

**BEFORE
THE OHIO POWER SITING BOARD**

In The Matter of the Application of Scioto)
Farms Solar Project, LLC for a Certificate of) Case No. 21-868-EL-BGN
Environmental Compatibility and Public)
Need.)

**APPLICANT SCIOTO FARMS SOLAR, LLC'S NOTICE OF FILING
IN RELATED PROCEEDING**

Scioto Farms Solar Project, LLC respectfully gives notice to the Ohio Power Siting Board of its October 6, 2023 Request for Rehearing of the September 8, 2023 Order Denying Waiver Request and Accepting Notice of Cancellation issued by the U.S. Federal Energy Regulatory Commission in Docket Nos. ER23-2375-000 and ER23-2458-000. A true and correct copy of the Request for Rehearing is attached hereto as Exhibit A.

In the FERC Proceeding, Scioto Farms Solar sought a waiver of the procedural deadline in section 212.4(c) of the PJM Interconnection, LLC Open Access Transmission Tariff. FERC denied said waiver request, but through the Request for Rehearing, Scioto Farms Solar is seeking reconsideration of the waiver denial in the FERC Proceeding.

Because Scioto Farms Solar is still actively seeking relief from the FERC waiver denial, this Board should continue in the normal course with issuing a decision on Scioto Farms Solar's Application.

Scioto Farms Solar respectfully requests that its Application be granted and that a Certificate be issued.

Respectfully submitted on behalf of
SCIOTO FARMS SOLAR PROJECT, LLC



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CERTIFICATE OF SERVICE

The OPSB's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 17th day of October 2023 via email.



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

Scioto Farms Solar Project, LLC)	Docket No. ER23-2375-000
)	
PJM Interconnection, L.L.C.)	Docket No. ER23-1452-000
)	
)	(Not Consolidated)

**REQUEST FOR REHEARING
OF SCIOTO FARMS SOLAR PROJECT, LLC**

Pursuant to Section 313(a) of the Federal Power Act,¹ and Rule 713 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure,² Scioto Farms Solar Project, LLC (“Scioto Farms”) respectfully requests rehearing of the Commission’s September 8, 2023 Order³ denying Scioto Farms’ request for a one-time, limited waiver of a procedural deadline in Section 212.4(c) of the PJM Interconnection L.L.C.’s (“PJM”) Open Access Transmission Tariff (“Tariff”).⁴ By denying Scioto Farm’s Waiver Request, the Commission: (1) failed to engage in reasoned decision-making by departing from precedent without a reasoned explanation or notice, and (2) acted arbitrarily and capriciously by finding that the filed rate doctrine precludes the Commission from granting retroactive waivers of non-rate tariff provisions. The only appropriate remedy for these errors is for the Commission to grant rehearing of the September 8 Order, and grant Scioto Farm’s

¹ 16 U.S.C. § 825l.

² 18 C.F.R. § 385.713 (2023).

³ *Order Denying Waiver Request and Accepting Notice of Cancellation*, 184 FERC ¶ 61,153, Docket Nos. ER23-2375-000, ER23-1452-000 (Sept. 8, 2023) (“September 8 Order”).

⁴ *Request of Scioto Farms Solar Project, LLC For Limited Waiver, Shortened Comment Period, and Expedited Action*, Docket Nos. ER23-2375-000, ER23-1452-000 (July 10, 2023) (“Waiver Request”).

Waiver Request, thereby allowing Scioto Farms to maintain its currently assigned AD2-162 PJM Queue Position.

I. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

In accordance with Rule 713(c),⁵ Scioto Farms provides the following statement of issues and specification of errors regarding the September 8 Order:

1. The Commission's determination that the filed rate doctrine precludes it from granting retroactive waivers of non-rate Tariff provisions is a departure from decades of FERC precedent,⁶ which the Commission has undertaken without

⁵ 18 C.F.R. § 385.713(c).

⁶ See, e.g., *EDF Renewables, Inc.*, 181 FERC ¶ 61,189 at P 13 (2022) (Commission granting retroactive waiver of a procedural deadline to amend a certification submitted by the wrong party); *Savion, LLC*, 181 FERC ¶ 61,188 at P 13 (2022) (Commission granting retroactive waiver of a procedural deadline to amend a certification submitted by the wrong party); *Lightsource Renewable Energy Dev., LLC*, 181 FERC ¶ 61,187 at P 13 (Commission granting retroactive waiver of a procedural deadline following a submission with invalid certifications that was identified as inadequate months after the deadline); *Buchanan County Solar Project, LLC*, 175 FERC ¶ 61,109 at P 13 (2021) (Commission granting retroactive waiver of a procedural deadline due to an oversight and the COVID-19 pandemic); *SunEnergyI, LLC*, 176 FERC ¶ 61,004 at P 42 (2021) (Commission granting retroactive waiver of a procedural deadline because applicant believed the relevant studies contained material errors and believed that the deadline did not apply to the relevant projects); *Rolling Hills Generating, L.L.C.*, 175 FERC ¶ 61,108 at P 13 (2021) (Commission granting retroactive waiver of a procedural deadline after a box was accidentally left unchecked in a submission); *Novera Energy, LLC*, 175 FERC ¶ 61,107 at P 14 (2021) (Commission granting retroactive waiver of a procedural deadline due to an inadvertent mistake and the COVID-19 pandemic); *Glidepath Ventures, LLC*, 173 FERC ¶ 61,085 at P 16 (2020) (Commission granting retroactive waiver of a procedural deadline due to a misunderstanding regarding the impact of suspension of the projects); *Hecate Energy Highland LLC*, 167 FERC ¶ 61,267 at P 12 (2019) (Commission granting retroactive waiver of a procedural deadline when the due date was mistaken by one day and payment was received a day late); *Invenergy Solar Development North America LLC*, 164 FERC ¶ 61,095 at P 12 (2018) (Commission granting retroactive waiver of a procedural deadline following an internal accounting error); *Dominion Energy Generation Marketing, Inc.*, 162 FERC ¶ 61,281 at P 12 (2018) (Commission granting retroactive waiver of a procedural deadline due to an administrative oversight); *Robinson Power Co., LLC*, 162 FERC ¶ 61,092 at P 13 (2018) (Commission granting a retroactive waiver of a procedural deadline after applicant was unable to complete its request by the deadline); *Northeast Energy Associates*, 152 FERC ¶ 61,175 at P 15 (2015) (Commission granting retroactive waiver of a procedural deadline following an administrative error); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 at PP 30-32 (2007) (Commission granting retroactive waiver following a failed good faith attempt to transfer a deposit by the deadline); *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 at P 5 (2003); *Great Lakes Gas Transmission Ltd. P'ship*, 102 FERC ¶ 61,331 at P 16 (2003); *Wisvest-Connecticut, LLC v. ISO New England, Inc.*, 101 FERC ¶ 61,372 at P 24 (2002); *Northern Nat. Gas Co.*, 76 FERC ¶ 61,330, at 62,580 (1996).

reasoned explanation or notice to participants in the organized wholesale power markets.⁷

2. The Commission's determination that the filed rate doctrine precludes it from granting a retroactive waiver of a non-rate tariff term is unsupported by law or fact, rendering it arbitrary and capricious. Specifically, the Commission has failed to demonstrate that it engaged in reasoned decision-making in finding that the filed rate doctrine applies to non-rate tariff terms and conditions.⁸

II. BACKGROUND

The relevant facts supporting the Waiver Request are undisputed. When Scioto Farms executed its ISA with PJM, it elected to pay Deferred Security pursuant to Section 212.4(c) of the Tariff. Scioto Farms was required to provide the Deferred Security to PJM by June 21, 2023.⁹ For reasons that were unexpected and entirely outside of Scioto Farms' control, despite having initiated the process to provide the Deferred Security well in advance of the June 21, 2023 deadline, the bank issuing the Deferred Security experienced technical difficulties that

⁷ September 8 Order at P 25. *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) (agency must provide a reasoned explanation before departing from precedent); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (failure to explain departure from precedent is arbitrary and capricious); *Williams Gas Processing-Gulf Coast Co., LP v. FERC*, 475 F.3d 319, 328-29 (D.C. Cir. 2006) (FERC cannot announce and apply new policy without explanation or justification); *Missouri PSC v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000) ("A passing reference . . . is not sufficient to satisfy the Commission's obligation to carry out reasoned and principled decisionmaking. We have repeatedly required the Commission to fully articulate the basis for its decision.") (internal quotation marks omitted); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014) (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 at 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

⁸ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (ruling that an agency failed "to offer [a] rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard."); *Emera Me. v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017) (finding that the Commission's judgement must be supported by substantial evidence and "the methodology used in arriving at that judgement [must be] either consistent with past practice or adequately justified.").

⁹ See *Motion for Leave to Answer and Answer of Scioto Farms Solar Project, LLC to Limited Protest of PJM Interconnection, L.L.C.*, Exhibit No. SFS-1 at 7:3-8:7, Docket Nos. ER23-2375-000, ER23-1452-000 (August 11, 2023) ("Answer to Answer").

7:3-8:7.

delayed PJM's receipt of the Deferred Security until June 22, 2023.¹⁰ On July 5, 2023, PJM informed Scioto Farms via email that because PJM had not received the Deferred Security by June 21, 2023, it would be terminating the ISA.

On July 10, 2023, Scioto Farms submitted its Waiver Request, demonstrating that it had met the Commission's four-part test for granting waivers.¹¹ On July 13, 2023 and July 31, 2023, PJM filed a motion to intervene¹² and a limited protest¹³ to Scioto Farms' Waiver Request, respectively. On August 11, 2023, Scioto Farms responded with an Answer to PJM's Protest.¹⁴ On September 8, 2023, the Commission issued the September 8 Order.

III. REQUEST FOR REHEARING

The Commission erred in denying Scioto Farms' Waiver Request. The Commission's determination that it lacks the authority to grant retroactive waivers of non-rate tariff provisions, such as the procedural deadline at issue in this proceeding, contradicts decades of Commission precedent without reasoned explanation. No law has been passed, no regulation implemented, and no legal or administrative proceeding adjudicated that requires the Commission to suddenly find – as it has here – that it now lacks the authority it wielded for decades prior without objection. In the absence of any such authority, the Commission's recent about-face on retroactive waivers is unsupported by law or fact and should itself be reversed. Moreover, the Commission's distinction between retroactive and prospective waivers in the context of non-rate administrative tariff provisions is illusory. Scioto Farms has demonstrated

¹⁰ Answer to Answer at 5-6.

¹¹ Waiver Request at 5.

¹² *Motion to Intervene of PJM Interconnection, L.L.C.*, Docket No. ER 23-2375-000 (July 13, 2023).

¹³ *Limited Protest of PJM Interconnection LLC on the Merits of Waiver Request and Response in Support of Request for Expedited Action*, Docket Nos. ER23-2375-000, ER23-1452-000 (July 31, 2023) ("PJM Protest").

¹⁴ See Answer to Answer.

that its Waiver Request satisfies the Commission’s four-part waiver test, is consistent with decades of precedent granting nearly identical waiver requests, and should be granted by the Commission so that Scioto Farms may retain its current PJM queue position.

A. The Commission’s Determination Departs From Decades of Nearly Identical Commission Precedent Without Providing A Reasoned Explanation

The Commission has properly granted retroactive waivers of non-rate tariff provisions for decades.¹⁵ Indeed, the Commission has granted retroactive waivers of non-rate tariff provisions in situations nearly identical to the one encountered by Scioto Farms as recently as 2022.¹⁶ Yet, in denying Scioto Farms’ Waiver Request, the Commission departed from this

¹⁵ See, e.g., *Invenergy Solar Development North America LLC*, 164 FERC ¶ 61,095 at P 12; *BSW ProjectCo LLC*, 163 FERC ¶ 61,213 at P 11 (2018) (granting waiver of a payment deadline because BSW acted in good faith to comply with, even though “complications caused by the U.S.-European time difference” contributed to missing the deadline); *First Solar Dev., LLC*, 161 FERC ¶ 61,256 at P 20 (2017) (granting waiver of deadline that was missed by two days); *Lark Energy Dev., Inc.*, 158 FERC ¶ 61,009 at PP 9-10 (2017) (granting waiver when “Lark Energy took all necessary steps to wire transfer the deposits to PJM by the requisite deadline and satisfied all other processing requirements” but missed the deadline by one day); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059 at P 13 (2016); *Calpine Energy Services, L.P.*, 154 FERC ¶ 61,082 at P 11 (2016).

¹⁶ See, e.g., *EDF Renewables, Inc.*, 181 FERC ¶ 61,189 at P 13 (Commission granting retroactive waiver of a procedural deadline to amend a certification submitted by the wrong party); *Savion, LLC*, 181 FERC ¶ 61,188 at P 13 (Commission granting retroactive waiver of a procedural deadline to amend a certification submitted by the wrong party); *Lightsource Renewable Energy Dev., LLC*, 181 FERC ¶ 61,187 at P 13 (2022) (Commission granting retroactive waiver of a procedural deadline following a submission with invalid certifications that was identified as inadequate months after the deadline); *Buchanan County Solar Project, LLC*, 175 FERC ¶ 61,109 at P 13 (Commission granting retroactive waiver of a procedural deadline due to an oversight and the COVID-19 pandemic); *SunEnergyI, LLC*, 176 FERC ¶ 61,004 at P 42 (Commission granting retroactive waiver of a procedural deadline because applicant believed the relevant studies contained material errors and believed that the deadline did not apply to the relevant projects); *Rolling Hills Generating, L.L.C.*, 175 FERC ¶ 61,108 at P 13 (Commission granting retroactive waiver of a procedural deadline after a box was accidentally left unchecked in a submission); *Novera Energy, LLC*, 175 FERC ¶ 61,107 at P 14 (Commission granting retroactive waiver of a procedural deadline due to an inadvertent mistake and the COVID-19 pandemic); *Glidepath Ventures, LLC*, 173 FERC ¶ 61,085 at P 16 (Commission granting retroactive waiver of a procedural deadline due to a misunderstanding regarding the impact of suspension of the projects); *Hecate Energy Highland LLC*, 167 FERC ¶ 61,267 at P 12 (Commission granting retroactive waiver of a procedural deadline when the due date was mistaken by one day and payment was received a day late); *Invenergy Solar Development North America LLC*, 164 FERC ¶ 61,095 at P 12 (Commission granting retroactive waiver of a procedural deadline following an internal accounting error); *Dominion Energy Generation Marketing, Inc.*, 162 (continued on next page)

extensive body of precedent by baldly concluding that Scioto Farms' Waiver Request "is retroactive in nature and is prohibited by the filed rate doctrine. Accordingly, we deny Scioto Farms' waiver request."¹⁷

The Commission cannot simply depart from years of precedent and announce what amounts to the application of a new policy without explanation or justification.¹⁸ Furthermore, "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."¹⁹ The Commission's actions here amount to changing policy *sub silentio*.

The Commission previously considered, and specifically rejected, arguments that the filed rate doctrine prevents it from granting retroactive waivers in narrow circumstances, such as those presented here.²⁰ That interpretation was upheld consistently thereafter, until recently.

FERC ¶ 61,281 at P 12 (Commission granting retroactive waiver of a procedural deadline due to an administrative oversight); *Robinson Power Co., LLC*, 162 FERC ¶ 61,092 at P 13 (Commission granting a retroactive waiver of a procedural deadline after applicant was unable to complete its request by the deadline); *Northeast Energy Associates*, 152 FERC ¶ 61,175 at P 15 (Commission granting retroactive waiver of a procedural deadline following an administrative error); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 at PP 30-32 (Commission granting retroactive waiver following a failed good faith attempt to transfer a deposit by the deadline); *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330; *Great Lakes Gas Transmission Ltd. P'ship*, 102 FERC ¶ 61,331 at P 16; *Wisvest-Connecticut, LLC v. ISO New England, Inc.*, 101 FERC ¶ 61,372 at P 24; *Northern Nat. Gas Co.*, 76 FERC ¶ 61,330, at 62,580.

¹⁷ September 8 Order at P 25. *Contra ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (agency must provide a reasoned explanation before departing from precedent).

¹⁸ *Williams Gas Processing-Gulf Coast Co., LP v. FERC*, 475 F.3d 319, 328-29.

¹⁹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 at 515.

²⁰ See, e.g., *Waterbury Generation LLC*, 120 FERC ¶ 61,007 at PP 30-31 (rejecting arguments to deny waiver on the basis of the filed rate doctrine, explaining: "While we agree with ISO-NE that the FCM rules, including the requirement to submit the Deposit by February 20, 2007, constitute a filed rate, we believe granting waiver in these narrow circumstances is appropriate. In the past, the Commission has granted a one-time waiver of the filed rate to alleviate the effects of errors by ISOs or other entities. Specifically, the Commission has granted tariff waivers where: (1) the underlying error was made in good faith; (2) the waiver was of limited scope; (3) a concrete problem needed to be remedied; and (4) the waiver did not have undesirable consequences, such as harming third parties."); see also *Central Vermont Pub. Serv. Corp., et al.*, 121 FERC ¶ 61,225 at P 28 (2008) ("The Commission explained the standard by which parties may obtain a one-time waiver of a filed rate. Specifically, we have granted tariff waivers (continued on next page)

The Commission has not explained why that precedent should not be followed here, or how the filed rate doctrine now applies in a way that it did not when previously considered.²¹ In fact, the Commission's September 8 Order fails to even recognize its prior, directly contradictory precedent.

In short, nothing has changed between 2022 – when the Commission was routinely granting retroactive waivers of non-rate Tariff provisions – and now to support the Commission's unexplained rejection of its precedent.²² There has been no new legislation or judicial precedent that supports the Commission's departure. And the Commission's September 8 Order does not, and cannot, cite to any support for its departure from its well-established precedent. This is not reasoned and principled decision-making.²³

where (1) the underlying error was made in good faith; (2) the waiver was of limited scope; (3) a concrete problem needed to be remedied; and (4) the waiver did not have undesirable consequences, such as harming third parties. The Commission finds that the request for limited waiver in the instant case satisfies the aforementioned conditions.”); *Mirant Americas Energy Mktg., L.P., et al.*, 112 FERC ¶ 61,056 at P 18 (2005) (“In this matter, unlike the facts presented in *Edison*, the Commission's decision to grant waiver did not retroactively change anyone's rates during the period the mitigation agreements were in effect, *i.e.*, the rates authorized were no higher than the rates actually charged and, in fact, were the same. Therefore, the filed rate doctrine and the rule against retroactive ratemaking are inapposite to this matter.”); *Con. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (quoting *Exxon Co., U.S.A., v. FERC*, 182 F.3d 30,49 (D.C. Cir. 1999) (“[t]he rule against retroactive ratemaking ... does not extend to cases in which [customers] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service” (alteration and omission in original) (internal quotation marks and citations omitted))).

²¹ *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (failure to explain departure from precedent is arbitrary and capricious); *Williams Gas Processing-Gulf Coast Co., LP v. FERC*, 475 F.3d 319, 328-29 (FERC cannot announce and apply new policy without explanation or justification); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014) (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)).

²² *Scioto Farms* notes that the various retroactive waivers of administrative tariff provisions that the Commission granted in 2021 and 2022 were granted either contemporaneous with, or following, the D.C. Circuit case in *Oklahoma Gas & Electric Co.*

²³ *Missouri PSC v. FERC*, 234 F.3d 36, 41 (“A passing reference . . . is not sufficient to satisfy the Commission's obligation to carry out reasoned and principled decisionmaking. We have repeatedly required the Commission to fully articulate the basis for its decision.”) (internal quotation marks omitted).

B. The Commission’s Interpretation Of The Filed Rate Doctrine As Precluding The Granting A Retroactive Waiver of Non-Rate Tariff Provisions is Arbitrary and Capricious

The FPA requires that “all rules and regulations affecting or pertaining to such rates or charges [in connection with the transmission or sale of electric energy] shall be just and reasonable.”²⁴ Any interpretation affecting such rates and charges “that is not just and reasonable is hereby declared to be unlawful.”²⁵ For a number of reasons, the Commission’s application of the filed rate doctrine to preclude a retroactive waiver of a non-rate tariff provision is facially unjust and unreasonable in violation of the FPA, and therefore its decision is arbitrary and capricious.

First, in a April 2023 order denying a retroactive waiver request of an administrative tariff provision, the Commission expressly noted that applying the filed rate doctrine to deny the waiver request produces an “inequitable result[.]”²⁶ The Commission further urged NYISO, in that case, to “consider revising its OATT to permit the Commission to waive such deadlines.”²⁷ In so doing, the Commission tacitly recognized that the lack of an ability to seek a retroactive waiver is unjust, unreasonable, and places the subject of the administrative deadline at a disadvantage in violation of section 206 of the Federal Power Act.

Second, as described in *Oklahoma Gas & Electric*, the filed rate doctrine “is shorthand for the interconnected statutory requirements that bind regulated entities to charge only the rates filed with FERC and to change their rates only prospectively.”²⁸ Additional caselaw explains,

²⁴ 16 U.S.C. § 824d(a).

²⁵ *Id.*

²⁶ *Hecate Grid Clermont I LLC*, 183 FERC ¶ 61,011 at n. 20 (Apr. 7, 2023).

²⁷ *Id.*

²⁸ *Okla. Gas & Elec. Co.*, 11 F.4th at 829; *see also S. Cal. Edison Co. v. FERC*, 805 F.2d 1068 at n. 2 (D.C. Cir. 1986) (“It is, of course, a cardinal rule of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle.”) (quoting *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975)).

“[b]y authorizing only prospective rate changes, these doctrines ensure rate predictability, and by preventing discriminatory pricing, they promote equity.”²⁹ Yet, the granting of a retroactive waiver of an administrative deadline under the circumstances presented here does not implicate, let alone undermine, the purpose behind the filed rate doctrine.³⁰

When a market participant files a waiver request to remedy its own non-compliance with an administrative tariff provision, it must meet the Commission’s four-part test to grant such a waiver. That test requires the market participant to demonstrate that: (1) the waiver is being sought in good faith; (2) it is of limited scope; (3) it addresses a concrete problem that will be remedied by the waiver; and (4) the waiver will not have negative consequences for the filing party or third parties.³¹ When the party seeking such a waiver meets that test, the policy considerations underpinning the filed rate doctrine are not implicated.³² Because the entity

²⁹ *Con. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 969 (internal citations omitted) (citing *Exxon Co., USA v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999)).

³⁰ *See, e.g., Mirant Americas Energy Mktg., L.P.*, 112 FERC ¶ 61,056 at P 18 (2005) (granting waiver of a 60-day prior notice requirement because “the rates authorized were no higher than the rates actually charged and, in fact, were the same. Therefore, the filed rate doctrine and the rule against retroactive ratemaking are inapposite to this matter.”).

³¹ *See, e.g., Invenergy Solar Development North America LLC*, 164 FERC ¶ 61,095; *Dominion Energy Generation Marketing, Inc.*, 162 FERC ¶ 61,281; *Robinson Power Co., LLC*, 162 FERC ¶ 61,092 at P 13; *Aurora Generation, LLC, et al.*, 162 FERC ¶ 61,076 at P 14 (2018); *Springdale Energy, LLC and Helix Ironwood, LLC*, 162 FERC ¶ 61,077 at P 13 (2018).

³² *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 817 (1998) (explaining Any application of the filed rate doctrine “must be ‘based upon a considered analysis of the facts of [the] case and the precise purposes of the filed rate doctrine.’”)(quoting *Towns of Concord, Norwood & Wellesley, Massachusetts v. FERC*, 955 F.2d 67,75 (D.C. Cir. 1992). *See also, Pioneer Trail Wind Farm, LLC v. FERC*, 798 F.3d 603, 610 (U.S. Ct. App. 7th Cir. 2015) (explaining “The filed rate doctrine, as the name suggests, requires utilities to charge the rate that is on file with the relevant regulatory agency. In order to evaluate the Generators’ argument, it is helpful to recall why the doctrine exists: ‘[to] preserv[e] the agency’s primary jurisdiction over reasonableness of rates,’ ‘to insure that regulated companies charge only those rates of which the agency has been made cognizant,’ and to ‘prevent[] the Commission itself from imposing a rate increase for [electricity] already sold.’ ... Nothing that happened in this case imperiled FERC’s primary jurisdiction, hid information from FERC, or imposed a retroactive fee on electricity already sold. Instead, what happened was an *ex ante* decision about cost allocation, untainted by fraud or discrimination. ... The filed rate doctrine protects parties not from misquoted rates, but from discriminatory or fraudulent ones.”) (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981)).

which is subject to the non-rate tariff provision is seeking the waiver, the most relevant party requiring notice of the application of the tariff provision has notice.³³ Moreover, with a finding that no third parties are harmed by the granting of the waiver, the filed rate doctrine's concern for non-discrimination inherently is met.³⁴ In sum, the granting of such a waiver results in neither a lack of rate predictability, nor in discriminatory pricing. Indeed, the Commission's existing four-part waiver test, as applied to retroactive waivers of non-rate tariff provisions, operates to ensure that the rationale underlying and supporting application of the filed rate doctrine are not implicated.

Third, even if the Commission were correct that the filed rate doctrine is applicable to retroactive waivers of non-rate terms and conditions, Scioto Farms' instant waiver request should still be granted. In its September 8 Order, the Commission interpreted the filed rate doctrine to preclude it from granting the type of retroactive waiver requested by Scioto Farms in this proceeding.³⁵ The Commission's support for this conclusion cites to the D.C. Circuit's orders in *Oklahoma Gas & Electric Co. v. FERC*³⁶ and *Old Dominion Elec. Coop. v. FERC*³⁷ finding that the Commission has no authority "to provide equitable exceptions or retroactive modifications to the tariff."³⁸ However, "courts have recognized only two circumstances in which a rate adjustment may take effect prior to a section 205 filing: when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a

³³ See *Nat. Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) ("Among other related purposes, we have identified the goals of [the filed rate doctrine as] avoiding discriminatory pricing, and most strongly urged here, rate predictability for buyers."); see also *Pub. Util. Com'n of State of Cal. v. FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993) ("Predictability is an underlying purpose of both the filed rate doctrine and the rule against retroactive ratemaking.").

³⁴ *Id.*

³⁵ September 8 Order at P 25.

³⁶ 11 F. 4th 821 (D.C. Cir. 2021).

³⁷ 892 F. 3d 1223 (D.C. Cir. 2018).

³⁸ *Okla. Gas & Elec. Co. v. FERC*, 11 F. 4th at 824-25.

rate effective retroactively.”³⁹ In the case of retroactive waivers of administrative tariff provisions, parties to such tariffs have had notice that such tariff provisions could be waived retroactively upon a demonstration that the requesting party has met the Commission’s four-part waiver test.⁴⁰ This applies to Scioto Farms in the instant case. Because the Commission had routinely granted similar retroactive waivers of administrative tariff provisions, Scioto Farms was on notice that an administrative tariff provision, such as a security deposit payment deadline, could be waived retroactively if it met the Commission’s test for granting waivers.

Finally, the Commission’s reasoning in the September 8 Order fails to distinguish between permissible waivers of tariff provisions and impermissible retroactive revisions of tariff provisions.⁴¹ This is inconsistent with controlling precedent. The D.C. Circuit has recognized that “[t]he very essence of waiver is the assumed validity of the general rule.”⁴² Thus, the request to waive application of a tariff provision is not a request to change or modify the tariff.⁴³

³⁹ *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999).

⁴⁰ *Invenergy Solar Development North America LLC*, 164 FERC ¶ 61,095 at P 12; *BSW ProjectCo LLC*, 163 FERC ¶ 61,213 at PP 11-12 (granting waiver of a payment deadline because BSW acted in good faith to comply with, even though “complications caused by the U.S.-European time difference” contributed to missing the deadline); *First Solar Dev., LLC*, 161 FERC ¶ 61,256 at P 20 (granting waiver of deadline that was missed by two days); *Lark Energy Dev., Inc.*, 158 FERC ¶ 61,009 at P 9 (granting waiver when “Lark Energy took all necessary steps to wire transfer the deposits to PJM by the requisite deadline and satisfied all other processing requirements” but missed the deadline by one day) ; *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059 at P 13; *Calpine Energy Services, L.P.*, 154 FERC ¶ 61,082 at P 11.

⁴¹ *See, e.g., Mirant Americas Energy Mktg., L.P., et al.*, 112 FERC ¶ 61,056 at P 18 (granting waiver and rejecting application of the filed rate doctrine because, “the rates authorized were no higher than the rates actually charged and, in fact, were the same. Therefore, the filed rate doctrine and the rule against retroactive ratemaking are inapposite to this matter.”). This is distinct from cases relied upon by the Commission that deal with retroactive increases in the amount to be paid by ratepayers without notice; *see, e.g., Okla. Gas & Elec. Co. v. FERC*, 11 F.4th 821, 824-25 (D.C. Cir. 2021) (“SPP began to collect upgrade charges from the upgrade users... about \$140 million”); *Old Dominion Elec. Coop v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (“Combined, Old Dominion claimed nearly \$15 million in costs attributable”).

⁴² *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969).

⁴³ *See, e.g., Mirant Americas Energy Mktg., L.P.*, 112 FERC ¶ 61,056 at P 18 (granting waiver and rejecting application of the filed rate doctrine because, “the rates authorized were no higher than the rates actually charged and, in fact, were the same. Therefore, the filed rate doctrine and the rule against (continued on next page)

This reasoning applies whether the request is prospective or retroactive. Here, Scioto Farms has demonstrated that it does not seek to modify or change PJM’s tariff provisions concerning the posting of security under an ISA. Rather, it is seeking a waiver of the application of a part of that tariff provision for good cause shown and because providing such waiver is in the public interest.

IV. CONCLUSION

For the foregoing reasons, Scioto Farms respectfully requests that the Commission grant rehearing to: (1) grant Scioto Farms’ Waiver Request; (2) reject PJM’s ISA Cancellation, effective immediately; and (3) restore Scioto Farms to its AD2-162 PJM Queue Position.

Respectfully submitted,

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Dated: October 6, 2023

retroactive ratemaking are inapposite to this matter.”); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,356-57 (1999) (“We believe that the key message from Koch is the court's findings that the refund did not promote the purposes of the filed rate doctrine and that the refund ‘would work counter to’ Order No. 636. ... [in Koch], the court found that the company's actions ‘did not truly implicate the doctrine's concerns.’” “the Commission may adjust rates within the zone of reasonableness to remedy violations of the FPA. ...[W]e reiterate that the remaining remedial measures we imposed are entirely appropriate.”).

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service lists compiled by the Secretary in the above-captioned proceeding.

Dated at Washington, DC this 6th day of October 2023.

/s/ Diane G. Evans

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Summary: Notice of Scioto Farms Solar, LLC's Request for Rehearing in Related Proceeding electronically filed by Teresa Orahod on behalf of Sommer Sheely.