154 FERC ¶ 61,156
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Corporation, Duke Energy Commercial Asset Management, Inc., and Duke Energy Lee II, LLC — Docket No. EL14-45-001

v.

PJM Interconnection, L.L.C., and PJM Settlement, Inc.

ORDER DENYING REHEARING

(Issued March 1, 2016)

Paragraph Numbers

1. In this order, the Commission denies rehearing of its June 9, 2015 order denying a complaint by Duke Energy Corporation (Duke)[1] against PJM Interconnection, L.L.C. (PJM).[2] In its complaint, Duke alleged that PJM failed to fulfill its obligation under the PJM Open Access Transmission Tariff (OATT) to indemnify Duke for losses incurred to implement a PJM directive.[3] Alternatively, Duke sought a waiver of certain provisions of the PJM OATT and Amended and Restated Operating Agreement (Operating Agreement) to enable Duke to recover those losses through make-whole payments. The Commission denied Duke's complaint on the grounds that Duke had failed to demonstrate that its losses were the result of a PJM directive, and that Duke's requested waiver would violate the filed rate doctrine and the rule against retroactive ratemaking. In this order, the Commission denies rehearing on both issues.

I. **Background**

2. PJM operates a capacity market in which generators compete in an annual forward capacity auction to be selected as Generation Capacity Resources[4] for a capacity year three years into the future. Generation Capacity Resources have the daily obligation to offer their capacity into PJM's Day-ahead Energy Market.[5] The following operational day, PJM may or may not call those resources to provide energy in real-time. However, Generation Capacity Resources are required to offer into the Day-ahead Energy Market each day (absent outages or other technical difficulties) and be available if called upon in real-time. Duke owns the Lee Facility in Dixon, Illinois, which consists of eight 80-MW natural gas-fired, combustion turbines (Lee units) that are Generation Capacity Resources in PJM. Duke purchases gas for the Lee units from a variety of suppliers,[6] but it takes

[1] Duke is also acting on behalf of its subsidiaries Duke Energy Lee II, LLC and Duke Energy Commercial Asset Management, Inc.

[2] *Duke Energy Corp. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,206 (2015) (June 9 Order).

[3] *See* PJM OATT, section 10.3.

[4] Capitalized terms that are used herein and not otherwise defined have the meanings used in the OATT.

[5] PJM OATT Attachment DD § 8.1; PJM Operating Agreement Schedule 1 § 1.10.1A(d).

[6] *See* Exhibit D-4 to Complaint, Affidavit of Shannon Gronefeld at P 6 (Gronefeld Affidavit).

interruptible gas transportation service and balancing service from Natural Gas Pipeline Company of America, LLC (NGPL). If Duke cannot obtain transportation service from NGPL's pipeline, it cannot operate the Lee units.[7]

3. The factual background of this case is discussed at greater length in the June 9 Order. Briefly, in January 2014, extreme weather conditions affected much of the eastern United States, resulting in record peak demand for natural gas.[8] On the morning of January 27, PJM called a Maximum Emergency Generation Alert covering the entire PJM footprint for January 28, since it expected record low temperatures, high load, and low reserves. A Maximum Emergency Generation is "an Emergency declared . . . to address either a generation or transmission emergency in which [PJM] anticipates requesting one or more Generation Capacity Resources . . . to operate at its maximum net or gross electrical power output . . . in order to manage, alleviate, or end the Emergency."[9]

4. On January 27, Duke dispatcher Greg Cecil was concerned about purchasing gas for the Lee units, believing that, despite its Maximum Emergency Generation, PJM might not call those units to provide energy in real-time on January 28; in that case, Duke might take a loss on the gas that it purchased to operate the units. While PJM's Day-ahead Energy Market would not clear until 4:00 p.m., resources must make their offers into the day-ahead markets by 12:00 noon,[10] and Duke's gas traders make most of their natural gas purchases between 8:30 a.m. Eastern Prevailing Time (EPT) and 10:30 a.m. EPT

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[7] Gronefeld Affidavit at PP 10-11; *see also* comments of PJM Market Monitor at 3.

[8] Complaint of Duke Energy, *et al.* (Complaint) at 11-12 & nn. 27-29. PJM projected that its load on January 28 would be 141,000 MW, but that its reserves would only be 1,000 MW, much less than the 9,450 MW of PJM's reserve objective. Complaint at 3 (citing Exhibit No. D-1 to Complaint, Affidavit of Gregory H. Cecil at P 19 (Cecil Affidavit)).

[9] Complaint at 12 (citing PJM Operating Agreement, Schedule 1, section 1.3.13).

[10] Cecil Affidavit at 8. After issuance of the June 9 Order, the Commission accepted revisions to sections 1.10.8(b) and 1.10.1A of PJM's Operating Agreement, Schedule 1, to modify the deadline for posting the results of PJM's Day-ahead Energy Market from 4:00 p.m. Eastern Prevailing Time (EPT) to 1:30 p.m. EPT, or as soon as practicable thereafter, and the deadline for submitting bids and offers for the Day-ahead Energy Market from 12:00 p.m. EPT to 10:30 a.m. EPT. *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,209 (2015).

day-ahead. Mr. Cecil called PJM's dispatch desk at 8:53 a.m. and spoke with PJM master dispatcher Nathan Marr, and asked whether PJM was likely to call the Lee units in real-time on January 28. Mr. Marr informed Mr. Cecil that it was highly likely that PJM would call the Lee units on January 28, but also noted that transmission constraints might prevent PJM from calling the Lee units in real-time.[11]

5. After this call, Mr. Cecil spoke with one of Duke's gas traders, who informed him that the price of gas was at that time $37 per MMBtu. Based on that price, and on his experience in a cold weather situation a week earlier when Duke had purchased gas for the Lee units and PJM did not call those units in real-time, Mr. Cecil concluded that the Lee units would not be called by PJM in real-time on January 28. Thus, Duke would therefore incur significant expenses from purchasing gas for the Lee units that would not be used. On this basis, Mr. Cecil decided at that time not to buy gas for the Lee units.[12]

6. Shortly thereafter, Mr. Marr called Duke back and communicated that "PJM wanted the Lee units available the following day," and that "this is a reliability issue, so all units must be available," and Duke should not be "securing gas based on an economic decision – this is not an economic decision." Mr. Cecil later reconfirmed this understanding with Mr. Marr.[13] After this conversation, Mr. Cecil learned from his trading desk that the price of gas being offered at Lee had now risen to $55/MMBtu.[14] Because of the cold weather emergency, Duke only could obtain these gas supplies on a take-or-pay basis, obligating it to pay for the gas even if the units were not dispatched.

[11] *Id*. at 5-6 ("Mr. Marr stated that PJM was calling maximum emergency generation into the capacity for the following day (January 28) and that more than likely, Lee would run. But Mr. Marr did not guarantee that the Lee units would run. He noted that if PJM ran into a transmission constraint in the area, then the units may not be brought on, but it was 99.9% that Lee would run").

[12] *Id*. at 6.

[13] *Id*. at 6.

[14] *Id*. at 7. Mr. Cecil also discussed with other Duke personnel the question of whether Duke would be made whole for any gas purchases, if necessary, and was told that PJM's vice-president for market operations "was not aware of anything in the PJM tariff that would permit Duke to be made whole" but had suggested that Duke "work out any issues with the situation at a later time." *Id*.

7. Following these communications with PJM, Duke purchased 209,100 MMBtus of gas for a total cost of $12,456,500, and offered the Lee units into the Day-ahead Energy Market for January 28. Five of the eight Lee units cleared the Day-ahead Energy Market, for a few hours in the morning and the evening. However, PJM backed down the Lee units in real-time, so they did not run. While Duke did not run in real-time, it still had to pay for the natural gas at $55/MMBtu but could not resell the natural gas at that price. Duke asserts that it made reasonable and appropriate efforts to mitigate its losses, but nevertheless incurred unrecoverable losses totaling $9,843,621.[15] Under the PJM provisions governing cost recovery for units dispatched in the Day-Ahead Market and backed down in real-time, Duke would not receive uplift payments from PJM to cover its losses.

II. Duke Complaint and June 9 Order

8. Duke filed a complaint against PJM seeking to recover costs it incurred in January 2014 to secure natural gas for the Lee units, on two bases. The Commission rejected both arguments, and denied Duke's complaint.

A. Indemnification

1. Complaint

9. Duke stated that, following the events outlined above, it requested compensation from PJM, pursuant to section 10.3 of the OATT, for the unrecovered costs Duke incurred to purchase gas on January 27, which was rejected by PJM. Section 10.3 of the OATT provides the following, as relevant (emphasis added):

> The Transmission Customer shall at all times indemnify, defend, and save . . . each Generation Owner acting in good faith to implement or comply with *the directives of the Transmission Provider* . . . harmless from, any and all damages, losses, claims, . . . arising out of or resulting from the . . . Generation Owner's . . . performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of negligence or intentional wrongdoing.

10. Duke argued that this provision requires transmission customers to hold Duke harmless for obligations to third parties arising out of its good-faith actions to implement PJM directives related to capacity resource obligations. Duke claimed that section 10.3

[15] June 9 Order, 151 FERC ¶ 61,206 at P 8.

requires PJM, as an intermediary between PJM's transmission customers and generators, to compensate Duke for the losses it incurred from purchasing gas for the Lee units on January 27.[16]

11. According to Duke, the communications between PJM Dispatch and Duke Dispatch constituted a "directive" to Duke to purchase gas. Duke states that, prior to the communications, Duke had decided not to purchase gas before knowing whether the Lee units would operate in real-time.[17] However, Duke stated that it "reversed course to follow the directive of the RTO [PJM] and buy the gas."[18] Duke argued that PJM's directive fell within its authority under the OATT to direct generators' activities in an emergency and that the OATT requires Duke to comply with such directives.[19] Duke asserted that Commission precedent supported holding Duke harmless for its gas-purchase losses, pointing to the Commission's allowance of similar cost recovery in *New England Power Pool* (*NEPOOL*).[20] In *NEPOOL*, during a period of exceptionally cold weather in 2004, ISO-NE asked Exelon to continue running its Mystic units to meet reliability needs, and after doing so Exelon requested compensation. The Commission found that "NEPOOL's proposal to provide Exelon special compensation [is] . . . reasonable . . . because it permits the payment of costs which were incurred as a result of Exelon following ISO-NE's dispatch instructions and [tariff] provisions that prevented ISO-NE from providing Exelon Operating Reserve credits."[21] Duke argued that the Commission permitted compensation to Exelon pursuant to a provision in the ISO-NE tariff with "the same broad purpose [as section 10.3 of the PJM OATT]: to serve as a safety net, and permit recovery in circumstances where no other provision . . . directly applies."[22]

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[16] *See* Complaint at 7, 26.

[17] Complaint at 29.

[18] *Id*.

[19] *Id.* at 32 (citing PJM Operating Agreement, Schedule 1, § 1.8.2(a) and PJM OATT, Attachment K – Appendix, § 1.7.4(f)).

[20] 107 FERC ¶ 61,183, *order on reh'g*, 108 FERC ¶ 61,207 (2004)).

[21] *NEPOOL*, 107 FERC ¶ 61,183 at P 26.

[22] Complaint at 36.

2. June 9 Order

12. The Commission first noted that section 10.3 stems from the *pro forma* indemnification provision that the Commission established in Order No. 888, which "provides for indemnification against third party claims arising from the performance of obligations under the tariff."[23] The Commission added that it "limited the indemnification portion of the provision so that it is . . . only the transmission customer who indemnifies the transmission provider," explaining that the "customer is taking service from the transmission provider and may appropriately be asked to bear the risks of third-party suits arising from the provision of service to the customer under the tariff."[24]

13. The Commission then stated that the PJM indemnification provision should not be interpreted to guarantee reimbursement of a generator's losses on gas purchases incurred in meeting its capacity resource obligations in PJM. Rather, it stated, a Generation Capacity Resource assumed the risks involved in fulfilling its energy market commitments when it chose to participate in the market, and those risks should not be transferred to PJM transmission customers. The Commission stated:

> [A] Generation Capacity Resource must offer its capacity into the Day-ahead Energy Market and must operate in real time if called upon. . . . [A]s currently provided under the PJM OATT and Operating Agreement, Duke's decision as to how to buy fuel to satisfy those obligations is left to its discretion. Guaranteeing Duke full recovery of its costs under the PJM

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[23] *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, FERC Stats. & Regs. ¶ 31,036, at 31,765 (1996), *order on reh'g*, Order No. 888-A, 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).

[24] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,765. *See also* Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,301 and Order No. 888-B, 81 FERC ¶ 61,248 at 61,082 ("The [i]ndemnification provision of the tariff, in its essence, provides that when the transmission provider behaves in all respects properly, the customer will indemnify the transmission provider for claims of damage to third parties arising from the service provided under the tariff").

> OATT's section 10.3 would improperly reallocate the risks related to fuel procurement, and the costs associated with its choices as to when or how to procure fuel, from capacity resources like Duke to PJM customers. . . . .[25]

14. Therefore, the Commission noted, "compensating Generation Capacity Resources for costs incurred to fulfill their capacity obligations through the PJM OATT's indemnification provision would render the cost recovery and energy and capacity payment provisions of the PJM governing documents meaningless."[26]

15. The Commission pointed out that, in exchange for capacity payments, for every day of the Delivery Year, a Generation Capacity Resource in PJM must offer all available capacity into the Day-ahead Energy Market, and is required to operate in accordance with PJM's dispatch instructions if called upon to operate in real-time. Additionally, a Generation Capacity Resource's offer is "final as to the price or prices" at which it proposes to supply energy into PJM's energy market, "such price or prices being guaranteed . . . for the period extending through the end of the following Operating Day."[27] The Commission thus stated that capacity resources, rather than transmission customers, were in a better position to manage risks associated with their availability, including risks relating to the price of fuel. It pointed to the fact that Duke contracted for only an interruptible balancing service agreement with NGPL, and relied upon purchasing natural gas from a marketer at downstream market area prices. Thus, the Commission found, "[t]he risk of purchasing such interruptible services remains with Duke and is not the type of third-party claim covered by the indemnification provision."[28] The Commission additionally stated that it had previously found that, under similar tariff authority, capacity resources like Duke have a strict performance obligation and that "economic considerations are irrelevant to determining whether a unit is 'physically available'" and "the price of fuel may not affect a unit's physical availability."[29]

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[25] June 9 Order, 151 FERC ¶ 61,206 at P 61 (citations omitted).

[26] *Id.* P 65.

[27] PJM Operating Agreement, Schedule 1, § 1.10.1A(d)(vii).

[28] June 9 Order, 151 FERC ¶ 61,206 at P 62 n.144.

[29] *Id.* P 63 n.145 (citing *New England Power Generators Ass'n, Inc. v. ISO New England Inc.* (*NEPGA*), 144 FERC ¶ 61,157 at PP 47, 58).

16. The Commission found that Duke was not acting pursuant to a "directive" from PJM when it purchased gas for the Lee units. The Commission found that, under PJM's OATT, Duke was already obligated to be available, and to be responsible for when and how it would purchase gas for the Lee units on January 27.[30] Thus, the Commission stated, because Generation Capacity Resources in PJM are already required to be available without regard to economics, PJM's communication to Duke that "all units need to be available, it's not an economic decision" did not constitute a directive. The Commission further stated that PJM had issued a Maximum Emergency Generation Alert, and that PJM's dispatcher had informed Duke that while he could not be 100 percent certain that the Lee units would run, he anticipated calling on those units.[31] The Commission noted that, under maximum emergency generation conditions, Generation Capacity Resources are required to make all capacity designated as maximum emergency generation available to PJM.[32] Thus, the PJM dispatcher's communication to Duke that it anticipated calling maximum emergency generation into service was not a directive that required PJM to indemnify Duke against the price-related risks of complying with it.

3. <u>Request for Rehearing</u>

17. Duke alleges that the Commission's holding conflicts with the unambiguous language of section 10.3, requiring a generation owner to be held "harmless" for "losses" or "obligations . . . to third parties" that "aris[e] out of or result[] from" the Generation Owner "acting in good faith to implement or comply with the directives of the Transmission Provider."[33] Duke argues that the Commission erred in denying

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[30] June 9 Order, 151 FERC ¶ 61,206 at P 63 & n.148 (citing to *NEPGA*, 144 FERC ¶ 61,157 at P 54 (finding that the ISO-NE Tariff "deals explicitly with operating characteristics" and does "not apply to fuel procurement or transportation activities")).

[31] Duke Complaint, Exhibit No. D-2, at 3.

[32] PJM's Operating Agreement provides that any Generation Capacity Resource that contracted its output on a bilateral basis – because it offered such capacity into the Day-ahead Energy Market but did not clear – is under an obligation to make that capacity "available upon request to the Office of the Interconnection for scheduling and dispatch during the Operating Day if the Office of the Interconnection declares a Maximum Generation Emergency." Schedule 1, § 1.10.4 (Capacity Resources).

[33] Request for Rehearing at 8. Duke further asserts that, even if the word "directive" is ambiguous, the Commission interpreted it unreasonably, since the background of negotiations between the parties and their subsequent course of

(continued…)

indemnification under section 10.3, because it refused to recognize that PJM's instructions to Duke were a "directive" under the meaning of that section.

18. Duke takes issue with the Commission's finding that PJM's instruction was not a directive, because it didn't change Duke's discretion about how much gas to buy, and that Duke was already obligated to make the Lee units available, so that PJM did not require Duke to do anything it wasn't already obligated to do. Duke states that PJM's instruction was a directive, because it required Duke to act, in that PJM made clear that it did not want Duke to exercise its own business judgment, given the existing emergency situation. Duke states that PJM unambiguously told Duke, and Duke understood, that it was required to buy gas for January 28.[34] Duke argues that the Commission avoided the unambiguous meaning of the term "directive" by pointing to possible negative outcomes if PJM's communication is treated a directive, such as the potential for eliminating the tariff's rate provisions by indemnifying generators for the costs incurred to fulfill their capacity obligations.[35] But, Duke argues, market participants should be able to rely on the plain meaning of tariff terms, rather than looking to policy outcomes to define them.

19. Duke further states that, if it had refused to follow PJM's instructions, it would have violated the PJM OATT, which requires Duke to "comply with all determinations of the Office of the Interconnection on the selection, scheduling, or dispatch of resources in the PJM Interchange Energy Market, or to meet the operational requirements of the PJM Region." It adds that PJM's powers are especially clear during emergencies, when "PJM has the authority to 'direct[] the operations of Market Participants as necessary.'"[36] Duke contends that PJM needs to be able to rely on generators to comply with dispatch instructions, and that if, in fact, Duke had been able to follow its own judgment on January 27, it would have saved $9.8 million.

20. Duke disputes the Commission's finding that PJM's directive did not require Duke to take action that it was not already obligated to take. Duke states that under normal circumstances it has discretion over whether to secure gas, but that in this case, PJM instructed Duke to secure gas without consideration of whether that made financial

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performance demonstrate that PJM's statements on the morning of January 27 constitute a "directive." *Id*.

[34] *Id*. at 10.

[35] *Id*. at 12 n.63 (citing June 9 Order, 151 FERC ¶ 61,206 at PP 61, 65).

[36] Request for Rehearing at 13 nn.69-70 (citing PJM OATT § 1.8.2(a).; *id*. at Attachment K – Appendix § 1.7.11; Operating Agreement § 1.10).

sense. Therefore, Duke states, PJM's instruction to secure gas was not an order to meet a preexisting contractual requirement, but a directive to Duke to go beyond that contractual obligation. Duke argues that, on the morning of January 27, Duke was obligated to be available (i.e., to offer into the day-ahead market), but was not obligated to buy gas for the Lee units at that time. Duke states that the Commission erred in equating "being available" with buying gas. It states that PJM capacity resources are not required to buy gas before they clear the day-ahead market; rather, they must specify notification times, and PJM must notify them by those times if it wants to call them into service the next day. Other circumstances could have prevented the Lee units from running on January 28, so that Duke would usually weigh the risk of buying gas for the Lee units (i.e., possibly being stuck with expensive unused gas) against the risk of not buying gas (having to buy even more expensive gas or replacement capacity if the Lee units are called into service). Duke asserts that, absent PJM's directive, Duke could have met its obligation to make the Lee units available by offering them into the day-ahead market with long notification periods, so that it could use the time after notification to find gas or purchase replacement capacity. But on January 27, PJM's employee Mr. Marr not only answered Mr. Cecil's inquiries, but called back a few minutes later to emphasize that "the decision to buy the gas was not economic." Duke argues that PJM thus ordered Duke to forego its normal economic risk/reward analysis and simply to buy the gas, at high prices, to ensure reliability.[37]

21. Duke states that the Commission erred in reasoning that to permit indemnification of Duke here would expand the scope of section 10.3 and swallow other provisions that allocate costs under tariff, in that it would allow generators to require PJM to reimburse them for all costs incurred in meeting their availability commitments, and would improperly reallocate the risks related to a generator's decision to procure or not procure fuel. Duke asserts that it is not seeking to recover costs incurred as part of the normal, discretionary risk calculation associated with procuring gas (and notes that when Duke experienced a similar loss a week earlier as a result of its own risk-taking decisions rather than a command from PJM, it did not seek indemnification). Duke further argues that its interpretation of section 10.3 doesn't swallow other tariff provisions, because "the specific governs the general." According to Duke, section 10.3 is a general safety net that a party can invoke only where there is no more specific provision addressing possible compensation for an action ordered by PJM. Where there is no such provision, as here, then section 10.3 applies.[38]

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[37] Request for Rehearing at 15-17.

[38] *Id*. at 18-20.

22. Finally, Duke argues Commission precedent supports indemnification. Duke states that the Commission found that this case is distinguishable from *NEPOOL*, because there, the generator did not rely on an indemnity provision but instead invoked a "discrete tariff section[] allowing cost recovery in specific circumstances" that "specifically addressed the facts presented."[39] But, Duke argues, the Commission did not specify why the provision at issue in *NEPOOL* addressed the facts presented there more specifically than section 10.3 does here. By their nature, indemnity provisions are general yet must be applicable to specific factual situations. In *NEPOOL*, the tariff at issue allowed for "the sharing by Participants . . . of payments and costs which are not otherwise reimbursed under this Agreement . . . incurred by Participants . . . as necessary . . . to meet the Pool's reliability objectives." [40] Under this provision, the Commission allowed Exelon New England Holdings to recover approximately $8.5 million in costs incurred for keeping two units running during a cold snap in response to ISO New England Inc.'s reliability-related request, even though those units had not been selected for dispatch in the day-ahead market. Duke asserts that the provision at issue in NEPOOL constituted a catch-all safety net, similarly to section 10.3, and the Commission should therefore permit indemnification of Duke here. [41]

4. **Commission Ruling**

23. We deny rehearing. As the Commission found in the June 9 Order, the indemnification provision is directed at liability to third parties incurred as a result of following instructions, not reimbursement for costs incurred as part of market operations. In essence, this provision is designed to protect generators from liability to third parties resulting from activity in serving transmission customers.[42] The types of costs envisioned by the tariff are "injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees," and other similar costs, not losses or costs incurred in adhering to tariff provisions providing

[39] *Id*. at 20 n.93 (citing June 9 Order, 151 FERC ¶ 61,206 at P 65).

[40] *NEPOOL*, 107 FERC ¶ 61,183 at P 6.

[41] Request for Rehearing at 20-21.

[42] This provision grew out of the indemnification provision in the *pro forma* OATT which is designed to allocate to transmission customers non-negligently incurred costs to third parties of the RTO, transmission owners, or generation owners incurred to serve those customers.

required service to customers.[43] To interpret the provision more broadly, as Duke does, would be tantamount to permitting generators to circumvent the filed rate doctrine whenever, as occurred here, they fulfill a tariff obligation to operate and incur a market related loss for which the tariff does not elsewhere provide recovery.[44]

24. Under the PJM tariff, as a capacity resource, Duke had both an obligation to bid into the Day-Ahead market and to run its unit upon dispatch by PJM. Duke concedes that it has that obligation and cannot "'fail to meet' the Lee units' capacity obligation for economic reasons."[45]

25. Nonetheless, Duke maintains that the PJM operator issued a "directive" to Duke to purchase gas for the Lee units on the morning of January 27 putting it within the terms of the indemnification provision. Contrary to Duke's view, Mr. Marr's statements to Mr. Cecil on the morning of January 27 were not a specific order to Duke to take actions that went beyond Duke's pre-existing contractual requirements. As discussed above, Duke, as a Generation Capacity Resource in PJM, has an obligation to offer the Lee units into the PJM Day-Ahead Energy Market every day and to operate when PJM dispatches that unit. Duke therefore is under an obligation to PJM to purchase or have on hand sufficient fuel to run its unit when dispatched by PJM. Duke retains the discretion as to when and at what price to obtain that gas in order to run when dispatched, but it is required under the tariff to operate in accordance with its Day-Ahead obligation as described herein.

26. In Mr. Cecil's affidavit he states that, on the morning of January 27, he was evaluating the costs of purchasing gas to comply with that obligation, and it was for that reason that he contacted PJM's dispatcher Mr. Marr to inquire whether PJM anticipated running the Lee units – precisely because he was contemplating *not* procuring gas at that

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[43] Under the rule of *ejusdem generis*, general terms which follow specific ones are interpreted similar to the terms specified. *See Yates v. United States*, 135 S. Ct. 1074, 1086, 191 L. Ed. 2d 64 (2015).

[44] PJM similarly concludes: "Under Duke's interpretation, Section 10.3, which is an indemnification provision to be applied under specific circumstances rather than a 'safety net' as Duke repeatedly asserts, would render the specific cost recovery provisions of the Tariff, Operating Agreement and RAA superfluous and meaningless." PJM Answer to Complaint at 6.

[45] Duke July 18, 2014 Answer to PJM Market Monitor's Answer at 2.

time.[46] Rather than making this decision himself, as he usually would do, he sought guidance from PJM as to its appraisal of the situation.

27. When Mr. Cecil called PJM, he stated only that he was calling about the Lee County plants and stated "we are trying to decide, because gas is very difficult [to obtain] at that location."[47] He then stated that while he "might be able to obtain some day ahead" gas, "I've got to be able [to] come on."[48] He stated nothing about buying natural gas at a later time to fulfill Duke's tariff obligation; he only communicated that he was thinking about not buying natural gas so the units would be unavailable.

28. Mr. Marr, the PJM dispatcher, responded: "I cannot anticipate what is going to be the situation. However, I can say that we're calling maximum emergency generation into the capacity for tomorrow. So, more than likely, your units will be running."[49] He then "advised" Duke to secure gas. Three minutes later Mr. Marr called back to make even clearer PJM's estimation that it would need those units to run: "We want your units available"[50] (which is Duke's obligation as a capacity resource). He then added: "if he's not securing gas based on an economic decision – this is not an economic decision. This is a reliability issue, so all units must be available."[51]

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[46] Cecil Affidavit at 5 ¶ 20 ("Based on the expectation that the power market would be strong on January 28th, we considered buying gas in order to run the Lee units on [that day]. However, because of our experience from the previous week of procuring gas for the Lee units [and losing money when the units were not called] . . . we wanted to proceed with caution in considering this route. So while it is not a normal practice for me to call PJM, I did so in this instance. I wanted to find out whether the units would run on January 28 and whether Duke would be able to self-schedule the units *so that we could decide whether* . . . *to procure the gas* needed to run them. So, . . . I placed a call to PJM") (emphasis added).

[47] Exhibit No. D-2 to Complaint, Transcripts and Audio Files of Recorded Phone Calls Between Duke and PJM on January 27 and 28, 2014, at 2.

[48] *Id.*

[49] *Id.*, at 3.

[50] *Id.* at 4.

[51] *Id.*

29. As PJM points out, dispatchers try to respond to such inquiries and to "answer those questions based on the best information they have available, but they are not providing guaranties through their answer."[52] Nor is the dispatcher sanctioning a determination by a unit not to honor a tariff commitment.[53] Based on the conversation, the PJM dispatcher was responding to a request as to whether these units would choose not to run for economic reasons, and responded to that request. Mr. Marr said nothing about when to purchase natural gas, at what price to purchase the gas, how to bid into the market, or to take any action beyond that which Duke is otherwise obligated to take under the tariff: to purchase natural gas to be prepared to run its units. Indeed, despite these statements, Duke was not sure that it would be able comply with its tariff obligation as Mr. Cecil states that he was not even sure he could secure natural gas for all the units. Mr. Marr's statement that economics is not a factor merely reflects Duke's tariff obligation to be prepared to run its units.[54]

30. Duke states that, absent the conversations between Mr. Cecil and Mr. Marr, it would have been able to take other actions to meet its capacity obligation, such as offering the Lee units into the Day-Ahead Energy Market with long notification periods,

[52] PJM Answer to Complaint at 4. PJM further notes that "this can result in units incurring gas balancing losses in which Generation Owners procure excess gas they did not use to operate their units as they originally anticipated," and that while this risk was greater than usual on January 28, "this is a normal risk that Generation Owners assume in conducting their business, particularly since Capacity Resources such as the Lee resources must be offered into PJM's markets on a daily basis and do not have an automatic right to recover all of [their] costs should the units not actually be dispatched." *Id*.

[53] Suppose, on the other hand, that a dispatcher indicates that s/he does not believe the unit will be required to run. That would not be a commitment on which the generator could rely to avoid the consequences of failing to buy natural gas if PJM did ultimately dispatch the unit.

[54] Duke maintains on rehearing that if it followed its own judgment it would have saved $9.8 million (Request for Rehearing at 14). Such savings, however, would only have occurred if Duke had purchased no natural gas and won its bet that the Lee units would not be dispatched. But that is not a risk sanctioned or permitted under the tariff, which requires Duke to be prepared to run when dispatched, and of course purchase natural gas to do so.

which would have enabled Duke to purchase gas mid-day.[55] But the conversation reflected none of these considerations. As far as the dispatcher knew, Duke was contemplating taking the gamble not to buy gas so the units would not be available, and the dispatcher was informing Duke that PJM believed it needed those units to be prepared to run – as Duke is obligated under the tariff to do.

31. Duke claims that PJM supports its interpretation that the operator's statements constitute a directive under section 10.3 of the tariff, because PJM states that "Duke purchased the gas in question in order to comply with a PJM dispatch instruction and under the extreme and specific circumstances of this case, it would be unjust and unreasonable for Duke's Lee resources, which PJM 'called upon to respond to critical reliability needs,' to suffer significant financial loss as a result of unrecovered costs."[56] However, PJM pointedly was not stating that this so-called dispatch instruction constituted a "directive" under section 10.3. PJM was instead explaining that, in PJM's estimation, this circumstance might justify the allowance of a non-tariff based uplift charge.[57] PJM, in fact, interprets the indemnification provision as does the Commission, stating: "PJM denies the discussions amounted to a directive to buy gas, within the meaning of Section 10.3 or otherwise."[58] PJM also recognized that interpreting this instruction as a directive to purchase natural gas would incorrectly permit Duke

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[55] Cecil Affidavit at 4 ¶ 13. Duke also states (Duke June 11, 2014 Answer at 5):

> Capacity Resources are not required to purchase gas before they clear the Day-ahead market, or even when they clear the Day-ahead market . . . . Instead, Capacity Resources specify a notification time with their Day-ahead offer, and PJM must provide advance notification if it intends to call the unit in Real-time. This notification time can take account of whether gas has been purchased for the unit(s) in question, with longer notification times submitted for resources for which gas has not yet been purchased, to allow time for that purchase to occur should they be called on to run. . . .

[56] PJM Answer to Complaint at 44.

[57] As discussed in the waiver section, however, despite PJM's beneficent leanings, permitting such retroactive recovery violates the filed rate doctrine.

[58] PJM Answer to Complaint at 4.

indemnification simply for honoring its capacity obligation under the tariff.[59] PJM, in fact, cited to Duke's own understanding that this verbal communication was not the equivalent of an electronic dispatch instruction, which would constitute a directive.[60]

32. Duke argues that allowing indemnification under section 10.3 will not expand the scope of that section or swallow other provisions that allocate costs under the OATT. But this outcome would, in fact, be the case. Under the rules of PJM's capacity market, resources compete to become Generation Capacity Resources (and receive capacity payments) by submitting bids into an annual auction. Such resources understand that, if accepted, they will be required to offer into PJM's energy market every day and to operate when dispatched, and they are able to choose a price to offer into the auction that, in their view, will compensate them sufficiently for taking on that obligation. Thus, Duke, like all capacity resources, has the responsibility for providing energy and capacity, but has the freedom as to what costs to incur, and what risks to take, to fulfill that obligation. It was for precisely this reason that Mr. Cecil and his staff were trying to choose among various options – bidding the Lee units into the Day-Ahead Energy Market with short notification periods, bidding the Lee units into the Day-Ahead Energy Market with long notification periods, not bidding the Lee units into the Day-Ahead Energy Market at all and risking capacity penalties. As the Commission stated in the June 9 Order, "as currently provided under the PJM OATT and Operating Agreement, Duke's decision as to how to buy fuel to satisfy [its] obligations is left to its discretion. Guaranteeing Duke full recovery of its costs under the PJM OATT's section 10.3 would improperly reallocate the risks related to fuel procurement, and the costs associated with its choices as to when or how to procure fuel, from capacity resources like Duke to PJM customers." [61]

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[59] "Duke is basically arguing that despite the fact that the Lee resources were Capacity Resources for the 2013-2014 Delivery Year and therefore had a must-offer requirement pursuant to which they were obligated to offer the resources into PJM's Day-ahead Energy Market, and therefore by extension be prepared to have sufficient gas available to operate those resources 365 days of the year, that its procurement of gas for those resources was for the ultimate benefit of Transmission Customers because without procuring gas, generators would not run and Transmission Customers could not receive electricity. Such a reading would turn the indemnification section into a blanket insurance policy for Market Sellers, and readings that 'transform definitive indemnification agreements into open-ended guarantees in the nature of insurance policies' should be disfavored." *Id*. at 43-44 (footnotes omitted).

[60] *Id*. at 42 (citing Complaint at 38 n. 126).

[61] June 9 Order, 151 FERC ¶ 61,206 at P 61.

33. Finally, we continue to find, contrary to Duke's argument, that this case is distinguishable from *NEPOOL*. Duke argues that "[b]y their nature, indemnity provisions are general yet must be applicable to specific factual situations," and that the tariff provision in issue in *NEPOOL* (section 7.5(g) of the restated NEPOOL Agreement), which allows for "the sharing by Participants . . . of payments and costs which are not otherwise reimbursed under this Agreement . . . incurred by Participants . . . as necessary . . . to meet the Pool's reliability objectives,"[62] is equivalent in purpose to the indemnification provision of the PJM OATT (section 10.3) under which Duke seeks relief here.[63] But we do not find these provisions similar. The NEPOOL provision applied before ISO-NE instituted a capacity market, and specifically provided for compensation for costs incurred to meet reliability objectives. PJM has no comparable provision. Section 10.3 of the PJM OATT addresses costs such as injury to or death of any person or damage to property,[64] not losses or costs incurred in adhering to tariff provisions providing required service to customers. Moreover, the NEPOOL provision applied to generators that incurred costs "not otherwise reimbursed under this agreement." But in PJM, as in ISO-NE, participants are now compensated through their capacity payments for the costs of standing ready to provide energy. The indemnity provision cannot be interpreted to provide retroactive compensation for the very costs of fulfilling Duke's capacity commitment for which it already has received compensation.

B. Waiver

1. Complaint

34. As an alternative to its indemnification argument, Duke asked the Commission to grant a limited, one-time waiver of three provisions of Schedule 1 of the PJM Operating Agreement: (1) section 1.9.7(b)(i), which authorizes generators to elect whether to use market-based or cost-based start-up and no-load fees twice a year but limits requests for payments to the biannually-established figures; (2) section 1.10.2(d), which, if PJM cancels its selection of a generator, caps that generator's request for make-whole

[62] *NEPOOL*, 107 FERC ¶ 61,183 at P 6.

[63] Request for Rehearing at 20.

[64] PJM OATT, section 10.3 (". . . any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties").

payments at actual costs up to the generator's start-up fee;[65] and (3) section 1.10.4(c), which prohibits self-scheduled resources from seeking to recover start-up fees.[66] Duke asserted that the PJM OATT and Operating Agreement contain a "make-whole" payment mechanism that would apply to the present case but for two factors: recovery of "start-up" costs is limited to a previously submitted *ex ante* figure, and make-whole payments are unavailable when a unit self-schedules service during the relevant time period, even when self-scheduling occurs for mitigation purposes by allowing the burning of gas to recoup part of the costs.[67]

35. Duke asserted that waiver is strongly supported by policy and equitable considerations.[68] Duke explained that, pursuant to section 1.9.7(b)(i), it elected to use a market-based start-up cost for the relevant six-month period (October 1, 2013-March 31, 2014) and chose $1,200; however, the $1,200 amount "was not developed with [NGPL's] restrictions in mind."[69] Duke added that, due to NGPL's restrictions in place, it was required to buy forty-eight (48) hours' worth of gas to be available for the full electric

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[65] Section 1.10.2(d) provides that:

> The Market Seller of a resource selected as a pool-scheduled resource shall receive payments or credits for energy, demand reductions or related services, or for start-up and no-load fees, from the Office of the Interconnection on behalf of the Market Buyers in accordance with Section 3 of this Schedule 1. Alternatively, the Market Seller shall receive, in lieu of start-up and no-load fees, its actual costs incurred, if any, up to a cap of the resource's start-up cost, if the Office of the Interconnection cancels its selection of the resource as a pool-scheduled resource and so notifies the Market Seller before the resource is synchronized.

[66] Section 1.10.4(c) provides that "a resource that has been self-scheduled shall not receive payments or credits for start-up or no-load fees."

[67] Complaint at 40-41.

[68] *Id*. at 7-8, 48-49. Duke noted that, to the extent necessary, it also requested waiver of the Commission's prior notice requirements, asserting that "the Commission permits back-ward looking waivers of the prior-notice requirement in extraordinary circumstances." *Id*. at 48 n.143.

[69] *Id.* at 44.

day on January 28, and under these unique facts the purchases constituted a legitimate start-up cost.[70] Therefore, Duke requested waiver of sections 1.9.7(b) and 1.10.2(d) so that it could recover these gas-purchase costs. Finally, Duke explained that it self-scheduled some of the Lee units to mitigate its losses and argued that it should not be penalized for doing so. On this basis, Duke requested waiver of section 1.10.4(c), which would otherwise bar its eligibility for make-whole payments.[71]

36. In support of its waiver request, Duke contended that the waiver is limited in scope, asserting that it would only apply to Duke and is narrowly drawn based on specific tariff provisions. In addition, it asserted that the waiver remedies a concrete problem, namely stranded gas-purchase costs. Finally, Duke asserted that granting waiver will have no unintended consequences, such as harm to third parties, because the costs it seeks to recover were incurred to provide PJM transmission customers a public good, reliability.[72]

2. June 9 Order

37. The Commission denied Duke's request for waiver, on the basis that it would violate the filed rate doctrine and the rule against retroactive ratemaking. It stated that the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority,"[73] and the related rule against retroactive ratemaking "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."[74]

38. When evaluating whether granting the requested relief would violate either the filed rate doctrine or the rule against retroactive ratemaking, the Commission considers whether the ratepayers had sufficient notice that the approved rate was subject to

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[70] *Id.*

[71] *Id.* at 45.

[72] *Id.* at 46-47.

[73] *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (*Arkla*).

[74] *Towns of Concord v. FERC*, 955 F.2d 67, 71 & n.2 (D.C. Cir. 1992).

change.[75] The Commission found that "Duke seeks a retroactive waiver of various provisions of the PJM OATT and Operating Agreement in order to recover gas-related costs . . . incurred prior to the date on which it made its waiver filing,"[76] and that ratepayers had not received prior notice of Duke's application for such retroactive cost recovery, which was sought roughly three months after the events in question. Thus, the Commission found that the relief sought by Duke was prohibited by the filed rate doctrine and the rule against retroactive ratemaking.[77]

3. Request for Rehearing

39. Duke asserts that the Commission erred by denying waiver because the Commission: (a) failed to explain why "extraordinary circumstances" did not warrant waiving the prior notice rule; and (b) ignored analogous precedents and equitable and policy principles.

40. Duke states that the Commission can and has waived the prior notice requirement to ensure that resources are compensated for providing a reliability service. Duke argues that the Commission permits backward-looking waiver of the prior-notice requirement in "extraordinary circumstances," such as here, where PJM was expecting its load to be 141,000 megawatts, as compared to a prior winter peak of about 126,000 MW, and

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[75] *See Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993); *see also PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 46 (2014) (*PJM*) ("The waiver is effective prospectively, as of the date of this order, and therefore does not retroactively change the rules . . . . Further, the instant filing put market participants on notice regarding a possible rule change."); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990) (applying same concepts in waiver context); *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 968-70 (D.C. Cir. 2003) (applying same concepts in waiver context).

[76] June 9 Order, 151 FERC ¶ 61,206 at P 68.

[77] The Commission also found that its prior decision in *Midwest Independent Transmission System Operator, Inc.* (*MISO*), 142 FERC ¶ 61,170, *order on reh'g*, 144 FERC ¶ 61,128 (2013), did not support Duke's argument that "the Commission permits backward looking waivers of the prior-notice requirement in extraordinary circumstances" (Duke Complaint at 48 n.143, citing *MISO*, 142 FERC ¶ 61,170 at PP 84-85). The Commission noted that, in *MISO*, it granted waiver not based on extraordinary circumstances. Rather, the Commission had determined that it was appropriate to grant waiver because prior notice had been given to ratepayers that they would be responsible for the costs in question (*MISO*, 142 FERC ¶ 61,170 at PP 84-88).

reserves of only 1,000 MW, as compared to the reserve objective of 9,450 MW.[78] Duke also argues that the Commission erred when it stated that, in *MISO*, it granted a waiver of the prior-notice rule "not based on extraordinary circumstances," but "because prior notice had been given to ratepayers that they would be responsible for the costs." [79] According to Duke, *MISO* could not have been decided on those grounds, because the ratepayers lacked notice that they were, in fact, receiving service, because of the tariff's confidentiality provisions, and a previous decision of the Commission had ruled that the provisions in question "were not sufficiently detailed to constitute a filed rate mechanism that could provide ratepayer notice." [80]

41. Duke argues that *MISO* is "best understood" as continuing the Commission's practice of waiving prior notice in extraordinary circumstances, especially where reliability concerns loom large.[81] In that case, a generator began providing service under a special agreement to extend the life of aging resources to ensure system reliability but did not submit the agreement for Commission approval for several months, thus leaving the generator to provide service at a potential loss. The generator argued that good cause existed to waive the prior-notice rule "because the delay in filing . . . was a consequence of the negotiations for the agreement" lasting past the date that service was required[82] – i.e., because, according to Duke, extraordinary circumstances existed. Duke argues that the Commission "did not dispute the applicability of the extraordinary-circumstances standard"[83] and states that the Commission found that waiver of the prior-notice rule was appropriate under the facts of the case, where the generator acted in order to preserve system reliability.[84]

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[78] Request for Rehearing at 23.

[79] *Id*. at 24 n.115 (citing June 9 Order, 151 FERC ¶ 61,206 at P 68).

[80] Request for Rehearing at 25 n.115 (citing Moeller Dissent from June 9 Order, 151 FERC ¶ 61,206 (Moeller Dissent) at 2-3).

[81] Request for Rehearing at 25.

[82] *Id*. at 25 n.120 (citing *MISO*, 142 FERC ¶ 61,170 at P 77).

[83] Request for Rehearing at 25.

[84] Id. (citing *MISO*, 142 FERC ¶ 61,170 at PP 84-86).

42. Duke argues that additional Commission decisions reflect the principle that waiver is appropriate where a party assumes costs to maintain reliability. It points to *New York Independent System Operator, Inc.* (*NYISO*),[85] in which NYISO was faced with spikes in natural gas costs caused by the same polar-vortex period at issue here, and generators sought waiver of tariff provisions that prevented them from recovering those full costs. The Commission granted the requested waiver because it "addresse[d] the concrete problem that generators might be required to provide service to support reliability but without being able to recoup the incremental operating costs that they incur, which would discourage generators from offering service at a time when they are needed."[86] Duke also points to *PJM*,[87] in which PJM received a waiver from the Commission for certain provisions of the PJM OATT and Operating Agreement to address spikes in fuel costs during the same polar-vortex conditions. The requested waiver would permit sellers that submit cost-based offers from Generation Capacity Resources into the PJM energy markets and whose costs exceed the applicable energy market clearing price to receive a make-whole payment covering the difference between their costs and the clearing price.[88]

43. Duke notes that both *NYISO* and *PJM* involved forward-looking waivers, but argues that both cases recognized the extraordinary nature of the polar vortex that caused Duke's difficulties here. Duke asserts that the Commission failed to explain why Duke should be subject to any different treatment than those cases, and thus engaged in unreasoned decision-making.

44. Duke additionally argues that equity and public policy support reimbursing Duke, and that it should not be punished for doing what was not only right but compulsory.[89] Duke further notes that the Commission's institution of a section 206 proceeding to prevent such difficulties in the future implicitly acknowledges that this is unreasonable. Duke asserts that PJM needs to be able to rely on generators to comply with its dispatch instructions, and thus, requiring generators "to provide service to support reliability but

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[85] 146 FERC ¶ 61,061 (2014).

[86] *Id*. P 20.

[87] 146 FERC ¶ 61,078.

[88] *Id*. PP 1-2.

[89] Request for Rehearing at 28 (citing Moeller Dissent at 1 (Commission's order "plac[es] Duke in a no-win situation where it acquired natural gas consistent with PJM's instructions, but was unable to recover the associated costs when PJM chose not to dispatch its units").

without being able to recoup the incremental operating costs that they incur . . . would discourage generators from offering service at a time when they are needed."[90]

4. **Commission Ruling**

45. The Commission affirms its denial of Duke's request for waiver of PJM tariff provisions, i.e., waiver of the filed rate. Duke'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, later surcharge for service already performed.

46. 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 doctrine retroactively based on equitable considerations in *Columbia Gas Transmission Corporation v. FERC I, II, and III,*[91] 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.[92] 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.[93] 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-

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[90] Request for Rehearing at 28 n.35 (citing PJM Answer at 48).

[91] 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*).

[92] *Regulations Implementing Section 110 of 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) (Order No. 94).

[93] *Id.* at 31,218.

1983 period. The pipelines contended that, due to restructuring changes in the natural gas market, they were unable to recover these costs from current customers, leaving large unrecovered balances.[94] The pipelines argued that considerations of equity required those who had previously purchased that gas in 1980-83 to pay its true cost through direct bills based on past purchases.[95] 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."[96]

47. 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.[97] 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.[98] 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.[99]

48. 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 that 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 that "the overriding public interest in the maintenance of orderly gas markets through the

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

[95] *Id*.

[96] *Id.* at 61,544-45.

[97] *Columbia I*, 831 F.2d at 1141-42.

[98] The corresponding provision of the FPA is in section 205(d).

[99] *Columbia II*, 844 F.2d at 880.

equitable allocation of costs" made it "necessary and proper . . . to waive the filed rate doctrine."[100]

49. 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."[101] 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.

50. 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 rates 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.[102]

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."[103] The court recognized that the Commission "may well have been correct in its assessment of the equities here

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

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

[102] *Columbia III*, 895 F.2d at 797.

[103] *Id*.

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 . . . ."[104]

51. We find that the court's unambiguous instruction in *Columbia III* dictates the result here. Duke 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 Duke seeks to recover through this waiver.[105] Whether Duke'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.[106] Duke argues that its request for waiver would avoid the inequity of forcing it to absorb nearly $10 million in costs incurred in good faith to ensure that its units were available for reliability reasons. 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.[107] Indeed, unlike this case, in the *Columbia* cases, 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 for past sales could be recovered. Thus, we continue to find that Duke's waiver request is barred by the filed rate doctrine and the rule against retroactive ratemaking.

52. Duke, nevertheless, asserts that there is an "extraordinary circumstances" exception to the filed rate doctrine, citing to a Commissioner's dissent and to his reliance on the Commission's decision in *MISO*,[108] and asserting that the requirement of notice of

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[104] *Id.*

[105] June 9 Order, 151 FERC ¶ 61,207 at P 46.

[106] *Columbia III*, 895 F.2d at 797.

[107] *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.

[108] *MISO*, 142 FERC ¶ 61,170 at PP 85-86.

potential additional charges for an already-performed service (that would preclude application of the filed rate doctrine) may be waived under extraordinary circumstances.[109] However, Duke does not cite any court precedent supporting an "extraordinary circumstances" exception from the filed rate doctrine.[110] Indeed, *Columbia III* makes clear that the Commission lacks authority to permit such exceptions to the filed rate doctrine. The circumstances addressed by the court in *Columbia III* of a delayed billing of $1.5 billion in costs to pipelines due to the Commission's inaction in a rulemaking proceeding with the result that an ongoing restructuring of the natural gas industry rendered the pipelines unable to recover the costs in current rates were arguably extraordinary. Yet the court found that the Commission lacked any authority to waive the filed rate.[111]

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[109] Request for Rehearing at 25.

[110] Contrary to Duke's assertion (Request for Rehearing at 23 n.107), *Xcel Energy Services v. FERC*, 510 F.3d 314 (D.C. Cir. 2007) (*Xcel Energy*) does not support Duke's argument. *Xcel Energy* addressed a situation where Xcel had negotiated new agreements with customers (so that the customers were on notice of the new rates) and then sought to make those agreements effective earlier than after 60 days' notice to the Commission and to the public (*see* 16 U.S.C. § 824d(d) (2012)), rather than the case here, where customers had no notice that over three months later, Duke would seek to recover additional expenses associated with providing service during January 2014. While section 205(d) of the Federal Power Act (FPA), 16 U.S.C. § 824d(d) (2012), provides that rates may not be charged except after 60 days' notice to the Commission and to the public, section 205(d) provides that the Commission, "for good cause shown, may allow changes to take effect without requiring the [60] days' notice herein provided for." *Id*. But that is for a change in rates, as distinct from a retroactive waiver of the filed rate for January 28, 2014 – which Duke sought in its complaint of May 5, 2014. And while the Commission does consider extraordinary circumstances in deciding whether to waive the 60-day prior notice requirement for a proposed rate when that rate is an agreement for new service filed on or after the date service commenced, *see Central Hudson Gas & Elec. Corp. et al.*, 60 FERC ¶ 61,106, at 61,339, *order on reh'g*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*), that is a very different circumstance from a requested waiver of the filed rate applicable during a single day over three months earlier.

[111] We further note that the Commission has specifically affirmed this position with regard to complaint cases filed under section 206, and rejected an "extraordinary circumstances" exception to the rule against retroactive ratemaking. *See AmerenEnergy Resources Generating Co v. Midcontinent Independent System Operator, Inc.*, 153 FERC ¶ 61,062, at P 58 (2015) (*Ameren*):

(continued…)

53. In any event, contrary to Duke's view, *MISO* does not support the proposition that a retroactive waiver of the filed rate is appropriate in extraordinary circumstances. While in *MISO*, one party did urge that the Commission use an extraordinary-circumstances test,[112] the Commission did not rely on that argument in reaching its ruling. In *MISO*, a generator sought to shut down its units on June 15, 2012, but agreed to keep operating the units pending negotiations with MISO to receive a System Support Resource (SSR) agreement. MISO filed that agreement on October 5, 2012, and sought to make it effective as of June 15, 2012.[113] The Commission stated it was waiving the prior notice requirement to make the proposed rate effective on the date the generator began providing service under the agreeement, because MISO's tariff provisions "clearly state that, '[d]uring the period that a Generation Resource or SCU is subject to an executed Attachment Y-1 agreement, it shall qualify as an SSR Unit'…. [and the generator] has

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> Regarding Illinois Power's arguments that retroactive ratemaking is permissible given previous guidance by the Commission that provided [System Support Resource (SSR)] owners the ability to challenge MISO's SSR compensation filings, while it is true that an SSR owner has the opportunity to present concerns, the relief the Commission may grant is necessarily restricted by the requirements of section 206 of the FPA and the requirements of the filed rate doctrine. . . . We . . . reject Illinois Power's claim that the Commission failed to adequately consider the unique and extraordinary circumstances of this case in denying the waiver of the prior notice requirement. As discussed above, the Commission can only make a rate increase under section 206 of the FPA effective prospectively from the date of the order fixing the new rate; the statutory limitation on the Commission's authority cannot be waived by extraordinary circumstances or by notice given to parties that the level of SSR compensation . . . was in dispute before the issuance of the Ameren Complaint Order.

[112] *MISO*, 142 FERC ¶ 61,170 at P 79.

[113] MISO stated that it had previously processed the generator's application for SSR service as early as 2011 and that the delay in filing the proposed SSR Agreement was a consequence of the negotiations for the agreement not being able to be completed before the requested shutdown date. *Id*. PP 76-77.

been providing reliability service subject to this SSR Agreement since June 15, 2012."[114] The Commission's waiver of the 60-day prior notice requirement for the proposed rate therefore was based on the MISO tariff's SSR provisions. In contrast, the PJM tariff in effect at the time Duke incurred the costs at issue here did not provide for the recovery of those costs.[115]

54. Similarly, Duke's reliance on *NYISO* and *PJM*, which also involved the polar vortex of January 2014, is misplaced. Given our findings here, the PJM and NYISO waivers do not support its requested relief. Furthermore, as Duke acknowledges, those cases concerned prospective, not retroactive, waivers of the filed rate.

55. As discussed above, we find Duke's waiver request would violate the filed rate doctrine and therefore deny rehearing.

<u>The Commission orders</u>:

Duke'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.

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[114] *Id.* P 85; *see Central Hudson*, 60 FERC ¶ 61,106 at 61,339 (providing for waiver of the 60-day notice requirement for filings that increase rates when the effective date is clearly prescribed).

[115] As shown by the *Ameren* case, the Commission recognizes that the filed rate doctrine does apply in SSR cases despite the emergency need for this service. Further, while we believe these orders 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 requested waiver in this case.