

169 FERC ¶ 61,265
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Pioneer Transmission, LLC

Docket No. ER18-2119-001

ORDER DENYING REHEARING

(Issued December 31, 2019)

1. On July 25, 2019, the Commission issued an order rejecting, without prejudice, a filing by Pioneer Transmission, LLC (Pioneer) and Midcontinent Independent System Operator, Inc. (MISO) requesting to amortize and recover the pre-commercial operation costs, deferred as a regulatory asset, incurred during Pioneer's development of the Greentown-to-Reynolds segment of a 765 kV transmission line located in Indiana.¹ On August 26, 2019, Pioneer filed a request for rehearing. Pioneer contends that rejection of its filing was impermissible because the Commission did not act in response to its filing within the 60-day notice period specified under section 205(d) of the Federal Power Act (FPA),² and therefore its filing had become effective by operation of law. As discussed below, we deny rehearing.

I. Background

2. On March 27, 2009, the Commission approved a transmission rate incentive allowing Pioneer³ to establish and subsequently amortize over five years a regulatory asset for pre-construction costs incurred in connection with the development of the Pioneer project, a 765 kV transmission line in Indiana, which includes the Greentown-to-Reynolds segment and would connect PJM Interconnection, L.L.C. (PJM) and MISO.⁴

¹ *Pioneer Transmission, LLC*, 168 FERC ¶ 61,055 (2019) (July 2019 Order).

² 16 U.S.C. § 824d(d) (2018).

³ Pioneer is a joint venture formed by American Electric Power Company, Inc. and Duke Energy Transmission Holding Company, an affiliate of Duke Energy Corporation.

⁴ *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 83 (2009) (March 2009 Order), *order granting clarification and denying rehearing*, 130 FERC ¶ 61,044 (2010).

The Commission also authorized Pioneer to accrue carrying charges on the regulatory asset balance from the date of its March 2009 Order until the date that the regulatory asset is included in rate base. In addition, the Commission approved an incentive allowing a return on equity (ROE) adder of 150 basis points for new transmission, but stated that the adder “will not go into effect unless and until the project is approved by the regional transmission planning processes of PJM and MISO and there is a Commission-approved cost allocation methodology in place.”⁵

3. On July 31, 2018, Pioneer submitted its filing in this docket, “[p]ursuant to section 205 and Part 35” of the Commission’s regulations, requesting authorization to amortize and recover the pre-commercial costs, deferred as a regulatory asset incurred during the development of the Greentown-to-Reynolds segment.⁶ It requested an effective date of August 1, 2018, and waiver of any applicable regulations necessary to grant that date.

4. Pioneer represented that, for the period March 2009 through April 2018, it incurred approximately \$8,828,383 in pre-commercial operation costs, including carrying charges. Pioneer also stated that it was finalizing pre-commercial operation costs incurred between May 1, 2018 and June 24, 2018, which was the day before the line was placed into commercial operation, and requested recovery of those costs via the true-up to its formula rate.⁷

5. On August 30, 2018, in Docket No. ER18-1159, the Commission issued an order accepting, subject to further compliance, Pioneer’s formula rate template and protocols to establish a formula rate under the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) for the Greentown-to-Reynolds segment. In that order, the Commission denied Pioneer’s request to implement the 150 basis point

⁵ March 2009 Order, 126 FERC ¶ 61,281 at P 56.

⁶ Pioneer Transmission, LLC, Request for authorization to recover pre-commercial costs deferred as a regulatory asset, Docket No. ER18-2119-000, at 1 (filed July 31, 2018).

⁷ *Id.* at 5.

adder to its ROE because the conditions set forth in March 2009 Order had not been met.⁸ Pioneer did not seek rehearing of the August 2018 Order.

6. In the July 2019 Order, the Commission rejected Pioneer's filing in the instant docket without prejudice, finding that it was inappropriate for Pioneer to include the 150 basis point ROE adder in the calculation of the carrying charges for its proposed regulatory asset because, as the Commission determined in the August 2018 Order, Pioneer had not satisfied the conditions imposed in the March 2009 Order as the project had not "been approved in the RTO planning processes of both PJM and MISO."⁹ The Commission also denied Pioneer's request to use the true-up mechanism in its formula rate to recover the pre-commercial operation costs incurred for the Greentown-to-Reynolds segment for the period May 1, 2018 through June 24, 2018, finding that a section 205 filing would be required to approve those costs.¹⁰

7. Pioneer requested rehearing of the July 2019 Order and then, on October 22, 2019, submitted a new regulatory asset filing under section 205 of the FPA in Docket No. ER20-159-000.¹¹

II. Rehearing Request

8. Pioneer argues that its July 31, 2018 filing was a section 205 rate filing that was subject to the 60-day statutory notice period under FPA section 205(d).¹² Pioneer claims that, because the Commission did not act within that 60-day period, Pioneer's filing became effective by operation of law on September 30, 2018, which was the 61st day

⁸ *Midcontinent Indep. Sys. Operator, Inc. and Pioneer Transmission, LLC*, 164 FERC ¶ 61,155 (2018) (August 2018 Order).

⁹ July 2019 Order, 168 FERC ¶ 61,055 at P 13 (quoting August 2018 Order, 164 FERC ¶ 61,155 at P 54).

¹⁰ *Id.* P 15.

¹¹ In an order issued in Docket No. ER20-159-000 concurrently with this order, the Commission accepts subject to condition Pioneer's request to place in rate base and amortize the regulatory asset, including carrying charges up to the time it is placed in rate base. See *Midcontinent Indep. Sys. Operator, Inc. and Pioneer Transmission, LLC*, 169 FERC ¶ 61,264 (2019).

¹² 16 U.S.C. § 824d(d) ("[u]nless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public.").

after filing. Accordingly, Pioneer requests that the Commission vacate the July 2019 Order. Pioneer cites a number of decisions in which the courts have confirmed that under section 205(d) of the FPA, there is a 60-day review period during which the Commission must take action; otherwise, the rate filing automatically takes effect immediately upon the expiration of this notice period.¹³

9. Pioneer also discusses *Fla. Power & Light Co. v. FERC*, a case in which, due to clerical error, the Commission issued an order suspending an electric rate filing one day after the statutory notice period.¹⁴ While noting the court majority's decision to affirm the Commission's action in light of the limited circumstances of that case, Pioneer emphasizes the dissenting opinion, which viewed the issuance of the order one day late as "ultra vires and beyond the statutory authority granted by Congress."¹⁵

10. Pioneer asserts that its July 31, 2018 filing did not propose an effective date that would have extended the time frame by which the Commission must take action. Pioneer also notes that the Commission did not request additional information related to the filing, nor were there any modifications or supplements to the filing. Accordingly, Pioneer contends that the Commission was required to act within 60 days of the date of the filing and that the Commission's failure to do so meant that Pioneer's filing became effective by operation of law, and is part of the filed rate, i.e., Pioneer Attachment O to the MISO Tariff. Pioneer asserts that the only way for the Commission to propose any changes to Pioneer Attachment O of the MISO Tariff is to exercise its authority under section 206 of the FPA¹⁶ and that any changes ultimately required by the Commission under that section cannot be imposed retroactively.¹⁷

11. Pioneer views the July 2019 Order as "unfair and highly prejudicial to Pioneer as Pioneer had no notice that the Commission would reject Pioneer's filing."¹⁸ Pioneer adds that it had already proceeded to implement the cost recovery of the pre-commercial costs

¹³ Rehearing Request at 5-6 (citing *Cities of Bethany v. FERC*, 727 F.2d 1131, 1143 (D.C. Cir. 1984); *City of Campbell v. FERC*, 770 F.2d 1180, 1184-85 (D.C. Cir. 1985); *City of Girard v. FERC*, 790 F.2d 919 (D.C. Cir. 1986)).

¹⁴ Rehearing Request at 6 (citing *Fla. Power & Light Co. v. FERC*, 617 F.2d 809 (D.C. Cir. 1980) (*Fla. Power and Light*)).

¹⁵ *Id.* at 6-7 (citing *Fla. Power and Light*, 617 F.2d at 818).

¹⁶ 16 U.S.C. § 824e.

¹⁷ Rehearing Request at 8-9.

¹⁸ *Id.* at 9.

under the Tariff based on the premise that its filing had become effective by operation of law as of the end of September 2018.¹⁹

12. Pioneer contends that the Commission's eTariff requirements, which limit filings considered to have statutory action dates to those submitted with a tariff record, should not apply here, and cannot limit the express requirements of FPA section 205 in any event. Referring to Order No. 714-A²⁰ and section 35.7(d) of the Commission's regulations,²¹ Pioneer argues that the Commission's orders and regulations cannot override or take precedence over the express provisions of a statute.²² Pioneer argues that the Commission cannot, through its orders or regulations, modify the express provisions of section 205(d) by creating categories of section 205 filings that are subject to the 60-day notice period and section 205 filings that are not.²³

13. Pioneer also contends that there is nothing in Order No. 714-A that requires an applicant to submit an eTariff record where the applicant did not propose any tariff or tariff changes. With regard to the July 31, 2018 filing, Pioneer states that there was no need for Pioneer to propose any tariff revisions to implement the recovery proposal for the regulatory asset.²⁴

14. Finally, Pioneer points to a number of recent Commission decisions in which, according to Pioneer, the Commission did not apply the eTariff record requirement but nonetheless treated the filing as having a statutory deadline for Commission action. For example, Pioneer cites several cases involving regulatory asset cost recovery filings that were not accompanied by any eTariff record or filing codes and were "virtually identical to Pioneer's July 31 Filing" but that were nevertheless acted upon by the Commission within the statutory 60-day period.²⁵ Pioneer argues that the July 2019 Order treats

¹⁹ *Id.*

²⁰ *Electronic Tariff Filings*, Order No. 714-A, 147 FERC ¶ 61,115 (2014).

²¹ 18 C.F.R. § 35.37(d) (2019).

²² Rehearing Request at 9-10.

²³ *Id.* at 10.

²⁴ *Id.* at 10-12.

²⁵ Rehearing Request at 13 n.24 (citing MidAmerican Central California Transco, Docket No. ER19-1384; Transource Pennsylvania, LLC, Docket No. ER18-1996; Transource Maryland, LLC, Docket No. ER18-1997; Transource West Virginia, LLC, Docket No. ER16-2131; Transource Missouri LLC, Docket No. ER14-1383).

Pioneer differently than similarly-situated utilities without providing an adequate explanation for departing from Commission precedent.²⁶

15. Pioneer also states that the Commission treated and processed the eighth forward capacity auction filing (FCA 8), submitted by ISO New England, Inc. (ISO-NE), as a section 205 filing subject to the 60-day deadline even though the filing did not include an eTariff record.²⁷ According to Pioneer, the Commission expressly recognized its obligation to process that filing as a statutory filing because the Commission's Office of the Secretary issued a notice stating that the filing had become effective by operation of law in the absence of Commission action.²⁸

III. Discussion

16. We deny rehearing. The FPA authorizes the Commission to prescribe the form of filings under section 205 that must be followed in order to have such a filing considered to be subject to the statutory 60-day notice period. Pioneer's filing did not comply with the prescribed form of filing, and the Commission therefore appropriately treated Pioneer's filing as one not subject to the statutory 60-day notice period.

17. Section 205(c) expressly grants the Commission authority to establish rules governing the submission of filings under section 205:

*Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, . . . all rates and charges for any transmission or sale subject to the jurisdiction of the Commission.*²⁹

²⁶ *Id.* at 4, 14 (citing *Basic Media Ltd. v. FCC*, 559 F.2d 830, 833 n.2 (D.C. Cir. 1977); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013)).

²⁷ *Id.* at 12-13 (referencing *ISO New England Inc.*, Notice of Filing Taking Effect By Operation of Law, Docket No. ER14-1409-000 (Sept. 16, 2014)).

²⁸ *Id.*

²⁹ 16 U.S.C. § 824d(c) (emphasis added); *see also* 16 U.S.C. § 825h (2018) (stating, in part, that the Commission may “prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter,” and “prescribe the form or forms of all statements,

18. The Commission has adopted regulations pursuant to that statutory authority. As relevant here, section 35.7(d) of the Commission's regulations (promulgated by Order No. 714-A³⁰) provides:

Only filings filed and designated as filings with statutory action dates in accordance with these electronic filing requirements and formats will be considered to have statutory action dates. Filings not properly filed and designated as having statutory action dates will not become effective, pursuant to the Federal Power Act, should the Commission not act by the requested action date.³¹

19. In Order No. 714-A, the Commission also revised section 385.205 of the Commission's regulations to state that an electronic filing in accordance with the requirements and formats specified by the Commission is required to implement a statutory action date for filings that are made "to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant."³² Although Pioneer's regulatory asset filing falls within these categories, it was not filed in accordance with the Commission's electronic filing instructions. Therefore, Pioneer's regulatory asset filing was not subject to a statutory action date. Anticipating such a situation, Order No. 714-A revised section 385.205 of the Commission's regulations to provide that a filing without a statutory action date "will not become effective should the Commission not act by the requested action date."³³

20. Pioneer itself recognizes that, under section 205(c), "the Commission may prescribe rules and regulations relating to rate filings, such as requiring electronic filing instead of paper filings in order to save storage space."³⁴ Indeed, such efficiency objectives led the Commission to exercise its authority under section 205(c) to issue

declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed.").

³⁰ Order No. 714-A, 147 FERC ¶ 61,115. Neither Pioneer nor any other party sought rehearing of Order 714-A.

³¹ 18 C.F.R. § 35.7(d) (2019).

³² 18 C.F.R. § 385.205 (2019).

³³ 18 C.F.R. § 385.205.

³⁴ Rehearing Request at 10 n.18.

Order No. 714, which originally required that tariffs and rate schedules be filed through eTariff, and Order No. 714-A. To more effectively process high volumes of rate filings, the Commission prescribed the required form of filing for filers who want their tariffs and rate schedules to become effective after 60 days' notice in the absence of a Commission order. Any filer who desires to have its section 205 filing subject to the statutory clock must follow the prescribed eTariff filing format.³⁵

21. Pioneer's argument on rehearing relies on the 60-day notice period in FPA section 205(d).³⁶ Pioneer contends that, notwithstanding the Commission's authority under FPA section 205(c), the Commission "may not adopt rules that contravene or are inconsistent with the express provision of section 205(d) or substantively change the statutory language of the statute." Section 35.7(d) of the Commission's regulations does not contravene section 205(d). The purpose and effect of section 35.7(d) is to establish the rules by which the notice period would be determined by specifying a process that ensures that the Commission is able to take timely action.³⁷ Section 35.7(d) is an appropriate use of the Commission's authority under section 205(c) to implement the purposes of section 205(d).

22. The U.S. Court of Appeals for the Eleventh Circuit recognized the Commission's authority to implement section 205(d) in a similar context in *Alabama Power Co. v. FERC*.³⁸ There, the court upheld the Commission's reliance on its regulations implementing section 205(d) in determining that, in the context of joint filings, the clock began only when the filing was complete for every individual filer. The court first noted

³⁵ Even prior to the advent of eTariff, the Commission had established procedures for determining effective dates based on the effective dates in tariff sheets. *See Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096, at 31,504 (2000) (cross-referenced at 90 FERC ¶ 61,352) ("It is thus incumbent upon utilities to unambiguously identify their proposed changes in a manner conforming to the Commission's regulations including properly formatting and designating their proposed tariff sheets. . . . It is not the function of this Commission to speculate on the nature of an applicant's filing (for example, what a utility intends as the effective date,) nor is it our function to, on our own, perfect a utility's application.").

³⁶ 16 U.S.C. § 824d(d); *see supra* note 11.

³⁷ *See Electronic Tariff Filings*, 130 FERC ¶ 61,047, at P 5 (2010) (January 2010 Order) ("the primacy of the Type of Filing codes is necessary to ensure the integrity of Commission processes and to ensure Commission action on such filings within the time period provided under the appropriate statute"); *see also id.* P 4.

³⁸ 22 F.3d 270 (11th Cir. 1994) (*Alabama Power*).

that “the statute is silent as to when such a filing becomes final for the purpose of commencing the 60–day review period.”³⁹ Next, the court observed:

Section 205(d) merely provides that a public utility may change its filed rates only “after sixty days’ notice to the Commission” *Congress did not set forth any filing procedures. Rather, it expressly authorized the FERC to prescribe rules and regulations pertaining to rate filings and to designate the form of such filings.* It was pursuant to that delegation of authority that the FERC promulgated 18 C.F.R. § 35.1 (1993), which permits the use of certificates of concurrence and establishes the joint filing procedure used in this case. Because Congress did not even envision the joint filing procedure at issue here, much less address precise questions regarding the consequences of its use, we review the FERC’s decision to determine only if it is based on a reasonable interpretation of the statute.⁴⁰

23. Just as Congress did not envision the joint filing procedure at issue in *Alabama Power*, Congress likewise could not, in 1935, have envisioned the quantity and complexity of filings made with the Commission, nor the ability to process filings electronically. Therefore, the Commission’s exercise of its section 205(c) authority in promulgating 35.7(d) was, as the court held in *Alabama Power*, reasonable “to promote certainty and to enable [the Commission] to efficiently review numerous and complex rate schedules.”⁴¹

24. Pioneer next asserts that “there is nothing in Order No. 714-A that requires an applicant to submit an eTariff record where the applicant did not propose any tariff or tariff changes.” That argument is incorrect. Order No. 714-A “make[s] explicit that, in order for *filings* to have a statutory action date, the *filings* must be made *electronically as*

³⁹ *Id.* at 272.

⁴⁰ *Alabama Power*, 22 F.3d at 272-73 (emphasis added). See *Bartlik v. U.S. Dep’t of Labor*, 62 F.3d 163, 166 (6th Cir. 1995) (establishing reasonable procedural rules for filing timelines does not “expand” or “enlarge” jurisdiction).

⁴¹ *Alabama Power*, 22 F.3d at 273. For these same reasons, we also disagree with Pioneer’s assertion, relying on the dissenting opinion in *Fla. Power & Light*, that the Commission acted “beyond the statutory authority granted by Congress.” Rehearing Request at 6-7 (quoting *Fla. Power & Light*, 617 F.2d at 818 n.1 (Tamm, J., dissenting)).

tariff filings in accordance with the Commission’s posted requirements and formats.”⁴² The Commission did not limit “filings” with a “statutory action date” to filings that require a new tariff provision. Rather, section 35.7(d) applies to “filings,” not “tariffs,” and section 35.7(a) makes clear that “filings” includes “tariffs, rate schedules and service agreements, or parts thereof, and material that relates to or bears upon such documents.”⁴³ Furthermore, Rule 205 of the Commission’s Rules of Practice and Procedure identifies a “tariff or rate filing” as a broad range of filings that encompasses the regulatory asset filing at issue in this case.⁴⁴ Pioneer also had notice that its filing was not a statutory filing made pursuant to section 205(d), as the Commission’s Notice of Filing did not indicate that Pioneer made its filing pursuant to section 205(d) or that it had a proposed effective date.⁴⁵

25. Pioneer contends that it is unclear what eTariff record it would have to submit to satisfy Order No. 714-A when its section 205 filing does not otherwise require the submission of or revision to a tariff. But the Commission has provided guidance to the industry explaining that section 205 filings will not be assigned a statutory action date unless they are accompanied by tariff records and explaining how to make such a filing

⁴² Order No. 714-A, 147 FERC ¶ 61,115 at P 1 (emphasis added).

⁴³ 18 C.F.R. § 35.7(a).

⁴⁴ 18 C.F.R. § 385.205 (a tariff or rate filing “to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice or any related regulation established by and for the applicant . . . must be made electronically in accordance with the formats for electronic filing listed in the instructions for electronic filings. A tariff or rate filing not made in accordance with these requirements and formats will not have a statutory action date and will not become effective should the Commission not act by the requested action date.”).

⁴⁵ Compare Pioneer’s Notice of Filing, at 3 with Pacific Gas and Electric Company’s Notice of Filing, at 3 in Combined Notice of Filings #1, Docket No. ER18-2119-000, (August 1, 2018), <https://elibrarypreview.ferc.gov/eLibrary/filedownload?fileid=14990996>. (Pacific Gas and Electric Company’s Notice states that it is a § 205(d) Rate Filing with a proposed effective date while Pioneer’s does not). The Commission adds the § 205(d) Rate Filing and the proposed effective date to those filings with statutory action dates that are properly made through eTariff. The Commission also includes both the filing code and the earliest proposed effective date in its “Acceptance for Filing” Email that provides the docket number and link to eLibrary that utilities use to provide service. See <https://www.ferc.gov/docs-filing/etariff/etariff-temp.pdf>.

when a tariff record does not need to be changed.⁴⁶ In addition, other regulated entities have submitted an eTariff record for the sole purpose of establishing or re-starting the 60-day clock.⁴⁷ Indeed, prior to its regulatory asset filing in this case, Pioneer received a delegated letter order finding its formula rate filing in Docket No. ER18-1159-001 deficient and, as relevant here, explaining the procedure to make a statutory eTariff filing to establish an effective date for Commission action without a changed tariff provision. The letter order stated that “[t]he filing must include at least one tariff record to restart the statutory timeframe for Commission action even though a tariff revision might not otherwise be needed.”⁴⁸ Pioneer successfully made such a filing,⁴⁹ and has since correctly submitted an eTariff record with its October 22, 2019 regulatory asset filing in Docket

⁴⁶ See FERC Staff’s Responses to Discussion Questions from eTariff@FERC.gov, Business Rules Question number 37 at p. 14, <https://www.ferc.gov/docs-filing/etariff/responses-discussion-questions.pdf> (Question: “The company wishes to file a NORMAL/STATUTORY filing without a Tariff Record and still achieve a statutory action date. Is that possible?” Answer: No); FERC, *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings*, at 5, <https://www.ferc.gov/docs-filing/etariff/implementation-guide.pdf> (“[t]he Commission will use the Type of Filing Code together with the Tariff Record Proposed Effective Date to establish whether a filing is statutory and the applicable statutory timelines.”); *Notice of Procedures for Public Utilities Seeking to Extend the Date for Commission Action on Statutory Filings*, Docket No. RM01-5-000 (Feb. 23, 2012) (citing procedures <http://www.ferc.gov/docs-filing/etariff/comm-order/extend-date.pdf>, explaining that “[f]ilings not made through eTariff, but rather through the Commission’s electronic filing system or on paper will not affect the date by which the Commission must act” and that to fulfill that requirement “the utility would refile a single pending Tariff Record from the filing in question with the same text and proposed effective date as in the original filing.”).

⁴⁷ See, e.g., *GridLiance West LLC*, Docket No. ER19-191-000 (filed Oct. 25, 2018) (“The instant Application does not necessitate any change to GridLiance West’s tariff. However, to ensure this Application is appropriately recognized as statutory submitted pursuant to section 205, GridLiance West includes an unrevised tariff record of the cover sheet to its Transmission Owner.”); *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER19-2619-001 (filed Oct. 10, 2019) (resubmitting eTariff record for the sole purpose of extending the statutory period for Commission action).

⁴⁸ *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER18-1159-000, at 6 n.3 (May 31, 2018) (delegated order).

⁴⁹ *Midcontinent Independent System Operator, Inc.*, Pioneer Response to Deficiency Letter, Docket No. ER18-1159-001 (filed July 2, 2018).

No. ER20-159-000. We therefore reject Pioneer's claim that it lacked adequate notice of how to make a proper section 205 with a 60-day notice period under section 205(d).

26. We disagree with Pioneer's claim that the July 2019 Order is inconsistent with the Commission's treatment of other regulatory asset filings cited in Pioneer's rehearing request. The fact that the Commission processed those cited filings within 60 days does not suggest or establish that the Commission was obligated to do so.⁵⁰ Furthermore, we note that for other filings that, like Pioneer's here, were not properly filed in eTariff, the Commission has issued orders more than 60 days after receipt of the filing.⁵¹

27. We acknowledge that the approach in the FCA 8 proceeding,⁵² despite the absence of an eTariff record, differs from the approach here. However, in ISO-NE, the requirement to submit a section 205 filing with the annual auction results was incorporated into the ISO-NE tariff as the result of a complex multilateral settlement,⁵³ which predated the creation of the eTariff system and procedures. As a result, the Commission has consistently treated those filings as section 205 proposals with statutory deadlines, even when made without tariff records, based on the parties' expectations following the settlement and in order to provide certainty to the region.⁵⁴ With respect to

⁵⁰ See *Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (affirming a Commission finding that "accepting another pipeline's provisions does not necessarily establish a generic Commission policy or precedent regarding similar tariff provisions").

⁵¹ See *Wabash Valley Power Association, Inc.*, Docket No. ER16-492-000 (application submitted on December 9, 2015; order issued on March 23, 2016); *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER16-744-000 (application submitted on January 15, 2016; order issued on March 29, 2019).

⁵² A similar notice issued with respect to the FCA 13 proceeding. *ISO New England Inc., Notice of Filing Taking Effect by Operation of Law*, Docket No. ER19-1166-000 (Sept. 25, 2019).

⁵³ The settlement occurred at least four years prior to the January 2010 Order and eight years prior to the effectiveness of section 35.7(d). See *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010) (detailing the history and litigation surrounding ISO-NE's capacity market).

⁵⁴ See *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1167 (D.C. Cir. 2016) (dismissing challenges to the FCA 8 results and noting that the settlement "provides for 'thorough review of the final auction clearing prices by the Commission' and any interested parties").

the notice issued in the FCA 8 proceeding, we note that the underlying filing was submitted prior to the issuance of Order No. 714-A and so differs from the Pioneer filing.

28. Finally, Pioneer's claim that it had "no notice" that the Commission would reject its filing is unsupported.⁵⁵ In the March 2009 Order, the Commission explained that Pioneer's eligibility to receive the 150-basis point adder depended on its receiving approval from PJM for its project, which it had not received as of the date of the filing.⁵⁶ And, in the August 2018 Order, which issued 30 days after Pioneer's July 31, 2018 filing in this docket (and before, as Pioneer claims on rehearing, its filing went into effect by operation of law), the Commission expressly rejected the 150 basis point adder because the condition of obtaining PJM approval specified in the March 2009 Order had not been satisfied. In addition, contrary to Pioneer's claim that rejection of its filing was "unfair and highly prejudicial to Pioneer," the rejection was without prejudice to making a new filing, which Pioneer has done in Docket No. ER20-159-000, and which will allow Pioneer to accrue its cost of capital on the regulatory asset until placed in rate base where it will be allowed to be amortized.⁵⁷ If we were to vacate the Commission's rejection of Pioneer's filing in this docket as Pioneer requests, it would be permitted to accrue an unauthorized 150 basis point ROE adder to its regulatory asset carrying charge and thus profit through its own failure to comply with the Commission's filing regulations.

The Commission orders:

Pioneer's request for rehearing of the July 2019 Order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁵ Rehearing Request at 9.

⁵⁶ March 2009 Order, 126 FERC ¶ 61,281 at P 56.

⁵⁷ See *supra* note 11.