

154 FERC ¶ 61,155
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Old Dominion Electric Cooperative

Docket No. ER14-2242-001

ORDER DENYING REHEARING

(Issued March 1, 2016)

1. On June 23, 2014, Old Dominion Electric Cooperative (ODEC) filed a petition for waiver of certain provisions of PJM Interconnection, L.L.C.'s (PJM) Open Access Transmission Tariff (OATT) and Amended and Restated Operating Agreement (Operating Agreement) to recover natural gas costs associated with the January 2014 cold weather events. On June 9, 2015, the Commission denied ODEC's petition finding that the filed rate doctrine and the rule against retroactive ratemaking precluded granting ODEC's waiver request.¹ On July 9, 2015, as supplemented on August 18, 2015, ODEC filed a request for rehearing of the June Order. As discussed below, the Commission denies ODEC's request for rehearing.

I. Background

2. On June 23, 2014, ODEC filed a petition for waiver of certain provisions of PJM's OATT and Operating Agreement in order to recover \$14,925,669.58 in natural gas-related costs that ODEC incurred during the cold weather events of January 2014.² As described in detail in the June Order, the costs at issue include (1) costs incurred in excess of PJM's \$1,000/MWh bid cap and (2) costs incurred to comply with dispatch instructions that were cancelled or cut short. ODEC therefore requested waiver of PJM's \$1,000/MWh bid cap and the tariff provisions that define and limit the costs that a

¹ *Old Dominion Electric Cooperative*, 151 FERC ¶ 61,207 (2015) (June Order).

² ODEC June 23, 2015 Waiver Request at 1 (ODEC Waiver Request).

generator can recover if a plant dispatch is cancelled or cut short. ODEC conceded that, absent waiver of these tariff provisions, PJM's tariff does not permit recovery of the subject costs.

3. In the June Order, the Commission denied ODEC's request for waiver of the filed rate, finding that the filed rate doctrine and the rule against retroactive ratemaking precluded granting ODEC's waiver request because ODEC sought to recover costs incurred prior to the date it filed its waiver request. The Commission also found that ratepayers had not received any prior notice of ODEC's requested relief, which was sought roughly five months after the events in question. In light of the Commission's decision to deny the waiver as impermissible retroactive relief, the Commission declined to reach any of ODEC's equitable arguments for granting waiver.³

II. Request for Rehearing

4. ODEC alleges that summarily denying its waiver request as barred by the filed rate doctrine and the rule against retroactive ratemaking departs from Commission precedent, and argues that examples of retroactive tariff waivers are plentiful.⁴ ODEC analogizes its interactions with PJM operators to cases involving unfiled rate agreements between a utility and its wholesale customer, in which the courts have said that the existence of the rate agreement provides sufficient prior notice regardless of whether "downstream" customers were on notice of the rates in the unfiled agreements.⁵ ODEC also contends that PJM stakeholders were on notice that they could be assessed charges for generators' costs incurred to ensure resource availability during emergency conditions. In particular, ODEC asserts that customers were on notice that they could be assessed costs above \$1,000/MWh on January 23, 2014 due to (1) a notice posted by PJM on January 21, 2014 acknowledging the problem of high gas prices and announcing its intention to file for a retroactive waiver, and (2) PJM's January 23, 2015 waiver request seeking a prospective waiver.

5. In addition, ODEC argues that the exigencies of the out-of-the-ordinary events at issue warrant issuance of a waiver despite the interval between the January 2014 events and the filing of ODEC's Waiver Petition. Further, ODEC argues that granting the

³ June Order, 151 FERC ¶ 61,207 at PP 47-48.

⁴ ODEC Rehearing Request at 14.

⁵ *Id.* at 22-23 (citing *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1983) (*Hall*); *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (*City of Piqua*)).

waiver would not be inconsistent with the purposes of the filed rate doctrine and rule against retroactive ratemaking.⁶

6. ODEC contends that the Commission erred by ignoring ODEC's demonstration that the standards for granting a waiver have been met. In particular, ODEC states that it demonstrated that its waiver would not have undesirable consequences, such as harming third parties. ODEC argues that the Commission erred in finding harm due to lack of notice.

7. Finally, ODEC argues that the assurances given by the PJM dispatchers that ODEC would be made whole implicate application of the apparent authority theory. ODEC avers that PJM dispatchers were acting within the scope of their apparent authority when communicating with ODEC and that reliance on this communication caused the pecuniary loss for which ODEC seeks to be made whole through this waiver.⁷

III. Discussion

A. Procedural Matters

8. Section 313(a) of the Federal Power Act (FPA)⁸ and Rule 713(b) of the Commission's Rules of Practice and Procedure⁹ require a request for rehearing to be filed within 30 days after issuance of any final decision or other final order in a proceeding.¹⁰ On August 18, 2015, ODEC filed a supplemental rehearing request. We reject ODEC's supplemental rehearing request because it was filed more than 30 days after the issuance of the June Order.¹¹

⁶ *Id.* at 27 (citing *Consolidated Edison*, 347 F.3d 964, 969-970 (D.C. Cir. 2003); *Exxon Mobil Corp. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999); *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992); *Cal. Pub. Utils. Corp. v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993) (*CPUC*)).

⁷ *Id.* at 35-37.

⁸ 16 U.S.C. § 825k (2012).

⁹ 18 C.F.R. § 385.713(b) (2015).

¹⁰ *Pub. Serv. Comm'n of Wisconsin*, 150 FERC ¶ 61,104, at P 147 (2015).

¹¹ *E.g.*, *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,623 (1991); *Pub. Serv. Co. of New Hampshire*, 56 FERC ¶ 61,105, at 61,403 (1991).

B. Substantive Matters

9. As discussed below, we deny ODEC's request for rehearing. ODEC's waiver request seeks to recover costs related to generation service provided to PJM in January 2014, although PJM's OATT and Operating Agreement on file with the Commission in January 2014 did not allow the recovery of those costs and no notice had been provided to PJM's ratepayers that the rates paid for service in January 2014 were subject to subsequent revision.¹² Such retroactive recovery of costs related to a past service is a classic example of a violation of the filed rate doctrine and the prohibition of retroactive ratemaking.

10. The FPA requires public utilities to "file with the Commission" and "keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission."¹³ When a public utility seeks to change its filed rate, it must "fil[e] with the Commission and keep[] open for public inspection new schedules stating plainly the change or changes in the schedule or schedules then in force and the time when the change or changes go into effect."¹⁴ As a consequence, regulated utilities are forbidden to charge rates for services other than those on file with the Commission, a prohibition that has become known as the filed rate doctrine.¹⁵ The related rule against retroactive ratemaking also "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."¹⁶

¹² See, e.g., June Order, 151 FERC ¶ 61,207 at P 46 ("ODEC does not dispute that such natural gas cost recovery is not currently allowed by the PJM OATT or Operating Agreement").

¹³ 16 U.S.C. § 824d(c) (2012).

¹⁴ 16 U.S.C. § 824d(d) (2012).

¹⁵ *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 11 (D.C. Cir. 2014) (*West Deptford*) (citing *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)).

¹⁶ *Towns of Concord v. FERC*, 955 F. 2d 67, 71 & n. 2 (D.C. Cir. 1992). See *Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir 1990) (*per curiam*) (Williams, J. concurring), describing the relationship between the filed rate doctrine and the rule against retroactive ratemaking.

11. ODEC nevertheless contends that the Commission has authority to retroactively waive a tariff in order to authorize “actions other than those prescribed by the filed rate.” ODEC argues that the Commission can do this when it concludes that “the tariff should not be applied under a particular out-of-the-ordinary set of facts . . . based on ‘considerations of hardship, equity, or more effective implementation of overall policy.’”¹⁷ ODEC argues that this case presents such equitable considerations. We disagree.

12. The United States Court of Appeals for the District of Columbia Circuit carefully considered the issue of the Commission’s authority to waive the filed rate retroactively based on equitable considerations in *Columbia Gas Transmission Corporation v. FERC I, II, and III*,¹⁸ and the court concluded unequivocally that the Commission has no such authority. That case arose from the Commission’s issuance of a rule in 1980 stating that it intended to permit natural gas producers to recover certain production-related costs from their pipeline sales customers.¹⁹ However, the Commission stated that it would not accept producer applications for recovery of these costs until it completed a further rulemaking to establish an appropriate generic allowance for such costs. The Commission also stated that, after completion of the rulemaking, it would provide producers a mechanism to recover the production-related costs they incurred during the interim period.²⁰ Three years later, in 1983, the Commission issued the rule establishing the generic allowance and permitting producers to charge pipelines for the \$1.5 billion in production-related costs they had incurred with respect to their sales to the pipelines between 1980 and 1983. The pipelines’ existing tariffs permitted them to flow through the deferred charges to their current downstream customers based on those customers’ current purchases. Rather than pursue this method, however, five pipelines petitioned the Commission to recover these costs in retroactive surcharges to their past downstream customers who had purchased gas during the 1980-1983 period. The pipelines contended that, due to restructuring changes in the natural gas market, they were unable to recover

¹⁷ ODEC Rehearing Request at 11.

¹⁸ 831 F.2d 1135 (D.C. Cir. 1987) (*Columbia I*); 844 F.2d 879 (D.C. Cir. 1987) (*Columbia II*); 895 F.2d 791 (D.C. Cir. 1990) (*Columbia III*).

¹⁹ *Columbia III*, 895 F.2d at 792 (citing *Order Amending Interim Regulations Under the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act*, Order No. 94, FERC Stats. and Regs., Regulations Preambles 1977-1981 ¶ 30,178 (1980)).

²⁰ *Id.* at 31,218

these costs from current customers, leaving large unrecovered balances.²¹ The pipelines argued that considerations of equity required those who had purchased that gas in 1980-1983 to pay its true cost through direct bills based on past purchases.²² The Commission approved these retroactive surcharge proposals, concluding they were not retroactive ratemaking because “Order No. 94-A expressly authorized the collection of retroactively effective allowances which, to the extent directly billed now, are a cost to those customers.”²³

13. On appeal, the D.C. Circuit held in *Columbia I* that the Commission’s approval of the pipelines’ retroactive surcharge proposals violated the filed rate doctrine. The court found that, while the Commission had given notice that producers would be permitted to impose a retroactive surcharge on the pipelines, no similar notice had been given that pipelines could impose a retroactive surcharge on their downstream sales customers.²⁴ The Commission sought rehearing of the court’s decision, arguing that section 4(d) of the Natural Gas Act permitting the Commission to waive the 30-day prior notice period “for good cause shown” allows the Commission to waive the filed rate doctrine.²⁵ In *Columbia II*, the court denied rehearing, but stated that, in light of the magnitude of the costs at issue, the Commission could consider the waiver issue on remand.²⁶

14. On remand, the Commission found that it had authority to waive the filed rate doctrine “for good cause shown.” The Commission found good cause in this case, because the pipelines’ retroactive surcharge proposals would ensure that current natural gas pricing signals were not distorted by an influx of substantial retroactive production-related costs into the pipelines’ current sales rates and would equitably charge past customers for costs the pipelines incurred on their behalf. The Commission concluded

²¹ See *Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230, at 61,543 (1985) (*Transco*).

²² *Id.*

²³ *Id.* at 61,544-45.

²⁴ *Columbia I*, 831 F.2d at 1141-42.

²⁵ The corresponding provision of the FPA is in section 205(d).

²⁶ *Columbia II*, 844 F.2d at 880.

that “the overriding public interest in the maintenance of orderly gas markets through the equitable allocation of costs” made it “necessary and proper . . . to waive the filed rate doctrine.”²⁷

15. In *Columbia III*, the D.C. Circuit reversed the Commission and held that the Commission has no authority to retroactively waive the filed rate. The court began its discussion by stating that “[n]o court has squarely decided whether the Commission’s waiver power may extend backward past the original filing date absent the parties’ agreement. Indeed, resolution of the conflict between the waiver power and the retroactive ratemaking rule presents difficult questions of statutory interpretation and regulatory policy.”²⁸ The court then proceeded to resolve this conflict and held that the Commission has no authority to waive the filed rate retroactively in order to permit a utility to modify a rate charged for services during a prior period, when there was no notice that the rate was subject to change.²⁹

16. The court acknowledged that prior notice, such as the notice the Commission provided pipelines that the rates they were paying to producers were subject to later revision:

changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rate being promulgated are provisional only and subject to later revision. This in no way dilutes the general rule that once a rate is in place with ostensibly full legal effect and is not made provisional, it can then be changed only prospectively.³⁰

The court concluded, however, that, because the Commission failed to provide adequate notice to the pipelines’ downstream customers that the price they paid for gas during the 1980-1983 period would be subject to adjustment, “the Commission was without authority to impose a retroactive surcharge for whatever cause.”³¹ The court recognized

²⁷ *Transcontinental Gas Pipe Line Corp.*, 45 FERC ¶ 61,169, at 61,488 n.26 (1988).

²⁸ *Columbia III*, 895 F.2d at 795 (quoting *City of Girard v. FERC*, 790 F.2d 919, 924 (D.C. Cir. 1986)).

²⁹ *Columbia III*, 895 F.2d at 797.

³⁰ *Id.*

³¹ *Id.*

that the Commission “may well have been correct in its assessment of the equities here involved and of the distortion in market signals that may result from the allocation of \$1.5 billion in prior production costs to current sales.” However, the court stated that it was “unaware, however, of any principle in equity or law that empowers an agency to ignore explicit legislative commands”³²

17. We find that the court’s unambiguous instruction in *Columbia III* dictates the result here. ODEC has acknowledged that the PJM OATT in force at the time of the transactions at issue here did not permit recovery of the costs which ODEC seeks to recover through this waiver.³³ Whether ODEC’s equitable arguments for waiving the filed rate may have merit is beside the point, as *Columbia III* makes clear that those equitable considerations do not bestow upon the Commission the authority to waive the filed rate doctrine.³⁴ ODEC argues that its request for waiver would avoid the inequity of forcing it “to ‘eat’ nearly \$15 million in costs incurred in good faith following PJM’s dispatch instructions under tariff provisions that the Commission found should be waived prospectively to avoid unreasonable outcomes and/or tariff provisions that the Commission subsequently found may be unjust and unreasonable, as well as PJM procedures that PJM has indicated may have been inadequate to address the circumstances in January 2014.”³⁵ However, *Columbia III* involved similar circumstances, in which pipelines sought waiver of the filed rate doctrine to avoid having to absorb a substantial portion of an amount 1000 times greater (\$1.5 billion) in natural gas purchase costs the pipelines incurred in good faith to serve their customers during the period the Commission was determining the amount of the production-related cost allowance the producers could charge the pipelines.³⁶ Indeed, unlike this case, in *Columbia*, the Commission had found that it would provide retroactive recovery to the producers; yet even that notification was deemed insufficient to permit pipeline recovery from past customers. Here, customers had not been provided any notice that these costs

³² *Id.*

³³ June Order, 151 FERC ¶ 61,207 at P 46.

³⁴ *Columbia III*, 895 F.2d at 797.

³⁵ ODEC Rehearing Request at 12.

³⁶ See *Panhandle Eastern Pipe Line Co. v. FERC*, 95 F.3d 62 (D.C. Cir. 1996), affirming the Commission’s order on remand following *Columbia III* requiring pipelines to refund, without interest, the amounts collected pursuant to their retroactive surcharges.

for past sales could be recovered.³⁷ Thus, we continue to find that ODEC's waiver request is barred by the filed rate doctrine and the rule against retroactive ratemaking.

18. ODEC contends that the Commission's action in this case is inconsistent with numerous other Commission orders, where ODEC asserts that the Commission has granted retroactive waivers of utility tariff provisions. As discussed below, we believe the orders cited by ODEC are distinguishable from the present case or do not warrant reaching a different conclusion.

19. We find that many of the cases cited by ODEC are distinguishable from the situation presented here because they deal with non-rate terms and conditions, such as deadlines and other qualification requirements for participating in PJM and New England ISO capacity auctions³⁸ or penalties for untimely or inaccurate information submissions.³⁹ However, in this case, we need not reach the issue of the breadth of our authority to grant

³⁷ Cf. *CPUC*, 988 F.2d. at 154, in which the court found that a pipeline's request for rehearing and its appeal of orders prohibiting the use of a particular recovery mechanism gave sufficient notice to allow use of that mechanism following reversal of those orders.

³⁸ *Portsmouth Genco, LLC*, 151 FERC ¶ 61,064 (2015); *Robinson Power Co.*, 150 FERC ¶ 61,123 (2015); *Future Power PA LLC*, 150 FERC ¶ 61,089 (2015); *National Grid USA and Laidlaw Berlin BioPower, LLC*, 129 FERC ¶ 61,212 (2009); *ISO New England Inc-EnerNOC, Inc.*, 122 FERC ¶ 61,297 (2008); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007).

³⁹ *San Diego Gas & Elec. Co.*, 151 FERC ¶ 61,215 (2015) (granting a waiver to relieve a utility of penalties associated with untimely submission of settlement-quality meter data); *Midcontinent Independent System Operator, Inc.*, 151 FERC ¶ 61,051 (2015) (granting retroactive waiver of an early termination notice provision); *EDP Renewables North America LLC*, 149 FERC ¶ 61,069 (2014) (granting retroactive waiver of information submittal requirements); *California Ind. Sys. Operator Corp.*, 147 FERC ¶ 61,132 (2014) (granting retroactive waiver to relieve suppliers of minimum performance threshold requirements for providers of frequency regulation services); *Pacific Gas and Elec. Co.*, 139 FERC ¶ 61,007 (2012) (granting retroactive waiver to relieve utility of inaccurate meter data penalties); *California Ind. Sys. Operator Corp.*, 135 FERC ¶ 61,159 (2011) (granting retroactive waiver to relieve scheduling coordinators of penalties for submitting untimely meter data for a 15-month period); *California Ind. Sys. Operator Corp.*, 129 FERC ¶ 61,127 (2009) (granting retroactive waiver of penalties associated with errors in submitting self-schedules).

retroactive waivers of non-rate terms and conditions.⁴⁰ As described above, a central purpose of the filed rate doctrine and the rule against retroactive ratemaking is to protect ratepayers from being subjected to an additional surcharge above the rate on file for service already performed. ODEC's request for waiver presents the classic situation addressed by the filed rate doctrine and the prohibition against retroactive ratemaking of a utility seeking to impose on ratepayers an additional surcharge for service already performed.

20. We also find that ODEC's reliance on cases such as *PJM Interconnection, L.L.C.*⁴¹ and *New York Independent System Operator, Inc.*⁴² is misplaced because these cases dealt with circumstances where the waiver at issue did not conflict with the filed rate, but was necessary to give effect to the intent of the tariff on file with the Commission.⁴³ We find that several of the other retroactive cost recovery cases that are cited by ODEC are inapposite here because, in those cases, prior notice had been given to ratepayers that they would be responsible for the costs at issue.⁴⁴ Courts have stated that, while notice does not relieve the Commission of the bar on retroactive ratemaking, it "changes what would be purely retroactive ratemaking in a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision."⁴⁵

⁴⁰ A retroactive waiver of a non-rate term and condition that does not subject ratepayers to an additional surcharge may not violate the filed rate doctrine or the rule against retroactive ratemaking. For example, a retroactive waiver of a deadline for participating in a capacity auction may only affect rates for future service.

⁴¹ 148 FERC ¶ 61,217 (2014) (*PJM*).

⁴² 139 FERC ¶ 61,108 (2012) (*NYISO*).

⁴³ See *PJM*, 148 FERC ¶ 61,217 at P 13; *NYISO*, 139 FERC ¶ 61,108 at P 13.

⁴⁴ See *Midwest Independent Transmission System Operator, Inc.*, 142 FERC ¶ 61,170, at PP 84-86 (2013); *Braintree Electric Light Department*, 116 FERC ¶ 61,121 (2006), *reh'g denied*, 120 FERC ¶ 61,097, at PP 1, 4-5 (2007) (filing of petition for declaratory order by Braintree put customers on notice that Braintree would be seeking to recover costs associated with a reliability must run agreement); *Cal. Indep. Sys. Operator Corp.*, 139 FERC ¶ 61,207, at P 4 (2012) (CAISO's announcement of the administrative prices that would apply during a system emergency put market participants on notice even though the Commission later found that those administrative prices were not authorized by CAISO's tariff).

⁴⁵ *CPUC v. FERC*, 988 F.2d at 164.

21. We also reject ODEC's contention that, in the circumstances of this case, PJM and its ratepayers had sufficient notice in January 2014 that ODEC would seek to recover these costs to satisfy the filed rate doctrine and the rule against retroactive ratemaking. ODEC contends that PJM was plainly on notice that it would seek to recover these costs, as evidenced by PJM's assurances before the costs were incurred that ODEC would be able to be made whole for them. ODEC asserts that this is analogous to cases involving unfiled agreements for service between a utility and its wholesale customer, where the courts have held that the existence of the rate agreement between those two parties provided sufficient prior notice, regardless of whether downstream customers were on notice of the rates in the unfiled agreements.⁴⁶

22. We find that ODEC's reliance on the "unfiled rate" cases is misplaced. Those cases dealt with written agreements for service that were ultimately filed with the Commission. The court explained that in those cases the Commission was not granting retroactive relief, but rather was giving "prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract."⁴⁷ Here, however, there was no contract between ODEC and PJM providing for ODEC's recovery of the costs at issue here, but only informal statements by PJM concerning cost recovery that were contrary to its tariff on file.⁴⁸ Thus, PJM is required to abide by the terms of its OATT and Operating Agreement and, as acknowledged by PJM,⁴⁹ the fuel cost recovery that ODEC seeks was not allowed under PJM's OATT or Operating Agreement. Moreover, unlike the situation in the *Hall* and *City of Piqua* cases cited by ODEC, involving bilateral contracts between a producer/utility and a single customer, PJM's OATT and Operating Agreement govern not only ODEC's recovery of its costs from PJM, but also PJM's recovery of those costs from its ratepayers. PJM cannot modify those generally applicable tariffs through a bilateral contract with a single generator, and any informal, private agreement between PJM and ODEC equally cannot serve to modify PJM's filed tariff.⁵⁰

⁴⁶ See *Hall*, 691 F.2d at 1192; *City of Piqua*, 601 F.2d at 951, 954.

⁴⁷ *Hall*, 691 F.2d at 1192.

⁴⁸ See, e.g., ODEC Waiver Request at 33-34, 56.

⁴⁹ See, e.g., PJM July 28, 2014 Comments at 7-9.

⁵⁰ *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,059, at P 16 (2014); see *West Deptford*, 766 F.2d at 71 (finding PJM's unilateral statements in pleadings insufficient to provide notice that a rate other than the filed rate could be charged).

23. We also reject ODEC's assertions that the extraordinary circumstances associated with operations in PJM during January 2014 were sufficient to give PJM's ratepayers notice that ODEC might seek relief of the type requested here. ODEC contends that, while ratepayers may not have received prior notice of ODEC's specific request, they have been on notice that prices for electricity under PJM's Tariff and Operating Agreement can vary, and have spiked, in conjunction with peak usage in extraordinary weather conditions that affect the price and availability of natural gas used to generate needed electricity. The court rejected a similar contention in *Columbia I*. There, the Commission argued that the pipelines' downstream customers had notice that they might be subject to a retroactive surcharge for 1980-1983 production-related costs, because the Commission had given notice in 1980 that it would permit the producers to recover those costs from pipelines and section 601 of the Natural Gas Policy Act required the Commission to allow pipelines to pass through those costs. However, the court held that those facts did not constitute sufficient notice, because the Commission orders only provided notice that the Commission would provide the producers a retroactive recovery mechanism. The mere circumstance that the Commission's authorization for producers to recover the costs retroactively from the pipelines might lead to a situation in which pipelines would, in turn, desire a similar retroactive recovery mechanism was insufficient to provide the necessary notice that the filed tariff mechanism for pipelines to recover these costs from their customers might be modified retroactively. So also in this case, the mere fact that ODEC faced circumstances in January 2014 that might cause it to incur costs not otherwise recoverable under PJM's filed tariff did not provide sufficient notice that PJM and its ratepayers could be subject to a retroactive surcharge.

24. In addition, we reject ODEC's contention that market participants were on notice from PJM's posting that they could be assessed charges for generators' costs in excess of the \$1,000/MWh offer cap. ODEC's claims for costs above \$1,000/MWh related to energy market outcomes for the operational day of January 23, 2014. The June Order, however, rejected the argument that the \$1,000 offer cap waiver could be applied earlier, since insufficient notice had been provided,⁵¹ and granted the waiver effective January 24, 2014, as requested by PJM.⁵² Thus, market participants were not on notice that they could be responsible for these excess charges on January 23, 2014. Moreover,

⁵¹ See *West Deptford*, 766 F.2d at 71 (finding PJM's statements in pleadings insufficient to provide notice).

⁵² *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,059 at P 18 ("PJM filed its waiver request to modify the terms and conditions of its Tariff for a short period on January 23, 2014, to be effective prospectively commencing January 24, 2014. The Commission did not waive the Tariff provisions at issue in any period prior to January 24, 2014, nor did the Commission provide a remedy for resources' under-recovery in prior periods.").

ODEC did not seek rehearing of the January 24, 2014 Order Granting Waiver,⁵³ which set the January 24, 2014 effective date, nor did it appeal the Commission's denial of the PJM Market Monitor's rehearing request to change the effective date of the waiver from January 24, 2014 to January 22, 2014.⁵⁴ Further, the facts presented here do not fit scenarios in which the Commission has invoked the notice exception to the filed rate doctrine; for example, the \$1,000/MWh offer cap is neither part of a formula rate, nor is it the result of any judicial action.

25. We find that ODEC's arguments to justify the interval between the January 2014 extreme weather events and the filing of ODEC's waiver request to be irrelevant. The Commission did not base its denial of ODEC's waiver on the amount of time that passed before ODEC filed its waiver request. Rather, the Commission relied on the filed rate doctrine and the rule against retroactive ratemaking in its finding that the relief sought by ODEC was impermissible.⁵⁵ ODEC's arguments regarding the purpose of the filed rate doctrine and rule against retroactive ratemaking are equally unavailing because, as explained above, courts have found that the Commission does not have the discretion to waive the filed rate doctrine, regardless of other equitable considerations.

26. Because we affirm the Commission's prior finding that notice had not been provided to PJM's ratepayers and that the relief requested by ODEC is barred by the filed rate doctrine and the rule against retroactive ratemaking, we find no error in the Commission's omission of a detailed analysis of whether ODEC's request met the Commission's waiver standards. For the same reason, we find that the Commission did not need to address ODEC's equitable arguments and we decline to do so here.

27. Finally, although we reject ODEC's supplemental rehearing request as untimely, we note that we would still deny rehearing even had the supplemental filing been considered. In its supplemental filing, ODEC sought to discuss the Commission's

⁵³ *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,041 (2014) (January 24, 2014 Order Granting Waiver).

⁵⁴ *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,059 at P 17 (denying the PJM Market Monitor's rehearing request, the Commission explained that PJM requested, and the Commission granted, the waiver to be effective January 24, 2014 and that the PJM Market Monitor failed to establish that sufficient notice was provided for any day earlier than the date of filing).

⁵⁵ June Order, 151 FERC ¶ 61,207 at PP 45-48.

July 29, 2015 order granting tariff waiver in Docket No. ER15-817-000,⁵⁶ and claimed that the Commission's decision in *CAISO* supports ODEC's request for retroactive waiver. In the *CAISO* proceeding, the Commission granted the waiver over filed rate doctrine objections, when the party that would be responsible for the refunds resulting from the waiver supported the waiver, no intervenors asserted that they would suffer harm from the waiver, and the Commission found that no third parties would be harmed by the waiver.⁵⁷ In contrast, in this proceeding, numerous parties objected to having to pay these retroactive assessments, and the PJM Market Monitor claimed the proposal violated the filed rate doctrine.⁵⁸ Thus, the Commission's decision in that proceeding does not support ODEC's request for retroactive relief.⁵⁹

The Commission orders:

ODEC's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary

⁵⁶ See *Cal. Indep. Sys. Operator Corp.*, 152 FERC ¶ 61,086 (2015) (*CAISO*) (granting a request for a waiver to permit CAISO to avoid pricing anomalies in its energy imbalance market).

⁵⁷ *Id.* PP 25-27. We note that a rate change that would otherwise be impermissible may be allowed when parties have agreed to change the rate retroactively. See, e.g., *Consolidated Edison Co. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003).

⁵⁸ Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket No. ER14-2242-000, at 3 (Sept. 5, 2014).

⁵⁹ While we believe these orders are distinguishable based on the discussion above, even if these cases are not distinguishable, the court's *Columbia III* decision would dictate the rejection of the waiver in this case. See Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket No. ER14-2242-000, at 3 (Sept. 5, 2014).