169 FERC ¶ 61,075
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Black Oak Energy, LLC
EPIC Merchant Energy, LP and
SESCO Enterprises, LLC

Docket No. EL08-14-013

v.

PJM Interconnection, L.L.C.

ORDER DENYING REHEARING

(Issued October 28, 2019)

1. American Municipal Power, Inc. (AMP) seeks rehearing of the Commission's June 20, 2019 Order[1] in this proceeding. That order found that it is appropriate for PJM Interconnection, L.L.C. (PJM) to refund certain line loss over-collection amounts to certain financial marketers (Financial Marketers). In this order, we deny rehearing.

I. Background

2. Our prior orders set forth the full background of this proceeding, which will not be repeated here.[2] As relevant on rehearing, Black Oak Energy, L.L.C., EPIC Merchant Energy, L.L.P., SESCO Enterprises, L.L.C., and other interested Financial Marketers initiated a complaint under section 206 of the Federal Power Act (FPA)[3] relating to the collection of charges for transmission line losses and the disbursement of the over-collection of these charges that inevitably results from setting the locational marginal pricing (LMP) based on marginal line losses. Under the PJM Open Access Transmission Tariff (tariff) at the time of the complaint, PJM would credit the over-collected amount to

[1] *Black Oak Energy, L.L.C v. PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,250 (2019) (Order on Remand).

[2] For a comprehensive history, *see Black Oak Energy, L.L.C v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011) (2011 Rehearing Order).

[3] 16 U.S.C. § 824e (2018).

load because load pays network and point-to-point transmission charges, and marginal losses are part of the payment for transmission service.[4] However, the Commission required that the amount of the credit could not be a direct, one-to-one reimbursement to customers for their marginal loss payments, finding that such crediting of the excess LMP revenues to those who paid would result in those purchasers no longer paying the marginal cost for energy—the basic foundation of LMP.[5] Load, therefore, could not count on receiving any particular exact amounts of line loss credit from a transaction.

3. The Commission denied the Financial Marketers' complaint, in which they alleged that they should not be assigned marginal line losses as part of their LMP price.[6] The Commission also denied the Financial Marketers' request that they receive a proportionate share of the marginal line loss credit, finding that the Financial Marketers are not similarly situated to load because, unlike load, they do not pay network and firm point-to-point transmission charges covering the cost of the transmission grid.

4. In 2008 and 2009, the Commission granted rehearing and ultimately found that PJM had incorrectly excluded Financial Marketers that paid transmission charges for Up-To-Congestion transactions from the allocation of marginal line loss over-collections, because Up-To-Congestion transactions required the payment of point-to-point transmission charges.[7] The Commission also set the refund effective date, required PJM to pay refunds to the Financial Marketers, and required PJM to submit a refund report.[8]

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[4] *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,169, at P 29 (2006).

[5] *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 24 (2006). The Commission found that "refunding excess loss revenues to the participants who incurred the losses would undermine the usefulness of including marginal losses in the LMP calculations." *Id.*

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

[7] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at PP 36-49 (2008) (requiring PJM either to pay credits to the Financial Marketers or show cause why such credits should not be provided); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 23 (2009) (2009 Refund Order) (accepting PJM's proposed crediting mechanism).

[8] 2009 Refund Order, 128 FERC ¶ 61,262 at PP 33-35.

5. Two parties sought rehearing of the Commission's 2009 Refund Order, contending that PJM improperly imposed a retroactive surcharge in order to collect the funds to pay the refunds directed by the Commission to those entities engaging in Up-To Congestion transactions. PJM subsequently submitted a refund report.[9] Based on those rehearing requests and the refund report, on April 15, 2010, the Commission directed PJM to provide additional information on how it calculated the refunds, including whether PJM assessed surcharges to obtain the refund amounts.[10]

6. PJM stated that it had recalculated the line loss credits based on the requirement in the order that parties receiving the credit needed to pay support for the PJM transmission grid. In so doing, PJM determined that load in the Midcontinent Independent System Operator, Inc. (MISO) would not be eligible for refunds, as it did not pay for the PJM transmission system. PJM therefore determined that the Financial Marketers who used Up-To-Congestion transactions received refunds. PJM imposed surcharges on other customers to collect the funds to pay for the refunds, including load in the MISO zone that conducted export transactions in PJM (exporters).

7. After receiving this additional information showing that PJM imposed a surcharge on some customers to pay the refunds to the Financial Marketers, the Commission granted rehearing and reversed its determination that PJM should pay refunds.[11] The Commission noted that PJM had surcharged certain parties (by reclaiming the credits previously paid to them) in order to pay the refunds to Financial Marketers.[12] Because the case involved a change in the allocation of costs, the Commission reasoned that, in keeping with what the Commission described as its general no-refund policy in cost allocation and rate design cases, it would not require refunds.[13]

8. On appeal, the D.C. Circuit affirmed the Commission's determination regarding line loss crediting, but remanded regarding refunds. The court found that the Commission did not sufficiently distinguish between denying refunds in the first instance and ordering

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[9] PJM, Report of Refund, Docket No. EL08-14-005 (filed Mar. 1, 2010), http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12279732.

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

[11] 2011 Rehearing Order, 136 FERC ¶ 61,040 at P 25.

[12] *Id*. P 28.

[13] *Id.* P 25; *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (2012).

recoupment after such refunds already had been paid to the Financial Marketers.[14] The court stated that, in addition to explaining why it should have denied the refunds in the first place, the Commission must explain why recouping is warranted.[15]

9. On remand, the Commission initially found that PJM should be able to recoup the refunds from the Up-To-Congestion holders.[16] One party filed an appeal at the D.C. Circuit, challenging the Commission's decisions related to refunds. During briefing before the D.C. Circuit, the Commission submitted an unopposed motion for voluntary remand[17] to address a subsequent order, *Pub. Serv. Comm'n of Wisc. v. Midcontinent Indep. Sys. Operator, Inc.* (*MISO*),[18] in which the Commission had held that its remedial authority allows it to order surcharges to fund refunds in certain circumstances. The court granted the Commission's request for a voluntary remand.

10. On July 31, 2018, the D.C. Circuit in *Verso Corp. v. FERC* (*Verso*),[19] upheld the Commission order in *MISO*. The court found that, under the facts of the case, the Commission's requirement for a not-for-profit RTO to reallocate costs during the refund period, including requiring surcharges, did not violate the filed rate doctrine and was "well within [the Commission's] remedial authority under Section 309,[20] read in harmony with Section 206 and the filed-rate doctrine."[21]

11. In the Order on Remand, the Commission determined after further consideration of *Verso* and other precedent that it had discretion under sections 309 and 206(b) of the FPA to order PJM to provide refunds to Financial Marketers, even if PJM must accomplish refunds through surcharges to parties that received a disproportionate share of the line loss

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[14] *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 243 (D.C. Cir. 2013).

[15] *Id*. at 244.

[16] *Black Oak Energy, LLC v. FERC*, 153 FERC ¶ 61,231, at PP 41-49 (2015).

[17] *Energy Endeavors, LP v. FERC*, Unopposed Motion for Voluntary Remand, No. 16-1172 (D.C. Cir. filed Nov. 4, 2016).

[18] 156 FERC ¶ 61,205, at PP 48, 49 (2016).

[19] 898 F.3d 1 (D.C. Cir. 2018), *cert. denied sub nom.*, 139 S. Ct. 2044 (2019).

[20] 16 U.S.C. § 825h (2018).

[21] *Verso*, 898 F.3d at 11.

credit surplus.[22] The Commission next stated that it has an obligation under FPA section 206(b) to weigh the equities and provide refunds when appropriate to restore the just and reasonable rate.[23] In assessing the equities involved, the Commission reversed its prior refund determinations and found that PJM must pay refunds to Financial Marketers, i.e., pay misallocated marginal line loss over-collection amounts to those Financial Marketers that engaged in Up-To-Congestion transactions.[24] The Commission also found that PJM has the authority to collect such refunds from the parties that received an overpayment of the line loss credits.

12. The Commission reasoned that providing refunds to the Financial Marketers effectuates the refund provision in section 206 of the FPA by ensuring that the Financial Marketers received the proper amount of credit for the refund period, and the Commission found that the equities favored ordering those refunds.[25] The Commission found that factors that often counsel against refunds are not present here. Specifically, the Commission noted that refunds in this case would not upset operational decisions made in reliance on one set of rates that could not be undone retroactively in light of the new, corrected rates. The Commission also noted that providing refunds would not require PJM to re-run the market and change the prices on which all customers rely. The Commission stated that requiring refunds is particularly appropriate here because the Financial Marketers had received line-loss credit payments from PJM prior to the Commission's changing its position on rehearing.

13. The Commission also found that an equitable result required that PJM's refund and surcharge calculations must account for the circumstances of the exporters and concluded that the exporters should not forfeit their entire payment of marginal line loss allocations.[26] The Commission reasoned that the exporters had not been on notice that they could forfeit their entire share of marginal line loss allocations, as the Financial Marketers' complaint sought only a proportionate share of line loss credits and did not challenge the exporters' eligibility to receive such credits. The Commission explained that, while the complaint put the exporters on notice that they might lose a proportionate share of their marginal line losses, the complaint did not provide notice that the exporters potentially could lose the

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[22] Order on Remand, 167 FERC ¶ 61,250 at PP 15-26.

[23] *Id.* P 27.

[24] *Id.* P 28.

[25] *Id.* P 30.

[26] *Id.* P 31.

entirety of their marginal line loss credits.[27] The Commission also found, based on the record, that in determining whether to schedule export transactions, the exporters would take into consideration the relative costs of energy in PJM and MISO, including a reasonable assumption about the receipt of a *pro rata* portion of marginal line losses.[28]

14. The Commission therefore directed PJM to treat the exporters no differently than internal PJM load and to calculate: (1) the refunds, with interest, owed to the Financial Marketers; (2) the amounts of refunds previously paid, and not returned, that may be retained by Financial Marketers; and (3) the surcharges owed by PJM load and the exporters based on their proportionate share of the marginal line loss allocations taking into account the payment of refunds.[29]

II. Rehearing Request

15. AMP argues that the Commission erred in reversing its prior refund determinations because the Commission's primary reason for doing so was its finding that it had the discretion, but not the obligation, to order certain refunds.[30] AMP states that evidence of equitable factors had been submitted demonstrating that refunds were not warranted, but the Commission ordered refunds without considering the equitable ramifications. According to AMP, the Order on Remand "focuse[d] solely on whether the Commission *may* require refunds," but failed to consider arguments raised "regarding whether the Commission *should* require refunds."[31]

16. AMP maintains that the Financial Marketers who sought to avoid recoupment of prior refunds did so with unclean hands because they reaped unjustified windfalls by manipulating their Up-To-Congestion bids so as to maximize their allocations of PJM's marginal loss surplus.[32] AMP argues that these Financial Marketers were unjustly enriched and that failing to require disgorgement of their shares of surplus marginal line loss

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[27] *Id.* PP 32-33.

[28] *Id.* (citing Brief of DC Energy and AEP, Docket No. EL08-14-007, at 10 (filed July 22, 2010); DC Energy and AEP Rehearing Request at 10).

[29] *Id.* P 34.

[30] AMP Rehearing Request at 3.

[31] *Id.* at 3-4 (emphasis in original).

[32] *Id.* at 4 (citing PJM Market Monitor, Initial Brief, Docket No. EL08-14-010, at 3 (filed Apr. 7, 2014)).

payments is an improper result. AMP also states that a number of Financial Marketers responded to the Commission's recoupment orders by defaulting on their recoupment debts and exiting the market, leaving approximately $28 million of the $37 million recoupment to be paid by others through the default PJM allocation.[33] AMP states that some of the defaulting Financial Marketers transferred their assets to others or assumed new corporate identities and reentered the market.[34] AMP argues that the balance of equities weighs against awarding refunds to these parties.

17. Finally, AMP states that the refunds required by the Order on Remand are inequitable because PJM expects a shortage in the payment of surcharges due to consumers or exporters being no longer active in PJM, and the refunds required by the Order on Remand may initiate yet another round of defaults by market participants who are required to fund these refunds.[35] According to AMP, this would result in additional surcharges that parties such as AMP would be required to pay.[36]

III. Request for Expedited Consideration

18. On August 23, 2019, PJM filed a request for expedited consideration of AMP's rehearing request. PJM states that it does not take a position on the merits of the issues discussed in the rehearing request, but it notes that the process of determining reallocations, providing refunds, and collecting surcharges requires a substantial administrative undertaking.[37] PJM thus seeks certainty before it begins the process of recalculation and rebilling. PJM advises the Commission that it intends to begin intensive work on determining appropriate refunds and surcharges approximately 90 days after the filing date of the rehearing request, i.e., around October 21, 2019.[38] PJM explains that it will first determine the amounts of refunds owed to Financial Marketers that remain active in PJM

[33] *Id.* at 4-5.

[34] *Id.* at 5.

[35] *Id.*

[36] *Id.* at 5-6.

[37] PJM Request for Expedited Action at 3-4. PJM explains that it will require substantial effort to determine proper refunds and surcharges for a 15-month period that ended over 10 years ago, especially because some affected parties are no longer in business. *Id.* at 4.

[38] *Id.* at 5.

and reflect the required surcharges and refunds in invoices issued in January and February of 2020.[39]

IV. Discussion

19. We deny rehearing. AMP is incorrect that the Order on Remand focused solely on whether the Commission may require refunds in cost allocation and rate design cases, and that it failed to consider whether the Commission should require refunds in this case. To be sure, the Commission discussed at length its authority to require refunds, but this was entirely warranted given the developments pertaining to the Commission's refund authority discussed in the Order on Remand. Nonetheless, the Commission went on to consider whether equitable factors warranted refunds here.

20. Specifically, the Commission found that providing refunds to the Financial Marketers was equitable because it effectuated the refund provision in section 206 of the FPA by ensuring that Financial Marketers received the proper amount of credit for the refund period.[40] The Commission found that providing refunds would permit Financial Marketers engaging in Up-To-Congestion transactions to participate equally in the distribution of line loss credits while not unduly upsetting settled expectations.[41] The Commission found that equitable factors that often counsel against refunds—i.e., operational decisions made in reliance on existing rates that could not be undone retroactively and difficulties associated with re-running markets—were not present. The Commission also stated that requiring refunds is particularly appropriate here because the Financial Marketers had received those payments from PJM prior to the Commission's changing its position on rehearing. The Commission further found that the equities favored treating exporters no differently than internal PJM load in calculating refunds and surcharges.[42] The Commission reasoned that exporters had a reasonable expectation of receiving some credit for line losses and concluded that full disgorgement of exporters' marginal line loss payments in the absence of notice would defeat those reasonable expectations. AMP does not mention these determinations in its rehearing request and therefore alleges no error in connection with them.

21. We reject AMP's argument that the balance of equities weighs against awarding refunds to Financial Marketers because, AMP argues, certain Financial Marketers that

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[39] *Id.* at 6.

[40] Order on Remand, 167 FERC ¶ 61,250 at P 30.

[41] *Id.* P 34.

[42] *Id.* PP 31-34.

sought to avoid recoupment of prior refunds did so with "unclean hands."[43] AMP claims that certain Financial Marketers reaped windfalls by manipulating their Up-To-Congestion bids to maximize their allocations of PJM's marginal loss surplus. First, none of the conduct that AMP refers to as evidencing "unclean hands" occurred during the 15-month refund period in this case.[44] Any such conduct occurred after the refund period was over. Nor did all the Financial Marketers participate in the conduct to which AMP refers. Moreover, some of the parties owed refunds in this proceeding are the exporters who were not implicated in any of the conduct alleged by AMP.[45]

22. Second, the appropriate Commission response to the conduct alleged by AMP is to consider enforcement action with respect to individual marketers, not to deny refunds to all marketers. The Commission has issued Orders Assessing Civil Penalties against three sets of respondents, determining that they engaged in manipulative conduct and requiring them to pay both disgorgement and civil penalties.[46] The Commission has since filed lawsuits in federal court to enforce those orders.[47] The Commission's determination in the Order on

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[43] AMP Rehearing Request at 4.

[44] The refund period runs from December 3, 2007 until March 3, 2009. *See* 2011 Rehearing Order, 136 FERC ¶ 61,040 at P 13. The actions of the financial marketers to which AMP refers occurred from June through September 2010. *See Houlian Chen*, 151 FERC ¶ 61,179, at P 3 (2015); *City Power Marketing, LLC and K. Stephen Tsingas*, 152 FERC ¶ 61,012, at P 3 (2015); *Coaltrain Energy, L.P.*, 155 FERC ¶ 61,204, at P 4 (2016); *In re PJM Up-To-Congestion Transactions*, 142 FERC ¶ 61,088, at P 8 (2013).

[45] The Order on Remand referenced DC Energy and AEP, two exporters engaging in good-faith export transactions to MISO load, noting that these exporters had a reasonable expectation of receiving some credit for line losses and that their reliance would have factored into their business decisions. *See* Order on Remand, 167 FERC ¶ 61,250 at P 33.

[46] *See Houlian Chen*, 151 FERC ¶ 61,179 (2015); *City Power Marketing, LLC and K. Stephen Tsingas*, 152 FERC ¶ 61,012 (2015); *Coaltrain Energy, L.P.*, 155 FERC ¶ 61,204 (2016).

[47] The Commission's enforcement lawsuit against *City Power Marketing, LLC* was resolved through a settlement in 2017. *See City Power Marketing, LLC and K. Stephen Tsingas*, 160 FERC ¶ 61,013 (2017). In 2013, the Commission approved a settlement agreement with Oceanside Power, LLC and an individual trader concerning Up-To-Congestion trading conducted in the summer of 2010. *See In re PJM Up-To-Congestion Transactions*, 142 FERC ¶ 61,088 (2013).

Remand does not affect these ongoing enforcement actions related to conduct occurring well after the refund period.

23. Finally, we reject AMP's argument that the refunds required by the Order on Remand should not be assessed because PJM has indicated that it may experience a shortage in the payment of surcharges due to consumers or exporters being no longer active in PJM. The fact that some consumers or exporters may no longer be active is not a sufficient basis for the Commission to conclude that PJM and its stakeholders will be unable to develop a fair and equitable method of determining refunds and surcharges.[48] AMP has not provided evidence that more than a few of the Financial Marketers are no longer on the system, that PJM will be required to pay additional refunds to those marketers, or that refunds and surcharges cannot be determined equitably.[49]

The Commission orders:

AMP's request for rehearing of the Order on Remand is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[48] In considering refunds, the Commission previously has weighed, as one of many equitable factors, a change in customers over time supported by substantial evidence. *See Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120, at P 31 (2016), *aff'd, Louisiana Public Service Comm'n v. FERC*, 883 F.3d 929 (D.C. Cir. 2018) (explaining that the fact that all of the wholesale customers, who would have been responsible for refunds, were no longer on the Entergy system, weighed in favor of denying refunds).

[49] Indeed, because the Commission is not reallocating the marginal line loss allocations from the exporters, the refunds to financial marketers will be less, so any financial marketers that failed to return their prior refund allocation will not be entitled to additional refunds. In addition, PJM has noted in its request for expedited consideration of the rehearing request that the amount of refunds PJM ultimately disperses may be less than the amount originally over-allocated. *See* PJM Request for Expedited Action at 6-7.