136 FERC ¶ 61,041
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.

EPIC Merchant Energy NJ/PA, L.P.,
SESCO Enterprises, L.L.C., and
Coaltrain Energy L.P.

v.

PJM Interconnection, L.L.C.

Docket No. EL10-40-001

ORDER DENYING REHEARING

(Issued July 21, 2011)

1. On June 9, 2010, EPIC Merchant Energy NJ/PA, L.P., SESCO Enterprises, L.L.C., and Coaltrain Energy L.P. (together, Financial Marketers) filed a request for rehearing of the Commission's May 10, 2010 order dismissing their February 1, 2010 complaint.[1] In this order, the Commission denies rehearing, as discussed below.

I. **Background**

2. A detailed background and description of the issues can be found in an earlier order in the complaint proceeding, Docket No. EL08-14-000.[2] In brief, when electric energy is transmitted over high voltage transmission lines, some electric energy is lost and additional energy needs to be purchased to make up for the loss. Transmission line losses increase as both the distance transmitted increases and the amount of energy transmitted increases. Under PJM Interconnection, L.L.C.'s (PJM) tariff, the Locational

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[1] *EPIC Merchant Energy NJ/PA, L.P., et al v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010) (Second Complaint Order).

[2] *E.g., Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024 (2010) (April Rehearing Order).

Marginal Price (LMP) for power includes the marginal price paid to cover transmission line losses. The total marginal line loss charges collected by PJM exceed the actual expense that PJM incurs in purchasing additional energy.[3] PJM accordingly credits its over-collections to its customers.

3. In December 2007, Financial Marketers submitted a complaint challenging PJM's marginal line loss methodology as applied to them and the related methodology for disbursing over-collected line loss charges.[4] Financial Marketers maintained that they should be exempt from the payment of marginal line losses. In the alternative, they maintained that they, like actual load, should receive a proportion of such distributions because they bought and sold power in a manner similar to load.[5]

4. The Commission granted the complaint in part. First, the Commission found that charging Financial Marketers marginal line losses is appropriate and reasonable.[6] The

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[3] It is a principle of mathematics that whenever any variable is continuously increasing, as here, the marginal value of the last unit exceeds the average of all the units. Thus, where an average method considers all the units of energy 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 for all the units. The marginal line loss method, therefore, will always result in a higher figure than the average line loss method.

[4] In the original complaint "Financial Marketers" included Black Oak Energy, L.L.C. (Black Oak), EPIC, and SESCO, the latter two of whom are participating in the instant complaint.

[5] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208, at P 46 (2008) (First Complaint Order).

[6] "Billing on the basis of marginal costs ensures that each customer pays the proper marginal cost price for the power it is purchasing." *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 22 (2006) (May 1, 2006 Order); *see also id.* P 4; *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,169, at P 27 (2006) (November 6, 2006 Order) (concluding that "the customer will face the correct price signal"); First Complaint Order, 122 FERC ¶ 61,208 at P 28, 29, 34, 41; *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at P 27, 32 (2008) (Rehearing Order); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C,* 128 FERC ¶ 61,262, at P 29 (2009) (Compliance Order).

Commission reasoned that calculating LMP based on marginal line losses establishes the correct price to be paid by all market participants, including Financial Marketers.[7]

5. Second, as to the Financial Marketers' eligibility for a share of the credits, the Commission found, as discussed above, that charging marginal line losses leaves PJM with an over-collection that it must credit back to its customers. The Commission, however, rejected the Financial Marketers' argument that the line loss credit should bear a relation to the amount of marginal line losses paid. The Commission found that whatever crediting mechanism is used should bear no relation to the marginal line losses incurred by any party.[8] Basing the credit on the marginal line losses incurred by individual parties would distort the very price signals that adoption of marginal line loss pricing is designed to provide.[9] While the Commission found that any crediting mechanism that does not distort the pricing signals may be acceptable,[10] the Commission held that, once PJM has chosen a methodology for crediting line losses, it must apply that

[7] May 1, 2006 Order, 115 FERC ¶ 61,132 at P 4 ("[O]ther things being equal, customers near generation centers pay prices that reflect smaller marginal loss costs while customers far from generation centers pay prices that reflect higher marginal loss costs. In addition, under the marginal loss method (and unlike under the current average loss system), PJM would consider the effects of losses in determining which generators to dispatch in order to serve load at least cost."). Since longer transactions incur greater costs to cover the line losses, prices for those transactions need to be higher in order to send proper price signals.

[8] Market participants "are not entitled to receive any particular amounts through disbursement of the over collections, since the price they are paying (based on marginal losses) is the correct marginal cost for the energy they are purchasing." May 1, 2006 Order, 115 FERC ¶ 61,132 at P 24; First Complaint Order, 122 FERC ¶ 61,208 at P 46, 48; Rehearing Order, 125 FERC ¶ 61,042 at P 33, 36.

[9] "The only fundamental principle to be applied is that the distribution should in no circumstance be based on the amount paid for transmission line losses, because that would distort the appropriate price signals which the use of marginal line loss pricing is designed to facilitate." Rehearing Order, 125 FERC ¶ 61,042 at P 37 (footnote omitted), 44; May 1, 2006 Order, 115 FERC ¶ 61,132 at P 24 (citing *Ne. Utils. Serv. Co.*, 109 FERC ¶ 61,204, at P 21 (2004)); November 6, 2006 Order, 117 FERC ¶ 61,169 at P 27; Compliance Order, 128 FERC ¶ 61,262 at P 29.

[10] For example, if PJM had proposed to use the over-collections to defray part of its administrative costs (thereby reducing uplift charges), the marginal line loss charge in PJM's rates would still be just and reasonable because such a crediting mechanism would not distort the pricing signals sent by the use of marginal line losses.

methodology on a not unduly discriminatory basis.[11] Therefore, because PJM chose to base the credit on customers' contribution to fixed system costs via the access and transmission charges for using the network, the Commission determined that PJM must provide a credit to all customers incurring those charges. Since Financial Marketers do pay transmission charges, specifically for a set of transactions known as Up-To Congestion transactions, the Commission required PJM either to show cause why these transactions did not qualify for a credit or to propose tariff provisions providing for a credit.

6. The Commission subsequently accepted a compliance filing by PJM that provided a credit to the Financial Marketers based on their contribution to the fixed costs of the grid. The Commission further adopted PJM's proposal to make its revised tariff effective June 1, 2009.[12]

7. The subject of this rehearing request is a second complaint filed on February 1, 2010 ("second complaint").[13] In the second complaint, Financial Marketers reiterated that virtual transactions are subject to the same line loss charges as load and should receive the same amount of the over-collection as load. Further, they expressed concern that, with the passage of time since the original, December 3, 2007 complaint was filed, the Commission or another party would invoke the fifteen-month limitation in section 206(b) of the Federal Power Act (FPA) as a basis for denying Financial Marketers relief for the period after March 3, 2009. They maintain that this second complaint would help preserve their refund effective date by establishing a second refund effective date going-forward from the date of this second complaint.

8. The Commission dismissed the complaint because it sought only to re-litigate the same issues as raised in the prior case and cited no new evidence or changed circumstances. The Commission noted that Financial Marketers' substantive arguments

[11] "Once having chosen a just and reasonable method, PJM cannot unduly discriminate among the class entitled to the distribution." Rehearing Order, 125 FERC ¶ 61,042 at P 49.

[12] The Commission initially required PJM to pay refunds for the refund effective period, but in an order issued in Docket No. EL08-14 issued contemporaneously with this order, the Commission grants rehearing and eliminates the refund requirement consistent with its policy of not providing refunds for rate design and cost allocation revisions.

[13] In the second complaint, Financial Marketers refer to "their" original complaint in Docket No. EL08-14-000, filed on December 3, 2007. Second Complaint at 2.

raised in the second complaint had been addressed in the related complaint proceeding in Docket No. EL08-14.[14]

9. Financial Marketers had maintained that the second complaint should be granted in order to establish a new refund effective date under section 206 of the FPA to preserve their refunds. The Commission explained that the second complaint would not change or otherwise affect the refunds or payments that the Commission determined should be collected from or owed to Financial Marketers resulting from the first complaint.[15]

II. Request for Rehearing

10. On rehearing, Financial Marketers make two arguments as to why a second complaint is appropriate. First, they contend that PJM's currently effective transmission line loss allocation methodology is different from the one that Financial Marketers originally challenged. They maintain that the new methodology is unjust and unreasonable and that they submitted the second complaint based on changed circumstances and new evidence. Next, Financial Marketers maintain that establishing a new refund effective date is necessary to ensure that, in the event they prevail on appeal from the Commission's determination in the first complaint proceeding, the fifteen-month statutory limitation under FPA section 206 cannot be a basis for denying them refunds beyond the date of the second complaint, i.e., February 1, 2010.

11. In addition, Financial Marketers, in the second complaint and rehearing, reiterate their argument that, unlike physical transactions, virtual transactions do not cause transmission line losses and, therefore, should not be assessed line loss charges. If they are charged, however, Financial Marketers maintain that it is unjust and unreasonable that these transactions are treated differently for the purpose of receiving a share of the over-collected amounts. Accordingly, they argue that basing disbursements on contribution to the fixed system costs results in excluding entire categories of market participants. Financial Markets once again contend that virtual transactions comprise about 40 percent of the transactions for which line losses are charged or approximately $1 billion of the total $2.4 billion, yet virtual transactions have not received any of this surplus, except relating to some of their Up-To Congestion transactions. Financial Marketers maintain

[14] Second Complaint Order, 131 FERC ¶ 61,130 at P 21 (citing May 1, 2006 Order, 115 FERC ¶ 61,132 (2006); November 6, 2006 Order, 117 FERC ¶ 61,169 (2006)); First Complaint Order, 122 FERC ¶ 61,208 (2008); Rehearing Order, 125 FERC ¶ 61,042 (2008); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,164 (2009) (Clarification Order); Compliance Order, 128 FERC ¶ 61,262 (2009); April Rehearing Order, 131 FERC ¶ 61,024 (2010)).

[15] Second Complaint Order, 131 FERC ¶ 61,130 at P 23 (citing April Rehearing Order, 131 FERC ¶ 61,024 (2010)).

that they have a statutory right to receive refunds from PJM in the event they ultimately prevail on appeal, and this new complaint will ensure that this right is not improperly curtailed based on the FPA's fifteen-month refund limitation. Moreover, they argue that the Commission has routinely allowed parties to file a second complaint in circumstances such as these.[16]

III. <u>Discussion</u>

12. We will deny rehearing, as discussed below.

13. Financial Marketers contend that, because the Commission directed PJM to revise its transmission line loss allocation methodology following Financial Marketers' initial complaint, Financial Marketers are entitled to submit a second complaint based on this "changed circumstance" (i.e., the revised tariff section) and other new evidence.

14. We disagree. Filing a second complaint is a collateral attack on the Commission's original order. If Financial Marketers are dissatisfied with the Commission's resolution of the first complaint (including the compliance filing), their recourse is to file for rehearing of the complaint order, not to file a new complaint on the same set of facts. An appropriately submitted second complaint should respond to a material "changed circumstance" that is distinct from the original dispute, and Financial Marketers have raised no such circumstance here.

15. While Financial Marketers contend that the Commission has routinely allowed parties to file a second complaint in circumstances such as these, we find that the cases they cite are distinguishable. All three cases on which Financial Marketers rely involve new rate proceedings based on updated financial information, not, as in this case, an identical complaint regarding the justness and reasonableness of the same tariff provision.

16. In *Allegheny Generating*, the Commission permitted a second complaint regarding the justness and reasonableness of a utility's cost of equity even though an earlier complaint considering the cost of equity was still pending. The Commission reasoned that the new complaint was permissible because the cost of equity in the new case could be different than the cost of equity in the prior case: "a return on equity found to be reasonable at one point in time may not be reasonable at another point in time."[17] The Commission explained that "in effect, the Joint Complainants bring a new claim, rather

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[16] Request for Rehearing at 10-11 (citing *Consumer Advocate Div. of the Pub. Serv. Comm'n of W.V. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288, at 62,000 (1994); *So. Co. Servs., Inc.*, 83 FERC ¶ 61,079, at 61,386 (1998); *San Diego Gas & Elec. Co. v. Pub. Serv. Comm'n of N.M.*, 85 FERC ¶ 61,414, at 62,577 (1998)).

[17] *Allegheny Generating*, 67 FERC at 62,000 n.7.

than reiterate their previous allegations."[18] Here, however, Financial Marketers bring up no new set of financial data or facts; they simply reargue the same positions in their second complaint.

17. Likewise, in *Southern Company Services*, [19] another order involving a second return on equity complaint filed while the first return on equity complaint was still pending, the Commission quoted its *Allegheny Generating* precedent: "[W]hile the issue in the [earlier] proceeding and in the instant proceeding may nominally be the same, i.e., return on equity, in substance it is a different issue in each of the proceedings."[20] The Commission clarified that it had instituted the new proceeding "based on new information" and that in this new proceeding

> the Commission was not instituting a duplicative proceeding intended solely to expand the amount of refund protection beyond 15 months, but rather was initiating an entirely separate factual record, that may or may not reach the same conclusions as those reached in the earlier [return on equity] proceeding.[[21]]

18. Similarly, in *San Diego Gas & Electric*, the Commission addressed a second and a third complaint, finding that the second was based on updated cost data and the third "provides additional new data and, for the first time, analyzes the rate using both single test-year cost data and data covering the life of the contract."[22] Again, Financial Marketers' second complaint does not present any such new data or new evidence, but only a new time (and refund) period.

19. We also reject Financial Marketers' contention that they should be permitted to file a second complaint in order to establish a new refund effective date. A second complaint is not necessary to preserve a refund effective date. As we explained in the Second Complaint Order, the earliest that a refund effective date could be set based on this second complaint is February 1, 2010 (i.e., the day it was filed). Since this date comes well after the June 1, 2009 effective date of the Commission's section 206 finding,

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[18] *Id.* at 62,000; *see also Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 445 (1930) ("[A] rate order is not res judicata. Every rate order made may be superseded by another").

[19] *Southern Company Services*, 83 FERC at 61,385.

[20] *Id.* at 61,386 (quoting *Allegheny Generating*, 67 FERC at 61,998).

[21] *Id.*

[22] *San Diego Gas & Electric*, 85 FERC at 62,577.

a second refund effective date is unnecessary. Financial Marketers' first complaint proceeding establishes the just and reasonable rate to be followed after June 1, 2009, which is well before any refund effective period established by the Second Complaint.[23]

The Commission orders:

Financial Marketers' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[23] Second Complaint Order, 131 FERC ¶ 61,130 at P 23. In any event, as the Commission has found in a contemporaneous order, Commission precedent does not support the granting of refunds in a case involving cost allocation.