

136 FERC ¶ 61,040
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Black Oak Energy, L.L.C.	Docket Nos.	EL08-14-003
EPIC Merchant Energy, L.P. and		EL08-14-004
SESCO Enterprises, L.L.C.		EL08-14-005

v.

PJM Interconnection, L.L.C.

Black Oak Energy, L.L.C.	
EPIC Merchant Energy, L.P. and	EL08-14-006
SESCO Enterprises, L.L.C.	

v.

PJM Interconnection, L.L.C.

Black Oak Energy, L.L.C.	
EPIC Merchant Energy, L.P. and	
SESCO Enterprises, L.L.C.	EL08-14-007

v.

PJM Interconnection, L.L.C.

ORDER GRANTING REHEARING, GRANTING MOTION, AND REJECTING
REFUND REPORT AS MOOT

(Issued July 21, 2011)

1. On May 17, 2010, Integrys Energy Services, Inc. (Integrys) filed a request for rehearing of the Commission's April 15, 2010 order, which accepted a compliance filing

from PJM Interconnection, L.L.C. (PJM) relating to PJM's disbursement of over-collected transmission line loss charges and denied requests for rehearing.¹

2. On May 20, 2010, American Municipal Power, Inc. (AMP) submitted a motion requesting that the Commission clarify that its failure to grant AMP's motion to intervene out-of-time was inadvertent.

3. Finally, on June 1, 2010, PJM submitted a revised refund report in compliance with the directives of the April 15, 2010 Rehearing Order. As discussed below, the Commission grants Integrys's request for rehearing, grants AMP's motion, and rejects PJM's refund report as moot.

I. Background

4. On March 3, 2006, Atlantic City Electric Company and others filed a complaint alleging that PJM's practice of recovering transmission line losses through an average cost method violated PJM's tariff. The complaining parties asserted that PJM's tariff required that the transmission line losses should be recovered through a marginal transmission line loss collection methodology when this became technically feasible, which it had become. They argued that PJM was unreasonably delaying implementation of the marginal loss method because of stakeholder disputes on how to allocate the over-collected amounts or "surplus" that necessarily would result. The complaining parties further argued that continued delay would result in misallocation of transmission line losses among load by as much as \$100 million per year and concluded that the average cost method was inconsistent with the efficiency principles underpinning the locational marginal cost method that determines PJM wholesale prices. By contrast, most other parties urged that PJM retain the average cost method of recovering transmission losses, or that implementation of the marginal cost method be delayed until June 1, 2007.

5. The Commission's May 1, 2006 order concluded that PJM's tariff required use of the marginal loss method when it was technically feasible and that this was now the case.² The Commission also affirmed that the marginal loss method was appropriate because it would allow PJM to change its dispatch of generators (by considering the effects of losses) in a way that would reduce the total cost of meeting load.³ The Commission found that the marginal loss method effectively imposes different loss

¹ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024 (2010) (April 15, 2010 Rehearing Order).

² *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 19 (2006) (May 1, 2006 Order).

³ *Id.* P 22.

charges to customers at different locations, as the loss component of the energy price varies for customers at different locations. That is, each spot market energy customer pays an energy price that reflects the full marginal cost—including the marginal cost of transmission losses—of delivering an increment of energy to the purchaser’s location. Transmission line losses vary based on both the distance the energy is transmitted and the amount of energy transmitted.⁴ Charging for marginal, rather than average, losses will result in collecting more revenues than needed to cover total loss costs.⁵ The Commission further found that PJM would need to develop a method to allocate any over-collections. Subsequently, in its November 6, 2006 order, the Commission addressed and resolved the allocation issue.⁶

6. On December 3, 2007, Black Oak, EPIC, and SESCO (collectively, Complainants) filed a complaint challenging the marginal line loss method and the related allocation methodology in PJM’s tariff. Specifically, Complainants argued that the financial transactions of “virtual traders” or arbitrageurs do not create the flow of physical energy and concomitant transmission line losses and, therefore, they should not be assigned marginal line losses. Alternatively, Complainants argued that if their financial transactions are assigned marginal line losses they should receive a share of the surplus over-collected amount. In its order denying the complaint, the Commission, *inter alia*, concluded that no party is entitled to receive any particular amounts through disbursement of the surplus that inevitably results from using the marginal line loss methodology, since the price each party is paying is the correct marginal price for the energy that each party is purchasing.⁷

⁴ It is a principle of mathematics that whenever any variable is continuously increasing, the marginal value of the last unit exceeds the average of all the units. Thus, where an average method considers all the units and produces an “average” transmission line loss (e.g., two percent is the average of an initial line loss of one percent that escalates as units increase to three percent), a marginal method would consider the losses incurred by the last unit(s) (e.g., three percent) and produces a “marginal” transmission line loss figure to be incorporated into the price of delivered energy (in that case, three percent). The marginal loss method, therefore, will always result in a higher figure than the average loss method.

⁵ May 1, 2006 Order, 115 FERC ¶ 61,132 at P 4-5.

⁶ *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,169 (2006) (November 6, 2006 Order).

⁷ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.* 122 FERC ¶ 61,208, at P 46 (2008) (March 6, 2008 Complaint Order).

7. Complainants filed a request for rehearing of the March 6, 2008 Complaint Order, arguing, among other things, that they, and others similarly situated, are entitled to receive a share of the marginal line loss surplus because they contribute to the fixed costs of the transmission system.⁸ In addressing Complainants' arguments, the Commission addressed whether arbitrageurs in the PJM market should be required to pay marginal line losses and, if so, whether they should be entitled to a share of the over-collected amounts (or "surplus") on an equal basis with other similarly situated customers.⁹ The Commission denied rehearing on the first issue and granted rehearing on the issue of the allocation of the over-collected amounts. The Commission directed PJM either to revise its tariff to include a credit to others who pay for the fixed costs of the transmission system in proportion to the load represented by their transmission usage or to show cause why its existing tariff provision is just and reasonable.

8. PJM subsequently requested that the Commission clarify its directive in paragraph 49 of the October 16, 2008 Rehearing Order that PJM make a tariff revision to include a credit to those who pay the fixed costs of the transmission system "in proportion to load represented by their transmission usage." Specifically, PJM asked whether this use of the term "load" evidences an intent by the Commission to exclude those market participants that engage in virtual transactions, i.e., those who do not serve "load."¹⁰ The Commission clarified that it did not intend to exclude virtual traders from eligibility for the credit related to the surplus to the extent that those traders make transmission payments that contribute to the fixed costs of the transmission grid, without regard to whether such parties serve load.¹¹

9. On March 26, 2009, PJM submitted revisions to section 5.5 of the appendix to Attachment K of its tariff and to the corresponding section of Schedule 1 of its Operating Agreement in compliance with the Commission's directive and clarification.¹² PJM

⁸ April 7, 2008 Request for Rehearing at 21-24.

⁹ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at P 24 (2008) (October 16, 2008 Rehearing Order).

¹⁰ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,164, at P 10, 13 (2009) (February 24, 2009 Clarification Order).

¹¹ *Id.* P 14-15.

¹² March 26, 2009 Compliance Filing at 3. Showing the proposed additions and deletions, PJM's revised section 5.5 read as follows:

The total Transmission Loss Charges accumulated by the Office of Interconnection in any hourmonth shall be distributed pro-rata to each Network Service User and

stated that section 5.5 had been revised to allocate the total transmission loss charges accumulated by PJM to each Network Service User and Transmission Customer in proportion to its ratio share of the total megawatt-hours of energy delivered to load in the PJM region.¹³ PJM further stated that the revised section 5.5 “allocates total transmission loss charges to the total exports of megawatt-hours of energy from the PJM Region, or the total [megawatt-hours] of cleared Up-To Congestion transactions (that paid for transmission service during such hour).”¹⁴

10. PJM stated that it believes its proposed revisions satisfy the Commission’s concern that collected marginal line losses be distributed equitably among all parties that support the fixed costs of the transmission system, without regard to whether such parties serve load.¹⁵ PJM stated that Network Service Users will still receive an allocation of surplus marginal line loss collections in proportion to their ratio shares of the total megawatt-hours of energy delivered to load in the PJM region, but that allocation now will also include “Transmission Customers,” which includes load serving customers such as those taking point-to-point transmission service under Part II of the tariff.¹⁶ PJM explained that the allocation methodology for these customers is still based upon the Commission’s accepted principle that allocation of marginal line losses to these customers is fair because it distributes the surplus back to load customers who pay for the fixed costs of the transmission system.¹⁷ PJM stated that it further modified section 5.5 to capture allocation of surplus marginal line losses to those customers engaging in Up-

Transmission Customer in proportion to its ratio shares of the total MWhs [megawatt-hours] of energy delivered to load (net of operating Behind The Meter Generation, but not to be less than zero) in the PJM Region, or the total exports of MWh of energy from the PJM Region, or the total MWh of cleared Up-To Congestion transactions (that paid for transmission service during such hour) and the total exports of MWhs of energy from such region during such month by all Transmission Customers.

Id. at Attachment B.

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 4-5.

¹⁷ *Id.* at 4.

To Congestion transactions in proportion to the total megawatt-hours of those cleared transactions (that paid for transmission service during such hour).¹⁸ PJM averred that each customer identified in revised section 5.5 contributes, through transmission charges, to the overall costs of the transmission grid; therefore, through the proposed revisions, each will receive a distribution of the surplus over-collected marginal line loss charges.¹⁹

11. In the September 17, 2009 Compliance Order, the Commission found that PJM's proposed revisions comply with the directive to credit those who pay for the fixed or embedded costs of the transmission system.²⁰ The Commission acknowledged, as did PJM, that some virtual traders or arbitrageurs pay transmission access charges related to Up-To Congestion transactions, which contribute to the fixed costs of the transmission system and which should be included in the allocation process for disbursement of any surplus resulting from the over-collection of transmission line loss charges.

12. The Commission also found that the revised tariff provision is not clear whether, to qualify for a credit, a Network User or Transmission Customer that exports energy from the PJM region must have paid for transmission service during the hour as is required for Up-To Congestion transactions. Therefore, the Commission directed PJM to file further revisions to the tariff and operating agreement to make clear that the credits to exporters are dependent on whether they have paid for transmission service during the hour, as is required for Up-To Congestion charges.²¹

13. The Commission provided that these provisions would become effective June 1, 2009, as requested by PJM. The Commission also established a refund effective date pursuant to section 206(b) of the Federal Power Act (FPA) as of the date of the complaint,²² December 3, 2007, and required PJM to pay refunds for the statutory fifteen-month period (i.e., until March 3, 2009), including interest as determined under the Commission's regulations.²³

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 26 (2009) (September 17, 2009 Compliance Order).

²¹ *Id.* P 27.

²² 16 U.S.C. § 824e (2006).

²³ *See id.* P 35.

14. On October 19, 2009, PJM submitted a filing in compliance with the Commission's September 17, 2009 Compliance Order.²⁴ In its April 15, 2010 Rehearing Order, the Commission accepted PJM's compliance filing, denied requests for rehearing relating to, *inter alia*, the exclusion from the surplus disbursement exporters who do not contribute to the fixed system costs, and directed PJM to submit a more-detailed refund report.

II. Request for Rehearing

15. In its request for rehearing of the April 15, 2010 Rehearing Order, Integrys contends that the Commission erred by not addressing its protest in which it maintained that PJM should not be permitted to reclaim any of the credits paid to exporters of energy from PJM to the Midwest Independent Transmission System Operator, Inc. (Midwest ISO or MISO) in order to pay for the refunds to Complainants. Integrys specifically contends that the Commission erred by failing to find that it would be unjust and unreasonable to retroactively require load-serving entities (LSE) who received distributions from the marginal line loss surpluses in the past from paying back those amounts. Integrys states that the exclusion of export transactions (that do not contribute to the fixed system costs through payment of a transmission access charges) from sharing in the distribution of surpluses relating to the over-collections of transmission line loss charges is retroactive with respect to the June 1, 2009 effective date, as well as for the fifteen-month refund period (i.e., December 3, 2007, through March 3, 2009).

16. According to Integrys, "[t]he ability of PJM to collect amounts previously distributed during the refund period is a critical component of the Commission's findings in this proceeding."²⁵ Integrys states that "the Commission was presented squarely with the obligation to determine whether retroactive repayment of surplus distributions already paid would be just and reasonable,"²⁶ but the Commission deferred the issue.

17. Integrys states that requiring the specified exporters to repay the credits (i.e., disbursement amounts) that they received is not consistent with the Commission's policy to avoid retroactive implementation of refunds that would undermine confidence in market activities.²⁷ Integrys maintains that it did not and could not have taken into

²⁴ On March 1, 2010, PJM also submitted a refund report in compliance with the September 17, 2009 Compliance Order.

²⁵ Integrys Request for Rehearing at 5.

²⁶ *Id.* at 6.

²⁷ *Id.* at 7, 9.

account in its business dealings the loss of the surplus revenues when it entered into export transactions.²⁸

III. Motion for Clarification

18. AMP states that the Commission's rationale for granting two other parties' motions to intervene out-of-time should apply to AMP's untimely motion, which was submitted February 22, 2010.²⁹ AMP reiterates that, based on previous developments in the proceeding, it could not have anticipated that parties transacting exports from PJM sinking in the Midwest ISO would be required to refund past loss revenues.

IV. Refund Report

19. PJM submitted a report providing additional detail, as directed in the September 17, 2009 Compliance Order. PJM explains that it reallocated the original revenues (i.e., the over-collected transmission line loss charges). The report indicates that PJM surcharged those entities which had received a share of the surplus but which had not contributed to the fixed system costs (*viz.*, the exporters who conducted PJM-to-Midwest ISO export transactions). PJM explains, "[S]ome entities were due a larger portion of the allocated surplus payments, while others were required to refund a portion of those payments."³⁰

20. Notice of the refund report was published in the *Federal Register*, 75 Fed. Reg. 40,815-16 (2010), with interventions and protests due on or before July 22, 2010. On July 16, 2010, Tenaska Power Services Co. (Tenaska) submitted comments in which it addressed the repayment of credits for exports of energy from the PJM region to the Midwest ISO region during the refund period. On July 21, 2010, AMP filed a motion to intervene. On July 22, 2010, Integrys filed a protest, and DC Energy, LLC and American Electric Power Service Corporation (DC Energy and AEP) filed a brief.

21. Tenaska maintains that interested parties did not have notice that the Commission might eliminate credits to exporters. Tenaska states that neither the Complainants nor PJM or any other party proposed to revise the methodology for allocating surplus credits to exporters "(apart from the Commission-mandated change in the October 2009 Compliance Filing)." According to Tenaska, the Commission *sua sponte* raised the issue.

²⁸ *Id.* at 8.

²⁹ AMP Motion at 3-4 (citing April 15 Rehearing Order, 131 FERC ¶ 61,024 at P 30-31).

³⁰ PJM Refund Report at 3.

22. Tenaska further maintains that the Commission violated FPA section 206 by retroactively and without notice directing PJM to change its existing rate on file, thereby denying disbursements from the over-collected surplus to exporters and by requiring retroactive refunds.

23. Lastly, Tenaska argues that the Commission improperly departed from its policies applying rate design changes prospectively only and against retroactive market resettlements. Based on such market resettlement during the refund period, Tenaska states that it was directed by PJM to repay \$361,893.36, which includes \$25,729.97 in interest.

24. Integrys does not challenge the Commission's decision to modify PJM's tariff; Integrys does challenge, however, the retroactive application of the tariff change for the refund period.³¹ DC Energy and AEP also argue that the change in revenue sharing applicable to exports should have been effective prospectively only.³² Integrys and DC Energy, together, and AEP maintain that parties were not on notice that the Commission would determine that no surplus would be disbursed in relation to those export transactions during the refund period for which transmission access charges had not been paid.³³ DC Energy and AEP explain that "[i]t appears that the Commission intended that this [tariff revision as to the exporters] would be effective on June 1, 2009, while certain other relief, logically flowing from the complaint in this proceeding would apply during the refund period for this proceeding from December 3, 2007 through March 3, 2009."³⁴

V. Discussion

A. Request for Rehearing

25. Upon considering the arguments made on rehearing, we will grant rehearing and will not require PJM to pay refunds. The Commission has two lines of precedent on refunds, each dealing with a different situation. When a case involves a company over-collecting revenues to which it was not entitled, the Commission generally holds that the

³¹ Integrys Protest at 7.

³² DC Energy and AEP Brief at 9. We note that DC Energy and AEP's brief was filed after the July 16, 2010 due date, *see* April 15 Rehearing Order, 131 FERC ¶ 61,024 at P 42; however, we will deem the pleading to be a timely comment submitted by the July 22, 2010 comment deadline.

³³ Integrys Protest at 8, 11; DC Energy and AEP Brief at 11-13.

³⁴ DC Energy and AEP Brief at 3, 4.

excess revenues should be refunded to customers.³⁵ By contrast, in a case where 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.³⁶

26. In *Occidental Chemical Corp. v. PJM*,³⁷ the Commission applied this same logic to a complaint case involving refunds ordered pursuant to the refund effective date provision of section 206(b) of the FPA. The Commission, on remand, revisited its prior decision to direct PJM to pay refunds and collect surcharges involving a change to PJM's rate design methodology dealing with curtailed load. The Commission applied its traditional policy of not ordering refunds involving rate design or cost allocation changes:

The Commission's long-standing policy is that when a Commission action under Section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively.³⁸

The Commission reasoned that ordering refunds in such a case would be unfair because it would result in a loss of revenue from the reallocation when the utility would not have the opportunity to file a new rate case to recover those revenues:

In these cases, where the utility's cost-of-service, or revenue requirement, has not been found to be unjust and unreasonable, the Commission has found that it would be unfair to require the utility to suffer a loss in revenue for periods before it can file a new rate case. In *Union Electric*, we recognized that parties cannot alter past decisions made in

³⁵ See, e.g., *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009); *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

³⁶ See, e.g., *La. Pub. Serv. Comm'n v. Entergy Corp.*, 135 FERC ¶ 61,218 (2011); *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193, at P 5 (2004) (accepting rate design change on a prospective basis); *Consumers Energy Co.*, 89 FERC ¶ 61,138, at 61,397 (1999) (same); *Union Elec. Co.*, 58 FERC ¶ 61,247, at 61,818 (1992) (same); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983); *accord Second Taxing Dist. v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming determination to make rate design changes prospective only); *Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982) (same).

³⁷ 110 FERC ¶ 61,378 (2005).

³⁸ *Id.* P 10.

reliance on a rate design then in effect. We also stated that retroactive implementation of such a rate design might result in an under-recovery of legitimate costs. Accordingly, while the Commission has the authority under the FPA to set a refund effective date earlier than the date of its order (as occurred here), we have also found that such a requirement would not be appropriate, or equitable, in the case of a rate design change where, as here, a transmission owner would not be permitted to make a rate filing to recover its legitimately incurred costs.³⁹

27. Similarly, in *Ameren Services Co. v. Midwest Independent Transmission System Operator, Inc.*,⁴⁰ the Commission did not require refunds in a section 206 complaint case involving a change in market design and thus in the allocation of costs to virtual traders, like the Complainants here. While the Commission initially required refunds under section 206(b), the Commission granted rehearing finding that such refunds would not be appropriate where such changes have occurred.⁴¹

28. In the case at issue here, the Commission has similarly imposed a change under section 206 involving the parties eligible to receive marginal line loss credits. This change does not affect the overall amount of the credit, but does provide larger amounts of credit to certain parties and lower amounts to other parties. In recognition of this fact, PJM, in its refund report, seeks to surcharge certain parties in order to pay the refunds owed to other parties. Were the Commission to require refunds without such surcharges, PJM would suffer a loss of revenue and an under-recovery of legitimate costs.⁴² Because this case involves a change in the allocation of costs, the Commission will grant rehearing and not require refunds.

³⁹ *Id.*; see also *Union Elec. Co.*, 64 FERC ¶ 61,355, at 63,468 (1993).

⁴⁰ 127 FERC ¶ 61,121, at P 157 (2009).

⁴¹ The Financial Marketers in the *Ameren* proceeding, which included some of the same parties in this proceeding (*viz.*, EPIC Merchant Energy, LP and SESCO Enterprises, LLC), argued that the Commission should not require refunds in a case involving rate design changes. See *Ameren*, 127 FERC ¶ 61,121 at P 143.

⁴² Indeed, PJM, which is a limited liability, non-stock company, has no corporate funds of its own to pay refunds, and it would have to acquire such funds either through surcharges or through an up-lift charge to all members. *But see Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) (“[Section] 206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate increases”).

B. Motion for Clarification

29. The Commission grants AMP's motion for clarification of its status as a party. AMP's position is substantially the same as the other parties who filed out-of-time motions to intervene in this proceeding. As we stated in the April 15, 2010 Rehearing Order, when late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and the burden upon the Commission of granting the late intervention may be substantial.⁴³ Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. In this case, we find that AMP is similarly situated with the other parties seeking, and who were granted, late intervention, because, like them, AMP could not have anticipated that the issue of paying credits to exporters would have arisen based on the original complaint. Accordingly, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), we will grant the unopposed motion to intervene out-of-time. Consequently, we do not need to address AMP's July 21, 2010 motion to intervene.

C. Refund Report

30. The Commission rejects PJM's June 1, 2010 refund report as moot, because, by granting the request for rehearing, PJM is no longer directed to pay refunds.

The Commission orders:

(A) Integrys's request for rehearing is hereby granted, as discussed in the body of this order.

(B) AMP's motion for clarification is hereby granted, as discussed in the body of this order.

(C) PJM's refund report is hereby rejected as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴³ April 15 Rehearing Order, 131 FERC ¶ 61,024 at P 30-31.