the rates being promulgated are provisional only and subject to later revision." *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d at 797. Accordingly, over the course of several decades, the courts have repeatedly and consistently affirmed the Commission's authority to allow rates to take effect prior to the date of their filing with the Commission.[6]

The Proposed Policy Statement identifies no change in law that upends and calls into question the legality of decades-long practice and prior precedent.[7] Although the Proposed Policy Statement points (P 5) to the D.C. Circuit's *ODEC* decision, it acknowledges (P 1 n.2) that "*ODEC* did not make new law, but rather reiterated existing law." Under existing law, there is no basis in the filed rate doctrine or the rule against retroactive ratemaking for the Commission to disable itself from granting any waivers of its prior notice requirements to permit a tariff or service agreement from becoming effective earlier than one day after filing, as the Proposed Policy Statement proposes. The Commission cannot, through a policy statement or otherwise, airbrush away the long-recognized legality of FPA section 205(d) waivers predicated upon prior notice or the agreement of the parties to an effective date prior to the date of filing.

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[6] *See, e.g.*, *Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992) (upholding a Commission order "waiving the 60-day notice period of § 205(d) [for a filing submitted in April 1990], and thereby allowing the $11 renewal rate to become effective retroactively to November 1, 1988"); *City of Piqua*, 610 F.2d at 955 (affirming a Commission order that established an effective date of May 10, 1977 when the filing was first submitted on August 5, 1977); *Hall v. FERC*, 691 F.2d at 1192 (holding that the Commission erred in not granting a waiver that would "give[] prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract").

[7] In fact, the Proposed Policy Statement's portrayal of the filed rate doctrine is irreconcilable with the Commission's defense of market-based rates as filed rates within the meaning of that doctrine. That defense is based on the *ex post* submission of transaction-specific data. In Order No. 697 (P 961), the Commission held that "[t]he market-based rate tariff, with its appurtenant conditions and requirement for filing transaction-specific data in EQRs, is the filed rate."

2. The Proposed Policy Statement is directly contrary to the Commission's rules and regulations.

The Commission's regulations expressly provide that the Commission may establish an effective date before the date of filing. The regulation on waiver of notice requirement provides that:

> Upon application and for good cause shown, the Commission may, by order, provide that a rate schedule or tariff, tariff or service agreement, or part thereof, *shall be effective as of a date prior to the date of filing* or prior to the date the rate schedule or tariff, tariff or service agreement would become effective in accordance with these rules. . . .

18 C.F.R. § 35.11 (emphasis added). For nearly sixty years the Commission's regulation on waiver of notice has specifically provided that the Commission may order filings to "be effective as of a date prior to the date of filing." *Part 35—Filing of Rate Schedules*, 28 Fed. Reg. 10,573, 10,574 (Oct. 2, 1963) (codified at 18 C.F.R § 35.11 to be effective on November 1, 1963).

Paragraph 21 of the Proposed Policy Statement, however, would establish the "day after the date a rate change is submitted to the Commission" as the earliest possible effective date the Commission will establish when waiving the sixty-day notice requirement. The Proposed Policy Statement does not, and cannot, reconcile its proposal with the Commission's longstanding regulation. Indeed, the Proposed Policy Statement does not even cite 18 C.F.R. § 35.11 or recognize that its proposed approach is inconsistent with the clear language of this regulation.

Likewise, the Commission's regulation on notice requirements provides that:

> Service agreements that are required to be filed and posted authorizing a customer to take electric service under the terms of a tariff, or any part thereof, shall be tendered for filing with the Commission and posted not more than 30

> days *after electric service has commenced* or such other date as may be specified by the Commission.

18 C.F.R. § 35.3(a)(2) (emphasis added). This regulation expressly contemplates the commencement of service up to thirty days *prior* to the date that the service agreement is filed, and the Commission has explained that rates collected from the time service commences until the Commission accepts the service agreement are subject to refund. *Prior Notice & Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,984 ("*Prior Notice*"), *on reh'g*, 65 FERC ¶ 61,081 (1993). Pursuant to these regulations, the Commission has routinely granted waivers of the prior notice requirement to establish effective dates prior to the date of filing.[8] The Proposed Policy Statement nowhere addresses nor explains, nor could it, how its new proposed practice of requiring all effective dates to be no earlier than the day after filing can be reconciled with the Commission's extant and operative filing regulations.

3. The Proposed Policy Statement is inconsistent with the Commission's duty to ensure just, reasonable, and not unduly discriminatory transmission service.

As explained in Order No. 888,[9] "[t]he Commission has a mandate under sections 205 and 206 of the FPA to ensure that, with respect to any transmission in interstate

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[8] *See e.g.*, *Midcontinent Indep. Sys. Operator*, 164 FERC ¶ 61,141, P 14 (2018) (granting effective date of June 1, 2018 for executed agreement filed on June 28, 2018); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,244, PP1-2 (2015) (accepting System Support Resource Agreement and Rate Schedule filed on April 20, 2015 to be effective April 16, 2015); *Midcontinent Indep. Sys. Operator*, 152 FERC ¶ 61,023, P 25 (2015) (granting effective date of January 28, 2015 for unexecuted agreement filed on February 27, 2015); *PacifiCorp.*, 134 FERC ¶ 61,042, P 1 (2011) (accepting proposed service agreement filed on November 23, 2010 to be effective November 22, 2010).

[9] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 75 FERC ¶ 61,080, *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 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 part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC,* 225 F.3d 667 (D.C. Cir. 2000*), aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage." Order No. 888, FERC Stats. & Regs. at 31,669. Even before issuing that landmark rulemaking, the Commission explained that setting effective dates prior to the date of filing plays a vital role in achieving this statutory directive. In providing "waiver of notice will be granted if service agreements are filed within 30 days after service commences," the Commission's *Prior Notice* order explained that allowing such waivers of prior notice requirements "balanced the goal of encouraging efficient transactions on short notice and the purposes of the statutory prior notice requirement." *Prior Notice* at 61,984. This specific policy was subsequently codified at 18 C.F.R. § 35.3(a)(2).[10]

The Commission again recognized the importance of ensuring timely service in promulgating its open access reforms in Order No. 888, which ensure just, reasonable, and not unduly discriminatory service, and relied upon its authority to waive filing requirements providing for notice prior to the commencement of transmission service in crafting those reforms. As found by the Commission: "[P]rior to Order No. 888, it was the practice of many utilities to condition service on the execution of an agreement and the customer had no choice but to agree not to object to unreasonable terms as a condition of getting service." *MidAmerican Energy Co.*, 83 FERC ¶ 61,084, at 61,416 (1998). To address this unreasonable and discriminatory practice, "Order No. 888 provides that the transmission provider shall file an unexecuted agreement and commence providing the requested service subject to the transmission customer agreeing to compensate the

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[10] *See Electronic Tariff Filings*, Order No. 714, 124 FERC ¶ 61,270 (2008), *order on reh'g*, Order No. 714-A, 147 FERC ¶ 61,115 (2014). As discussed above, the Commission's regulation generally allowing the Commission to set effective dates prior to the date of filing, 18 C.F.R. § 35.11, was promulgated long before the *Prior Notice* order.

transmission provider at whatever rate the Commission ultimately determines to be just and reasonable." *S. Cal. Edison Co.*, 97 FERC ¶ 61,148, at 61,640 n.3 (2001) (citing *Tenn. Power Co.*, 90 FERC ¶ 61,238, at 61,762 (2000), *reh'g denied*, 91 FERC ¶61,271 (2000)).[11] Under the express terms of the Commission's *pro forma* Open Access Transmission Tariff ("OATT"),[12] a transmission customer that agrees to take tariff service under the rates ultimately determined by the Commission can direct a transmission provider to begin service and to file an unexecuted service agreement with an effective date prior to the date of that filing.[13] In enabling transmission customers to secure timely and non-discriminatory transmission service, Order No. 888 thus closely tracked the precedent confirming the Commission's Section 205(d) authority to waive prior notice requirements for good cause to allow contracts to go into effect *prior* to their filing where there is agreement. *See Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d

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[11] *See also Okla. Mun. Power Auth. v. Am. Elec. Power Serv. Corp.*, 110 FERC ¶ 61,228, P 21, *reh'g denied*, 112 FERC ¶ 61,107 (2005) ("The purpose of requiring transmission providers to file unexecuted service agreements at the customer's request is to prevent the delay in service while disputed issues are resolved either by the parties or the Commission.").

[12] *See* OATT Section 15.3:"If the Transmission Provider and the Transmission Customer requesting Firm or Non-Firm Point-To-Point Transmission Service cannot agree on all the terms and conditions of the Point-To-Point Service Agreement, the Transmission Provider shall file with the Commission, within thirty (30) days after the date the Transmission Customer provides written notification directing the Transmission Provider to file, an unexecuted Point-To-Point Service Agreement containing terms and conditions deemed appropriate by the Transmission Provider for such requested Transmission Service. The Transmission Provider shall commence providing Transmission Service subject to the Transmission Customer agreeing to (i) compensate the Transmission Provider at whatever rate the Commission ultimately determines to be just and reasonable, and (ii) comply with the terms and conditions of the Tariff including posting appropriate security deposits in accordance with the terms of Section 17.3." *Pro Forma Open Access Transmission Tariff*, FERC, § 15.3 (July 18, 2013), https://www.ferc.gov/industries/electric/indus-act/oatt-reform/pro-forma-OATT.pdf. *See also* OATT Section 29.1(iii) and (iv), which make a service contingent on a customer's execution or request that the Transmission Provider filed unexecuted network service and network operating agreements. *Id* § 29.1(iii), (iv).

[13] *See, e.g.*, *Sw. Power Pool, Inc.*, 170 FERC ¶ 61,104, P 1 (2020); *Sw. Power Pool, Inc.*, 155 FERC ¶ 61,002, P 18 (2016); *Midcontinent Indep. Sys. Operator*, 152 FERC ¶ 61,023, P 25 (2015); *Sw. Power Pool, Inc.*, 153 FERC ¶ 61,354, P 1 (2015).

at 969; *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d at 795-97; *City of Piqua v. FERC*, 610 F.2d at 954-55.

Thus, the Commission's long-established and judicially recognized authority to waive notice requirements, on good cause, to permit service to become effective before the filing of a service agreement is a vital tool in carrying out its statutory obligation to ensure just, reasonable and not unduly discriminatory transmission service. *See* Order No. 888, FERC Stats. & Regs. at 31,682 ("[I]t is [the Commission's] duty to eradicate unduly discriminatory practices."). By restricting the Commission's FPA authority to waive the prior notice requirement and establish effective dates prior to the date of filing, the Proposed Policy Statement would needlessly impede the Commission's ability to fulfill its statutory obligations. The Proposed Policy Statement nowhere acknowledges its impact on the Commission's open access reforms that require the timely provision of transmission service. Because the Proposed Policy Statement's proposed curtailment of these fundamental transmission customer rights is not required by statute or judicial precedent, and is contrary to the Commission's regulations, it should not be issued as a final Policy Statement.

4. The proposed waiver restriction is arbitrary and capricious and contrary to law as an unreasoned departure from precedent.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005). The agency "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Id.* at 2126 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Otherwise, "an

'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Id.* (quoting *Brand X.*, 545 U.S. at 981). The Proposed Policy Statement (P 15) acknowledges that its "proposal[s] represent[] a change from the Commission's past approach."[14] As shown above, the Commission's filing regulations, its open access transmission service policy, and its filing policy, precedent, and practices permit good cause waiver of the section 205 notice requirements to enable pre-filing effective dates. Although the Proposed Policy Statement seeks to fundamentally alter the waiver filing rules, practices and standards previously used by the Commission, it has provided no reasoned basis for this change.

As discussed above, the Proposed Policy Statement's only proffered rationale for prohibiting waivers of filing requirements that would permit tariffs and service agreements to become effective before the day of after filing is to ensure compliance with the filed rate doctrine and the prohibition against retroactive ratemaking. Because that reasoning is unsound, the proposed restriction is unlawful.

5. The Proposed Policy Statement violates the statutory requirement of notice and comment rulemaking.

As discussed above, the Proposed Policy Statement would fundamentally alter the Commission's filing regimen and impair the rights of affected stakeholders by requiring all effective dates to be at least one day after filing. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," this proposal falls under the Administrative Procedure Act's ("APA") definition of "rule." 5 U.S.C. § 551(4). And although styled as a proposed policy statement, that

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[14] The Proposed Policy Statement, however, nowhere addresses the proposed departure from its existing regulation at 18 C.F.R. § 35.11.

label is inaccurate and not controlling. The Proposed Policy Statement's prohibition against waivers permitting effective dates prior to the day after filing is a legislative rule within the meaning of the APA. It "reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). Waiver of the sixty notice day requirement will be permitted only "to the extent that entities seek an effective date no earlier than the day after the date a rate change is submitted to the Commission." Proposed Policy Statement, P 21. There is nothing interpretive about this. It is a rule of general applicability governing the Commission's filing requirements and the entities subject to and affected by those requirements.[15] Assuming it were otherwise lawful, such change must be promulgated under APA notice and comment rulemaking, 5 U.S.C. § 553, which the Commission has not done.[16]

In addition, the Supreme Court has explained that section 2 of the APA, 5 U.S.C. § 551, "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U. S. at 515). The Commission impermissibly seeks to use a policy statement to eliminate or restrict the application of its current lawful regulations.

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[15] "'A document will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as . . . denial of an application. If the document is couched in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced. In some circumstances, if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter.'" *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1328-29 (1992)).

[16] Although the Commission has provided a comment period, it has not complied with the APA's notice requirement, which requires publication in the Federal Register unless every person subject to the proposal is "named and either personally served or otherwise have actual notice." 5 U.S.C. § 553(b).

Even if the Proposed Policy Statement could plausibly be construed as interpreting these existing filing regulations, an agency may only change its interpretation if that new interpretation is consistent with the underlying regulation. *Id.* at 105 (citing *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995)). Here, the Proposed Policy Statement does not claim to reinterpret the Commission's existing regulations, nor is it consistent with those existing regulations. The Commission's longstanding regulation provides that the Commission may, for good cause shown, provide that a filing "shall be effective as of a date prior to the date of filing," 18 C.F.R. § 35.11, and the Commission cannot eliminate that regulation through its Proposed Policy Statement.

B. To the extent to which the Proposed Policy Statement would preclude requests for remedial relief pursuant to FPA section 205(d), it is similarly flawed.

The Proposed Policy Statement also seeks to forbid all requests for remedial relief under the Commission's FPA section 205(d) authority. The Proposed Policy Statement would restrict entities requesting remedial relief from previously occurring tariff-related actions or omissions to "request[s] [for] Commission action pursuant to FPA section 309 or NGA section 16." Proposed Policy Statement P 14 (footnotes omitted). Although section 309 may afford appropriate relief to remediate certain prior tariff-related actions or omissions, it is not sufficient to remediate conduct such as noncompliance with a contract right that can only be enforced by means of good cause waiver under section 205(d) to permit the filing of a tariff change with a prior effective date. This restriction on an express form of remedial relief permitted under the statute is a legislative pronouncement of general applicability and cannot be promulgated absent notice and comment rulemaking. *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d at 1023. It is

also impermissible as an unreasoned departure from Commission practice and applicable precedent.

The Proposed Policy Statement's only justification for prohibiting remedial relief by means of FPA section 205(d) waiver is that it is only statutorily authorized to grant prospective waivers:

> The foregoing proposed guidance is limited to requests for remedial relief to address tariff-related actions or omissions that have already occurred before a petition or complaint is filed. Requests for remedial relief are distinct from prospective requests to waive the 60-day prior notice requirement under FPA section 205(d), or the 30-day prior notice requirement under NGA section 4(d), which the Commission has discretion to waive "for good cause shown."

Proposed Policy Statement P 21. Based upon the filed rate doctrine and the prohibition against retroactive ratemaking, the Proposed Policy Statement (P 12) contends that it is "incorrect[] . . . that the Commission may alter the substance of a filed [rate schedule] retroactively from the date a filing is made." Not so. Once again, the Proposed Policy Statement ignores the notice and contract prongs that enable the Commission to grant section 205(d) waivers in order to permit *ex post* filings for rate schedule-related actions or omissions that have already occurred.

The Proposed Policy Statement (P 1 n.2, P 5 n.14) cites *Arkla v. Hall*[17] in support of its cramped reading of its section 205(d) waiver authority. Ironically, viewed in full, the Hall litigation is one of the most famous and noteworthy examples of the sweeping breath of the Commission's ability to remedy past conduct by means of an FPA section 205(d) or NGA section 4 waiver. In *Arkla v. Hall*, 453 U.S. at 576 n.6, the Court

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[17] *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) ("*Arkla v. Hall*").

noted that in separate litigation the Fifth Circuit was reviewing the Commission's denial of a requested waiver under NGA section 4; that request sought to implement an amendment to the rate schedule at issue with a retroactive effect date in order to enforce Hall's most favored nation rights under the parties' agreement reflected in the rate schedule filed with Commission. Although the Supreme Court held that the filed rate doctrine barred judicial relief because the gas purchase agreement's stated numerical rate was different than the rate Hall was entitled to under the triggering of the rate schedule's most favored nations clause, he was nevertheless entitled to pursue relief from the Commission in the parallel track litigation by means of a waiver under NGA section 4.

Although Hall lost before the Supreme Court, he prevailed on appeal from the parallel agency track litigation. In *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982), the Fifth Circuit reversed the Commission's refusal to grant a statutory waiver of the analogous NGA prior notice requirement in order to enforce a most favored nations clause in a gas sales agreement and effectuate the necessary change in the numerical stated rate by means of a rate change filing with a retroactive effective date. The relief sought concerned conduct going back two decades. The court of appeals rejected the Commission's invocation and reliance on the prohibition against retroactive ratemaking. *See id.* at 1191.

> We agree with the D.C. Circuit Court that the policy against retroactive ratemaking which precludes Commission "substitution of an unreasonably high or low rate with a just and reasonable rate" is "immediately distinguishable" from the present situation where the Commission's waiver gives prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract. The Commission erred in not giving effect to this policy which it had previously distinguished and espoused.

Id. at 1192. On remand, the Commission granted waiver of the prior notice requirement. *Ark. La. Gas Co. v. Hall*, 29 FERC ¶ 61,346, at 61,734 (1984), *order terminating proceeding*, 31 FERC ¶ 61,032(1985).

The Proposed Policy Statement fails to show that the relief available under FPA section 309 includes the waiver relief expressly permitted under FPA section 205(d). Indeed, the Proposed Policy Statement's reason for limiting remedial relief for past tariff-related conduct to section 309 is the necessary and implicit contention that section 309 does not encompass the retrospective waiver relief available under section 205(d).[18]

The Commission is not free to depart from its own precedent recognizing the availability of remedial waiver of FPA section 205(d) absent a reasoned basis for doing so. The Proposed Policy Statement provides no sound justification for changing course. Even if the Commission were to proceed on the basis of notice and comment rulemaking,[19] it is unclear that the Commission can categorically refuse to entertain statutorily permitted requests for remedial relief. It certainly cannot do so for the (unsound) reasons articulated in the Proposed Policy Statement. The Commission's proposed refusal to entertain section 205(d) waiver relief for past conduct in accordance with the parties' agreement (or notice expectations) is a breathtaking departure from past precedent and its statutory obligation under the FPA to ensure just and reasonable, and not unduly discriminatory rates, terms and conditions of service.[20]

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[18] "Requests for remedial relief are distinct from prospective requests to waive the 60-day prior notice requirement under FPA section 205(d), or the 30-day prior notice requirement under NGA section 4(d), which the Commission has discretion to waive 'for good cause shown.'" Proposed Policy Statement P 21.

[19] As it must do in order to promulgate the proposed remedial restriction which is clearly a legislative rule.

[20] The Proposed Policy Statement's limitation of remedial relief would subject customers to undue risk of denial or loss of service associated with a utility's inadvertent or deliberate failure to file a contract for agreed-upon service. *See, e.g., Borough of Lansdale v. FPC*, 494 F.2d 1104, 1117 (D.C. Cir. 1974) ("[f]iled

C. At minimum, the Commission should delay the effective date of any final policy statement to allow for the tariff changes suggested in the Proposed Policy Statement.

The Proposed Policy Statement expressly acknowledges that its proposal would constitute a major change to the Commission's longstanding approach to these issues. Proposed Policy Statement P 15 ("We recognize that this proposal represents a change from the Commission's past approach."). It acknowledges (PP 15-17) that this change may result in "harsh outcomes" and suggests ways in which tariffs may be modified in order to mitigate that effect. The Commission's proposed recommendation of tariff modification in no way cures the fundamental defects discussed above. And the Commission is seemingly indifferent to the implementation of its own limited palliative. The Proposed Policy Statement provides no period of time for such tariff modification to be developed, filed, accepted by the Commission, and implemented before the final Policy Statement would become effective and cause such harsh outcomes. *See id.* P 1, n.4.

Because many current tariffs and other agreements were developed based on the Commission's current waiver approach, they may not expressly state that the failure to comply with certain deadlines may be waived by order of the Commission (*see id.* P 16) or that certain errors may be cured within a reasonable period of time without seeking remedial relief from the Commission (*see id.* P 17). The lack of these provisions may have been just and reasonable under the Commission's current approach, but that may no longer be the case given the harsh outcomes that may result under the Proposed Policy

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or not, [the] contract [was] within the Commission's jurisdiction from the moment it became effective by its own terms").

Statement. If it adopts the Proposed Policy Statement (which, as discussed above, TAPS urges against), the Commission should at least defer the effective date of this new policy to allow for the development, filing, approval, and implementation of the types of mitigating tariff modifications suggested in the Proposed Policy Statement. While such delayed implementation cannot cure all the harm that would result from the Commission's unnecessary truncation of its own statutory waiver authority (such as the proposed impairment of its fundamental open access reforms), it may at least mitigate some adverse impacts.

CONCLUSION

For the reasons stated above, the Commission should not adopt the Proposed Policy Statement as a final policy statement in this proceeding

Respectfully submitted,

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