

139 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
John R. Norris, and Cheryl A. LaFleur.

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

Docket No. EL08-14-008

v.

PJM Interconnection, L.L.C.

ORDER DENYING REHEARING AND
DENYING MOTIONS

(Issued May 11, 2012)

1. On August 3, 2011, Financial Marketers¹ submitted a request for clarification or, in the alternative, rehearing, of the Commission's July 21, 2011 order, with a motion for leave to intervene out-of-time and a motion for issuance of stay. As discussed in this order, the Commission denies rehearing. The Commission denies the motion to intervene out-of-time for failure to show good cause and denies the motion for a stay as moot.

I. Background

2. Black Oak Energy, L.L.C., EPIC Merchant Energy, L.L.P., and SESCO Enterprises, L.L.C. (collectively, Complainants) initiated this complaint proceeding challenging the method by which PJM Interconnection, L.L.C. (PJM) implements its

¹ In this proceeding Financial Marketers include: Black Oak Energy, L.L.C.; SESCO Enterprises, L.L.C.; Energy Endeavors LP; and Twin Cities Power, LLC. We note that Coaltrain Energy LP; City Power Marketing, LLC; Twin Cities Energy, LLC; TC Energy Trading, LLC; and Summit Entergy [*sic*], LLC (collectively, Other Marketers) join Financial Marketers in this filing, notwithstanding they lack party status.

marginal line loss methodology with respect to virtual traders or arbitrageurs.² In *Atlantic City Electric Co. v. PJM Interconnection, L.L.C.*, the Commission adopted the marginal line methodology for determining prices on the PJM system.³ The Commission found that the marginal (versus average) loss method was appropriate because the marginal loss method 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. The Commission recognized that using a marginal line loss methodology would result in PJM collecting more in line loss payments than it paid to generators. In its November 6, 2006 order, the Commission adopted an allocation methodology to distribute surpluses back to load customers “since they pay for the fixed costs of the grid.”⁴

3. Complainants jointly filed a complaint challenging the marginal loss method and the related allocation methodology in PJM’s tariff. Specifically, they argued that their financial transactions as “virtual traders” do not create a flow of physical energy and concomitant transmission line losses and, therefore, they should not be assigned marginal line losses. Alternatively, they argued that if their financial transactions are assigned marginal line losses they should receive a share of the surplus over-collected amounts. 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 loss method, since the price each party is paying is the correct marginal price for the energy that each party is purchasing.⁵ It therefore rejected the Complainants’ argument that they should not be assessed marginal line losses.

² For a more indepth background, *see, e.g., Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at PP 4-14 (2011) (July 21, 2011 Rehearing Order).

³ *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 22 (2006) (May 1, 2006 Order).

⁴ *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,169, at P 28 (2006) (November 6, 2006 Order).

⁵ *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).

4. With respect to the allocation of the surplus, the Commission found any crediting mechanism that does not distort the pricing signals may be acceptable.⁶ But once PJM has chosen a methodology for crediting line loss over-collections, the Commission found that PJM must apply that methodology on a not unduly discriminatory basis.⁷ PJM based the credit on customers' access and transmission charges for using the network. The Commission concluded, however, that PJM's tariff was unjust and unreasonable and unreasonably discriminatory because it failed to pay the credit in certain circumstances in which customers paid transmission charges. The Commission directed PJM to revise its tariff to include a credit to others who pay for the fixed costs of the transmission system, including virtual traders.⁸

5. As relevant to this rehearing, in its September 17, 2009 order, the Commission established a refund effective date of December 3, 2007 (the date of the complaint), and required PJM to pay refunds for the fifteen months provided in the Federal Power Act (FPA) (i.e., until March 3, 2009). The Commission further required PJM to file a refund report.⁹ The procedural history of the refund requirement is discussed below.

6. On October 19, 2009, DC Energy, LLC and American Electric Power Service Corp. (DC Energy and AEP) filed for rehearing of the September 17, 2009 order.¹⁰ With respect to the requirement to pay refunds, they argued that "the unsolicited change in credits applicable to exports should NOT be effected retroactive to the refund effective date [as] exporters to [Midwest Independent Transmission System Operator, Inc.

⁶ For example, if PJM proposed to use the over-collections for another purpose, such as to defray part of its administrative costs (thereby reducing uplift charges), the marginal line loss charge in PJM 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.

⁷ "Once having chosen a just and reasonable method, PJM cannot unduly discriminate among the class entitled to the distribution." *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at P 49 (2008) (October 16, 2008 Rehearing Order).

⁸ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,164, at PP 14-15 (2009) (February 24, 2009 Clarification Order).

⁹ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at PP 33-35 (2009) (September 17, 2009 Compliance Order).

¹⁰ DC Energy and AEP Request, Docket No. EL08-14-002 (filed Oct. 19 2009).

(MISO)] simply had no notice that their export transactions might be subject to refund.”¹¹ In particular, they argued “the Commission has a long-standing policy of avoiding retroactive implementation of rates where, as here with respect to exports, retroactive application of charges (“rebilling”) or resettlement “would create substantial uncertainty in the . . . markets and would undermine confidence in them.”¹²

7. On October 19, 2009, PJM submitted a compliance filing revising its tariff as directed by the Commission. Integrys Energy Services, Inc. (Integrys) protested the compliance filing contending that changes proposed by PJM in the compliance filing “retroactively den[y] those Market Participants that exported energy from PJM to [MISO] credits relating to marginal line loss surplus beginning June 1, 2009 as well as for the fifteen month refund period and is unjust and reasonable and unduly discriminatory.”¹³ On March 1, 2010, PJM submitted its refund filing to the Commission for the fifteen-month refund period of December 3, 2007, through March 3, 2009.

8. In an order issued on April 15, 2010, the Commission addressed the DC Energy and AEP rehearing request,¹⁴ the PJM refund report, and the compliance filing. The Commission determined that it could not resolve the issue raised on rehearing by DC Energy and AEP and therefore deferred ruling. In order to obtain additional information with which to respond to this issue, the Commission required PJM to submit a more comprehensive refund report, including “whether any entity was required to repay any credits and, if so, the amount of repayment required and an explanation of why such repayment is appropriate.”¹⁵ In the same order, the Commission also responded to

¹¹ *Id.* at 12.

¹² *Id.* at 12-13.

¹³ Integrys Protest, Docket No. EL08-14-004, at 3-4 (filed Nov. 9, 2009). DC Energy and AEP raised the same argument in its request for rehearing of the September 17, 2009 Compliance Order.

¹⁴ In this same order, the Commission also addressed and denied requests for rehearing submitted by Financial Marketers and the Midwest LSEs. *See infra* P 17 (discussing issues and defining Midwest LSEs).

¹⁵ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024, at P 42 (2010) (April 15, 2010 Rehearing Order).

Integrys's protest of the compliance filing by deferring its consideration of this issue until PJM submitted its required refund report.¹⁶

9. On May 17, 2010, Integrys filed a request for rehearing of the April 15, 2010 Rehearing Order, arguing the Commission failed to address its argument that PJM should not be permitted to reclaim any of the credits paid to exporters of energy from PJM to the MISO in order to pay for the refunds to Complainants.

10. On June 1, 2010, PJM submitted the required comprehensive report on its calculation of refunds. Parties protested the refund report on the same grounds as discussed above.

11. The Commission addressed all of the deferred rehearing and compliance issues relating to the requirement to pay refunds in the July 21, 2011 Rehearing Order. The Commission explained that it has two lines of precedent on refunds, each dealing with a different situation. In the first, where a company was over-collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers.¹⁷ 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.¹⁸ As the Commission explained:

[O]rdering 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:

¹⁶ *Id.* P 46.

¹⁷ See July 21, 2011 Rehearing Order, 136 FERC ¶ 61,040 at P 25 (citing *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)).

¹⁸ See *id.* (citing *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); see also *id.* P 26).

“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 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.”¹⁹

Consistent with this second line of precedent, the Commission granted Integry’s request for rehearing and, consequently, rejected PJM’s refund report as moot.

II. Request for Clarification or Rehearing

12. At the outset, Financial Marketers and Other Marketers submit a motion to intervene out-of-time, stating that Other Marketers were among the market participants that received refunds from PJM in accordance with the Commission’s September 17, 2009 Compliance Order in this proceeding. Additionally, Financial Marketers submit a motion for a stay, pending action on the request for clarification or rehearing.

13. Financial Marketers argue that the refund requirement is distinguishable from the issue of surcharging other customers in order to pay for such refunds. They therefore request rehearing to the extent that the Commission’s order eliminated the requirement for PJM to pay refunds to eligible parties. They request that the Commission clarify that the only refund issue addressed by the July 21, 2011 Rehearing Order relates to whether the disqualification of the exports from PJM to the MISO was properly given retroactive effect in the distribution of marginal line loss surpluses.²⁰

¹⁹ *Id.* (quoting *Occidental Chemical Corp. v. PJM*, 110 FERC ¶ 61,378 (2005), and citing *Union Elec. Co.*, 64 FERC ¶ 61,355, at 63,468 (1993)).

²⁰ Financial Marketers August 3, 2011 Request at 11.

14. Financial Marketers argue that this was the only issue properly before the Commission because all other issues were either finally resolved by the Commission in its September 17, 2009 Compliance Order or pending before the U.S. Court of Appeals for the District of Columbia Circuit. Moreover, Financial Marketers maintain that no party requested rehearing on the issue of refunds on Up-To Congestion transactions.

15. Financial Marketers point out that Integrys did not request rehearing of the September 17, 2009 Compliance Order. They note that Integrys requested rehearing of the April 15, 2010 Rehearing Order on May 18, 2010. They argue, however, that even if this request could be treated as a timely request for rehearing of the Commission's September 17, 2009 Compliance Order (that asks the Commission to reverse its decision directing PJM to pay refunds), Integrys's request would fail to meet the FPA's standards for presenting an issue on rehearing with specificity. Financial Marketers aver that Integrys's request for rehearing does not specifically challenge the payment of refunds to market participants that had conducted Up-To Congestion transactions.²¹ They maintain that upon the expiration of the thirty-day period to request rehearing of that order, Integrys waived any right to challenge the directive to pay refunds relating to the transmission line loss over-collections to those market participants who engaged in Up-To Congestion transactions during the refund period in this proceeding.²² Therefore, Financial Marketers conclude that Integrys did not preserve the right to challenge whether market participants may receive such refunds.

16. Financial Marketers alternatively request rehearing. Financial Marketers contend that, to the extent the July 21, 2011 Rehearing Order directs forfeiture of the refunds paid to market participants who conducted Up-To Congestion transactions, the order is *ultra vires*.²³ Financial Marketers maintain that the Commission's prior resolution of the refund issue in this proceeding has long been final and non-appealable because no party

²¹ *Id.* at 12-13 (quoting FPA § 313, 16 U.S.C. § 825l(a) (2006), (“The application for rehearing shall set forth specifically the ground or grounds upon which such application is based No proceeding to review any orders of the Commission shall be brought by any [entity] unless such [entity] shall have made application to the Commission for a rehearing thereon.”)). Financial Marketers also cite *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, FERC Stats. & Regs. ¶ 31,193, at P 7 (2005): “If a movant fails to list issues in a separate section entitled ‘Statement of Issues,’ such issues will be deemed to have been waived.”

²² See Financial Marketers August 3, 2011 Request at 11.

²³ *Id.*

challenged it on rehearing and because all but one narrow issue was already before the Court of Appeals at the time the July 21, 2011 Rehearing Order was issued. Financial Marketers state that “[w]hen the Commission ordered PJM to pay refunds to market participants that had engaged in Up-to-Congestion transactions, not a single party requested rehearing of that directive.”²⁴ Financial Marketers argue that there is no jurisdiction to address issues not sufficiently raised in a request for rehearing,²⁵ and that “[n]o party in this proceeding has preserved its right to challenge the Commission determination that refunds should be paid to Financial Marketers and others.”²⁶

17. Financial Marketers acknowledge that requests for rehearing were filed by Financial Marketers; jointly by DC Energy and AEP; and jointly by Madison Gas and Electric Company, WPPI Energy, and Alliant Energy Corporate Service, Inc. (together, Midwest LSEs), but argue that none of the parties requesting rehearing challenged the Commission’s directive that PJM pay refunds to market participants that conducted Up-To Congestion transactions.²⁷ Financial Marketers argue that the requests for rehearing filed by DC Energy and AEP and the Midwest LSEs were focused on the narrow issue of whether the Commission erred in retroactively disqualifying certain export transactions from receiving a share of PJM’s line loss surpluses.

18. Financial Marketers further argue that to the extent the July 21, 2011 Rehearing Order requires the forfeiture of refunds paid to market participants that conducted Up-To Congestion transactions, the July 21, 2011 Rehearing Order violates sections 206 and 313 of the FPA²⁸ and the Due Process Clause of the United States Constitution,²⁹ because the Commission’s decision to order refunds on Up-To Congestion transactions in this proceeding is final and non-appealable and, therefore, is no longer a part of the

²⁴ *Id.* at 15.

²⁵ *Id.* at 16 (citing section 713(c)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(2) (2011), which provides that “[a]ny request for rehearing must . . . include a separate section entitled “Statement of Issues,” listing each issue in a separately enumerated paragraph . . . any issue not so listed will be deemed waived.”).

²⁶ *Id.* at 17.

²⁷ *Id.* at 18.

²⁸ *Id.* at 20 (referring to 16 U.S.C. § 824e (2006) and 16 U.S.C. § 825l (2006)).

²⁹ U.S. CONST. amend. V.

proceeding properly before the Commission.³⁰ Financial Marketers state that section 313(a) of the FPA requires the Commission to provide reasonable notice before taking *sua sponte* action. Financial Marketers also state that the July 21, 2011 Rehearing Order violates the Due Process Clause of the Constitution because it would deprive them and others of property without giving them the opportunity to rebut the basis stated in the decision.

19. Financial Marketers contend that the July 21, 2011 Rehearing Order provides no reasoned basis for departing from the Commission's well-established general policy of awarding refunds back to the date of the complaint.³¹ Financial Marketers aver that it is well-established Commission policy to "establish the earliest refund effective date allowed" under the FPA to provide the maximum protection to customers and that the Commission has generally held that refunds should run from the date of complaint except in extraordinary circumstances.³² Financial Marketers maintain that refunds paid on Up-To Congestion transactions pose no risk of anyone under-recovering legitimate costs since the allocations are associated with the over-collection of those costs.³³

20. Finally, Financial Marketers argue that, to the extent the July 21, 2011 Rehearing Order requires the forfeiture of refunds paid to market participants that conducted Up-To Congestion transactions, the July 21, 2011 Rehearing Order violates sections 205 and 206 of the FPA.³⁴ Financial Marketers explain that the Commission has held that PJM's prior practice of excluding Up-To Congestion transactions from its distributions of marginal line loss surpluses was unjust, unreasonable, and unduly discriminatory, but now the July 21, 2011 Rehearing Order requires PJM to reinstitute PJM's prior practice by imposing a charge on Financial Marketers and others to recapture the refunds. Financial Marketers therefore argue that the Commission has prescribed an unlawful rate or charge in violation of FPA section 205 and that this action is beyond the Commission's authority, i.e., *ultra vires*. Further, Financial Marketers contend that to prescribe a rate

³⁰ Financial Marketers August 3, 2011 Request at 20.

³¹ *Id.* at 22.

³² *Id.* at 23 (citing *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,162, at P 50 (2008); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,010, at P 31 (2008)).

³³ *Id.* at 26.

³⁴ *Id.* at 27-28.

under section 206(a) of the FPA, the Commission must find the rate to be just and reasonable, and that the Commission has not made such a finding.

21. On August 9, 2011, PJM submitted comments on Financial Marketers' request for clarification or, in the alternative, rehearing, as well as their motions for leave to intervene out-of-time and for issuance of stay. While PJM does not take a position with respect to the issues presented by parties in this proceeding, PJM states that it supports expedited consideration of Financial Marketers' request for clarification to resolve any ambiguity in the July 21, 2011 Rehearing Order and provide certainty to market participants. PJM also states that it expects to be prepared to implement the Commission's directive (not to pay refunds or surcharges) in the October 2011 month-end billing statement issued in early November.

III. Discussion

A. Procedural Matters

22. We will deny Financial Marketers' motion for leave for certain non-party financial marketers to intervene out-of-time. Under Rule 214(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d)(1) (2011), the movant must show good cause for filing a late intervention. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a high burden to demonstrate good cause for granting such late intervention.

23. The Commission finds that Financial Marketers have not met that burden. Financial Marketers have provided no justification for the failure of these additional parties to intervene timely in this proceeding, since the issues in this proceeding were apparent at a much earlier stage.

B. Substantive Matters

24. We will deny Financial Marketers' request for rehearing for the reasons discussed below. We find that the payment of refunds to certain customers is linked to the surcharge or retroactive recovery of overpayments from other parties and that the Commission had jurisdiction to grant rehearing of its refund decision in the July 21, 2011 Rehearing Order. We then reaffirm our determination to apply our traditional policy of denying refunds in cases involving rate design and cost allocation.

C. Commission Jurisdiction to Address Refunds

25. We find that the refund issue is not final and that the Commission has jurisdiction to address the question of refunds based on the rehearing requests filed by DC Energy and AEP, as well as the Commission's actions on the refund report PJM was required to

file. DC Energy and AEP filed a rehearing request questioning the Commission's refund requirement in the September 17, 2009 Compliance Order.³⁵ They argued that the Commission erred if its refund condition resulted in PJM collecting back (i.e., surcharging) PJM-MISO exporters, like themselves. As part of the rehearing request, they cited numerous Commission cases for the proposition that the Commission can exercise its discretion and not order refunds retroactively because market participants cannot revisit economic decisions.³⁶ They therefore argued that the Commission should "exercise its discretion and decline refunds."³⁷ The DC Energy and AEP rehearing request therefore raised both the issue of surcharges exacted from other parties and the refunds that caused the need for such surcharges.

26. Moreover, PJM submitted a refund report that was unclear as to how PJM was going to satisfy the refund requirement and whether and how it had employed surcharges to cover the refund obligation. In light of the DC Energy and AEP rehearing request, the Commission was concerned that the refund report did not disclose how PJM proposed to satisfy the refund requirement.³⁸

27. In response to both the rehearing request and the unsubstantiated refund report, the Commission, in the April 15, 2010 Rehearing Order, deferred ruling on whether its requirement to pay refunds or require surcharges to fund such refunds should be revised until it could review a comprehensive refund report including both refunds and surcharges.³⁹ Thus, the refund requirement was not final, as Financial Marketers argue,

³⁵ Integrys also filed a protest to PJM's compliance filing and a rehearing request of the April 15, 2010 Rehearing Order, raising the same issue.

³⁶ DC Energy and AEP Request at 13-15.

³⁷ *Id.* at 15.

³⁸ Finding that "[t]he refund report does not sufficiently describe the methodology used for calculating refunds nor the parties and amounts to whom refunds are owed or credits charged," the Commission directed PJM to file with the Commission a detailed refund report that included PJM's calculations of the amounts for December 2007 through March 2009, along with a detailed narrative description of the methodology used in determining such amounts; the individual affected parties to whom PJM paid refunds and the corresponding amount paid to each entity; and whether any entity was required to repay any credits and, if so, the amount of repayment required and an explanation of why such repayment is appropriate.

³⁹ *See* 18 C.F.R. § 385.313(d)(2) (the Commission may establish briefing or other procedures to resolve issues raised on rehearing).

but instead was subject to further review based on the revised report that PJM was required to file.

28. In the July 21, 2011 Rehearing Order, the Commission ruled on all the pending requests for rehearing related to the refund and surcharge issue. In that order, the Commission determined that, consistent with its precedent, refunds generally are not required where the only issue is rate design and cost allocation. As the Commission explained in the July 21, 2011 Rehearing Order, the question of refunds and surcharges are inextricably intertwined, particularly in the case of a regional transmission organization (RTO) like PJM, and surcharges are simply the antipodes of refunds. As the Commission stated in the July 21, 2011 Rehearing Order: “Were the Commission to require refunds without such surcharges, PJM would suffer a loss of revenue and an under-recovery of legitimate costs.”⁴⁰

29. In this case, the Commission applied its long-standing policy not to require refunds in rate design and cost allocation cases because it would be “unfair to require the utility to suffer a loss in revenue for periods before it can file a new rate case.”⁴¹ As the Commission further pointed out, in the case of RTOs (which have no shareholders to absorb a loss associated with the payment of refunds) any requirement to pay refunds would require surcharges be imposed on other members. Therefore, any requirement to pay refunds would require either that PJM re-run its market and determine the proper surcharges that would apply retroactively to customers (the subject of the DC Energy and AEP rehearing request) or the surcharges would have to be imposed generally on all

⁴⁰ July 21, 2011 Rehearing Order, 136 FERC ¶ 61,040 at P 28. 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.

⁴¹ July 21, 2011 Rehearing Order, 136 FERC ¶ 61,040 at P 26 (quoting *Occidental Chemical Corp. v. PJM*, 110 FERC ¶ 61,378, at P 10 (2005)). Indeed, when the Financial Marketers potentially were subject to surcharges, they argued that the Commission should eliminate a refund and surcharge obligation based on the same policy employed in this case: “the Commission has a long and well-established policy of not retroactively applying changes in rate design, even where the rate was collected subject to refund and the change is found to be required on a prospective basis.” *EPIC Merchant Energy, LP*, Emergency Request for Rehearing of Nov. 10, 2008 Order on Paper Hearing, Docket Nos. EL07-88-005, EL07-92-005, EL07-86-005, at 21 (filed Dec. 10, 2008); see also *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator. Inc.*, 127 FERC ¶ 61,121, at P 143 (2009).

members of PJM, including those who may have had no connection with the line loss issues in this proceeding. Therefore, we find that the refund and surcharge issue was not final as of 30 days after September 17, 2009 Compliance Order, but rather was preserved by the rehearing request and the Commission's order on the rehearing.

30. Moreover, even if the issue of refunds had not been raised by DC Energy and AEP on rehearing, the Commission upon the receipt of the refund report has the authority to act *sua sponte* on this issue, as it has authority under the FPA, "at any time, upon reasonable notice and in such manner as it shall deem proper, [to] modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act."⁴²

31. Financial Marketers contend that the question of whether they should receive refunds was not an open issue remaining to be addressed by the Commission and, moreover, "[n]o party in this proceeding has preserved its right to challenge the Commission determination that refunds should be paid to Financial Marketers."⁴³ Thus, according to Financial Marketers this issue became final and non-appealable 30 days after the September 17, 2009 Compliance Order. While Financial Marketers note that DC Energy and AEP requested rehearing of the September 17, 2009 Compliance Order, they aver that the requests for rehearing filed by DC Energy and AEP and others were focused on the narrow issue of "whether the Commission erred in retroactively disqualifying certain export transactions from receiving a share of PJM's line loss surpluses,"⁴⁴ but "[n]one of the parties requesting rehearing challenged the Commission's directive that PJM pay refunds to market participants that conducted Up-To Congestion transactions."⁴⁵ Financial Marketers point out that DC Energy and AEP stated in a footnote to their petition for rehearing, "Requestors do not seek rehearing of the Commission's decision to set December 3, 2007 as the refund effective date for the

⁴² Federal Power Act § 313(b), 16 U.S.C. § 8251(b) (2006); *North Baja Pipeline LLC*, 102 FERC ¶ 61,239, at P 12 n.14 (2003) (stating that even though specific issues were not raised on rehearing, the Commission has the authority, *sua sponte*, to modify its original order, where the proceeding is not final).

⁴³ Financial Marketers August 3, 2011 Request at 17, 18, and 19.

⁴⁴ *Id.* at 19.

⁴⁵ *Id.* at 18.

allocation of surplus marginal line losses to those customers engaging in Up-To Congestion transactions.”⁴⁶

32. We disagree. We do not read this single sentence as an indication that the decision to order refunds was distinct from the issue of surcharges raised by the rehearing request. First, the meaning of the sentence is not clear, since it refers to the establishment of a “refund effective date” and not necessarily to the order’s requirement that PJM pay refunds to Financial Marketers. Second, in other parts of the rehearing petition, DC Energy and AEP recognized the connection between refunds and surcharges and cite a number of cases for the proposition that the Commission should not order refunds.⁴⁷ In any event, even if DC Energy and AEP had not specifically raised the refund issue, refunds and surcharges are so inextricably intertwined that challenging the question of surcharges raises the question of whether refunds should not be required in the first place.

33. Financial Marketers further maintain that 30 days after the September 17, 2009 Compliance Order the refund issue became final and the Commission was without jurisdiction to resolve that issue. They mention that an appeal of the Commission’s determination has been filed and that such an appeal deprives the Commission of jurisdiction to reverse its determination on refunds.

34. We disagree. As discussed above, there was a rehearing request that raised both the refunds and surcharge issues, and even if the issue of refunds had not been raised by DC Energy and AEP on rehearing, the Commission upon the receipt of the refund report has the authority to act *sua sponte* on this issue. Nor would the filing of a petition for review in these circumstances preclude the Commission from acting *sua sponte*. The filing of a petition for review does not end the Commission’s jurisdiction until the record is filed with the Court.⁴⁸ The D.C. Circuit Court of Appeals has stated that “[t]he power to correct an order remains with the Commission until such time as the record on appeal has been filed with a court of appeals or the time for filing a petition for judicial review

⁴⁶ DC Energy and AEP Rehearing at 12 n.30.

⁴⁷ DC Energy AEP Rehearing Request at 12-15 (citing *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, at P 155 (2009); *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 147, *order on reh’g*, 124 FERC ¶ 61,301 (2008), *order on reh’g*, 131 FERC ¶ 61,170 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113 (2006)).

⁴⁸ Federal Power Act § 313(b), 16 U.S.C. § 825l(b).

has expired.”⁴⁹ Thus, because the record in this case has not yet been filed in the court of appeals, the Commission has authority to modify its prior order based on the further clarification provided by PJM in its refund report. For these reasons, the Commission had authority to revise its refund order because a rehearing on the issue was pending and the Commission itself had instituted a proceeding to examine the refund report.

35. Financial Marketers contend that the Commission’s action violated the FPA and the takings clause of the Constitution because it failed to provide sufficient notice.⁵⁰ Given that this proceeding was far from final, as we demonstrate above, all parties, including Financial Marketers, were on notice that the Commission was still reviewing and could potentially change this or other aspects of this order. Therefore, the Commission’s actions on the rehearing request and refund report do not violate the Constitution or the FPA.

D. Commission Policy to Deny Refunds in Rate Design and Cost Allocation Cases

36. Financial Marketers challenge the Commission’s application of its policy to deny refunds in cases involving rate design and cost allocation. Financial Marketers aver that it is well-established Commission policy to “establish the earliest refund effective date allowed” under the FPA to provide the maximum protection to customers and that the Commission has generally held that refunds should run from the date of complaint except in extraordinary circumstances.⁵¹ Financial Marketers maintain that refunds paid on Up-To Congestion transactions pose no risk of anyone under-recovering legitimate costs since the allocations are associated with the over-collection of those costs.

⁴⁹ *Pan Am. Petroleum Corp. v. Fed. Power Comm’n*, 322 F.2d 999, 1004 (D.C. Cir. 1963) (citing *Pub. Serv. Comm’n of State of New York v. Fed. Power Comm’n*, 284 F.2d 200 (1960)).

⁵⁰ The remedy for an alleged taking by the federal government does not lie in this proceeding but in a suit brought in the United States Court of Federal Claims pursuant to the Tucker Act. 28 U.S.C. § 1346(a)(2) (2006); see also *Wisc. Valley Improvement Co. v. FERC*, 236 F.3d 738, 743 (D.C. Cir. 2001) (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 690 (D.C. Cir. 2000)); *Ry. Labor Executives’ Ass’n v. United States*, 987 F.2d 806, 815-16 (D.C. Cir. 1993) (citing *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985)).

⁵¹ Financial Marketers August 3, 2011 Request at 23.

37. After considering this issue in this case, we have concluded that denying refunds in rate design and cost allocation cases is the fairest approach, is consistent with our precedent, and is particularly appropriate in cases involving RTOs that have no shareholders.

38. Providing for refunds is appropriate in cases in which the utility's overall rates are shown to be unjustly and unreasonably high. In such a case, the utility has collected too much money from its customers (over-collected its revenue requirement) and can be required under section 206(b) of the FPA to refund such over-collections.

39. However, cases involving rate design and cost allocation issues present different issues such that refunds should not be required. In these cases, the utility's revenue requirement is not at issue but rather how it will recover that revenue requirement from specific customers or customer groups (i.e., how it designs its rates or allocates costs). The revenue requirement remains constant; it is the specific rate levels paid by customers that are the concern. Thus, if the utility were required to pay refunds to the one customer class, without being able to surcharge the second set of customers, it would be unable to recover its full (and Commission-approved) revenue requirement.

40. In *Union Electric Co.*, the Commission stated that “although discretionary, refunds are typical in cases involving cost-of-service issues, where the Commission orders refunds of amounts collected in excess of the rate ultimately found to be just and reasonable. However, when dealing with rate design issues ... the Commission typically refrains from ordering refunds and instead orders relief prospectively.”⁵² The Commission explained that the policy of implementing rate design and cost allocation changes prospectively is based on two rationales: “retroactive implementation might result in an underrecovery of costs”; and “parties cannot alter past decisions made in reliance on a rate design then in effect.”⁵³ These inherent inequities similarly have led the Commission to deny refunds in section 206 complaint cases involving rate design and cost allocation.⁵⁴

⁵² *Union Electric Co.*, 64 FERC ¶ 61,355, at 63,468 (1993) (*Union Electric*).

⁵³ *Id.*; see also *Second Taxing Dist. v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming the Commission's determination not to order refunds on the grounds that “the Company might be subject to undercollections from the refund because it could not collect retroactively from other customers, and that retroactive changes in rates cannot affect customer demand”).

⁵⁴ See *Occidental Chemical Corp.*, 110 FERC ¶ 61,378, at P 10 (2005).

41. Financial Marketers argue that this case is different because here no party had prior notice of the amount of line loss surpluses that would be distributed to them, surcharges would have no effect on a market participant's decisions, and no party is entitled to receive any particular amounts through disbursement of the surplus. They also argue that this case is different from other rate design cases cited by the Commission in the July 21, 2011 Rehearing Order in which the Commission has declined to order refunds. They maintain that in *Occidental* the utilities would have under-recovered their revenue requirements and lacked an opportunity to change their rate designs to recoup the revenue shortfall and that in *Ameren* no accurate true-up was possible (due to the inability to measure what market participants' would have done had they known of the retroactive tariff change), thus making the refund computation too complex.

42. We do not find that any factual distinctions that may exist between this case and other rate design cases in which we declined to order refunds warrant a change in our overall policy or reversal of our decision in this case. 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. Rather, it would need to recover the amount paid in refunds in the form of direct surcharges or up-lift charges.⁵⁵

43. While we agree with Financial Marketers that no party is entitled to a particular amount of line loss credits (and that all parties have paid the correct price for energy), we do not find that this distinction is sufficient reason to distinguish this case from our long-standing policy of not paying refunds in rate design and cost allocation cases.⁵⁶ Even

⁵⁵ The Court in *Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009), indicated that section 206(b) authorizes only retroactive refunds (rate decreases), not surcharges (retroactive rate increases).

⁵⁶ Financial Marketers argue that independent power trading companies, like themselves, are a special class. Financial Marketers August 3, 2011 Request at 32. But the customers in *Occidental* and *Ameren* were equally deserving of refunds based on the Commission finding that the pre-existing rate design was unjust and unreasonable. In this case, any PJM customer required to pay surcharges also may have invested or otherwise made use of the marginal line losses they received and imposing a surcharge on those customers could be equally as harmful as depriving Financial Marketers of refunds. The Commission in *Union Electric Company* rejected a similar argument for not applying the no-refund policy because the customer was in a special position having incurred added expenses in attempting to hedge their costs. *Union Electric*, 64 FERC at 63,469.

assuming that PJM were permitted to surcharge customers (and thereby avoid a short-fall), parties point out that, although they were not assured any specific amount of credit, they relied on the existing PJM tariff in making business decisions to export from PJM, assuming they would be entitled to at least some credit.⁵⁷ Because these parties cannot alter prior business decisions retroactively, we find applying our traditional no-refund policy would be appropriate.

44. In summary, where the rate design but not the revenue requirement is in question, as is the case here, we find that our traditional policy of not requiring refunds is fair and equitable since it does not either deprive the utility of legitimate revenue, attempt to impose surcharges on other customers, or affect the prior business decisions of the parties.

The Commission orders:

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

(B) Financial Marketers' motion for certain Other Marketers to intervene out-of-time is hereby denied, as discussed in the body of this order.

(C) Financial Marketers' motion for issuance of stay is hereby denied as moot, as discussed in the body of this order.

By the Commission. Commissioner Moeller is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁷ See Integrys July 22, 2010 Protest at 10 (averring that “exporters like Integrys Energy engaged in export transactions from PJM into Midwest ISO with the expectation that under the PJM Tariff in effect at that time, it would receive a pro rata share of the surplus revenues PJM allocated for transmission loss charges”). Integrys argues that, while it might have been on notice from the complaint that certain reallocations of the marginal line loss credit could occur, it could not be held to be on notice that the result of the complaint would be to deprive certain customers of the credit entirely. *Id.* at 11.