UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Waiver of Tariff Requirements Docket No. PL20-7-000

Comments of the National Rural Electric Cooperative Association

The National Rural Electric Cooperative Association (NRECA) appreciates the opportunity to submit comments on the May 21, 2020, "Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief."[1] The following comments make three points.

First, the Commission should clarify the following statement, addressing waivers of the "prior notice requirement" section 205 of the Federal Power Act (FPA),[2] in paragraph 21 of the Proposed Policy Statement:

> The Commission has long found that waiver of the prior notice requirement will generally be granted in certain circumstances, and we propose that this policy will remain in effect *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*.[[3]]

This last restriction does not reflect any statutory requirement, departs from the Commission's current regulations, and is inconsistent with other language in the Proposed Policy Statement. To avoid confusion and to promote the public interest, any final statement of policy in this docket should provide that the Commission will continue to allow waivers of the prior notice requirement in at least the following two instances:

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

[2] 16 U.S.C. § 824d (2018).

[3] Proposed Policy Statement at P 21 (emphasis supplied; footnotes omitted).

- A service agreement under a tariff (executed or, if allowed by the tariff, unexecuted) may be filed up to 30 days after the service commencement date, as provided in the Commission's regulations.[4]
- An executed wholesale power supply agreement may be filed with an agreed-upon effective date before the filing date or otherwise applicable effective date, upon application as provided in the Commission's regulations.[5]

If the Commission is unable to clarify the Proposed Policy Statement as requested above, it should withdraw the proposal.

Second, the Commission should reconcile any statement of policy or other action in this docket with Executive Order 13924 of May 19, 2020, "Regulatory Relief to Support Economic Recovery."[6] Many elements of the Proposed Policy Statement appear to work in the opposite direction, providing *less* flexibility and *increased* regulatory burdens and costs for public utilities and their customers.

Third, the Commission should apply any statement of policy prospectively and provide a reasonable time for compliance.

I. NRECA's Interest

The National Rural Electric Cooperative Association (NRECA) is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. America's electric cooperatives are owned by the people that they serve and comprise a unique sector of the electric industry. From growing regions to remote farming communities, electric cooperatives power 1 in 8 Americans and serve as engines

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[4] *See* 18 C.F.R. § 35.3(a)(2) (2019).

[5] *See* 18 C.F.R. § 35.11 (2019).

[6] 85 Fed. Reg. 31,353 (May 22, 2020) (also available at https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/).

of economic development for 42 million Americans across 56 percent of the nation's landscape.[7]

Electric cooperatives operate at cost and without a profit incentive. NRECA's member cooperatives include 62 generation and transmission (G&T) cooperatives and 831 distribution cooperatives. The G&Ts generate and transmit power to distribution cooperatives that provide it to the end of line co-op consumer-members. Collectively, cooperative G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives in the nation. The remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

Many cooperatives are transmission and/or wholesale power customers of public utilities under the Act. Most cooperatives are exempt from most provisions of Part II of the Federal Power Act by virtue of section 201(f) of the Act.[8] A small number of cooperatives are public utilities subject to regulation under Part II, including the rate-filing requirements of section 205.[9] Accordingly, NRECA member cooperatives have interests in this proceeding as regulated public utilities and as customers of public utilities and thus the beneficiaries of Commission regulation in the public interest under the Act.[10]

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[7] See https://www.electric.coop/electric-cooperative-fact-sheet/

[8] 16 U.S.C. § 824(f) (2018). *See Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 950 (D.C. Cir. 2016); *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 918 (9th Cir. 2005); *Midcontinent Independent System Operator, Inc.*, 171 FERC ¶ 61,143 at PP 4-5, 32 (2020); *Sw. Power Pool Inc.*, 171 FERC ¶ 61,142 at PP 4-5, 32 (2020).

[9] *See, e.g., Tri-State Generation & Transmission Ass'n, Inc.*, 170 FERC ¶ 61,224, at PP 82-92 (2020).

[10] *See, e.g., FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 767 (2016); *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973); *U.S. v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 312-13 (1953).

II. FERC should clarify the Proposed Policy Statement to conform with the Federal Power Act, Commission regulations, and precedent.

A. The applicable statute and regulations allow for rate changes to take effect without prior notice and before the filing date.

The statute and the Commission's regulations allow for a change in rates to become effective before the date of filing. Section 205(a) of the FPA provides that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with" Commission-jurisdictional transmission or wholesale sales of electric energy "shall be just and reasonable."[11] To enable the Commission to enforce this mandate, section 205(c) requires a public utility to file schedules showing all such rates and charges, "together with all contracts which in any manner affect or relate to such rates [or] charges."[12] Under section 205(d), a public utility ordinarily may not change these rates, charges, or contracts without sixty days' prior notice, which includes filing the change with the Commission, although the Commission has authority to waive the prior-notice requirement for good cause:

> *Unless the Commission otherwise orders*, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. *The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and*

[11] 16 U.S.C. § 824d(a).

[12] 16 U.S.C. § 824d(c).

> *the time when they shall take effect and the manner in which they shall be filed and published*.[[13]]

Section 35.11 of the Commission's regulations provides for waivers of the prior-notice requirement as permitted by section 205 the Act and explicitly allows for a rate to become effective *before* the filing date:

> *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.* Application for waiver of the prior notice requirement shall show (a) how and the extent to which the filing public utility and purchaser(s) under such rate schedule or tariff, tariff or service agreement, or part thereof, would be affected if the notice requirement is not waived, and (b) the effects of the waiver, if granted, upon purchasers under other rate schedules. The filing public utility requesting such waiver of notice shall serve copies of its request therefor upon all purchasers.[[14]]

Inexplicably, the Proposed Policy Statement does not discuss, interpret, or even cite this regulation.

Section 35.3(a)(2) of the Commission's regulations allows service agreements under tariffs to be filed up to thirty days after service has commenced:

> 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.[[15]]

In addition, the Commission's *pro forma* open-access transmission tariff (OATT) provides for unexecuted service agreements to be filed at the transmission customer's

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[13] 16 U.S.C. § 824d(d) (emphasis supplied).

[14] 18 C.F.R. § 35.11.

[15] 18 C.F.R. § 35.3(a)(2).

request. Thus, a customer can obtain transmission service without an executed service agreement by requesting the transmission provider to file an unexecuted service agreement. The obligation to provide service, however, is not contingent on the prior filing of the unexecuted service agreement. Section 15.3 of the *pro forma* OATT, governing point-to-point transmission service, reads as follows:

> 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.

Sections 29.1(iii) and (iv) of the *pro forma* OATT have similar language making service contingent on a transmission customer's execution of network service and network operating agreements or the customer's request that the transmission provider file unexecuted agreements.

B. The Proposed Policy Statement is internally inconsistent and unclear as to the Commission's proposal to retain or change its current waiver practices.

Paragraph 3 of the Proposed Policy Statement acknowledges that section 205 allows the Commission to waive the prior-notice requirement and that reviewing courts have upheld the Commission's authority to allow rate changes to take effect without advance filing in two circumstances (footnote original):

> FPA section 205 and NGA section 4 require that public utilities and pipelines file all rates with the Commission and also file any changes to their existing rates before a proposed change may go into effect. The FPA prior notice period is 60 days, while the NGA prior notice period is 30 days. Both statutes permit 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.[10]

Footnote 10 of the Proposed Policy Statement cites the court precedent and then states that "this Proposed Policy Statement would not change" the "several long-standing waiver practices" of the Commission described later in the Proposed Policy Statement:

> *See 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). This exception was adopted by the courts in *City of Piqua v. FERC*, 610 F.2d 950, 954-55 (D.C. Cir. 1979), and it is reflected in several long-standing waiver practices this Proposed Policy Statement would not change. *See infra* note 50.

In *City of Piqua v. FERC*, the D.C. Circuit upheld the Commission's "interpretation of section 205(d), authorizing rates without requiring advance notice, for good cause shown."[16] In that case, the court held that neither the rule against retroactive ratemaking nor the filed rate doctrine apply when "two parties agreed on new rate schedules and on the effective date for the new contract," because the "negotiated rate change was not retroactive; it was prospective from the date of the contract," and the filed rate doctrine's "purpose is unaffected" by the Commission's waiver of the prior-notice requirement."[17]

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[16] 610 F.2d 950, 954 (D.C. Cir. 1979).

[17] *Id.* at 954, 955.

Paragraph 21 of the Proposed Policy Statement creates confusion, however, by suggesting both that certain waiver practices would not change, as footnote 10 of the Proposed Policy Statement states, and that they would change. The last sentence of paragraph 21 reads as follows (emphasis added; footnotes original):

> The Commission has long found that waiver of the prior notice requirement will generally be granted in certain circumstances,[50] and we propose that this policy will remain in effect *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*.[51]

Footnote 10 of the Proposed Policy Statement, quoted above, cross-references footnote 50 for an explanation of the "several long-standing waiver practices this Proposed Policy Statement would not change."[18] Footnote 50 describes several Commission long-standing waiver practices:

> *See Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*). Factors that will generally support a waiver of prior notice include: (1) uncontested filings that do not change rates; (2) filings that reduce rates and charges; and (3) filings that increase rates as prescribed by a previously-accepted contract or settlement on file with the Commission. *See Central Hudson,* 60 FERC at 61,338-39; *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,974-75 (summarizing *Central Hudson*), *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*); *see also Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,241-42 (1996). The Commission has also found that prior notice may be waived for service agreements under an umbrella tariff if such service agreements are filed within 30 days after service commences. *See Prior Notice*, 64 FERC at 61,984; 18 C.F.R § 35.3(a)(2). Commission Staff retains its existing delegated authority to accept service agreement filings under 18 C.F.R

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[18] The Microsoft Word version of the Proposed Policy Statement on the Commission's eLibrary system mistakenly refers to footnote 49, which simply cites section 205(d) of the FPA and the corresponding section in section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d) (2018). The "unofficial" PDF version on the eLibrary system correctly refers to footnote 50, as does the copy posted on the Commission's web page with the decisions approved at the May 21, 2020, open meeting, https://www.ferc.gov/whats-new/comm-meet/2020/ca05-21-20.asp

> § 35.3(a)(2), to accept notices of cancellation under 18 C.F.R § 35.15, and to accept notices of succession under 18 C.F.R § 35.16. *See* 18 C.F.R. § 375.307(a)(1)(iii), 307(a)(7)(iv) (2019) (delegating authority to resolve uncontested requests for waiver of the prior notice requirement under FPA section 205(d) and NGA section 4(d)).

Significantly, footnote 50 cites the Commission's practice of accepting service agreements filed within thirty days after service commences as provided by section 35.3(a)(2) of the Commission's regulations. Thus, paragraph 3 and footnote 10 appear to state that the Proposed Policy Statement "would not change" the current waiver practices listed in footnote 50, which paragraph 21 correctly states the Commission has "long" followed.

But paragraph 21 concludes with a suggestion that the Commission is proposing a policy change: "and we propose that this policy will remain in effect *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*." It is unclear how this proposal squares with the prior statement that the Proposed Policy Statement "would not change" the waiver practices described in footnote 50. It is also unclear what this statement means by "this policy." The waivers described in footnote 50's first sentence that "will generally be granted" as a matter of discretion? Or all waivers described in footnote 50? Specifically, it is unclear whether the last sentence of paragraph 21 of the Proposed Policy Statement would limit the waivers of the prior-notice requirement for service-agreement filings under section 35.3(a)(2) and the delegations of authority to staff to accept these service-agreement filings and the other filings cited in the rest of footnote 50.

Footnote 51 compounds the confusion, stating that "we propose that our 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." It is unclear if this "general intent" allows for exceptions, including (1) the two judicially approved exceptions noted in paragraph 3; (2) service-agreement filings under section 35.3(a)(2) of the Commission's regulations; and (3) case-by-case discretionary waivers under section 35.11. The Proposed Policy Statement does not explain how the Commission can or should require "some amount of prior notice" in all cases. Section 205(d) does not require it. The court in *City of Piqua* held that section 205(d) has no such requirement. Section 35.11 of the Commission's regulations expressly allows an effective date "prior to the date of filing" for good cause.

Finally, the Proposed Policy Statement does not address the *pro forma* OATT provisions cited above allowing unexecuted service agreements to be filed at the request of the customer in order to initiate transmission service without advance agreement on all rates, terms, and conditions. The Proposed Policy Statement provides no basis for altering these tariff provisions or rendering them unenforceable.

C. If the Commission issues any statement of policy, it should be clarified and should conform with the FPA and the Commission's current regulations.

If the Commission issues a statement of policy on waivers of the prior-notice requirement of section 205(d) of the FPA in this docket, the Commission should clarify which of the Commission's long-standing waiver policies described in paragraph 3, footnote 10, and footnote 50 of the Proposed Policy Statement "would not change" and which, if any, would change. If there is some sub-category of waiver requests for which it is appropriate to adopt a prospective policy that they "will generally 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," then the Commission should identify that sub-category and justify that new policy under the statute and regulations. The Proposed Policy Statement does not explain why all current Commission waiver policies should be subject to this limitation.

In any event, to avoid confusion and to promote the public interest, any such statement of policy should expressly provide that the Commission will continue to allow waivers of the prior notice requirement in at least the following two instances:

- A service agreement under a tariff (executed or, if allowed by the tariff, unexecuted) may be filed up to 30 days after the service commencement date, as provided in section 35.3(a)(2) of the Commission's regulations.
- An executed wholesale power supply agreement may be filed with an agreed-upon effective date before the filing date or the otherwise applicable effective date, upon application as provided in section 35.11 of the regulations.

It is undisputed that the Commission's waiver of the prior-notice requirement under its current policies has ensured just and reasonable, non-discriminatory transmission service and economically efficient negotiated short- and long-term wholesale power transactions enabled by open access transmission. Commission Order No. 888 allowed unexecuted service agreements to be filed at the customer's request in order to further the Commission's policy of open access, non-discriminatory transmission service and competitive wholesale power markets.[19] Without these provisions in the *pro*

[19] *See* 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, 61 Fed. Reg. 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Red. 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, *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). In response to comments, Order No. 888 lengthened the period allowed for the filing of the service agreement from ten days to thirty days after service commences. *See* 61 Fed. Reg. at 21,617.

forma OATT, transmission customers would be forced to accede to transmission provider demands in order to obtain needed transmission service on a timely basis.[20] Nothing in the Proposed Policy Statement demonstrates that these *pro forma* OATT provisions, together with waivers of the prior-notice requirement in these instances under section 35.3(a)(2) of the Commission's regulations, would be inconsistent with the rule against retroactive ratemaking or the filed rate doctrine. The Proposed Policy Statement does not purport to disturb the Commission's continued enforcement of these *pro forma* OATT provisions, but any final policy statement should expressly confirm this point.

For similar reasons, wholesale power customers needing new or changed wholesale contracts should be able to negotiate a contract with a supplier and agree to an effective date that may precede the filing date, in order to ensure uninterrupted service at a just and reasonable rate. Section 35.11 of the Commission's regulations provides for waivers of the prior-notice requirement upon good cause shown in these instances. Waiver of the prior-notice requirement helps to equalize the parties' bargaining power and thus promotes the Commission's policies of competitive wholesale power markets and stable, long-term wholesale power contracts.[21] The *City of Piqua* decision expressly recognized that waiver of the prior-notice requirement in such wholesale-contracting situations is consistent with both the rule against retroactive ratemaking and the filed rate doctrine. Nothing in the Proposed Policy Statement draws that holding into question. Any final statement of policy should provide for waiver of the prior-notice requirement for

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[20] *See MidAmerican Energy Co.*, 88 FERC ¶ 61,084, at 61,416 (1998) ("prior 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.").

[21] *See, e.g., Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008).

good cause shown in these circumstances, in accordance with section 35.11 of the Commission's regulations.

D. If the Commission is unable to clarify the Proposed Policy Statement as requested above, it should withdraw the proposal.

If the Commission is unable to clarify that the Proposed Policy Statement would allow waivers of the prior-notice requirement in (at least) the two instances described above, the Commission should withdraw the proposal.

"[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[22] Moreover, the agency must show that the new policy "is permissible under the statute" and that "there are good reasons for the new policy."[23] Absent substantial clarification, the Proposed Policy Statement does not meet these "rigorous standards."[24]

If the Commission intends in the last sentence of paragraph 21 an across-the-board limitation on the Commission's prior-notice waiver policy, the Proposed Policy

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[22] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (emphasis original).

[23] *Id.*

[24] *Baltimore Gas & Elec. Co. v. FERC*, No. 18-1298, slip op. at 12 (D.C. Cir. Mar. 27, 2020) ("When an agency seeks to change policy, we assess its actions under the rigorous standards of *FCC v. Fox Television Stations, Inc.*, by requiring the agency to 'display awareness that it is changing position,' show 'the new policy is permissible under the statute,' and 'show that there are good reasons for the new policy.' 556 U.S. 502, 515-16 (2009).") As the court makes clear, these requirements apply to agency actions beyond a notice-and-comment rulemaking. Thus, any application of a final statement of policy would be subject to these standards. *See Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A general statement of policy … does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.").

Statement fails to explain how that would be consistent with the statute, the Commission's current regulations, or the applicable precedent. Indeed, the Proposed Policy Statement's equivocal language does not acknowledge that it would constitute a major substantive change in Commission policy, and it "simply disregard[s] rules that are still on the books."[25]

The Commission cannot override its regulations by an inconsistent statement of policy. Any change in Commission regulations requires a notice-and-comment rulemaking. Section 1 of the Administrative Procedure Act[26] "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."[27] If the Commission believes that its current waiver regulations, staff delegations of authority, and *pro forma* OATT provisions are inconsistent with the filed rate doctrine and the rule against retroactive ratemaking, it must address the problem directly, rather than through a statement of policy.

In this regard, the Commission should reconsider the Proposed Policy Statement in light of Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents."[28] This executive order's underlying premise is that agencies "may clarify existing obligations through non-binding guidance documents," but "may impose legally binding requirements on the public only through regulations and on

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[25] The Proposed Policy Statement unquestionably proposes changes to the Commission's waiver procedures. See P 15 ("We recognize that this proposal represents a change from the Commission's past approach."). *See infra* section IV. Its proposed change to substantive waiver policy is far less clear.

[26] 5 U.S.C. § 551 (2018).

[27] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[28] 84 Fed. Reg. 55,235 (Oct. 15, 2019), also available at https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/.

parties on a case-by-case basis through adjudications ….”[29] The Office of Information and Regulatory Affairs in the Office of Management Budget has issued a guidance memorandum stating that under EO 13891, “guidance documents should only clarify existing obligations.”[30] Moreover, the memorandum states, “[e]ven guidance documents that do not create binding requirements … can significantly affect the public, and EO 13891 recognizes that these documents warrant a thorough review prior to issuance.”[31] Although the Commission is not directly subject to the implementing requirements of EO 13891,[32] the principles of law underlying EO 13891 counsel against issuing binding requirements substantively changing the Commission's policy on waiver of the prior-notice requirement through the Proposed Policy Statement.

III. The Commission should reconsider its proposal in light of the President's Executive Order on Regulatory Relief to Support Economic Recovery.

In addition, the Commission should reconsider the Proposed Policy Statement and reconcile any policy statement or other action it takes in the proceeding with Executive Order 13924 “Regulatory Relief to Support Economic Recovery”[33] issued on May 19,

[29] *Id.*, sec. 1.

[30] Office of Information and Regulatory Affairs, Office of Management and Budget, Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions at 1 (Oct. 31, 2019) (Memorandum M-20-2), available at https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf

[31] *Id.*

[32] EO 13891 does not apply to the Commission, because section 2(a) defines “agency” by reference to Executive Order 12866 (Regulatory Planning and Review), 58 Fed. Reg. 51,735 (Oct. 4, 1993), which excludes independent regulatory agencies as defined in 44 U.S.C. § 3502. The Proposed Policy Statement would be a guidance document under EO 13891. Section 2(b) of EO 13891 defines “guidance document” as “an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation ….” The Proposed Policy Statement would be a guidance document under this definition.

[33] 85 Fed. Reg. 31,353 (May 22, 2020) (also available at https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/).

2020, two days before the Proposed Policy Statement, in response to the novel coronavirus (COVID-19) outbreak. This executive order directly applies to independent regulatory agencies.[34] The basic policy is set forth in section 1 of the order:

> It is the policy of the United States to combat the economic consequences of COVID-19 with the same vigor and resourcefulness with which the fight against COVID-19 itself has been waged. Agencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility. They should also give businesses, especially small businesses, the confidence they need to re-open by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication.

Section 4 directs the heads of agencies to rescind and waive regulatory standards:

> The heads of all agencies shall identify regulatory standards that may inhibit economic recovery and shall consider taking appropriate action, consistent with applicable law, including by issuing proposed rules as necessary, to temporarily or permanently rescind, modify, waive, or exempt persons or entities from those requirements, and to consider exercising appropriate temporary enforcement discretion or appropriate temporary extensions of time as provided for in enforceable agreements with respect to those requirements, for the purpose of promoting job creation and economic growth, insofar as doing so is consistent with the law and with the policy considerations identified in section 1 of this order.

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[34] Section 2(b) of the executive order applies the definition of “agency” in 44 U.S.C. § 3502, which provides that “the term ‘agency’ means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or *any independent regulatory agency* ….” (emphasis supplied).

Section 7 directs the heads of agencies to review any temporary regulatory rescissions, suspensions and waivers and consider whether they should be made permanent.

The Proposed Policy Statement would move in exactly the opposite direction, toward greater regulation, fewer waivers, higher costs, and increased regulatory burdens. The most obvious example of higher costs is the proposal that "when the entity requesting remedial relief is the entity that acted in a manner inconsistent with the tariff, or believes it may have done so, such requests should be filed as petitions for declaratory order under Rule 207 of the Commission's Rules of Practice and Procedure."[35] Such petitions require a filing fee of $30,060.[36] But many other aspects of the Proposed Policy Statement portend higher operating costs for public utilities and their customers, since the Proposed Policy Statement would introduce more regulatory "friction" into new transmission and wholesale power transactions and require the modification of existing tariffs to comply with the Commission's proposed new policy.[37]

The Commission should reconsider the Proposed Policy Statement in light of the directive in EO 13924. If time permits, the Commission could discuss these proposals at the technical conference on the impact of COVID-19 on the energy industry scheduled for July 8-9, 2020.[38]

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[35] Proposed Policy Statement at P 13. See 18 C.F.R. § 385.207 (2019).

[36] *See* Annual Update of Filing Fees, 169 FERC ¶ 61,167 (2019).

[37] See Proposed Policy Statement at PP 16-17.

[38] See Impacts of COVID-19 on the Energy Industry, Docket No. AD20-17-000 (June 5, 2020) (Supplemental Notice of Technical Conference).

IV. The Commission should apply any new policy prospectively and give parties reasonable opportunity to comply.

Although the Proposed Policy Statement is unclear about certain changes to the Commission's current substantive waiver policies, as described in section III above, there is no doubt the Proposed Policy Statement proposes significant changes in the Commission's waiver procedures.[39] The Commission "recognize[s] that this proposal represents a change from the Commission's past approach" and may result in "harsh outcomes."[40] Thus the Commission offers suggestions for ways to modify tariffs to obviate the need for waivers that might run afoul of the filed rate doctrine or the rule against retroactive ratemaking.[41]

But the Commission proposes that its new policy, including these procedural requirements, would become effective immediately: "We propose that waiver requests pending as of the date of issuance of a final Policy Statement in this proceeding be handled in accordance with the Policy Statement. Applicants could refile pending waiver requests as appropriate."[42]

The Commission should modify this approach in two respects. First, the Commission should not apply new substantive and procedural requirements to waiver requests pending when a final policy statement is issued, and should not require or encourage the refiling of waiver requests.

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[39] See Proposed Policy Statement at PP 12-14.

[40] *Id.,* P 15.

[41] *Id.*, PP 16-17.

[42] *Id.*, P 1 n.4.

Second, the Commission should delay the effectiveness of any final policy statement to give parties a reasonable time to modify their tariffs to take account of the Commission's new substantive and procedural policies. While 180 days might be appropriate for most public utilities, a year may be needed for Regional Transmission Organizations or Independent System Operators with complex tariffs requiring many changes and stakeholder review and input.

V. Conclusion

The Commission should clarify the Proposed Policy Statement as described above or else withdraw the proposal. In any event, the Commission should reconsider the proposal in light of Executive Order 13924, apply any new policy prospectively, and give parties a reasonable opportunity to comply.

Respectfully submitted,

/s/ Randolph Elliott

Sean T. Beeny
Randolph Elliott
Barry Cohen
McCarter & English, LLP
1301 K Street, NW, Suite 1000 West
Washington, DC 20005
(202) 753-3400
sbeeny@mccarter.com
relliott@mccarter.com
bcohen@mccarter.com

Jay Morrison
Vice President, Regulatory Affairs
National Rural Electric Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203
(703) 907-5837
jay.morrison@nreca.coop

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