

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

Waiver of Tariff Requirements)

Docket No. PL20-7-000

**COMMENTS OF THE
ISO-RTO COUNCIL**

The ISO-RTO Council (“IRC”)¹ respectfully submits these comments in response to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Proposed Policy Statement issued on May 21, 2020² and requests that the Commission make the following clarifications in any final policy statement it adopts.

First, the Commission should specify in any final policy statement that an entity may still seek remedial relief for prior actions or omissions through a petition under Rule 207(a)(5) of the Commission’s Rules of Practice and Procedure when the remedial action the petitioner seeks does not call for a petition for declaratory order.³ Second, the Commission should clarify that the proposed “stronger showing” requirement does not apply when the petitioner is an Independent System Operator (“ISO”) or Regional Transmission Organization (“RTO”) seeking remedial relief to address the adverse impacts to its market caused by its own failure to implement its tariff requirements. Finally, the Commission should confirm that when faced with

¹ The IRC comprises the Alberta Electric System Operator (“AESO”), the California Independent System Operator Corporation (“CAISO”), the Electric Reliability Council of Texas, Inc. (“ERCOT”), the Independent Electricity System Operator (“IESO”), ISO New England Inc. (“ISO-NE”), the Midcontinent Independent System Operator, Inc. (“MISO”), the New York Independent System Operator, Inc. (“NYISO”), PJM Interconnection, L.L.C. (“PJM”), and the Southwest Power Pool, Inc. (“SPP”). AESO, IESO and ERCOT are not subject to the Commission’s jurisdiction. Therefore, AESO, IESO and ERCOT are not joining these comments. Individual IRC members may also file separate comments.

² *Waiver of Tariff Requirements*, 171 FERC ¶ 61,156 (2020) (“Proposed Policy Statement”).

³ *See* 18 C.F.R. § 385.207(a)(5) (2020).

a protest claiming “undesirable consequences,” the Commission does not intend to shift the evidentiary standard of review in its evaluation of waiver requests. Specifically, the Commission should state its intent that it will evaluate the validity of the alleged harm, and continue to balance and weigh all the equities, including the overall benefit and harm, when evaluating the merits of an ISO or RTO’s petition for remedial relief.

I. BACKGROUND

The IRC is comprised of nine ISOs and RTOs that operate under complex energy market and transmission tariff requirements and processes designed to produce well-functioning and efficiently-run electric grids and markets to ensure affordable, reliable, and sustainable power. The Commission regulates six of the IRC member ISOs and RTOs, which operate under tariffs and agreements (collectively “tariffs”) to orchestrate the generation and transmission of electricity in the interest of two-thirds of North America’s ratepayers.

ISO and RTO rates, terms, and conditions consist of complex sets of rules and requirements that are effectuated through intricate sets of procedures and software systems. Although all ISOs and RTOs have extensive pre-implementation processes for documenting, verifying, and testing their systems to ensure they are consistent with tariff requirements, there are times when outcomes can be inconsistent with their tariffs.

The IRC understands ISO and RTO tariff provisions are subject to the filed rate doctrine.⁴ Unlike other regulated entities, however, ISOs and RTOs implement Commission-regulated tariffs to serve the interests of hundreds of individual participating entities. Consequently, requests by an ISO or RTO for tariff waivers are primarily to seek remedial relief in the interest

⁴ Proposed Policy Statement at P 6.

of market efficiency and equitable outcomes for all its participants rather than in the interest of the ISO or RTO itself.

II. COMMENTS

A. Petitions for Remedial Relief Can Be Based on Rule 207(a)(5) of the Commission's Rules of Practice and Procedure.

The IRC seeks two procedural clarifications regarding petitions for certain remedial relief described by the Proposed Policy Statement. The Proposed Policy Statement indicates that, when seeking relief in connection with actions or omissions that have occurred prior to the date relief is sought, filers should describe their filings as requests for remedial relief under Section 309 of the Federal Power Act ("FPA"), not as waiver requests.⁵ The Proposed Policy Statement further proposes:

. . . 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.⁶

First, the IRC seeks clarification that in cases where the ISO's or RTO's tariff contains a provision allowing the applicant to seek remedial relief from the Commission, and an ISO or RTO requires remedial relief for adverse market consequences caused by the ISO or RTO's failure to implement its own tariff, the ISO or RTO may request remedial relief through a petition under Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,⁷ instead of a petition for declaratory order under Rule 207(a)(2). This clarification is consistent with the

⁵ *Id.* at P 14.

⁶ *Id.* at P 13 (footnote omitted).

⁷ 18 C.F.R. § 385.207(a)(5) (2020).

Commission’s statement that “petitions for remedial relief when a tariff expressly authorizes regulated entities to seek a remedial waiver from the Commission for past non-compliance with the filed tariff” are appropriately characterized as “waivers.”⁸ However, the Commission’s Proposed Policy Statement may be misinterpreted because it later states 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 Rule of Practice and Procedure.”⁹

The IRC agrees with the Commission that there is no violation of the filed rate or prohibition against retroactive ratemaking if participants are on notice that the rules are provisional and changes to the rules may occur at a later time subject to the Commission’s further actions.¹⁰ To that end, the Commission provides guidance on how public utilities may modify their tariffs to avoid conflict with the filed rate doctrine and the rule against retroactive ratemaking resulting from subsequent remedial relief.¹¹ However, even with such tariff changes in place, the IRC is concerned that without further clarification the Commission’s final policy may be interpreted as requiring that in all cases where the entity requesting remedial relief is the entity that acted inconsistent with the tariff, the entity must submit such request under Rule 207 (a)(2). The IRC requests that the Commission eliminate any potential confusion to ensure that when the ISO or RTO tariff contains explicit notice allowing potential waiver of or remedial relief from a tariff provision by order of the Commission, the ISO and RTO need not submit its

⁸ Proposed Policy Statement at P 12.

⁹ *Id.* at P 13.

¹⁰ *Id.* at P 7.

¹¹ *Id.* at PP 15-17.

request in the form of a petition for declaratory order and instead may submit it as a petition for waiver under Rule 207 (a)(5).

Second, in addition to the clarification above, the IRC requests the Commission clarify that, even absent specific language in the tariff indicating the potential of a Commission-ordered waiver of a tariff provision, an ISO or RTO may request remedial relief under Rule 207(a)(5), instead of a petition for declaratory order under Rule 207(a)(2), in circumstances where essentially:

- (1) There is no controversy that the applicant's actions or omissions were inconsistent with the tariff; and
- (2) There is no uncertainty regarding the meaning of the tariff provision that needs to be resolved.

Where these circumstances essentially exist, it should be permissible for a filer to request remedial relief through a petition under Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,¹² because the prerequisites for a petition for declaratory order under Rule 207(a)(2) do not exist.¹³

The IRC agrees that the Commission has authority under section 309 of the FPA to grant the type of remedial relief discussed in the Proposed Policy Statement.¹⁴ Although the Commission's regulations do not explicitly provide a specific procedural mechanism for a filer

¹² 18 C.F.R. § 385.207(a)(5) (2020).

¹³ 18 C.F.R. § 385.207(a)(2) (2020).

¹⁴ See Proposed Policy Statement at PP 8-10, 14. See also *Black Oak Energy et al.*, 167 FERC ¶ 61,250 (2019), *order on reh'g*, 169 FERC ¶ 61,075 (2019) (Commission has significant discretion under FPA Section 309); *Cooltrain Energy LP, et al.*, 155 FERC ¶ 61,204 (2016) (Commission has broad authority to exercise its discretion under section 309); *Peregrine Oil & Gas, LLC v. Texas Eastern Transmission, LP*, 163 FERC ¶61,001 (2018) (Commission has broad remedial discretion under Section 16 of the Natural Gas Act and Section 309 of the Federal Power Act).

to seek such remedial relief for prior actions or omissions inconsistent with a filed tariff, the IRC believes a petition under Rule 207(a)(5) will generally be the appropriate procedural vehicle for remedial relief requests under the circumstances discussed above. Rule 207(a)(5) permits a petition for “[a]ny other action for which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.”¹⁵

The Commission has previously exercised its discretion and permitted Rule 207(a)(5) petitions.¹⁶ Further, the Commission has regularly considered requests filed under Rule 207(a)(5) to waive tariff provisions and provisions in jurisdictional agreements both prospectively and retroactively.¹⁷

Although the IRC does not object to the proposal to distinguish requests for prospective waivers of tariff provisions from requests for remedial actions for past misapplications of specific tariff provisions, as shown below, the prerequisites for a petition for declaratory order will not always exist for remedial relief requests arising from prior actions or omissions inconsistent with the tariff. Moreover, given that the Commission proposes to apply its

¹⁵ 18 C.F.R. § 385.207(a)(5) (2020).

¹⁶ See, e.g., *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 at PP 30-32 (2005) (indicating that, where there is no relevant proceeding already pending before the Commission and parties therefore cannot avail themselves of Rule 602, a settlement resolving rates, terms, and conditions can be submitted as a petition under Rule 207(a)(5)).

¹⁷ See, e.g., *AEP Generation Resources Inc. and AES Ohio Generation, LLC*, 170 FERC ¶ 61,103 (2020) (granting waiver request submitted under Rule 207 (a)(5)); *California Independent System Operator Corp.*, 167 FERC ¶ 61,199 (2019) (granting waiver request that was not specifically filed pursuant to Rule 207 (a)(2)); *Exelon Corp.*, 167 FERC ¶ 61,176 (2019) (granting petition for waiver requested under Rule 207 (a)(5)); *Old Dominion Electric Cooperative*, 151 FERC ¶ 61,207 (2015) (rejecting the waiver request because it violated the filed rate doctrine, not because it was filed under Rule 207(a)(5)); *New Jersey Energy Associates*, 152 FERC ¶ 61,181 (2015) (rejecting the waiver request because it violated the filed rate doctrine, not because it was filed under Rule 207(a)(5)). Thus, the Commission has considered under Rule 207(a)(5) requests for relief it ultimately found violated the filed rate doctrine, but has not ruled that such filings were improper procedurally or otherwise not permitted by the Commission’s Rules of Practice and Procedure.

traditional waiver standard to such requests for remedial relief¹⁸ and is not proposing to change its Rules of Practice and Procedure, the Commission should continue evaluating such requests as petitions under Section 207(a)(5), consistent with precedent.

Providing the requested clarifications would continue to ensure that petitions for declaratory orders are used in the discrete circumstances contemplated by precedent and the regulations themselves. The Commission has previously noted “section 554(e) of the Administrative Procedure Act provides that an agency in its sound discretion may issue a declaratory order to terminate a controversy or remove uncertainty.”¹⁹

The Commission’s discretion to issue a declaratory order under Rule 207(a)(2) is limited to terminating a controversy or removing uncertainty.²⁰ The Commission will not issue a declaratory order unless the filing party can demonstrate the existence of a controversy or uncertainty.²¹ Traditionally, the Commission has required there be an “actual,” “ongoing,” or “live” controversy or dispute to terminate.²²

Further, the Commission has generally relied on the petition for declaratory order process to “provide authoritative guidance to regulated entities on important questions of interpretation regarding statutes, regulations, tariff, or precedent.”²³ Petitions for declaratory order are designed to address uncertainty about what the existing law requires or whether the law applies

¹⁸ See Proposed Policy Statement at P 15.

¹⁹ *USGen New England, Inc.*, 118 FERC ¶ 61,172 at P 18 (2007).

²⁰ 18 C.F.R. § 385.207(a)(2).

²¹ See, e.g., *Nevada Hydro Co., Inc.*, 164 FERC ¶ 61,197 at PP 22-23 (2018) (dismissing the petition and finding the requested relief to be premature, “agree[ing] with CAISO’s argument that there is no controversy or uncertainty necessitating a declaratory finding at this time.”).

²² See, e.g., *Southern California Edison Co.*, 151 FERC ¶ 61,273 (2015); *Public Service Company of Colorado*, 149 FERC ¶ 61,128 (2014); *El Paso Natural Gas Company*, 44 FERC ¶ 61,065 (1988); *Interstate Natural Gas Association of America*, 18 FERC ¶ 61,170 (1982).

²³ *Penn East Pipeline Co.*, 170 FERC ¶ 61,064 (2020).

to the facts.²⁴ In other words, if there is no ambiguity as to what is expected under the filed rate, there is no need for the Commission to take any action necessary to clarify such uncertainties.

None of these circumstances typically exist in connection with remedial relief requests arising from prior actions or omissions inconsistent with the tariff. Such requests for remedial relief would not seek to terminate a “live” controversy or remove uncertainty regarding the meaning of a tariff provision or jurisdictional agreement. It generally is clear (and not in dispute) that the filing entity has committed an error or omission inconsistent with the tariff, and there is no controversy, uncertainty, or need to interpret the tariff. In those circumstances, the Commission should permit entities to submit a petition under Rule 207(a)(5) because the specific requirements for a petition for declaratory order do not exist, and the procedural rules do not prescribe any other form of pleading.

As indicated above, the Commission has regularly considered requests of this nature under Rule 207(a)(5), and the Commission is not proposing to change its Rules of Practice and Procedure.²⁵ Accordingly, where there is no controversy or dueling tariff interpretations, a petition for declaratory order should not be required to obtain remedial relief under Section 309. This would ensure that the body of precedent that has been established as to the surgical and narrow use of petitions for declaratory orders for significant legal clarifications is not blurred by requiring them to be used in a manner removed from their unique purpose.

Clarifying that a request for remedial relief can be submitted in the form of a Rule 207(a)(5) petition under the conditions discussed above would have the added benefit of

²⁴ *ITC Grid Development, LLC.*, 154 FERC ¶ 61,206 (2016).

²⁵ Indeed, the Commission’s Proposed Policy Statement cited to an order involving the CAISO when noting it has previously granted waivers for non-rate terms and conditions of public utility tariffs retroactively. Proposed Policy Statement at P 11, n.37 (citing *California Independent System Operator Corp.*, 164 FERC ¶ 61,065 (2018)).

avoiding the imposition of fees for such requests. As discussed above, ISOs and RTOs maintain and administer large and complex tariffs on file with the Commission as part of their responsibilities to help ensure just and reasonable rates. These responsibilities have led to instances where ISOs and RTOs must submit requests for relief that are intended to produce fair, equitable, and efficient results for market participants. Therefore, an ISO or RTO's requests for waivers or remedial action seek to rectify the adverse impacts of its error or omission on its market outcomes, without necessarily seeking clarity on a legal standard as part of that rectification. If the Commission were to require ISOs/RTOs to file petitions for declaratory order when seeking remedial relief for prior actions or omissions, they would be required to pay a \$30,060.00 fee to file each such petition. ISO/RTO customers will ultimately bear the costs of such filings, whether they caused the need for relief or not. Such an outcome is unnecessary to achieve the goals of the Proposed Policy Statement.

B. ISO or RTO Petitions for Remedial Relief to Remedy an Issue in the Interest of Equitable Outcomes for its Markets Should not be Subject to the Same “Stronger Showing” as When the Petitioner Requests a Waiver or Remedial Relief in Its Own Interest.

In paragraph 20 of the Proposed Policy Statement the Commission proposes that, although it will continue to apply the existing four-part analysis to prospective waiver requests and petitions for remedial relief, “it is appropriate to require a stronger showing when a petitioner is seeking remedial relief for its own failure to comply with a tariff.”²⁶ The Commission further explains that it would:

find that arguments that a petition for remedial relief has been made in good faith will be more compelling when the petition contends the error was caused by something more than inadvertent error or administrative oversight; that arguments that a petition for remedial relief is limited in scope will be less compelling when the petition involves long-standing tariff provisions that affect large numbers of similarly-situated entities; and

²⁶ Proposed Policy Statement at P 20.

that arguments that remedial relief addresses a concrete problem will be more compelling when the concrete problem was not created by the petitioner in the first place.

The Commission should clarify that if the petitioning ISO or RTO seeks remedial relief in the interest of equitable outcomes for its participating entities, the Commission will not apply the proposed “stronger showing” requirement. This is especially important for ISOs and RTOs because they generally are differently situated than other Commission-regulated entities. ISOs and RTOs are independent and neutral market and tariff administrators that do not take market positions or otherwise “benefit” when they violate tariff rules or when the Commission grants relief to correct misapplication of a tariff provision.

Also, ISOs and RTOs implement and administer extensive tariffs that address a broad range of market- and transmission-related matters. Unlike some tariffs that simply specify a “stated rate,” ISO and RTO tariffs specify elaborate market rules and processes and rely on complex software solutions to implement them. Therefore, when an ISO or RTO fails to implement its tariff, it will ordinarily affect a cross-section of the ISO’s or RTO’s participating entities, not just the ISO or RTO itself. Some of the entities participating in the ISO or RTO may benefit from the error, while others may be harmed.

ISOs and RTOs should not be held to a “stronger showing” requirement under these circumstances. The “stronger showing” may be appropriate when an entity seeks remedial relief from the Commission for its own benefit. However, when the petitioner is an ISO or RTO that failed to implement its tariff and in so doing impacted some or all of its participating entities, the ISO/RTO is merely seeking to remedy such general harm.²⁷ Under these circumstances, the

²⁷ For example, when the ISO or RTO petitions the Commission for remedial relief due to an inadvertent error or administrative oversight it committed itself, market participants may be adversely impacted regardless of the ISO or RTO’s admission that it committed an inadvertent error or administrative oversight. Similarly, the ISO or RTO may petition to address a concrete problem for its market participants, even though it as the petitioner created the concrete problem in the first place.

Commission should apply the four-part waiver analysis to consider the impact the requested relief has on the affected entities. Imposing a “stronger showing” requirement on the ISO/RTO merely because it is the petitioner can result in denying remedial relief to affected entities that had nothing to do with causing the error or oversight in the first place.

For the foregoing reasons, the Commission should clarify that the “stronger showing” requirement will not apply when the petitioning ISO or RTO is the entity that caused the problem and it seeks a remedy for the benefit of its participating entities.

C. The Commission Should Require and Weigh Demonstrations of Tangible Harms Claimed by Protests in Evaluating Requests for Prospective or Remedial Relief.

The Commission should also clarify that when a protest is filed in response to a petition for prospective or remedial relief, the Commission will nonetheless continue to weigh the equities consistent with the traditional four-part analyses. The Proposed Policy Statement creates ambiguity on this point as it states that “petitioners requesting remedial relief will generally be denied when a protestor credibly contends that the petition for remedial relief will result in undesirable consequences, such as harm to third parties.”

As discussed above, ISOs and RTOs implement complex Commission-regulated tariffs in the interest of their participating entities overall. The IRC recognizes that waiver requests should be narrow and limited, and any request for a waiver must be balanced against its potential harm to third parties. However, the aforementioned language in the Proposed Policy Statement appears to limit the Commission’s ability to balance interests by indicating that if any protestor “merely credibly contends” that it will lead to “undesirable consequences,” the waiver request will “generally be denied.” By definition, this implies a lower standard than today’s standard in which a protest must demonstrate that the waiver will cause actual “undesirable consequences”

as opposed to merely hypothesizing about future potential and unrealized “undesirable consequences.”

The Commission should anticipate that when the ISO or RTO petitions the Commission either for prospective or remedial relief, there will likely be parties that object to the requested relief given the sheer number of parties that are affected by ISO or RTO tariffs and the fact that some parties may have unjustly benefitted from a misapplication of the tariff that the relief would undo. Further, ISOs and RTOs operate on a zero-sum basis. Any payment needs to be offset by a corresponding charge. Any request for prospective or remedial relief that impacts the financial clearing of the market or other tariff obligation will always benefit some participating entities to the detriment of others. As written, the “credibly contends” standard, in conjunction with a mere showing of the possibility of future “undesirable consequences” (rather than actual tangible harm), could result in one entity, including a competitor of the requestor, defeating a waiver request merely by noting “undesirable consequences” to that entity even if the relative harm to the vast body of stakeholders from denying the waiver far exceeds the alleged “undesirable consequences” to the one protesting entity.

The proposed relaxed “undesirable consequences” standard seemingly provides any single market participant with an effective veto over any ISO/RTO requests for remedial relief without even a showing of tangible harm to that protesting entity or consideration of whether the undesirable effect on the protestor is outweighed by the other benefits that would result from the relief. The IRC is concerned that ISOs and RTOs could be unduly constrained in their ability to obtain remedial relief that is otherwise warranted. In short, the Commission may be lowering the bar for objections and unduly restricting its discretion to weigh the relative harms in deciding whether or not to grant a requested waiver.

The Commission should continue to consider its analysis based on the four-part test and not deny the requested relief merely because a party protests the request under the new proposed standard and points to a potential (but as-yet unproven) undesirable consequence or harm.²⁸ If not, mere allegations of potential “undesirable consequences” would obviate the need to consider the actual equities of the requested relief. Such conclusions could not only prevent an equitable solution, but invite protestors to raise hypothetical arguments of potential “undesirable consequences” as opposed to demonstrating tangible harm to themselves or other stakeholders if the waiver were granted.

The Commission should indicate in the final policy its intent to continue to apply the four part balancing test in applying this aspect of its waiver analysis. Specifically, as part of its balancing, the Commission would weigh the relative harms to the protestor compared to the harm to other participating entities by focusing on *tangible* harms from which the protestor seeks to relieve the affected entities, compared to demonstrations of *tangible* harms to third parties. The IRC urges the Commission to provide these clarifications in its final Policy Statement so the Commission can retain the needed discretion to weigh the competing interests presented in waiver requests, while still expressing the Commission’s overall intent to limit the use of waivers going forward.

III. CONCLUSION

The IRC respectfully requests that the Commission consider these comments in developing a final Policy Statement. In particular, the Commission should clarify that (1) an

²⁸ See, e.g., *PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072 (2019) (denying request for waiver based on four-part analysis and not merely on submission of protest); *PJM Interconnection, L.L.C., New York Independent System Operator, Inc.*, 165 FERC ¶ 61,149 (2018) (granting waiver request considering the four-part analysis regardless of submitted protest); and *PJM Interconnection, L.L.C., Ohio Valley Electric Corporation*, 164 FERC ¶ 61,004 (2018) (granting requested waiver based on four-part analysis despite submitted protest).

entity submitting a request for remedial relief in connection with prior actions or omissions under a filed tariff may do so under Rule 207(a)(5) of the Commission’s Rules of Practice and Procedure under the conditions specified in these comments, (2) the proposed “stronger standard” should not apply when the ISO or RTO failed to implement its tariff correctly and it is the petitioner seeking remedial relief for the benefit of equitable market outcomes and affected parties, and (3) the Commission will consider the benefit and harm to the overall affected parties.

Respectfully submitted,

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June 18, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon the parties listed on the official service list in the captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, CA this 18th day of June, 2020.

/s/ Martha Sedgley

Martha Sedgley