

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

**Waiver of Tariff Requirements**

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**Docket Nos. PL20-7-000**

**COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION**

The Natural Gas Supply Association (“NGSA”) respectfully submits the following comments in response to the Commission’s Proposed Policy Statement on Waiver of Tariff Requirements (“Proposed Policy”). In the Proposed Policy, the Commission states that its intention is to clarify its procedures for requests for waiver and remedial relief of tariff provisions to ensure compliance with the filed rate doctrine and rule against retroactive ratemaking; and to align its procedures with recent case law. NGSA is concerned that the Proposed Policy unnecessarily and arbitrarily limits the Commission’s discretion to grant requests for remedial relief, while imposing a burdensome process on parties seeking waivers. The Commission’s current approach of reviewing requests on a case-by-case basis is effective and there is not adequate justification in the proposal to depart from its policy.

If adopted, the Proposed Policy would grant relief in much more narrow circumstances than in past situations. This more narrowly-applied proposed waiver policy could create considerable uncertainty given that current pipeline tariffs may not be written in a manner that can effectively address this unanticipated change. Further, it appears that pipeline shippers and regulated entities would be held to a much higher standard for relief to be granted when seeking a waiver for non-compliance; even in situations where the act was an inadvertent error and/or there was no harm to third parties or the public interest. Additionally, the current \$30,060.00 cost of filing

a petition for declaratory order also imposes a substantial economic burden and potential barrier to parties' abilities to seek required relief. Given that the natural gas industry is operating effectively under the existing rules and the uncertainty that may be experienced under the newly proposed policy, NGSA strongly encourages the Commission to reconsider the impact of this burden.

### **Interest of NGSA**

Founded in 1965, the Natural Gas Supply Association (NGSA) represents integrated and independent energy companies that produce, transport and market domestic natural gas and is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA's members trade, transact and invest in the U.S. natural gas market in a range of different manners. NGSA members transport and/or supply billions of cubic feet of natural gas per day on interstate pipelines to FERC-jurisdictional entities and could be greatly impacted by the outcome of this proceeding.

#### **I. Comments**

*i. The Commission's proposed approach unnecessarily and arbitrarily limits the Commission's discretion to grant waivers.*

The Commission's statutory authority under the Natural Gas Act (NGA) provides it with significant discretion to grant requests for waivers and remedial relief. This regulatory tool is important for protecting the public interest after unanticipated deadlines or tariff provisions have been missed, and it has worked effectively without undue burden on the Commission or market participants. To be clear, NGSA is not advocating for the Commission to circumvent or to extend its waiver authority beyond what it can administer under its statutory authority or for the Commission to violate the filed rate doctrine and rules prohibiting retroactive ratemaking.

However, we question why the Commission would want to unnecessarily limit its discretion to fashion remedies for retroactive relief. As active participants in the natural gas market, we are unaware of any issues or violations with granting waiver requests, nor does the Proposed Policy Statement cite specific violations or instances of concern that provide a basis for a drastic policy shift.<sup>1</sup> When assessing retroactive relief, the Commission has strictly adhered to the filed rate doctrine and rules against retroactive ratemaking. Thus, this departure from current policy for the natural gas industry is unnecessary.

Given that each situation requiring a waiver is unique, the Commission's authority to grant waivers best serves the market when it assesses requests on a case-by-case basis and can fashion remedies as needed. Otherwise, we are unsure how the Commission will rectify parties' inadvertent issues with tariff provisions that could later be waived under a modified tariff. For example, if an interstate gas pipeline inadvertently exercises its tariff in a discriminatory manner and has not violated its tariff, it may be appropriate to modify the tariff to preclude future discrimination. However, we are concerned with whether the Commission would be able to provide a remedy for the past discrimination if a policy is put in place that significantly limits retroactive relief and changes to the tariff, even as the pipeline is modifying its tariff to prevent future discrimination.

If a company finds that it needs a waiver, which may be necessary in order to accommodate a request outside of the tariff provisions caused by unique circumstances, each entity should have the right to state its case before FERC for remedial relief. Given the large scope of issues that

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<sup>1</sup> In fact, the Commission's sole explanation for why it is reviewing and clarifying its policy is "The Commission's waiver orders have sometimes drifted beyond the limits imposed by the filed rate doctrine and the rule against retroactive making" with a reference to one limited case in *Old Dominion Elec. Coop., Inc. v. FERC*. See P. 1 of Proposed Policy Statement.

could necessitate a need for waiver or remedial relief, we encourage FERC to refrain from adopting a one-size-fits all approach and instead, maintain its flexibility to assess waivers on a case-by-case basis.

***ii. The Commission's proposed change to waiver requests and its higher standard for granting waivers impose a burdensome process on parties seeking waiver.***

NGSA is concerned that the Commission's proposed approach will replace its effective and efficient process for granting relief with a process that is limiting and burdensome. When seeking remedial relief for actions or omissions that have occurred prior to the date that relief is sought, FERC is proposing to no longer categorize the request as a waiver, and instead to categorize it as a request for remedial relief. To make the request, a shipper would be required to either file a petition for declaratory order (if it is the entity that acted inconsistently with the tariff) and expressly request Commission action pursuant to NGA Section 16, or file a complaint if it believes another entity, such as the pipeline, acted inconsistent with a tariff. After acknowledging this is a sharp departure from past policy, the Proposed Policy goes one step further by proposing to require an even stronger showing for entities seeking remedial relief. More specifically, arguments that the errors were made in good faith due to inadvertent errors or administrative oversight; were limited in scope; or were not protested by third parties, will no longer be compelling on their own. Under these proposed higher standards for remedial relief, one can easily presume that FERC's intention is to deny the request for remedial relief except for extraordinary circumstances.

For the natural gas industry, this proposed change to the process for requesting waivers may harm shippers because it could hamper FERC's ability to act quickly on a critical waiver request on a pipeline tariff provision in order to provide needed flexibility to address unexpected operational situations. For example, pipelines often waive certain tariff provisions on a non-duly

discriminatory basis, both prospectively and retroactively, if waiver provisions are provided for in the tariff with adequate notice or it is operationally feasible. However, waiver provisions in tariffs are not standardized across interstate pipelines and we question whether FERC would be able to act quickly on a waiver request to allow for the pipeline to provide this benefit to its system within the gas day. Otherwise, under the Proposed Policy, the pipeline would be required to file a petition for declaratory order for remedial relief if it is able to accommodate this unanticipated service request that was not contemplated in its tariff. This new approach could limit the unanticipated flexibility needed to serve shippers transporting natural gas on interstate pipelines.

Further, we strongly encourage the Commission to reconsider its proposal for entities seeking remedial relief to file a petition for declaratory order. Rectifying a nominal administrative violation of a tariff provision that has not caused harm to third parties (ratepayers or market) by filing a petition is overly harsh and burdensome, as the current filing fee is \$30,060.00. The request for waiver is the stopgap to prevent any further harm in instances in which new tariff language is found to be unworkable once adopted and applied. Our concern is that the ‘punishment does not fit the crime,’ particularly since many of these requests for waiver are for ministerial relief. Additionally, we are concerned this will deter some parties from seeking the remedial relief needed for unanticipated acts because the costs and perceived hurdles for approval are too high. Therefore, we ask the Commission to continue to provide flexibility and accessibility needed for parties that seek relief, not hinder it.

***iii. The proposal's suggested 'fix' for modifying tariffs to anticipate waiver needs creates more uncertainty for parties seeking waivers of tariff provisions, and if adopted, should include additional guidance and clarity.***

To address the issues discussed above, the Proposed Policy provides suggested guidance of modifying tariffs as a proactive option to address potential waiver issues, such as advance provisions to waive deadlines or inadvertent errors within a specified time period. We are concerned with the lack of clarity on how to navigate this process, which could cause more uncertainty between interstate pipelines and their customers during negotiations, instead of mitigating the impacts of the Proposed Policy; thus disrupting the current process, which is working well for all in the industry. While parties may have different views on how pipeline tariffs could or should be modified to proactively address potential waiver issues, this approach may potentially limit the flexibility that pipelines are able to provide their customers when operationally feasible. Further, it is unclear whether a petition for declaratory order would need to be filed even if the pipeline has an advance waiver provision in its tariff and exercises that discretion. Similarly, it is unclear if it is the pipeline or shipper that is responsible for filing the petition. Therefore, we request that at a minimum, if adopted, the Commission provide additional clarity on how this process would work and provide sufficient time for parties to negotiate and modify tariff provisions that would be necessary to comply with any new requirements.

While two examples of how to modify the tariffs are provided, the Commission's guidance does not consider the nuances of individual companies' business needs, operations and various types of contracts. Furthermore, there is no guarantee the Commission will provide sufficient flexibility for parties attempting to address this new waiver approach proactively, since it states "requests to make specific tariff provisions subject to a remedial waiver may or may not be just

and reasonable... for example, an excessively broad advance waiver provision would erode commercial certainty . . . undermining the core purpose of the filed rate doctrine and the rule against retroactive ratemaking.’<sup>2</sup> We are concerned with the lack of guidance regarding what is acceptable and how pipelines could anticipate all waiver scenarios without conflicting with the ‘broad advance waiver provision’ in its Proposed Policy. Thus, if the Commission adopts this proposal, we ask for any final rule to provide the requested clarity above and provide additional guidance regarding the procedure for how pipelines could incorporate such language in their tariffs. Regardless, the timing and scope of the inevitable tariff filings present an industry burden in absence of adequate benefit.

***iv. The Commission should refrain from applying this proposed policy to non-rate terms and conditions.***

NGSA is unpersuaded that the Commission should depart from prior precedent and apply the Proposed Policy Statement to non-rate tariff terms and conditions. In its Proposed Policy, the Commission states, “there is no basis for the Commission to conclude that those doctrines apply any differently to non-rate terms and conditions than to rates” and supports this assertion with a single citation to *Seminole Electric Coop.*<sup>3</sup> However, upon further review of this proceeding, this case applied the filed rate doctrine to a billing provision because that provision directly impacted the rates paid by Seminole to Florida Power & Light and since the customer agreed to a rate other than the filed rate, it was not barred by the filed rate doctrine. Thus, in the context of waivers, the Commission should uphold that the filed rate doctrine should apply only to tariff provisions that directly affect the rate paid by shippers.

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<sup>2</sup> See Proposed Policy Statement at P. 16

<sup>3</sup> See Proposed Policy Statement at P. 6 and reference to *Seminole Elec. Power Coop., Inc. v. Fla. Power & Light Co.*, 139 FERC ¶ 61,254, (2012 and 2015).

Further, the Commission also acknowledges that it has previously issued orders that the filed rate doctrine and rule against retroactive ratemaking may not apply to non-rate terms and conditions, and that the Commission has granted waivers for non-rate tariff terms and conditions.<sup>4</sup> Yet, the Commission has decided “upon further consideration” to no longer take this approach, without justification or case law that this prior practice violated the rate doctrines or what is permitted within its statutory authority. Given the lack of compelling evidence for this change in policy, we believe applying the Proposed Policy’s approach to non-rate tariff terms and conditions is unwarranted and we strongly encourage the Commission to expressly exclude non-rate tariff terms and conditions in any final rule.

## **II. Conclusion**

As discussed above, NGSAs has concerns about applying the Commission’s Proposed Policy Statement to the natural gas industry and strongly encourages the Commission to continue its effective approach of assessing requests on a case-by-case basis. Given that the Proposed Policy would unnecessarily burden parties seeking requests for remedial relief without sufficient

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<sup>4</sup> See Proposed Policy Statement at P. 11



justification for this sudden change in policy, the Commission should not adopt a policy that limits its ability to provide remedial relief in the most optimal fashion that its statutory authority allows.

Sincerely,

/s/ Casey Gold

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