153 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Black Oak Energy, L.L.C.
EPIC Merchant Energy, L.P. and
SESCO Enterprises, L.L.C.

Docket No. EL08-14-010

v.

PJM Interconnection, L.L.C.

ORDER ON REMAND

(Issued November 19, 2015)

1. In an opinion issued on August 6, 2013, the United States Court of Appeals for the District of Columbia Circuit remanded to the Commission for further consideration the issue of whether PJM Interconnection, L.L.C. (PJM) may recoup money refunded to virtual marketers, after the Commission determined on rehearing that its initial order directing refunds to the virtual marketers was contrary to Commission policy.[1] As discussed below, we have determined that the virtual marketers (described herein as Financial Marketers) should be required to repay refunds, with interest, to put the parties back in the positions in which they would have found themselves if the Commission had not erred in requiring refunds in the first place.

[1] *Black Oak Energy, LLC v. FERC*, 725 F.3d 230 (D.C. Cir. 2013) (referring to *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011) (July 2011 Recoupment Order), *order on reh'g*, 139 FERC ¶ 61,111 (2012) (May 2012 Recoupment Order) (collectively, Refund Orders)).

I. Background

2. Black Oak Energy, L.L.C.; EPIC Merchant Energy, L.L.P.; and SESCO Enterprises, L.L.C. (collectively, Financial Marketers) initiated a complaint proceeding challenging the method by which PJM implements its transmission loss pricing methodology with respect to Financial Marketers. As relevant here, the Commission determined that it was appropriate for PJM to apply marginal loss pricing to every buyer of electricity to cover transmission losses,[2] which refers to "the amount of electric energy lost when electricity flows across a transmission system."[3] Under marginal loss pricing, transmission losses are recovered "on a transaction-by-transaction basis by. . . treat[ing] every transmission as if it were the last (marginal) transmission on the system."[4]

3. Treating every transmission as the marginal transmission inevitably leads to the collection of more revenues than are needed to cover the costs of actual transmission losses. The Commission required PJM to credit the over-collection to those that pay for the fixed costs of the transmission grid.[5] In response to requests for rehearing and clarification, the Commission clarified that, to the extent Financial Marketers pay transmission charges that contribute to the fixed costs of the transmission grid – as they did for a time with Up-To Congestion transactions – they should receive an allocation of the surplus transmission losses.[6] Subsequently, in an order accepting PJM's compliance filing, the Commission established a refund effective date of December 3, 2007, and required PJM to pay refunds for the statutory fifteen-month period and submit a refund report, within 30-days of the date of the order.[7]

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[2] *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 22 (2006).

[3] *See Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 2 (D.C. Cir. 2002).

[4] *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 250-51 (D.C. Cir. 2007).

[5] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at P 38 (2008) ("This method of distribution returns the surplus to those parties that support and pay for the fixed costs of the transmission grid.") (Order on Rehearing).

[6] *See id., Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,164, at PP 13-15 (2009) (Order on Clarification).

[7] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 35 (2009) (September 2009 Compliance Order).

4. DC Energy, L.L.C. and American Electric Power Service Corp. (together, DC Energy and AEP), PJM transmission customers that export energy from PJM into the Midwest Independent Transmission System Operator, Inc. (MISO),[8] timely filed for rehearing of the September 2009 Compliance Order. Regarding the Commission directive to pay refunds, they argued that an unsolicited change in transmission export credits (i.e., having to pay back certain amounts) should not be effected retroactive to the refund effective date, because exporters had no notice of such a change.[9] They additionally asserted that the Commission has a long-standing policy of avoiding retroactive implementation of rates where retroactive application of charges or resettlement would create market uncertainty and undermine market confidence.[10] Although the rehearing requests had been filed prior to PJM's payment of refunds,[11] PJM paid the refunds (to Financial Marketers who had participated in Up-To Congestion transactions) prior to the resolution of those rehearing requests.[12]

5. In April 2010, based on the rehearing requests, the Commission required further pleadings from PJM regarding the payment of refunds.[13] PJM submitted additional refund information on June 1, 2010.

6. The Commission addressed the rehearing issues relating to the requirement to pay refunds in the July 2011 Recoupment Order. As relevant here, the Commission granted rehearing, and determined that its earlier directive to PJM to pay refunds relating to Up-To Congestion charges was inconsistent with Commission policy, particularly as

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[8] Since this proceeding MISO has changed its name to Midcontinent Independent System Operator, Inc.

[9] DC Energy and AEP Rehearing Request, Docket No. EL08-14-002, at 12 (filed Oct. 19, 2009) (citing *N.Y. Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073, at 61,307 (2000), *reh'g denied*, 97 FERC ¶ 61,154, at 61,673 (2001)).

[10] *Id.* at 12-13.

[11] *See* PJM, Motion for Extension of Time, Docket No. EL08-14-004 (filed Oct. 19, 2009); PJM, Report of Refunds, Docket No. EL08-14-000 (filed Mar. 1, 2010).

[12] PJM did not seek at that time to delay the payment of refunds until the rehearing requests were resolved. *See* 18 C.F.R. §35.19a (obligation to pay refunds "as required by final order of the Commission").

[13] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024, at P 42 (2010) (April 2010 Rehearing Order).

applied to regional transmission organizations (RTOs). The Commission found that in a case like this one, in which "the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds."[14] In an order affirming the July 2011 Recoupment Order, the Commission explained that this policy has particular resonance with respect to RTOs that are not-for-profit companies which cannot absorb any refund losses:

> During the fifteen-month refund period, PJM paid out more in refunds to some customers and too little to Financial Marketers and other customers engaging in Up-To Congestion transactions. As in *Occidental*, PJM therefore would have a net shortfall and would be unable to revise its rate design retroactively to recover those funds. Indeed, PJM, unlike for-profit companies, could not pass the loss onto any shareholders.[15]

As part of their argument on rehearing that the Commission acted arbitrarily in affirming its no-refund policy in cases of rate design and cost allocation, Financial Marketers stated, without explication, that requiring recipients of refunds to forfeit them at this time would shake market participants' confidence in both the integrity of the market and the Commission's adherence to the rule of law. While the Commission responded to the argument regarding the justification for adhering to its refund policy, it did not explicitly address the argument about whether recoupment of previously paid refunds would upset market expectations.

II. Court of Appeals Determination

7. In a decision issued August 6, 2013, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's determination that virtual marketers will receive no surplus allocation in the event they pay none of the fixed costs of the grid.[16] The D.C. Circuit also upheld the Commission's determination to grant

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[14] July 2011 Recoupment Order, 136 FERC ¶ 61,040 at PP 25-26 (referencing *Occidental Chem. Corp. v. PJM*, 110 FERC ¶ 61,378 (2005); *Union Elec. Co.*, 64 FERC ¶ 61,335, at 63,468 (1993)).

[15] May 2012 Recoupment Order at P 42.

[16] *Black Oak Energy*, 725 F.3d at 236 ("The virtual marketers pay none of the fixed costs of the grid. As a result, under the system FERC approved, the virtual marketers receive no surplus allocation. They petition for review of FERC's orders

(continued…)

rehearing and follow its traditional policy of not providing for refunds in cases involving rate design and cost allocation.[17] The court also affirmed the Commission's determination that "the broad inquiry FERC initiated in the April 2010 order should have made it clear to the virtual marketers that their refunds were subject to reconsideration."[18]

8. The court, however, remanded the question of whether PJM, having already paid out refunds, should be permitted to recoup those refunds, finding the Commission had not directly addressed this issue.[19] In particular, the court found that the Commission did not sufficiently distinguish between denying refunds in the first instance and ordering recoupment after such refunds have been paid.[20] The court remanded the case to the Commission, without vacating, because it found that the Commission could plausibly redress the inadequate explanation and still reach the same result.[21]

III. Briefing Order

9. On February 20, 2014, the Commission issued an order establishing a briefing schedule[22] and requested that parties comment on: (1) the effects, if any, on the operations of the PJM market of requiring Financial Marketers to return already-paid refunds; (2) the legal and/or policy basis for not permitting recoupment of previously-paid refunds, when the Commission has agreed with rehearing requests seeking recoupment and determined that its initial order to originally direct refunds was in error; (3) how much of the $37 million refund amount has PJM already recouped, what amount

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approving that outcome. We deny their petition for review."). Although the court addresses the instance where virtual marketers pay none of the fixed costs of the grid, there may have been instances where virtual marketers paid these fixed costs.

[17] 725 F.3d at 243-44 (finding "the Recoupment Orders did not 'reinstitute' an unlawful tariff; they merely modified the remedy that FERC ordered in September 2009" and holding "Although we remand, we do so without vacating the Recoupment Orders.").

[18] *Id.* at 242.

[19] *Id.* at 244.

[20] *Id.* at 243-44.

[21] *Id.* at 244.

[22] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,099 (2014) (Briefing Order).

is still outstanding, and what has PJM done with the amount already recouped; (4) if PJM was not permitted to recoup the refunds, which class(es) of customers should fund the refunds and why; and (5) the potential effect on the timely payment of refunds ordered by the Commission in future proceedings, if the Commission cannot reverse on rehearing an erroneous decision that directed refunds.

IV. Notice of Filings and Responsive Pleadings

10. On March 19, 2014, PJM's Independent Market Monitor, Monitoring Analytics, LLC (the Market Monitor), filed an out-of-time motion to intervene. On March 24, 2014, Financial Marketers filed an answer in opposition to the Market Monitor's March 19, 2014 out-of-time motion to intervene. On March 28, 2014, the Market Monitor filed an answer to Financial Marketers' March 24, 2014 answer.

11. On April 7, 2014, Financial Marketers, the Market Monitor, PJM, American Municipal Power, Inc. (AMP), and Madison Gas & Electric Co. and WPPI Energy (together, Madison and WPPI) filed initial briefs. On April 24, 2014, the Market Monitor filed errata to its April 7, 2014 brief.

12. On May 6 and 7, 2014, PJM, Financial Marketers, Madison and WPPI, and AMP filed reply briefs.

13. On May 29, 2014, the Market Monitor filed an answer to Financial Marketers' May 6, 2014 reply brief. On June 3, 2014, Financial Marketers filed an answer to the Market Monitor's May 29, 2014 answer. On June 19, 2014, the Market Monitor filed an answer to Financial Marketers' June 3, 2014 answer.

A. Effect on the PJM Market

14. On brief, Financial Marketers contend that recouping refunds negatively impacts the market. In their view, exposing market participants to recoupment potentially years later will harm market predictability and repose. Financial Marketers refer to Dr. William Hogan's testimony, in which he explains that recoupment imposes higher costs on markets and market participants and creates barriers to entry.[23] And they contend that the negative impact of this particular recoupment on market participants

[23] Financial Marketers Initial Br. at 10-12 (citing W.W. Hogan, Expert Testimony on Behalf of the Financial Marketers (Apr. 6, 2014)); *see also* Financial Marketers Reply Br. at 5-6; *id.* at 3 (asserting that neither the initial refund nor rescission of the recoupment of that refund would adversely affect market operations, because these are billing matters outside "market operations").

remains severe due to its unexpected nature.[24] Thus, they argue that there is no support for a recoupment policy here.

15. Financial Marketers further assert that this specific recoupment was destabilizing for three reasons: (1) it reflects a new policy of recouping refunds after distribution with no time limits or parameters; (2) the Commission signaled a willingness to apply new practices after-the-fact, without sufficient notice; and (3) the Commission ostensibly granted rehearing to relieve exporters of retroactive obligations and are treating Financial Marketers unfairly by requiring them to repay refunds.[25]

16. The Market Monitor asserts that neither the payment of refunds nor recoupment of refunds paid in error has any impact on market operations, as both are billing matters. Indeed, it argues that, by broadly construing the meaning of "market operations," recoupment has positive impacts because market participants know they will not be permitted to retain erroneously paid refunds and will be less likely to engage in questionable behavior. In addition, the Market Monitor argues that failure to require refunds here would provide parties with negative incentives so that they would not seek to reverse incorrect decisions.[26]

17. PJM maintains that the Recoupment Orders had a positive effect on market operations because they fixed an error that occurred when the Commission departed from its no-refund policy in cost allocation cases. PJM asserts that it is the inability or refusal of Financial Marketers to pay the recoupment that has had a negative impact on PJM markets. PJM notes that as a result of the July 2011 Recoupment Order, PJM required financial marketers to repay the refunds they inappropriately received. Thirteen of the financial marketers have since defaulted on approximately $28 million of the refund repayments. PJM states that these defaults directly harm PJM's members who must bear the costs of the defaults under section 15.2.2 (Default Allocation Assessments) of the Operating Agreement.[27]

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[24] Financial Marketers Reply Br. at 4-5.

[25] Financial Marketers Initial Br. at 12-15.

[26] Market Monitor Initial Br. at 1-4.

[27] PJM Initial Br. at 2-4.

18. AMP agrees with PJM that recoupment has beneficial market effects and argues that recoupment would have more salutary long-term effects on market operations than failing to correct an error.[28]

19. On reply, Financial Marketers aver that the only evidence as to broader market impacts is the Hogan testimony they submitted, and they maintain that recoupment did not correct an error but merely was the Commission changing its mind as to how it would exercise its discretion.[29] In turn, PJM contends on reply that Financial Marketers are trying to prevent the Commission from undertaking a permissible review and reversal of an erroneous decision.[30]

B. Legal or Policy Support for Recoupment of Erroneously Paid Refunds

20. Among other things, on initial and on reply brief Financial Marketers assert that recouping refunds lacks legal precedent or policy justifications. They argue that no logical justification exists for recouping refunds that were ordered after a rate was found to be illegal.[31] Moreover, they argue that no support for recoupment can be drawn by analogy from Commission policy that dictates when initial refunds are appropriate. They explain that the court ruled that initial denial of refunds and recouping refunds already ordered are distinct.[32]

21. Financial Marketers also maintain that this case reflects both a cost allocation matter as well as an over-recovery matter, and that they are owed a share of what they characterize as the over-allocation.[33] They contend that no other market participant could have reasonably relied on receiving what turned out to be an excessive share of the surplus, because these participants were on notice from the Financial Marketers' complaint. Further, they argue that there is no chance of under-recovery here because PJM can implement an up-lift charge to resettle the market, and, in any event, under-

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[28] AMP Initial Br. at 6-9.

[29] Financial Marketers Reply Br. at 5-6.

[30] PJM Reply Br. at 9-10.

[31] Financial Marketers Initial Br. at 16-17.

[32] *Id.* at 17-18; *see also* Financial Marketers Reply Br. at 22-23.

[33] *But see* Madison and WPPI Reply Br. at 2-5 (averring court agreed this case is one of rate design and not an over-collection case).

recovery as a reason for not ordering a refund has been rejected by Commission precedent.[34]

22. Financial Marketers further assert that recouping refunds is arbitrary and capricious here because it causes the harm it means to prevent.[35] They also argue that recouping refunds here is additionally unsupported because it is unprecedented. They assert that, because "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles," recouping refunds goes against the principle of just and reasonable rates and refund effective dates. Furthermore, they assert that recouping refunds also violates the fair notice doctrine, which precludes an imposition of severe financial impact without fair notice.[36]

23. The Market Monitor asserts that the Commission has applied recoupment for decades and ample legal and policy precedent exists to support and order recoupment as a remedy for errors. Citing *Tennessee Gas Pipeline Co.* as an example, the Market Monitor contends that the Commission has approved refund recoupment mechanisms in the past as remedial measures for cases on remand from the D.C. Circuit based on the absence of case law directly prohibiting recoupment.[37]

24. In turn, PJM explains that it knows of no precedent for not permitting recoupment, but it asserts that there are several important legal and policy reasons for permitting recoupment to correct error. PJM argues that the Commission erred by departing from its policy of not ordering refunds in cost-allocation and rate design cases; the proper equitable remedy to fix this error is to put the parties in the positions in which they would have been without the error. PJM asserts that such recoupment is necessary as a policy to make the affected market participants whole because they should not have suffered a

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[34] Financial Marketers Initial Br. at 18-20 (citing *Ameren Servs. Co. v. Midwest Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,161, at P 145 (2008); *Cal. Indep. Sys. Operator Corp.*, 103 FERC ¶ 61,114, at P 11 (2003)).

[35] *Id.* at 20-22 (citing *Towns of Concord v. FERC*, 933 F.2d 67, 75 (D.C. Cir. 1992)).

[36] *Id.* at 22-24 (citing *SEC v. Chenery*, 332 U.S. 194, 203 (1947); *Power Co. of Am., LP v. FERC*, 245 F.3d 839, 847 (D.C. Cir. 2001); *McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1359 (D.C. Cir. 1993)).

[37] Market Monitor Initial Br. at 4-5 (citing *Tenn. Gas Pipeline Co.*, 65 FERC ¶ 61,158, at 61,699 (1993)).

shortfall for the initial refund at the outset. Since PJM is an RTO, it states that any payment of refunds requires imposing surcharges—i.e., a billing adjustment—on other members.[38]

25. AMP contends that the charges imposed for the initial refund conferred an unjust enrichment on Financial Marketers, and recoupment is necessary to restore all parties to their original economic positions.[39]

26. Madison and WPPI contend that FPA sections 206 and 313(a) give the Commission broad discretion to order refunds and authority to modify or set aside decisions to direct refunds, respectively, and the Commission has done so many times in the past. Madison and WPPI argue, however, that in rate design cases such as this the Commission exercises its discretion by not ordering refunds and implementing changes prospectively.[40]

C. Recoupment Status

27. Financial Marketers contend that PJM is in the best position to report on the results of the Refund Orders.[41]

28. The Market Monitor states that PJM has been unable to recoup approximately 75 percent of the $37 million refund amount.[42]

29. PJM states that it has recouped approximately $9 million of the $37 million refund amount from Financial Marketers, leaving a shortfall of approximately $28 million. PJM used the approximately $9 million to reimburse the market participants originally

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[38] PJM Initial Br. at 4-7 (citing *Pub. Utils. Comm'n of State of Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993)).

[39] AMP Initial Br. at 9-10 (citing *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (3rd Cir. 1977)).

[40] Madison and WPPI Initial Br. at 7-10 (citing *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218,225 (D.C. Cir. 1999); *Towns of Concord v. FERC*, 995 F.2d 67, 72-73 (D.C. 1992); *Second Taxing Dist. of City of Norwalk v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982); *Cities of Batavia v. FERC*, 672 F.2d 64, 85 (D.C. Cir. 1982)).

[41] Financial Marketers Initial Br. at 24.

[42] Market Monitor Initial Br. at 5 (correcting its earlier mistaken statement that the amount not recouped was 25 percent).

surcharged to fund the refunds to the Financial Marketers. PJM states that, to recoup the remaining $28 million, it issued Default Allocation Assessments to all PJM members. PJM notes that as additional refunds are recouped from the Financial Marketers, either through voluntary payment or court order(s) related to the Delaware state court proceedings, those recoupments will be used to reverse the Default Allocation Assessments.[43]

D. Alternatives to Recoupment

30. Financial Marketers suggest that the Recoupment Orders should be rescinded; they support any methodology for rescission consistent with law and PJM market rules. [44]

31. The Market Monitor states that it takes no position on this issue at this time.[45]

32. PJM states that if it could not recoup the refunds from Financial Marketers, it could not reimburse the affected market participants for surcharges that never should have been billed to them. PJM states that it has no authority under its Tariff or Operating Agreement to charge any other class of members for those refund reversals, nor does it believe there is a class of members who should fund the refund reversals. According to PJM, the proper remedy is to require the defaulting Financial Marketers to remain responsible for the $28 million in refund reversal charges.[46]

33. AMP interprets the Commission's request about alternatives to recoupment to be asking what source would be used to "reimburse the market participants that paid surcharges to finance the refunds paid to the virtual traders, assuming PJM is not permitted to obtain those funds through recoupment from the virtual traders themselves."[47] AMP explains that PJM would reimburse affected market participants through billing credits, but that such credits would result in a shortfall between PJM's revenues and expenses, which would require PJM to borrow from its working capital. Such borrowing would be repaid from collections of PJM's administrative costs under Schedule 3 of PJM's Tariff.

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[43] PJM Initial Br. at 7-8.

[44] Financial Marketers Initial Br. at 24-25.

[45] Market Monitor Initial Br. at 6.

[46] PJM Initial Br. at 8-9.

[47] AMP Initial Br. at 11-13.

34. Madison and WPPI disagree with Financial Marketers' assertion that PJM can always order an up-lift charge to prevent under-recovery. They contend that this ignores the fact that Financial Marketers themselves were what necessitated the up-lift charge. Payment responsibilities, according to Madison and WPPI, must ultimately rest with cost causers.[48]

E. Timely Distribution of Refunds

35. Financial Marketers argue that the Commission should propose any new rule for recouping refunds prospectively. They argue that the Commission should not revisit the propriety of a refund once ordered, because it is highly disruptive, unsupportable, and an abuse of discretion for the Commission to reverse its exercise of discretion through recouping refunds.[49]

36. The Market Monitor contends that any policy against recouping erroneous refunds could bar claimants from receiving their proper refunds in a timely fashion. According to the Market Monitor, such a policy, moreover, would prevent the Commission from correcting error and would permit parties to either retain a windfall or refuse to pay absent a final order.[50]

37. PJM explains that refunds are funded either through surcharges on specific members or classes of members or through up-lift charges on all members. If the Commission is unable to direct the recoupment of erroneously directed refunds, PJM states that in the future PJM may request Commission approval to delay processing refunds until all rehearing requests and appeals are resolved. Alternatively, PJM states that funds could be held in escrow pending such resolution.[51]

38. AMP asserts that delaying the issuance of refunds runs counter to the purpose of refunds, which is to restore the economic position of customers that have paid charges legitimately believed by the Commission to be unjust, unreasonable, or unduly

[48] Madison and WPPI Reply Br. at 4.

[49] Financial Marketers Initial Br. at 25-27.

[50] Market Monitor Initial Br. at 6.

[51] PJM Initial Br. at 9-10.

discriminatory. AMP contends that, due to constant changes in the customer base, that purpose is undermined if issuance of refunds is delayed till the end of proceedings.[52]

V. Discussion

A. Procedural Matters

39. While ordinarily the Commission does not permit late interventions at such a late stage in a proceeding, we will do so when special circumstances are present.[53] We will grant the Market Monitor's late-filed motion to intervene pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2015). We find granting intervention at this stage appropriate because the intervention was filed at the beginning of a new remand on a limited discrete issue and the Market Monitor accepts the underlying record, the issue of whether permitting recoupment of refunds has an effect on the market was highlighted by the court remand and the Commission's Briefing Notice, and this issue is a subject specifically within the province of the Market Monitor.

40. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept all answers because they provided information that assisted us in our decision-making process.

B. Substantive Matters

41. For the reasons explained below, we affirm that the Financial Marketers should be required to repay refunds, with interest, to put the parties back in the positions in which they would have found themselves if the Commission had not erred in requiring refunds in the first place.

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[52] AMP Initial Br. at 13-14 (citing *FPC v. Tenn. Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962)).

[53] *See PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128, at P 13 (2014) (granting intervention at the rehearing stage when other parties are not prejudiced); *Transcontinental Gas Pipe Line Corp.*, 132 FERC ¶ 61,034, at P 25 (2010) (granting late intervention given the ongoing nature of the proceeding and that the intervenors were new customers); *San Diego Gas & Elec. Co.* v. *Sellers of Energy and Ancillary Service*, 95 FERC ¶ 61,418, at 62,550 (2001) (granting late intervention at rehearing stage due to extensive overlap of issues between proceedings); *Trunkline Gas Co.*, 41 FERC ¶ 61,121 (1987) (granting late intervention when the public interest will be better served).

42. In its order remanding the matter of recoupment to the Commission, the D.C. Circuit acknowledged that the Commission's policy reasons for ordering recoupment may outweigh its negative effects, but directed the Commission to analyze that question and justify the result.[54] The Commission's discretionary authority is at its zenith in determining remedies,[55] and when determining whether recoupment is warranted, the Commission must weigh the equities of requiring the Financial Marketers to repay the refunds against those of the parties that sought rehearing to correct the Commission's erroneous refund directive in the first place.

43. Section 313 of the Federal Power Act provides a specific avenue for parties to seek Commission review and reappraisal of a determination in an initial order. "Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing."[56] In its July 2011 Recoupment Order, the Commission considered arguments made on rehearing, and determined that it had erred when it ordered PJM to issue refunds to Financial Marketers. The Commission reasoned that this directive to PJM was a departure from its policy of not ordering refunds involving rate design or cost allocation changes.[57]

44. We find that failing to permit recoupment of these erroneously issued refunds would reduce the incentive of parties to seek to correct legal errors or policy deviations made by the Commission in initial orders.[58] If parties could receive no relief from improvidently granted refunds, they would have no reason to incur the legal and other expenses involved in seeking rehearing of orders directing refunds.[59] We are persuaded

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[54] 725 F.3d at 244.

[55] *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1966).

[56] 16 U.S.C. § 825*l* (a) (2012).

[57] July 2011 Recoupment Order, 136 FERC ¶ 61,040 at PP 25-26.

[58] The ability to seek rehearing of Commission orders to correct such errors is particularly important since, in many cases, the Commission is required to issue initial orders on very short time frames (30 days after filing under the Natural Gas Act, 15 U.S.C. § 717 (2012), and 60 days under the Federal Power Act, 16 U.S.C. § 824 (2012)).

[59] Market Monitor Initial Brief at 3-4 (stating, "[T]he failure to require refunds by the Financial Marketers in this case would create negative incentives for parties to seek to reverse incorrect decisions . . . This increases the likelihood that bad precedents would stand unchallenged.").

by the Market Monitor's assertion that neither the payment of refunds nor recoupment of refunds issued in error will impact the operations of the market, because both are billing matters.[60] We are similarly persuaded by PJM's assertion that recoupment will have a positive effect on the market because market participants know they will not be permitted to retain erroneously paid refunds.[61]

45. As the D.C. Circuit found, Financial Marketers were on notice that the refunds paid based on the initial Commission order were in question: "The broad inquiry FERC initiated in the April 2010 order should have made it clear to the virtual marketers that their refunds were subject to reconsideration. . . . In other words, the September 2009 refund order was not final."[62] Financial Marketers had sufficient reason to preserve those funds in the event that the Commission (or a court) subsequently reversed the Commission's initial determination. In these circumstances, we find the equities lie in favor of requiring the recoupment of those refunds to put the parties in the position in which they would have been, absent Commission error. As the Commission has explained in determining how to exercise its remedial authority to correct an error:

> In doing so, the Commission has, and must, balance the relevant equities and, if necessary, make limited departures from traditional ratemaking principles. *All this is done with the objective of placing the parties as closely as possible in the position they would have been in if the Commission had not erred ….*[63]

46. We also find that this result is supported by relevant Commission and judicial precedent. In the *Occidental Chemical Corp.* proceeding, the Commission directed PJM to determine refunds and surcharges based on a refund effective date.[64] The Commission asked for a voluntary remand to consider whether its refund order contravened its no-refund policy. On remand, PJM informed the Commission that its directive to pay refunds did result in a change in PJM's rate design with a consequent undercollection and

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[60] *See supra* P 15.

[61] *See supra* P 16.

[62] 725 F.3d at 242-43.

[63] *Northwest Pipeline Corp.*, 69 FERC ¶ 61,359, at 62,330-31 (1994) (emphasis added), *reh'g denied*, 71 FERC ¶ 61,012 (1995).

[64] 110 FERC ¶ 61,378 at P 8.

overcollection of revenue. In the order on remand, the Commission granted rehearing, finding that under its long-standing policy, refunds should not be applied when a Commission action requires a cost allocation change or rate design change.[65] To rectify this error, the Commission directed PJM to determine refunds and surcharges for the refund period.[66]

47. In *Ameren Services Co.*,[67] Financial Marketers and other parties sought rehearing of a Commission order requiring refunds based on a similar policy argument that the Commission should not order refunds in cases involving changes in market design. The Commission granted those rehearing requests, finding that "in cases involving changes in market design, the Commission generally exercises its discretion and does not order refunds when doing so would require re-running a market."[68] The Commission then ordered MISO to "cease the ongoing market resettlement, and to reconcile all invoices and payments issued therein."[69]

48. Requiring the recoupment of refunds when the Commission grants rehearing is also consistent with prior court determinations. In *Transcontinental Gas Pipe Line Corp. v. FERC*,[70] the court ruled that the Commission erred when it determined not to correct its error on rehearing. In this proceeding, the Commission granted rehearing of a decision to reject the proposal of a rate design change, but delayed the implementation date of the rate design until the date of its rehearing order. The court reversed finding that the Commission's policy is to honor the expectations of those customers that fully expected that the Commission would grant rehearing:

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[65] *Id*. P 10.

[66] *Id*. P 12.

[67] *Ameren Servs. Co.*, 127 FERC ¶ 61,121, at PP 143-148, 157 (2009).

[68] *Id.* P 157 (citing *Md. Pub. Serv. Comm'n. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, at P 49 (2008)); *see also Bangor Hydro-Elec. Co. v. ISO New England Inc.*, 97 FERC ¶ 61,339 (2001) (finding that re-running markets even when an error was made would do more harm to electric markets than is justifiable).

[69] *Id.*

[70] 54 F.3d 893, 899 (D.C. Cir. 1995).

> The expectations of those who act in anticipation of the right rate are protected, and they would seem presumptively the most deserving."[71]

49. Likewise, when a court, rather than the Commission, finds that the Commission has committed a legal error, the Commission ordinarily is expected to ensure that parties are placed in the same position they would have been if the Commission had not committed legal error. The Supreme Court has stated that "an agency, like a court, can undo what is wrongfully done by virtue of its order."[72] The courts have found that such adjustments do not run afoul of the filed rate doctrine because "the filed rate doctrine simply does not extend to cases in which buyers 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."[73]

50. We discuss below the issues raised by the comments.

1. Effect on the PJM Market

51. The D.C. Circuit questioned whether recoupment of refunds may reduce the confidence of participants in the smooth functioning of the market.[74] Financial Marketers argue that allowing PJM to recoup refunds already paid detrimentally affects the integrity of the market and imposes higher costs to markets and market participants, working against Commission goals of supporting competition and greater efficiency. Financial Marketers also assert that this specific recoupment was destabilizing because it reflects a new policy of recouping refunds after distribution with no time limits or parameters, the Commission signaled a willingness to apply new practices after-the-fact, and the Recoupment Orders generate a perception of bias against financial marketers as a group.

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[71] *Id.*

[72] *United Gas Improvement Co. v. Callery Properties, Inc*., 382 U.S. 223, 229-30, (1965) (finding the Commission has authority to order reparations after a remand order).

[73] *Can. Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *see also W. Res., Inc. v. FERC*, 72 F.3d 147, 151 (D.C. Cir. 1995) (stating, "were the Commission not able to take remedial action to correct its errors, 'pipelines would be substantially and irreparably injured by [Commission] errors, and judicial review would be powerless to protect them from [many] of the losses so incurred") (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074-75 (D.C.Cir.1992).

[74] 725 F.3d at 243-44.

They include an affidavit by Dr. William Hogan stating that "success of the market also requires some finality in choosing such a balance and ordering refunds."[75]

52. Contrary to the Financial Marketers' assertion, the instant case will not harm the integrity of the market or impose higher costs to markets and market participants. According to the PJM Market Monitor, "neither the payment of refunds nor the recoupment of refunds wrongfully paid has relevance to market operations."[76] As the Market Monitor further explains, the transactions that generated the funds in question settled between December 3, 2007 and March 3, 2009 and significantly, those transactions were *not* resettled when the refunds were initially paid and they will not be resettled to whatever extent the refunds are recouped.[77] In considering whether recouping is warranted – and specifically, whether recoupment would "reduce the confidence of participants in the smooth functioning of the market" – the Commission necessarily considers the expertise of the market operators and market monitor responsible for monitoring and reporting on the PJM market.[78]

53. This case involves *surplus* funds resulting from PJM's use of a marginal loss pricing methodology to cover transmission losses. PJM correctly calculated marginal line losses and prices, and all parties paid the correct price for energy. The production from all generation plants was unaffected. As the Market Monitor for PJM informed the Commission in no uncertain terms, the recoupment of refunds is a billing matter that can be settled without affecting market operations.[79]

54. Allowing recoupment after the Commission has reversed itself on rehearing has positive effects on the market. It creates an incentive for companies to seek rehearing of Commission orders they believe are legally or factually incorrect. As the Market Monitor states, "it is better for the markets that participants believe that the benefits of this

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[75] Financial Marketers Initial Br. at 12.

[76] Market Monitor Initial Brief at 1.

[77] *See id*.

[78] *See* FERC, *Policy Statement on Market Monitoring Units*, Docket No. PL05-1-000, at 1 (2005) (Noting the market monitors for RTOs (like PJM) "perform an important role in assisting the Commission in enhancing the competitiveness of ISO/RTO markets" and these market monitors "provide the comprehensive market analysis critical for informed policy decision making.").

[79] Market Monitor Initial Brief at 1.

behavior may be reversed and that they will not be permitted to keep the money allocated to them based on what was an obvious error."[80] And as AMP explains, "What undermines confidence in a market isn't the correction of errors; rather, it is the failure to correct errors once identified."[81]

55. In response to the Financial Marketers' assertion that the Recoupment Orders generate a perception of bias against virtual marketers as a group, we note that the D.C. Circuit determined that the surplus allocation system does not unduly discriminate against virtual traders.[82] We therefore disagree that a legitimate distinction between market participants, coupled with a correction of the Commission's deviation from its no-refund policy, should generate a perception of bias against the Financial Marketers. In any event, we do not believe that a perception of bias, to the extent it exists, overrides the legal and policy reasons for directing recoupment.

56. Although Financial Marketers concede that "market operations," narrowly defined, are not affected,[83] they maintain that the recoupment of refunds is destabilizing because: (1) it reflects a new policy of recouping refunds after distribution imposed with no time limits or parameters; (2) the Commission signaled a willingness to apply new practices after-the-fact, without adequate notice; and (3) the Commission ostensibly granted rehearing to relieve exporters of retroactive obligations and are treating the

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[80] *Id.* at 2-3.

[81] AMP Initial Br. at 8 ("[I]t is hard to imagine anything more harmful to confidence in the market than leaving uncorrected an order that erroneously conferred unjust enrichment on one set of market participants at the expense of another. The failure to correct such an order would send an unmistakable message that the market rules and the overlying regulatory mechanism simply cannot be trusted."); *see also* Madison and WPPI Initial Br. at 6-7 ("[I]f the Commission could not cure a mistaken refund, then either the fear of incurable mistakes would undermine market confidence, or FERC proceedings would become so prolonged, in an effort (likely a futile one) to avoid ever making a mistake, that market confidence and functioning would be undermined by extended administrative processes with uncertain end-points.").

[82] 725 F.3d at 239. ("In this case, the Surplus Orders sufficiently justified the approval of a discriminatory system on the grounds that virtual marketers perform different roles from load-serving entities within the market, and that the system will limit virtual marketers' incentives to engage in market manipulation. Therefore, we hold that the Commission's action did not run afoul of § 824(b) or the APA.")

[83] Financial Marketers Reply Br. at 3.

Financial Marketers unfairly requiring them to repay refunds.[84] We address these contentions in turn.

a. The Commission Did Not Impose a New Policy

57. We do not find that recouping refunds is a change in Commission policy. As discussed earlier, we find substantial precedent for ensuring that parties are made whole when the Commission finds on rehearing that it has made an error in its initial order.[85] These cases also show that the Commission does permit resettlement and recoupment on rehearing. In *Occidental Chemical Corp.*, the Commission reversed its position after a voluntary remand, and in *Ameren Services Co.*, the Commission reversed its position upon rehearing. In both cases, the Commission required resettlement to rectify its error.[86]

b. The Commission Did Not Implement a New Policy Without Notice

58. Financial Marketers maintain that the Commission implemented a new policy when the request for rehearing did not raise issue with the refund to the Financial Marketers and, therefore, did not provide clear notice that their refunds remained in play.[87] They claim that in this case, the rehearing requests were too tangential to provide adequate notice.

59. The argument concerning lack of notice reprises an argument Financial Marketers made to the D.C. Circuit, and the court affirmed the Commission's determination that Financial Marketers had been provided adequate notice through the Commission's April 2010 order.[88] As the court stated:

> We need not decide whether the exporters' rehearing request provided "reasonable notice" to the virtual marketers that their refunds were being reconsidered because the April 2010 order did…. The April 2010 order responded to arguments

[84] Financial Marketers Initial Br. at 12-15.

[85] *See supra* PP 45-49.

[86] *See supra* PP 46-47.

[87] Financial Marketers Initial Br. at 13 and n.32.

[88] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024 (2010).

> raised in the exporters' request for rehearing of the September 2009 order, and expanded beyond them. The exporters contended that retroactive alteration of the treatment of their surplus allocations was contrary to FERC precedent. Their arguments were equally applicable to the virtual marketers' refunds.… The broad inquiry FERC initiated in the April 2010 order should have made it clear to the virtual marketers that their refunds were subject to reconsideration.[89]

60. Moreover, the rehearing requests themselves did provide notice that the Commission's refund policy with respect to rate design changes was at issue. The rehearing requests continually pointed to cases in which the Commission "reversed its refund direction."[90] The rehearing petitions also made specific mention of the Commission's policy against ordering refunds in rate design cases: "These 'revisiting decisions' generally stand for the proposition that the Commission should allow changes in rate design to be effective prospectively only because market participants cannot revisit their economic decisions in light of the rate design change."[91] Given the notice to the Financial Marketers, and the lack of effect on market operations, we conclude that the balance of equities lies in favor of the parties seeking rehearing and correcting the billing error to ensure all parties are made whole from the Commission's failure to apply its no-refund precedent.[92]

c. The Commission Did Not Treat the Financial Marketers Differently than Other Parties

61. Financial Marketers maintain the Commission granted rehearing so that exporters would be relieved of retroactive obligations while then requiring Financial Marketers to repay retroactively the refunds they received. Financial Marketers maintain that this

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[89] 725 F.3d at 242.

[90] DC Energy and AEP, October 19, 2009 Request for Clarification and Rehearing at 14; *see also id*. at 13 ("[T]he Commission has previously refused to impose refunds.").

[91] *Id*. at 13.

[92] The Commission has recognized the difference between ordering refunds involving market operations and those relating only to billing disputes, distinguishing between a change involving the model used to calculate prices and the correction of a billing error. *Exelon Corp. v. PPL Elec. Utils. Corp*., 114 FERC ¶ 61,298 (2006).

injures the market by generating a perception of bias against a particular class of market participants. Financial Marketers point to the harm done to some of their members who have not been able to pay back the refunds. Financial Marketers argue that requiring the return of the refunds is "robbing Peter to pay Paul—the definition of arbitrary, capricious, and discriminatory conduct."[93]

62. The Commission was not treating Financial Marketers differently from other customers of PJM by granting exporters' requests for rehearing. The PJM exporters' financial concern was that if the Commission ordered refunds to Financial Marketers, such a direction might result in PJM surcharging the exporters and other customers to fund the refunds.[94] Moreover, the exporters sought rehearing based on the Commission's failure to adhere to its prior precedent.[95] The purpose of rehearing is for parties to apprise the Commission of purported errors or departures from precedent involved in its initial determination. Financial Marketers were on notice that rehearing had been requested. And, contrary to Financial Marketers' argument, the requests for rehearing raised the issue of whether providing refunds in a rate design and cost allocation case is consistent with Commission precedent. Since the market does not have to be re-run, the only issue involved here is whether to permit Financial Marketers to retain the refunds or to require them to repay PJM for the refunds (and PJM will then reimburse those who were surcharged to pay for the refunds). Those seeking rehearing are deserving of having their requests vindicated should the Commission determine that it has made an error.[96] Honoring that expectation benefits all parties by providing an incentive for parties to

[93] Financial Marketers Br. at 21; Financial Marketers Reply Br. at 4.

[94] Because the Commission granted rehearing, it did not determine whether such surcharges would be appropriate. *See Black Oak Energy, L.L.C. v. FERC*, 139 FERC ¶ 61,111, at P 42, n.55 (2012).

[95] *See supra* P 4.

[96] Some financial marketers apparently managed their finances so that they were able to repay the refunds, while others did not. Of the $28 million remaining to be collected, $17 million comes from one entity, *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,019 (2013), and four entities represent 98% of the total default amount. PJM Initial Br. at 4. It is not apparent why Financial Marketers have a stronger entitlement to the funds than other PJM parties, or why Financial Marketers have less of an obligation than other PJM market participants to maintain funds necessary to satisfy their financial obligations to the market.

raise such issues on rehearing.[97] Given the notice provided to Financial Marketers from the rehearing requests, we have determined that, in considering the interests of all parties and consistent with Commission and court precedent, the better result is to put parties in the position they would have found themselves if the Commission had not erred in granting refunds in the first place.

2. Absence of Legal Error

63. Financial Marketers also maintain that the Commission should not implement its no-refund policy in this case because the Commission did not find legal error in the ordering of refunds; instead, they argue, "this was a Commission revisitation of a past exercise of discretion."[98] However, it may be legal error for the Commission to "depart[] from established precedent without a reasoned explanation."[99] In this case, the

[97] In *Ameren*, Financial Marketers were the parties seeking rehearing to reverse a refund order, and the Commission granted that request, just as it did the parties seeking rehearing here. *See supra* P 47. Financial Marketers contend that *Ameren* is distinguishable from this case because it occurred after the decision in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2008), which held that the Commission cannot order retroactive rate increases. Financial Marketers Reply Br. at 17 n.42. We do not find meaningful distinctions between this proceeding and *Ameren.* The issue in *Ameren*, just as here, was whether to require refunds of an overpayment and financial marketers, among others, cited to the Commission policy of not requiring refunds in cost allocation and rate design cases. The Commission applied this policy to halt the refund payments. Moreover, this proceeding, just as *Ameren*, also involves the issue of whether an independent system operator or RTO can surcharge other parties in order to pay the refunds.

[98] Financial Marketers Initial Br. at 16.

[99] *Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 309 (D.C. Cir. 2003) ("There is, however, a serious glitch: The Commission failed to reconcile its decision at issue here with its previous opinions . . . ."); *Dominion Resource, Inc. v. FERC*, 286 F.3d 586, 592 (D.C. Cir. 2002) (explaining that the Commission decision "represents a sharp and unexplained break with FERC precedent and is otherwise arbitrary and capricious"); *ANR Pipeline Co. v. FERC*, 71 F3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious . . . ."); indeed, the *Occidental* decision resulted from a voluntary remand and the Commission determined that it needed to adhere to its past precedent regarding refunds in cost allocation and rate design cases. *Occidental Chem. Corp*., 110 FERC ¶ 61,378, at P 10 (2005).

Commission ultimately determined that it could not justify changing its precedent. Our decision to adhere to past precedent therefore did not represent a change in a discretionary policy, but was an acknowledgement by the Commission that its initial refund order was not supported by precedent and was in error.

64. Financial Marketers continue to assert that the Recoupment Orders unjustly reinstitute an illegal rate.[100] The D.C. Circuit addressed this contention and dismissed it after finding "the Recoupment Orders did not 'reinstitute' an unlawful tariff; they merely modified the remedy that FERC ordered in September 2009. . . . Thus, the virtual marketers' 'unjust, unreasonable, and unduly discriminatory' argument fails."[101]

3. Reconsideration of the Commission's No-Refund Policy

65. Financial Marketers also revisit the Commission's determination to apply the no-refund policy in this case, arguing that PJM's status as a not-for-profit entity would argue in favor of allowing the refunds to stand.[102] As Financial Marketers recognize, the issue of whether to apply the no-refund policy in the first place is not at issue in this case.[103] The court did not question the Commission's determination to reverse its prior order of refunds on rehearing, concluding "had FERC followed its precedent in the first instance, there would have been no $37 million refund."[104] The court found only that the Commission in implementing that policy had not explained the distinction between denying refunds and recouping them.[105] We explain above why we find that recoupment

[100] *See supra* P 20; Financial Marketers Initial Brief at 16-17.

[101] 725 F.3d at 243.

[102] Financial Marketers Initial Br. at 19.

[103] *Id*. at 17 (recognizing that the only issue in this proceeding is whether to permit PJM to recoup refunds, not whether "to order refunds in the first place").

[104] *Black Oak*, 725 F.3d at 243; s*ee also* July 2011 Recoupment Order, 136 FERC ¶ 61,040 at P 28 (finding that ordering refunds, without the ability to surcharge customers, would lead to an under-recovery of legitimate costs).

[105] *Id.* at 241 ("[W]e hold that FERC gave the virtual marketers reasonable notice that their refunds were under reconsideration, but that FERC's orders were arbitrary and capricious because they were insufficiently justified . . . .").

of refunds in this case follows prior Commission and court precedent, and is a reasonable balance of interests.[106]

66. Moreover, if we were to revisit the application of our policy with respect to PJM, we do not agree with Financial Marketers that PJM's status as a not-for-profit entity militates in favor of allowing the refunds to remain in Financial Marketers' hands.[107] Financial Marketers assert that no risk of under-recovery exists because PJM always has the ability to order a general uplift charge to its stakeholders to cover any refunds.[108] Financial Marketers fail, however, to cite support for their claim that PJM can recover refunds through a general surcharge imposed on other customers.[109] Notably, as the court found in *City of Anaheim v. FERC*,[110] "§206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate increases" such as those that PJM would have to assess on other customers to cover the refunds.

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[106] One of the cases cited by Financial Marketers in contending the Commission should not require repayment of refunds is *Ameren Services Co.*, 125 FERC ¶ 61,161, at P 143 (2008). But, as pointed out earlier, in a subsequent order on rehearing, the Commission granted the rehearing requests of financial marketers, finding that the Commission should have applied its policy of not granting refunds in cases involving market design. Having granted rehearing, the Commission rescinded its refund determination and required that the refunds be repaid. *See supra* P 47; *Ameren Servs. Co.*, 127 FERC ¶ 61,121, at P 57 (2009).

[107] Financial Marketers Initial Br. at 19 (noting PJM's lack of shareholders).

[108] *Id.*

[109] The tariff provision cited by Financial Marketers, PJM Operating Agreement § 5.2.5(c)(1-3), deals with FTR under-collection, not with Up To Congestion transactions or refund payments under section 206(b) of the FPA. PJM Interconnection, L.L.C./Intra-PJM Tariffs, Operating Agreement, Schedule 1, § 5.2, (Transmission Congestion Credit Calculation) (7.0.0), § 5.2.5(c) ("the Office of the Interconnection shall assess a charge equal to the difference between the Transmission Congestion Credit Target Allocations for all revenue deficient FTRs and the actual Transmission Congestion Credits allocated to those FTR holders"), http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=145222.

[110] 558 F.3d 521 (D.C. Cir. 2009).

4. Conclusion

67. While certainty is generally preferable to uncertainty, the FPA's rehearing provision, section 313, by definition, creates a regulatory risk that any Commission order may be changed or revised before the proceeding is final. Since the recoupment at issue in this case involves only billing and a redistribution of after-the-fact credits unrelated to market pricing, we conclude that in weighing the interests of the parties, the precedent and equities favor putting parties in the same position in which they would have been if the Commission had not deviated from its traditional no-refund policy with respect to rate design and cost allocation, i.e., by recouping the refunds, with interest.

The Commission orders:

The Commission hereby finds PJM is entitled to seek recoupment of refunds, with interest, as discussed in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.