

131 FERC ¶ 61,024
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.

PJM Interconnection, L.L.C.

ORDER DENYING REHEARING AND ACCEPTING COMPLIANCE FILING

(Issued April 15, 2010)

1. On October 19, 2009, Black Oak Energy, L.L.C. (Black Oak), EPIC Merchant Energy, L.P. (EPIC), SESCO Enterprises, L.L.C. (SESCO), Energy Endeavors L.P., and Solios Power, L.L.C. (collectively, Financial Marketers), the Midwest LSEs,¹ and DC Energy, LLC and American Electric Power Service Corp. (together, DC Energy and AEP) filed separate requests for rehearing of the Commission's September 17, 2009 order accepting the compliance filing of PJM Interconnection, L.L.C. (PJM).² In this order, the Commission denies rehearing, sets one issue aside as premature, and accepts PJM's October 19, 2009 compliance filing, as discussed below.³

¹ The Midwest LSEs include: Madison Gas and Electric Company (MGE), WPPI Energy (WPPI), and Alliant Energy Corporate Services, Inc. (Alliant).

² *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262 (2009) (Compliance Order).

³ On February 2, 2010, EPIC Merchant Energy NJ/PA, LP; SESCO; and Coaltrain Energy LP jointly filed a complaint related to the issues in this proceeding under Docket No. EL10-40-000. The Commission will address this complaint in a subsequent order.

I. Background

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

3. The Commission's May 1, 2006 order concluded that PJM's tariff required use of the marginal loss method when it was technically feasible and that this was now the case.⁴ The Commission also affirmed that the marginal loss method was appropriate because it would allow PJM to change its dispatch of generators (by considering the effects of losses) in a way that would reduce the total cost of meeting load.⁵ The Commission found that the marginal loss method effectively imposes different loss charges to customers at different locations, as the loss component of the energy price varies for customers at different locations. That is, each spot market energy customer pays an energy price that reflects the full marginal cost—including the marginal cost of transmission losses—of delivering an increment of energy to the purchaser's location. Transmission line losses vary depending on the distance required to deliver energy to different locations. Besides the effect of distance, line losses also increase as the number of megawatts of power moved increases.⁶ As a result, charging for marginal losses will

⁴ *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 19 (2006) (May 1, 2006 Order).

⁵ May 1, 2006 Order, 115 FERC ¶ 61,132 at P 22.

⁶ It is a principle of mathematics that whenever any variable is continuously increasing, the marginal value of the last unit exceeds the average of all the units. Thus, where an average method considers all the units and produces an "average" transmission line loss (e.g., 2 percent is the average of an initial line loss of 1 percent that escalates as units increase to 3 percent), a marginal method would consider the losses incurred by the

(continued...)

result in collecting more revenues than needed to cover total loss costs.⁷ The Commission further found that PJM would need to develop a method to allocate any over-collections. Subsequently, in its November 6, 2006 Order, the Commission addressed and resolved the allocation issue.⁸

4. On December 3, 2007, Black Oak, EPIC, and SESCO (collectively, Complainants) filed a complaint challenging the marginal line loss method and the related allocation methodology in PJM's tariff. Specifically, Complainants argued that the financial transactions of "virtual traders" or arbitrageurs do not create the flow of physical energy and concomitant transmission line losses and, therefore, they should not be assigned marginal line losses. Alternatively, Complainants argued that if their financial transactions are assigned marginal line losses they should receive a share of the surplus over-collected amount. In its order denying the complaint, the Commission *inter alia* concluded that no party is entitled to receive any particular amounts through disbursement of the surplus that inevitably results from using the marginal line loss methodology, since the price each party is paying is the correct marginal cost for the energy that each party is purchasing.⁹

5. Complainants subsequently filed a request for rehearing of the Complaint Order, arguing, among other things, that they, and others similarly situated, are entitled to receive a share of the marginal line loss surplus because they contribute to the fixed costs of the transmission system.¹⁰ In addressing Complainants' arguments, the Commission addressed whether arbitrageurs in the PJM market should be required to pay marginal line losses and, if so, whether they should be entitled to a share of the over-collected amounts (or "surplus") on an equal basis with other similarly situated customers.¹¹

last unit(s) (e.g., 3 percent) and produces a "marginal" transmission line loss figure to be incorporated into the price of delivered energy. The marginal loss method, therefore, will always result in a higher figure than the average loss method.

⁷ May 1, 2006 Order, 115 FERC ¶ 61,132 at P 4-5.

⁸ *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,169 (2006) (November 6, 2006 Order).

⁹ *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.* 122 FERC ¶ 61,208, at P 46 (2008) (Complaint Order).

¹⁰ April 7, 2008 Request for Rehearing at 21-24.

¹¹ *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at P 24 (2008) (Rehearing Order).

The Commission denied rehearing on the first issue and granted rehearing on the issue of the allocation of the over-collected amounts. The Commission directed PJM either to revise its tariff to include a credit to others who pay for the fixed costs of the transmission system in proportion to the load represented by their transmission usage or to show cause why its existing tariff provision is just and reasonable.

6. PJM subsequently requested that the Commission clarify its directive in paragraph 49 of the Rehearing Order that PJM make a tariff revision to include a credit to those who pay the fixed costs of the transmission system “in proportion to load represented by their transmission usage.” Specifically, PJM asked whether this use of the term “load” evidences an intent by the Commission to exclude those market participants that engage in virtual transactions, i.e., those who do not serve “load.”¹² The Commission clarified that it did not intend to exclude virtual traders from eligibility for the credit related to the surplus to the extent that those traders make transmission payments that contribute to the fixed costs of the transmission grid, without regard to whether such parties serve load.¹³

7. On March 26, 2009, PJM submitted revisions to section 5.5 of the appendix to Attachment K of its tariff and to the corresponding section of Schedule 1 of its Operating Agreement in compliance with the Commission’s directive and clarification.¹⁴ PJM

¹² See *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,164, at P 10, 13 (2009) (Clarification Order).

¹³ *Id.* P 14-15.

¹⁴ March 26, 2009 Compliance Filing at 3. Showing the proposed additions and deletions, PJM’s revised section 5.5 read as follows:

The total Transmission Loss Charges accumulated by the Office of Interconnection in any ~~hour~~~~month~~ shall be distributed pro-rata to each Network Service User and Transmission Customer in proportion to its ratio shares of the total MWhs of energy delivered to load (net of operating Behind The Meter Generation, but not to be less than zero) in the PJM Region, or the total exports of MWh of energy from the PJM Region, or the total MWh of cleared Up-To Congestion transactions (that paid for transmission service during such hour)~~and the total exports of MWhs of energy from such region during such month by all Transmission Customers.~~

Id. at Attachment B.

stated that section 5.5 had been revised to allocate the total transmission loss charges accumulated by PJM to each Network Service User and Transmission Customer in proportion to its ratio share of the total megawatt-hours (MWh) of energy delivered to load in the PJM region.¹⁵ PJM further stated that the revised section 5.5 “allocates total transmission loss charges to the total exports of MWh of energy from the PJM Region, or the total MWh of cleared Up-To Congestion transactions (that paid for transmission service during such hour).”¹⁶

8. PJM stated that it believes its proposed revisions satisfy the Commission’s concern that collected marginal line losses be distributed equitably among all parties that support the fixed costs of the transmission system, without regard to whether such parties serve load.¹⁷ PJM stated that Network Service Users will still receive an allocation of surplus marginal line loss collections in proportion to their ratio shares of the total MWhs of energy delivered to load in the PJM region, but that allocation now will also include “Transmission Customers,” which includes load serving customers such as those taking point-to-point transmission service under Part II of the tariff.¹⁸ PJM explained that the allocation methodology for these customers is still based upon the Commission’s accepted principle that allocation of marginal line losses to these customers is fair because it distributes the surplus back to load customers who pay for the fixed costs of the transmission system.¹⁹ PJM stated that it further modified section 5.5 to capture allocation of surplus marginal line losses to those customers engaging in Up-To Congestion transactions in proportion to the total MWh of those cleared transactions (that paid for transmission services during such hour).²⁰ PJM averred that each customer identified in revised section 5.5 contributes, through transmission charges, to the overall costs of the transmission grid; therefore, through the proposed revisions, each will receive a distribution of the surplus over-collected marginal line loss charges.²¹

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 4-5.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.*

9. In the Compliance Order, the Commission found that PJM's proposed revisions comply with the directive to credit those who pay for the fixed or embedded costs of the transmission system.²² The Commission acknowledged, as did PJM, that some arbitrageurs or virtual traders pay transmission access charges related to Up-To Congestion transactions, which contribute to the fixed costs of the transmission system, and which should be included in the allocation process for disbursement of any surplus resulting from the over-collection of transmission line loss charges. However, the Commission found that the arbitrageurs or virtual traders that only pay for ancillary services—such as black start or reactive control—do not support the fixed costs of the entire transmission system and should not be eligible to receive a share of the marginal line loss surplus.²³

10. The Commission also found that the revised tariff provision is not clear whether, to qualify for a credit, a Network User or Transmission Customer that exports energy from the PJM region must have paid for transmission service during the hour as is required for Up-To Congestion transactions. Therefore, the Commission directed PJM to file further revisions to the tariff and operating agreement to make clear that the credits to exporters are dependent on their having paid for transmission service for a time period that includes the hour, as is required for Up-To Congestion charges.²⁴

11. The Commission provided that these provisions would become effective June 1, 2009, as requested by PJM. The Commission also established a refund effective date pursuant to section 206(b) of the FPA as of the date of the complaint, December 3, 2007, and required PJM to pay refunds for the statutory fifteen-month period (i.e., until March 3, 2009), including interest as determined under the Commission's regulations.²⁵

12. On October 19, 2009, PJM submitted a filing in compliance.²⁶

²² Compliance Order, 128 FERC ¶ 61,262 at P 26.

²³ *Id.*

²⁴ *Id.* P 27.

²⁵ *Id.* P 35.

²⁶ On March 1, 2010, PJM also submitted a refund report in compliance with the Compliance Order.

II. Requests for Rehearing

13. In their request for rehearing, Financial Marketers take issue with the finding that all customers paying a price based on marginal line losses are paying the just and reasonable price for energy. Financial Marketers dispute the lawfulness of the method of disbursing the surplus line loss charges on the basis that the method (1) bears no relationship to cost causation principles or alignment of benefits with burdens; (2) has no nexus with transmission line losses; (3) excludes all virtual transactions and approximately 70 percent of Up-To Congestion transactions; (4) results in some market participants receiving a preferential transmission line loss rate;²⁷ and (5) distorts price signals. Financial Marketers also dispute the Commission's finding that PJM's method of disbursing the surplus to those parties that support and pay for the fixed costs of the transmission grid is a reasonable basis for determining the disbursement credit.²⁸ Further, they state that the Commission erred in approving an allocation method that excludes virtual transactions.²⁹ Financial Marketers maintain that the Commission erred in finding that PJM's proposed revisions comply with the directive to credit those who pay for the fixed or embedded costs of the transmission system when the revised provisions exclude payments related to black start and reactive control. Consequently, Financial Marketers take issue with the Commission's finding that PJM's proposal provides an equitable distribution of the line loss surpluses and is not unjust and unreasonable for excluding payments based on black start and reactive control.³⁰ They disagree with the Commission's finding that virtual traders who only pay for ancillary services do not support the fixed costs of the entire transmission system. They contend that the Commission erred in finding that black start and reactive control are ancillary

²⁷ Financial Marketers argue in terms of a "punitive rate" or "tax" on virtual transactions and "premium rate" or "subsidy" for physical transactions. *See, e.g.*, Financial Marketers Request at 1-2, 3, 14, 15-16.

²⁸ Financial Marketers Request at 13 ("[A]llocating the surpluses based on whether a transaction contributes to the fixed costs of the transmission system is, in itself, unduly discriminatory.").

²⁹ Financial Marketers appear to concede, however, that not all virtual transactions are excluded. They appear to acknowledge that virtual transactions that entail Up-To Congestion bids which contribute to the fixed or embedded costs of the transmission system are included in the disbursement allocation. *See* Financial Marketers Request at 1, 10.

³⁰ *See* Financial Marketers Request at 22-23.

service payments that do not support the embedded costs of the transmission system. Financial Marketers contend that the Commission erred in failing to adopt an allocation method that reflects virtual transactions' proportional share by volume of all Day-Ahead transactions

14. Finally, Financial Marketers contend that the Commission erred in directing PJM to file revisions to make clear that the credits to exporters are dependent on their having paid for transmission service, because Financial Marketers have not requested such relief; such relief is beyond the scope of the proceeding; it exacerbates the unlawfulness of the allocation method; and there is no just and reasonable, non-discriminatory basis for excluding such exports from an allocation of the surplus.³¹

15. The Midwest LSEs filed a motion to intervene out-of-time with their request for rehearing or clarification. The Midwest LSEs question the Commission's decision-making behind a "loss surplus qualification requirement that has the effect of increasing net charges for PJM-to-[Midwest Independent Transmission System Operator (the Midwest ISO or MISO)] export transmission."³² They ask whether the Commission departed without adequate explanation from its precedents, under which PJM transmission customers taking point-to-point service from within PJM to the MISO border for delivery to MISO sinks qualify as "paying" transmission customers for purposes of qualifying for "RTO revenue rights."³³ They question the Commission's order, given that "the PJM-MISO Combined Region is intended to be seamless, such that the convoluted PJM-MISO border does not result in transmission being made more costly merely because it crosses that border."³⁴ The Midwest LSEs query whether the Commission limited the distribution of the marginal line loss surplus in an unjust,

³¹ *See id.* at 24. Financial Marketers reiterate, "Transactions should not be excluded from receiving a share of transmission line loss surpluses based on whether or not a market participant contributes to the fixed costs of the transmission system," *id.* at 25, and that the current disbursement method (between market participants) has "*nothing to do with transmission line loss cost incurrence or aligning benefits and burdens.*" *Id.* at 22 (emphasis in original).

³² Midwest LSEs Request at 4.

³³ *Id.*

³⁴ *Id.* at 3-4.

unreasonable, or unduly discriminatory way. Finally, they ask whether the Commission erred by applying such a result retroactively.³⁵

16. The Midwest LSEs state that they take no issue with the eligibility requirement that, to be allocated a share of the surplus, market participants must be paying for transmission service and thereby covering the grid's fixed costs. Rather, their concern goes to the question of what form of payment for the grid's fixed costs satisfies the requirement.³⁶ They contend that their "zonally-quantified transmission access charges are nonetheless understood to support the embedded costs of the entire PJM-MISO Combined Region grid."³⁷ The Midwest LSEs describe the MISO-PJM rate structure as a form of "cost sharing," under which cross-border customers who pay transmission access charges covering their host zone's fixed costs (e.g., by paying MISO transmission access charges in a PJM-to-MISO export) share in the fixed transmission costs of the entire Combined Region.³⁸ Thus, the Midwest LSEs maintain that "MISO-area network service customers effectively do pay for the fixed costs of PJM-area transmission facilities, through what amounts to an 'intra-RTO' rate design."³⁹

17. In their request for rehearing, DC Energy and AEP maintain that the Commission erred by directing PJM to clarify its tariff with respect to the allocation of surplus line loss revenues to market participants engaging in export transactions. They maintain that the Commission erred by retroactively excluding PJM-MISO exports. They state that the Commission erred by conditioning the surplus allocation in this manner without providing notice, by failing to consider market impacts, and by expanding the scope of its order beyond an examination of PJM's compliance filing.

18. DC Energy and AEP state that exporters had no notice that these credits would be eliminated for PJM-MISO exports. Moreover, they state that PJM's compliance filing did not propose to limit this provision in the manner directed by the Commission in the Compliance Order. DC Energy and AEP maintain that the change in credits applicable to exports should not be effected retroactive to the refund effective date, because exporters

³⁵ *Id.* at 1 (referencing Attachment A, an email from PJM to its customers on the subject of retroactive billing adjustments).

³⁶ *Id.* at 6.

³⁷ *Id.* (footnote omitted).

³⁸ *Id.* at 8.

³⁹ *Id.* at 9.

had no notice that their export transactions might be subject to refund. They cite Commission case law for the proposition that the Commission should allow changes in rate design to be effective prospectively only because market participants cannot revisit their economic decisions in light of the rate design change.⁴⁰ They explained that the Commission previously has refused to impose such refunds because doing so would interfere after-the-fact with the commercial and economic decisions of market participants who cannot undo their transactions.⁴¹ DC Energy and AEP contend that if they were not entitled to a share in the surplus loss revenues for their PJM-MISO exports during the refund period, their power sales activities likely would have been substantially different. They aver that elimination of the surplus loss revenue credit places the exporters in question in a worse economic position than they would occupy had they been subject to the transmission service charge. Revisiting the case history, DC Energy and AEP underscore that the Commission may not institute a section 206 proceeding to change rates without notice to customers and utilities.

19. Subsequently, Duke Energy Ohio, Inc. (Duke) submitted an answer in opposition to the Financial Marketers' request for rehearing. Financial Marketers followed with an answer to Duke's answer.

III. Compliance Filing

20. PJM states that section 5.5 of the Appendix to Attachment K of its tariff and the corresponding section of Schedule 1 of its Operating Agreement have been revised to include a qualifying parenthetical which allocates total transmission loss charges to the total exports of MWh of energy from the PJM region, dependant on the exporter having paid for transmission service for a time period that includes the hour, as is required for Up-To Congestion charges.⁴²

IV. Notice and Responsive Pleadings

21. Notice of the compliance filing was published in the *Federal Register*, 74 Fed. Reg. 55835 (2009), with interventions and protests due on or before November 9, 2009. MGE and WPPI, together, and Alliant timely filed motions to intervene. Integrys Energy

⁴⁰ DC Energy and AEP Request at 13 & n.32.

⁴¹ *Id.* at 13 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at P 95 (2006)), 14-15.

⁴² *See supra* P 7 and accompanying notes.

Services, Inc. (Integrys) and the Midwest LSEs⁴³ timely filed protests. Financial Marketers timely filed a protest to the compliance filing and request for rehearing of the Commission's granting PJM's motion for an extension of time for its refund obligation. On January 20, 2010, Tenaska Power Services Co. (Tenaska) submitted a motion to intervene out-of-time and comments.

22. Integrys contends that the Commission cannot direct a tariff change that would limit exporters' credits on a retroactive basis. Integrys points out that PJM did not propose this change, nor did an intervenor, Financial Marketers, or the complaining parties. To direct such a change, Integrys maintains that section 206 of the Federal Power Act (FPA) requires that the Commission provide notice of its intention to change an established rate and that such a change must be made prospectively. Integrys states that it reviewed the previous Commission orders in this proceeding and did not have any reason to believe that its interests would be adversely affected.

23. Integrys further contends that Commission policy does not support the retroactive application of the restriction imposed on the allocation of surplus loss revenues. According to Integrys, Commission policy is to avoid retroactive implementation of rates and resettlements that "would create substantial uncertainty in the ... markets and would undermine confidence in them."⁴⁴ Integrys cites precedent where the Commission, on rehearing, elected not to "retroactively undo the decisions of market participants."⁴⁵ Integrys concludes that the Commission's policy is clear: "it will not order refunds where doing so would change the economic and commercial expectations of market participants with respect to their transactions which they cannot undo."⁴⁶

24. Tenaska supports the protest of Integrys and the request for rehearing and clarification filed by DC Energy and AEP.

⁴³ The Midwest LSEs previously submitted a motion to intervene out-of-time and a request for rehearing or clarification of the Compliance Order. Subsequently, MGE and WPPI (together) and Alliant separately intervened and jointly, as Midwest LSEs, submitted a protest to PJM's October 19, 2009 compliance filing.

⁴⁴ Integrys Protest at 7 (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)).

⁴⁵ *Id.* (citing *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, at P 155 (2009)).

⁴⁶ *Id.* at 7-8.

25. The Midwest LSEs reiterate their principal arguments proffered in their earlier request for rehearing on the Compliance Order, discussed above. In their protest to PJM's compliance filing, they maintain that transmission customers who export to the MISO-PJM border do pay base transmission access charges that "pay for the costs of the transmission grid" and "support the fixed costs of the entire transmission system."⁴⁷ The Midwest LSEs make the point that this contribution includes the fact that MISO-area network customers are subject to funding PJM-area transmission fixed costs.⁴⁸ Further, The Midwest LSEs state that the Commission recently explained that the pricing structure in the PJM-MISO Combined Region—i.e., the zonally-quantified transmission access charges⁴⁹—extends to the Combined Region the same license-plate cost allocation structure that applies internally within both MISO and PJM.⁵⁰

26. The Midwest LSEs state that the Commission rejected the position that the Midwest LSEs are "free-riding" on PJM point-to-point service; they state that the Commission rejected the position that the Midwest LSEs should not be allocated congestion revenue rights on the basis that they no longer directly pay PJM's though and out rates.⁵¹ According to the Midwest LSEs, "the MISO-PJM rate structure is a form of 'cost sharing,' under which cross-border customers who pay transmission access charges covering their host zone's fixed costs are sharing in covering the fixed transmission costs of the entire Combined Region."⁵² They contend that such "support is an integral part of Combined-Region-wide reciprocal arrangements under which PJM load-serving entities ... access MISO-area transmission facilities and vice versa."⁵³ Thus, the Midwest LSEs contend that PJM transmission customers exporting MWh from PJM to MISO should

⁴⁷ Midwest LSEs Protest at 4 (quoting, respectively, Compliance Order, 128 FERC ¶ 61,262 at P 23, 26).

⁴⁸ *Id.* at 4-5 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,102 (2009); *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,168, at P 60 (2004)).

⁴⁹ *See supra* P 16.

⁵⁰ Midwest LSEs Protest at 6-7 (quoting *Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator Inc. and PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,341, at P 11-12 (2008)).

⁵¹ *Id.* at 7-8 (quoting *Midwest ISO*, 109 FERC ¶ 61,168 at P 74).

⁵² *Id.* at 8, 9.

⁵³ *Id.* at 8.

share in the marginal loss surplus distribution only for those hours when they are paying *either* PJM or MISO for transmission service, without specifying that PJM must be the payment recipient.⁵⁴

27. Next, Financial Marketers remark that the Commission's prompt granting of PJM's motion for an extension with respect to its refund obligation is "the latest example of the Commission's failure in this case to take a hard look at the issues, address the unequal treatment of virtual market participants, and uphold the substantive and procedural rights of Complainants."⁵⁵ Financial Marketers argue that a delay in receiving refunds deprives them and others of capital that they could be using to trade.

28. In their protest, Financial Marketers argue that the Commission must reject PJM's compliance filing, which would put into effect an unjust, unreasonable, and unduly discriminatory tariff provision. They maintain that the proposed tariff revisions "unfairly and improperly limit the distribution of transmission line loss surpluses for pure virtual transactions, Up-To Congestion transactions, and exports from MISO into PJM."⁵⁶ According to Financial Marketers, excluding exports to MISO and certain Up-To Congestion transactions only further increases the group of market participants that are subjected to undue discrimination under PJM's tariff. In addition, they contend that the proposed methodology in PJM's compliance filing "for allocating transmission line loss surpluses is not truly based on whether a transaction supports the fixed costs of the transmission system—since the methodology would ignore payments of blackstart and reactive control—but is rather based on whether the transaction serves load."⁵⁷ Financial Marketers again reiterate that virtual transactions pay for 40 percent of PJM's transmission line losses and, thus, 40 percent of the over-collections, but "do not receive a penny of the surpluses collected."⁵⁸

29. In their request for rehearing in the same filing, Financial Marketers contend that the Commission erred by (1) summarily granting PJM's motion for an extension of time (with respect to calculating and making refunds) and (2) issuing a notice of extension of time before the deadline for motions to intervene and comments, depriving Financial

⁵⁴ *Id.* at 11.

⁵⁵ Financial Markets Protest and Request at 4.

⁵⁶ *Id.*

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 6.

Marketers and others of their refunds and right to be heard. Financial Marketers contend that they should have had fifteen days to file an answer to PJM's motion. They further contend that granting PJM's motion and extending the refund deadline by six months has "greatly harmed" Financial Marketers and other parties who need capital to trade in the markets and operate their companies.⁵⁹ Financial Markets also contend that the Commission failed to employ reasoned decision-making; they aver that "the Commission's only stated rationale is that the extension is granted due to the 'significant amount of effort that will be required of its [PJM's] technical and human resources staff.'"⁶⁰

V. Discussion

A. Requests for Rehearing

1. Procedural Matters

30. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and the burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. In this case, we find that the movants in this proceeding have met this burden because they could not have anticipated that the issue of paying credits to exporters would have arisen based on the original filing of the complaint.

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), we will grant the unopposed motions to intervene out-of-time and comments filed by the Midwest LSEs and Tenaska given their interest and the absence of undue prejudice or delay.

32. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2009), prohibits an answer to a request for rehearing. Accordingly, we will reject Duke's answer to Financial Marketers' request for rehearing, as well as Financial Marketers' answer to Duke's answer.

⁵⁹ *Id.* at 8 (citing Rule 213, 18 C.F.R. § 213 (2009)).

⁶⁰ *Id.* at 11 (asserting that no where in PJM's motion does PJM provide any facts or other evidence in support).

2. Commission Determination

33. We will deny the requests for rehearing, as discussed below. We first must reiterate here the four principles that govern our determination. First, our original May 1, 2006 Order established that calculating LMP based on marginal line losses establishes the correct price to be paid by all market participants, including Financial Marketers.⁶¹ Since longer transactions incur greater costs to cover the line losses, prices for those transactions need to be higher in order to send proper price signals.⁶² Second, charging marginal line losses leaves PJM with an over-collection that it must credit back to its customers. Third, and perhaps most important, the credit should bear no relation to the marginal line losses incurred by any party;⁶³ had the credit been based on marginal line losses incurred by individual parties, the credit would distort the correct price signals that adoption of marginal line loss pricing is designed to provide.⁶⁴ Any crediting mechanism

⁶¹ “Billing on the basis of marginal costs ensures that each customer pays the proper marginal cost price for the power it is purchasing.” May 1, 2006 Order, 115 FERC ¶ 61,132 at P 22; *see also id.* P 4; November 6, 2006 Order, 117 FERC ¶ 61,169 at P 27 (concluding, “the customer will face the correct price signal”); Complaint Order, 122 FERC ¶ 61,208 at P 28, 29, 34, 41; Rehearing Order, 125 FERC ¶ 61,042 at P 27, 32; Compliance Order, 128 FERC ¶ 61,262 at P 29.

⁶² May 1, 2006 Order, 115 FERC ¶ 61,132 at P 4 (“[O]ther things being equal, customers near generation centers pay prices that reflect smaller marginal loss costs while customers far from generation centers pay prices that reflect higher marginal loss costs. In addition, under the marginal loss method (and unlike under the current average loss system), PJM would consider the effects of losses in determining which generators to dispatch in order to serve load at least cost.”).

⁶³ Market participants “are not entitled to receive any particular amounts through disbursement of the over collections, since the price they are paying (based on marginal losses) is the correct marginal cost for the energy they are purchasing.” May 1, 2006 Order, 115 FERC ¶ 61,132 at P 24; Complaint Order, 122 FERC ¶ 61,208 at P 46, 48; Rehearing Order, 125 FERC ¶ 61,042 at P 33, 36.

⁶⁴ “The only fundamental principle to be applied is that the distribution should in no circumstance be based on the amount paid for transmission line losses, because that would distort the appropriate price signals which the use of marginal line loss pricing is designed to facilitate.” Rehearing Order, 125 FERC ¶ 61,042 at P 37 (footnote omitted), 44; May 1, 2006 Order, 115 FERC ¶ 61,132 at P 24 (citing *Ne. Utils. Serv. Co.*, 109 FERC ¶ 61,204, at P 21 (2004)); November 6, 2006 Order, 117 FERC ¶ 61,169 at P 27; Compliance Order, 128 FERC ¶ 61,262 at P 29.

that does not distort the pricing signals may be acceptable.⁶⁵ Fourth, once PJM has chosen a methodology for crediting line losses, it must apply that methodology on a not unduly discriminatory basis.⁶⁶ Therefore, having chosen to base the credit on customers' access and transmission charges for using the network, PJM must provide a credit to all customers incurring those charges.

34. These previously articulated principles respond to the Financial Marketers' arguments that PJM's method of distributing line losses is unjust and unreasonable. Financial marketers claim that the Commission's treatment of the line loss credit bears no relationship to cost causation principles or alignment of benefits with burdens and has no nexus with transmission line losses. But, as explained above, line loss credits are specifically designed not to equate the cost of marginal line losses with the credits. Indeed, the entire principle is to make sure that the line loss credits do not undermine the correct price signals that marginal line loss pricing sends. Thus, those parties that incur the largest charges for line losses have no entitlement to a larger proportion of the credits.

35. Financial Marketers maintain that some market participants are receiving a preferential transmission line loss rate.⁶⁷ But no party receives a preferential transmission rate. All customers pay the correct LMP based on the calculation of marginal line losses. The credit simply helps to defray the fixed access charges that some transmission customers pay. Since Financial Marketers do not pay access charges for most of their transactions, they legitimately are not entitled to receive the credits for those transactions. However, with respect to those transactions for which Financial Marketers do pay transmission access charges (e.g., for certain Up-To Congestion transactions), they will receive their proportionate share of the credit.

⁶⁵ 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.

⁶⁶ "Once having chosen a just and reasonable method, PJM cannot unduly discriminate among the class entitled to the distribution." Rehearing Order, 125 FERC ¶ 61,042 at P 49.

⁶⁷ Financial Marketers argue in terms of a "punitive rate" or "tax" on virtual transactions and "premium rate" or "subsidy" for physical transactions. *See, e.g.*, Financial Marketers Protest and Request at 1-2, 3, 14, 15-16.

36. Financial Marketers maintain PJM's method distorts price signals. In fact, however, this methodology sends the correct price signals by basing LMP on marginal costs. Providing credits in relation to marginal line losses, as urged by Financial Marketers, would distort price signals because it would encourage inefficient longer transactions by artificially reducing the cost of transmission below the actual marginal cost for that transmission.⁶⁸

37. Financial Marketers and the Midwest LSEs object to the Commission's determination that export transactions, which do not incur transmission costs, should not be eligible to receive credits. In the first place, Financial Marketers were the ones that contended that allocating credits to those who do not support the PJM infrastructure was unduly discriminatory. The Commission merely agreed with their point and acted to remedy the discrimination.

38. The only principle on which the Commission insisted was that the line loss credit could not be proportionate to line loss charges incurred by a participant. While we would have permitted PJM to adopt a number of just and reasonable methodologies for allocating the credit, we determined that once PJM has chosen a methodology for crediting line losses, it must apply that methodology on a not unduly discriminatory basis. Since PJM's allocation of the credit was based on those providing support for the fixed assets of the transmission grid, our order required PJM to apply this criterion uniformly and non-discriminatorily, as urged by the Financial Marketers.

39. Financial Marketers maintain that the definition of support for the transmission system must be broadened to include payments for ancillary services, since such services are considered part of transmission service. As pointed out previously, many just and reasonable methodologies might be adopted for allocating the credits, so long as the method chosen is not proportionate to the incurrence of line loss charges. As we found in the September 17, 2009 Compliance Order, even though ancillary services are considered a part of transmission service, PJM could reasonably distinguish these services from the access and transmission charges that support the fixed costs of the transmission system. The payments for ancillary service involve payments to generators, rather than covering the costs for the transmission system itself. While including ancillary service payments as part of the allocation methodology might not be unjust and unreasonable, PJM has not

⁶⁸ As a simple example, if the LMP without marginal line losses is \$35/MW, and marginal line losses add \$15/MW, and the customer received a proportional credit of 50 percent (\$7.50/MW), the effective price for that transaction becomes \$42.50/MW rather than the true cost of \$50/MW.

proposed such an allocation. We cannot find that limiting the allocation to access charges and transmission charges is unjust and unreasonable.⁶⁹

40. Finally, Financial Marketers maintain in their Rehearing Statement of Issues, without elaboration or further discussion, that the Commission “errs in holding that Financial Marketers’ protest to PJM’s exclusion of virtual transactions from the distribution of transmission line loss surpluses is a collateral attack on the Commission’s Rehearing Order.”⁷⁰ Since Financial Marketers provide no explanation of why the Commission should not have found that their pleading was a collateral attack, we deny rehearing.⁷¹ As we found in the September 17, 2009 Order, the arguments advanced by the Financial Marketers in that order, as well as the ones advanced here, are duplicative of the arguments previously raised and addressed in the October 16, 2008 Rehearing Order.⁷²

41. The Midwest LSEs do not challenge the rationale for the distribution of the credit; they argue only that the Midwest LSEs ought to qualify because they pay transmission charges to MISO as part of what they interpret as an intra-RTO design. The orders cited by the Midwest LSEs deal only with the elimination of through and out rates between PJM and the Midwest ISO and the establishment of a joint operating agreement as a result of seams issues between PJM and the Midwest ISO. These orders do not provide that payment of transmission charges to the Midwest ISO should be treated as the equivalent of payment of transmission charges to PJM. Indeed, the Midwest ISO does not distribute marginal line loss over-collections to those paying PJM transmission charges.⁷³ PJM’s basis for distributing marginal line loss credits was to allocate the

⁶⁹ PJM, in fact, could have proposed a crediting mechanism that was unrelated to the use of the transmission system entirely, such as using the funds to cover other expenses.

⁷⁰ Financial Marketers Request at 8.

⁷¹ Rule 713(c)(2), 18 C.F.R. § 713(c)(2) (2009), requires that a request for rehearing include “a separate section entitled, ‘Statement of Issues,’ listing each issue in a separately enumerated paragraph.” While Financial Marketers list eleven issues, their pleading has only three substantive discussion sections and does not appear to discuss all eleven issues, including the collateral attack issue. The purpose of Rule 713 is to require the filing party to provide a concise and precise list of the substantive issues raised and discussed in its pleading, not simply a long list of possible issues.

⁷² Rehearing Order, 125 FERC ¶ 61,042.

⁷³ In the Midwest ISO, over-collections of marginal line loss charges are disbursed

(continued...)

credit to those who pay for the fixed costs of the PJM transmission grid. Since the Midwest LSEs do not help cover those costs, including the Midwest LSEs in the distribution is at odds with the requirement that PJM apply its crediting mechanism in a not unduly discriminatory manner.⁷⁴ Our determination here is based solely on the record in this case and the justification PJM has given for its allocation method. This ruling is without prejudice to PJM and MISO seeking to develop and propose a not unduly discriminatory allocation of marginal lines losses across their two systems to those who pay transmission charges to either system.

42. DC Energy and AEP contend that PJM is foreclosed from requiring customers to repay any credits they had received based on export transactions for which they did not pay transmission charges retroactively from the refund effective date (i.e., the date the complaint was filed, December 3, 2007).⁷⁵ 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. Although no party filed a protest to the report, it is not clear how PJM has handled the issue raised by DC Energy and AEP. The 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. To ensure that all issues have been resolved, we will require PJM within 45 days of the date of this order to file with the Commission a detailed refund report that shows:

to MISO load. PJM exporters are not credited any of the Midwest ISO's marginal line loss surplus. *See* MISO, FERC Electric Tariff Vol. No. 1, § 40.6, First Revised Sheet No. 1180 (Calculation and Distribution of Marginal Losses Surplus).

⁷⁴ For similar reasons, we also reject the suggestion of several parties (including DC Energy, AEP, and Integrys) that the Commission inappropriately expanded the scope of the Compliance Order beyond an examination of PJM's compliance filing to address the PJM-MISO export transactions. The issue the Commission addressed in the Compliance Order was whether the tariff language provided by PJM in its compliance filing was just and reasonable in limiting the distribution of marginal line loss over-collections for Up-To Congestion transactions only to those who pay for transmission service and thus contribute to the fixed costs of the PJM transmission grid, while at the same time allowing the MISO exporters to share in the over-collections even though they do not pay for such service. Accordingly, whether the MISO exporters should share in the credits when they do not pay for transmission service is within the scope of the Commission's examination of the compliance filing

⁷⁵ *See* Compliance Order, 128 FERC ¶ 61,262 at P 35.

(1) PJM's calculations of the amounts shown for December 2007 through March 2009 in the column titled "Revenues Reallocated" of Attachment A, along with a detailed narrative description of the methodology used in determining such amounts;

(2) the individual affected parties to whom PJM paid refunds and the corresponding amount paid to each entity; and

(3) 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. Parties will have 45 days from the date of PJM's filing to brief any issues with respect to refunds, and PJM will have a 30 day reply period.

43. Financial Marketers also seek rehearing of the grant of PJM's motion for an extension of time to comply with its refund obligations, contending that they were not provided an opportunity to respond to the request. As the notice stated, the request was granted because PJM was unable to calculate the refunds in the time period provided by the September 17, 2009 Order due to the "significant amount of effort that will be required of [PJM's] technical and human resources staff."⁷⁶ As PJM explained, "the calculation of refunds will require the implementation of new settlement calculation and reporting software, which requires significant development, testing and implementation," and "the sheer volume of transactions that must be re-processed and re-evaluated, including the use of manual hourly calculations."⁷⁷ Since PJM could not determine the refunds as of the date set in the September 17, 2009 Order, no purpose would have been served by denying its motion, since doing so would not advance the payment of refunds. Financial Marketers are not financially harmed by the delay because PJM is required to pay interest as determined under the Commission regulations.⁷⁸ We therefore deny the rehearing request.

⁷⁶*Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, Notice Of Extension Of Time, Docket No. EL08-14-002 (Oct. 26, 2009).

⁷⁷ PJM Compliance Filing and Motion at 4.

⁷⁸ See Compliance Order, 128 FERC ¶ 61,262 at P 35.

B. Compliance Filing**1. Procedural Matters**

44. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

2. Commission Determination

45. We find that PJM has complied with the September 17, 2009 Order. PJM has revised its tariff so that it provides credits only to those parties that contribute to the fixed costs of the PJM transmission grid.

46. Integrys raises a concern about requiring repayment of prior credits. As discussed above, we will address this issue, if it arises, in the refund proceeding.

47. The Midwest LSEs repeat in their protest the point that they raised in their request for rehearing, namely, that they are "effectively" paying for the fixed costs of the PJM-area transmission facilities through an "intra-RTO rate design." We deny the protest for the reasons discussed above. Financial Marketers repeat the arguments they raised on rehearing regarding the allocation of costs to virtual transactions and exports as well as their contentions regarding ancillary services. These arguments go beyond the scope of PJM's compliance filing in which the only issue is whether PJM complied with the Commission's prior order. Further, these arguments have been addressed above, as well as in the prior orders in which Financial Marketers raised them.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) PJM's compliance filing is hereby accepted, as discussed in the body of this order.

(C) PJM is hereby directed to submit a detailed refund report within 45 days of the issuance of this order, as discussed in the body of this order. Parties will have 45 days from the date of PJM's filing to file responsive pleadings and PJM will have 30 days from that date to reply.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.