

140 FERC ¶ 61,003  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. EL08-14-000

v.

PJM Interconnection, L.L.C.

ORDER DENYING MOTION FOR STAY AND  
CLARIFYING ABILITY TO USE DEFERRED REPAYMENT SCHEDULES

(Issued July 3, 2012)

1. On June 15, 2012, a group of market participants in PJM Interconnection, L.L.C. (PJM) (collectively, Financial Power Marketers),<sup>1</sup> submitted an emergency motion and request for stay, seeking that the Commission stay PJM's planned implementation of the Commission's May 11, 2012 order,<sup>2</sup> pending the outcome of any judicial review of that order. As discussed below, the Commission denies the motion for stay. The Commission also clarifies that in appropriate circumstances PJM may negotiate reasonable deferred repayment schedules with individual market participants.

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<sup>1</sup> In this proceeding Financial Power Marketers include: Black Oak Energy, LLC; SESCO Enterprises, LLC; Energy Endeavors LP; Coaltrain Energy LP; City Power Marketing, LLC; Twin Cities Power, LLC; Twin Cities Energy, LLC; TC Energy Trading, LLC; and Summit Entergy [*sic*], LLC. We note that Coaltrain Energy LP; City Power Marketing, LLC; Twin Cities Energy, LLC; TC Energy Trading, LLC; and Summit Entergy [*sic*], LLC join in this motion, notwithstanding they lack party status.

<sup>2</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (2012) (May 11, 2012 Rehearing Order).

## I. Background

2. Original complainants, Black Oak Energy, LLC; EPIC Merchant Energy, LLP; and SESCO Enterprises, LLC (together, Complainants) initiated this complaint proceeding challenging the method by which PJM implements its marginal line loss methodology with respect to virtual traders or arbitrageurs.<sup>3</sup> In general, the Commission denied the complaint, but we did grant the complaint with respect to eligibility for virtual traders to receive marginal line loss compensation for “up-to” congestion trades.<sup>4</sup>

3. As relevant to this motion, in the Commission’s September 17, 2009 order,<sup>5</sup> the Commission established a refund effective date of December 3, 2007 (the date of the complaint), and required PJM to pay refunds for the full fifteen-month refund period provided in the Federal Power Act (FPA) (i.e., until March 3, 2009). The Commission further required PJM to file a refund report, which PJM tendered on March 1, 2010.<sup>6</sup>

4. DC Energy, LLC, and American Electric Power Service Corp. (DC Energy and AEP) timely filed for rehearing of the September 17, 2009 order. 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 [because] exporters to [Midwest Independent Transmission System Operator, Inc. (MISO)] simply had no notice that their export transactions might be subject to refund.”<sup>7</sup> 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 (*viz.*, rebilling) or resettlement ‘would create substantial uncertainty in the . . . markets and would undermine confidence in them’.”<sup>8</sup> The matter they raised was

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<sup>3</sup> For a more in-depth 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).

<sup>4</sup> See *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).

<sup>5</sup> *Id.*

<sup>6</sup> September 17, 2009 Compliance Order, 128 FERC ¶ 61,262 at PP 33-35. We discuss the procedural history of the refund requirement below.

<sup>7</sup> DC Energy and AEP Request, Docket No. EL08-14-002, at 12 (filed Oct. 19, 2009) (citing *N.Y. Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307 (2000), *reh’g denied*, 97 FERC ¶ 61,154 at 61,673 (2001)).

<sup>8</sup> *Id.* at 12-13.

characterized by the Commission as “surcharges,” i.e., surcharging those who may have been over-paid, or over-credited, from the marginal line loss over-collections, in order to refund those who had not been properly credited by PJM during the fifteen-month refund period.

5. 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.”<sup>9</sup> 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.

6. In an order issued on April 15, 2010,<sup>10</sup> the Commission addressed the DC Energy and AEP rehearing request, the PJM refund report, and PJM’s compliance filing. The Commission determined that it could not resolve at that time 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.”<sup>11</sup> In the same order, the Commission also responded to Integrys’s protest of the compliance filing by deferring its consideration of this issue until PJM submitted its required refund report.<sup>12</sup>

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<sup>9</sup> 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 Order.

<sup>10</sup> *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). In this same order, the Commission also addressed and denied requests for rehearing submitted by Complainants and the Midwest LSEs.

<sup>11</sup> April 15, 2010 Rehearing Order, 131 FERC ¶ 61,024 at P 42.

<sup>12</sup> *Id.* P 46. 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.

7. 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.

8. 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. As relevant here, in the July 21, 2011 order the Commission granted rehearing and determined not to require refunds retroactively (without surcharges) on the reasoning that “PJM would suffer a loss of revenue and an under-recovery of legitimate costs.”<sup>13</sup> 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:

“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.”<sup>14</sup>

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

9. On August 3, 2011, Complainants submitted a request for clarification or, in the alternative, rehearing, of the Commission’s July 21, 2011 Rehearing Order, with a motion

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<sup>13</sup> July 21, 2011 Rehearing Order, 136 FERC ¶ 61,040 at P 28 & n.42.

<sup>14</sup> *Id.* P 26 (quoting *Occidental Chemical Corp. v. PJM*, 110 FERC ¶ 61,378 (2005) and citing *Union Elec. Co.*, 64 FERC ¶ 61,355, at 63,468 (1993)).

for leave to intervene out-of-time and a motion for issuance of stay.<sup>15</sup> They contended that the only refund issue addressed in the July 21, 2011 Rehearing Order relates to whether the disqualification of the exports from PJM to MISO was properly given retroactive effect in the distribution of marginal line losses, i.e., whether surcharges (of the over-payments) were properly applied to these exporters. Complainants also requested that the Commission act upon the request for rehearing prior to PJM's planned issuance of a billing adjustment to recover those refunds. On August 9, 2011, PJM filed in support of expedited consideration of the Request for Clarification so as to quickly resolve outstanding ambiguity, provide certainty to market participants, and avoid unnecessary administrative burden to the affected parties.

10. On October 31, 2011, the Secretary of the Commission granted PJM an extension of time to comply with the July 21, 2011 Rehearing Order until 60 days after the issuance of an order on rehearing of the July 21, 2011 Rehearing Order.

11. On May 11, 2012, the Commission denied rehearing of the Commission's July 21, 2011 Rehearing Order and affirmed its determination to apply the traditional policy of denying refunds in cases involving rate design and cost allocation.<sup>16</sup> On June 11, 2012, Financial Power Marketers filed a second request for rehearing on the same issues.

## **II. Request for Stay**

12. On June 15, 2012, Financial Power Marketers submitted a motion requesting the Commission to stay, within seven days, PJM's implementation of the directives in the Commission's May 11, 2012 Rehearing Order with respect to refunds. Financial Power Marketers state that PJM plans to issue billing adjustments to reclaim some of the refunds in its June month-end invoices. Financial Power Marketers cite to letters received from the Chief Financial Officer of PJM requesting, pursuant to the PJM tariff, that they demonstrate sufficient resources to meet PJM's credit requirements. These letters indicate that PJM intends to recoup these losses over a period of several months beginning with the June 2012 month-end invoice. The letter then inquires as to what assets Black Oak Energy, LLC has available to satisfy its current and future obligations related to these billing adjustments, and states that unfulfilled collateral calls will result in PJM declaring the company in default of the Credit Policy in Attachment Q of the PJM Open Access Transmission Tariff.

13. Financial Power Marketers maintain that the refunds were used to pay taxes, cover employee compensation, and make distributions to investors. They maintain that the

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<sup>15</sup> See *supra* note 1. Four of the filing Financial Power Marketers are parties to this proceeding, five are not.

<sup>16</sup> May 11, 2012 Rehearing Order, 136 FERC ¶ 61,040 at PP 24, 32 & n.47.

Commission's action reversing the payment of refunds "has already led to great uncertainty and panic" and PJM's imminent proposed recovery of refunds already distributed for this time period "threatens to put some companies permanently out of business."<sup>17</sup>

14. Financial Power Marketers maintain that their request satisfies the standard for granting a stay. They argue that the stay is needed to protect the public interest from being harmed by the lost jobs, sullied professional reputations, and chilled markets that may result from some Financial Power Marketers defaulting on PJM's invoices and going out of business.<sup>18</sup> Financial Power Marketers characterize PJM's decision to recapture the already-paid amounts as "arbitrary" and a "hurry up and bill approach."<sup>19</sup> Financial Power Marketers contend they were caught off guard with the Commission's "spontaneous reversal" of its refund determination,<sup>20</sup> because they had no notice. They reiterate the arguments they previously proffered following the July 21, 2011 Rehearing Order; for example, no party raises the broader refund issue on rehearing. Financial Power Marketers also point out that the public interest could be harmed absent a stay because such market resettlements are complex and multiple resettlements would result in an unnecessary waste of time, money, and resources.

15. Second, Financial Power Marketers argue that a stay is needed to limit irreparable injury to them, namely, the defaults, suspended trading privileges, sullied reputations, and lost jobs that will be the result of PJM's "accelerated" recapturing of these refunds.<sup>21</sup>

16. Finally, Financial Power Marketers contend that no other parties will be harmed by the stay.

17. On June 20, 2012, Financial Power Marketers submitted a letter recounting their request for a stay and the timeline and renew their request for a shorted comment period. They request that the Commission act by noon on June 27, 2012.

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<sup>17</sup> Financial Power Marketers Motion at 3.

<sup>18</sup> *Id.* at 12 (averring a "strong likelihood that one or more companies will in turn be driven out of business entirely").

<sup>19</sup> *Id.* at 13, 21.

<sup>20</sup> *Id.* at 14, 16.

<sup>21</sup> *Id.* at 18.

### **III. Notice of Filing and Responsive Pleadings**

18. On June 19, 2012, a notice was issued shortening the normal 15-day answer period from July 2, 2012, to June 26, 2012.<sup>22</sup>

19. On June 26, 2012, PJM filed an answer. While PJM takes no position on the request for stay, it does seek to correct misstatements of fact contained in the motion, describes how it is implementing the May 11, 2012 Rehearing Order, and describes certain other facts of which it is aware that bear on the request. PJM first points out that despite confidentiality protections in the PJM tariff, Financial Power Marketers refused to share the confidential affidavits with PJM. PJM states that, in contrast to the assertions of the Financial Power Marketers, it has never supported a stay, and could not have done so when Financial Power Marketers refused to share with it the information on which the stay was premised.

20. PJM asserts that its planned implementation of the May 11, 2012 Rehearing Order is required by the Commission's orders and PJM's tariff. PJM asserts that under its tariff, it will issue bills reflecting surcharges and credits on July 9, 2012, with payment due by July 13, 2012.

21. PJM maintains that, having initially received the specific refund amounts at issue two years ago, the Financial Power Marketers were fully aware of their payment obligations. PJM states that it had previously thought it would need a deferred payment schedule to make the required bill adjustments but that it now has determined it can make the adjustments to its billing software so that a deferred payment schedule is not necessary. PJM recognizes that its staff had discussed with Financial Power Marketers the possibility of staggering payments over a three to four-month period as indicated in the June 7th letters. However, it argues that PJM staff indicated to Financial Power Marketers that no final decision had been reached on any such deferred payment schedule. PJM states that it determined not to offer a deferred payment schedule because it read the Commission's orders as requiring an immediate rebill, if possible, and because, under its tariff, any such deferred reimbursement schedule would require Commission approval.

22. PJM further clarifies that the credit requirements in its tariff permit it to issue collateral calls to participants. Under Attachment Q § I.B.3 of its tariff, PJM states "if PJM Settlement determines that a Material change in the financial condition of the Participant has occurred, it may require the Participant to provide Financial Security

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<sup>22</sup> Financial Power Marketers had requested a three-day answer period so that answers to their 24-page pleading plus attachments, filed on a Friday at 4:29 pm, would be due on the following Monday. The notice provided eight days for responsive answers.

within two Business Days.” PJM states that consistent with its past practice, it only considers deferred payment plans if security is provided.

23. PJM points out that, according to Financial Power Marketers’ own pleading, some of the parties that will be required to repay amounts have withdrawn from PJM and may no longer exist. PJM states that further delay would simply elongate this already extended proceeding and further delay the relief to the entities owed monies under the Commission’s July 21, 2011 Rehearing Order.

24. PJM states that because Financial Power Marketers refuse to provide their confidential affidavits to PJM, PJM is unable to comment on any specific claims of irreparable harm that may be set forth in those affidavits. PJM can state, however, that based on its review of the financial statements that market participants have provided to PJM, some affected companies have cash on their balance sheets that would cover their liabilities to PJM.

#### **IV. Discussion**

25. We will deny Financial Power Marketers’ motion requesting stay, as discussed below. We will also clarify that, under the Commission’s orders, PJM is permitted to negotiate reasonable deferred payment schedules in appropriate circumstances.

26. Section 313(c) of the Federal Power Act states that neither the filing of rehearing nor the filing of an appeal operates to stay the effectiveness of a Commission order.<sup>23</sup> Rather, a party must specifically request a stay. The standard for the Commission to grant a stay under the Administrative Procedure Act is whether “justice so requires.”<sup>24</sup> In the circumstances here, we do not find a basis for granting a stay.

27. Financial Power Marketers were aware of the requirements of the PJM tariff and PJM credit requirements and had sufficient time to prepare for such collateral calls. Financial Power Marketers were aware as early as the initial set of rehearings of the September 17, 2009 Compliance Order that the refund issue was in dispute and there was a risk of the Commission granting rehearing and requiring the repayment of refunds.<sup>25</sup> But even after the Commission determined in the July 21, 2011 Rehearing Order that the refunds would have to be returned, PJM did not require Financial Power Marketers to

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<sup>23</sup> 16 U.S.C. § 825l (2006).

<sup>24</sup> 5 U.S.C. § 705 (2006); *see also, e.g., City of Vernon*, 116 FERC ¶ 61,091, at P 12 (2006).

<sup>25</sup> Financial Power Marketers should not reasonably have considered the refunds to be final action when the refund mechanism was challenged on rehearing.

repay those refunds at the time. Instead, the requirement to repay refunds was delayed until the Commission ruled on the Financial Power Marketers' rehearing request. That order on rehearing was issued on May 11, 2012.

28. Financial Power Marketers have therefore had at least 10 months' prior notice in which to plan for and ensure that they have adequate resources and capitalization to satisfy the creditworthiness requirements of the PJM tariff and reimburse PJM for their refunds, starting from the date of the Commission's July 21, 2011 Rehearing Order. Moreover, as both Financial Power Marketers and PJM point out, some of the companies involved in these transactions no longer participate in PJM markets and some may no longer exist. Further delay in recovering these funds will only increase the possibility that funds will not be available to repay those other PJM customers to whom funds are now owed. In these circumstances, we find that justice does not require that the Commission prevent PJM from ensuring that other customers are made whole and from ensuring that the Financial Power Marketers participating in PJM markets maintain sufficient creditworthiness to protect against the risk of further losses to PJM stakeholders.

29. Moreover, the Commission "typically does not stay its orders."<sup>26</sup> The Commission's general policy is to deny requests for stay "to assure definiteness and finality in Commission proceedings."<sup>27</sup> As the Commission explained in *City of Vernon*, "the Commission follows a general policy of denying stays of refund obligations pending further review because there is a remedy to recover refunded amounts in the event the Commission's decision is reversed or revised."<sup>28</sup> In *City of Vernon*, the movant contended that it would be required to amend recently-issued financial statements, adjust critical financial commitments to creditors, and make substantial adjustments to its budget, which was established in a formal, public process. The Commission denied the stay because the harm incurred could be remedied.<sup>29</sup> Citing to *Wisconsin Gas Co. v.*

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<sup>26</sup> *City of Vernon*, 116 FERC ¶ 61,091 at P 11

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing *High Island Offshore Sys., LLC*, 112 FERC ¶ 61,087, at P 11 (2005); see also *Olympic Pipe Line Co.*, 102 FERC ¶ 61,055, at P 16 (2003)).

<sup>29</sup> *City of Vernon*, 116 FERC ¶ 61,091 at PP 12-13 (citing *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("It is also well settled that economic loss does not, in and of itself, constitute irreparable harm.... Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.")).

*FERC*,<sup>30</sup> the Commission stated that it is well established that economic loss does not necessarily constitute irreparable harm.

30. The Commission similarly denied a motion for stay in *Olympic Pipe Line*, where the movant alleged, as Financial Power Marketers allege here, that it would be forced into bankruptcy or become insolvent if required to refund its obligations of \$16 million plus interest.<sup>31</sup> Applying the standard set out for motions for stay, the Commission held that “irreparable injury must be more than unfavorable circumstances, loss or loss of profits.”<sup>32</sup> Because either the Commission or the courts could grant relief and a remedy could be sought to recover lost revenue, the Commission found that a stay was not required by the interests of justice.<sup>33</sup>

31. Financial Power Marketers cite two 1977 Federal Power Commission cases, *Belco Petro. Corp.*<sup>34</sup> and *Area Rate Proceeding*,<sup>35</sup> where the Commission granted a stay pending appeal.<sup>36</sup> But these cases involved different factual circumstances. In these cases, the refunds to producers would be disbursed to consumers and therefore might not be recoverable if the movant succeeded on appeal. Moreover, in *Belco*, the company placed the potential refunds in an escrow account to ensure they would be available if the Commission’s order were affirmed. This case does not involve similar circumstances, since no refunds are being paid to consumers. In fact, the greater risk in this case is that, as noted above, continued delay in recovering funds from the Financial Power Marketers might lead to unrecoverable amounts if these firms leave the PJM market or cease to exist.

32. PJM states that it reads the Commission’s July 21, 2011 and May 11, 2012 orders, and its tariff, as not permitting it to negotiate deferred payment schedules. Neither the

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<sup>30</sup> 758 F.2d at 674.

<sup>31</sup> A protesting party in this proceeding asserted that the movant’s financial difficulties were caused by it paying out \$51.1 million in dividends in addition to making poor investments.

<sup>32</sup> *Olympic Pipe Line*, 102 FERC ¶ 61,055 at P 17.

<sup>33</sup> *Id.* The Commission did permit a deferred payment schedule in *Olympic* to permit the pipeline time to adjust its financing and cash flow. *Id.* at P 19.

<sup>34</sup> *Belco Petro. Corp.*, 58 FPC 2306 (1977)

<sup>35</sup> *Area Rate Proceeding*, 58 FPC 1931 (1977).

<sup>36</sup> Financial Power Marketers Motion at 11.

July 21, 2011 nor May 11, 2012 order prohibited PJM from proposing a deferred implementation deadline.<sup>37</sup> We clarify that, in appropriate circumstances, such as where a deferred payment schedule may minimize a potential default, PJM is authorized to negotiate a reasonable deferred repayment schedule with individual market participants without seeking further Commission approval. Given the unique circumstances of this proceeding, we encourage PJM to negotiate such a deferred payment schedule with individual marketers when appropriate.

The Commission orders:

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

By the Commission. Commissioner Moeller is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>37</sup> Since PJM was not provided with the confidential information attached to Financial Power Marketers' motion, PJM was unable to fully evaluate the claims of irreparable harm from an immediate collection of funds. PJM does note, however, that certain of the entities implicated here have sufficient cash on hand to cover their liabilities to PJM.

Financial Power Marketers' failure to make confidential information available to parties, we add, is inconsistent with Commission regulation and practice. *See West Deptford Energy, LLC*, 134 FERC ¶ 61,189 (2011) (finding that fairness requires that parties to a proceeding be able to access confidential information pursuant to appropriate protective agreements); *cf.* 18 C.F.R. § 385.206(e) (2010) (“[I]f a complainant seeks privileged treatment for any documents submitted with the complaint, the complainant must submit . . . a proposed form of protective agreement.”).