

146 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

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

Docket No. EL08-14-010

v.

PJM Interconnection, L.L.C.

ORDER ESTABLISHING BRIEFING SCHEDULE

(Issued February 20, 2014)

1. In an order issued on August 6, 2013, the Court of Appeals for the District of Columbia Circuit remanded to the Commission for further consideration the issue of recoupment of refunds directed by the Commission in its Recoupment Orders.¹ As discussed below, the Commission sets a schedule for briefing this issue.

I. Background

2. Black Oak Energy, L.L.C., EPIC Merchant Energy, L.L.P., SESCO Enterprises, L.L.C., and other interested “virtual marketers” initiated a complaint proceeding relating to the collection of charges for transmission line losses and the disbursement of the over-collection of these charges that inevitably results from assessing those charges based

¹ *Black Oak Energy, LLC v. FERC*, 725 F.3d 230 (D.C. Cir. 2013) (referring to *Black Oak Energy, L.L.C., EPIC Merchant Energy, L.P. and SESCO Enterprises, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011) (July 21, 2011 Recoupment Order), *order on reh’g*, 139 FERC ¶ 61,111 (2012) (May 11, 2012 Recoupment Order) (collectively, Recoupment Orders)).

on the marginal cost of line losses (marginal losses method).² In its September 17, 2009 compliance order, the Commission directed PJM Interconnection, LLC (PJM), to pay refunds under section 206(b) of the Federal Power Act to certain Virtual Marketers who had contributed to the fixed costs of the transmission system.³ The refund amounts associated with the Virtual Marketers' trading on the Up-To Congestion Market totaled approximately \$37 million. Several parties sought rehearing of the September 17, 2009 order, contending that the Commission should not have granted refunds and should not have required them to retroactively be surcharged to finance the refunds. On July 21, 2011, the Commission granted rehearing of its refund requirement, finding that its initial direction to PJM to pay refunds conflicted with the Commission policy of not requiring refunds to be paid for rate design and cost allocation changes.⁴ On appeal,⁵ the court affirmed the Commission's determination to grant rehearing, finding that the Commission had authority to change its course on refunds.⁶ The court also affirmed the Commission's determination that Virtual Marketers had reasonable notice that their refunds were at risk.

3. However, the court found that since PJM already had paid refunds to the Virtual Marketers, the Commission failed to justify permitting PJM to recoup those refunds from the Virtual Marketers. In particular, the court found that the Commission orders failed to

² For a more in depth background, *see, e.g.*, July 21, 2011 Recoupment Order, 136 FERC ¶ 61,040 at PP 4-14; *id.* P 5 n.4 (explaining why "marginal" loss method over-collects).

³ *Black Oak Energy, L.L.C., EPIC Merchant Energy, L.P. and SESCO Enterprises, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262 (2009) (September 17, 2009 Compliance Order). (Virtual Marketers used to trade on the Up-To Congestion Market; their "transmission reservation" charges on this market included a component that paid for the transmission system fixed costs.)

⁴ *Black Oak Energy, L.L.C., EPIC Merchant Energy, L.P. and SESCO Enterprises, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011) (July 21, 2011 Recoupment Order), *order on reh'g*, 139 FERC ¶ 61,111 (2012) (May 11, 2012 Recoupment Order) (collectively, Recoupment Orders)).

⁵ Black Oak Energy, L.L.C., Coaltrain Energy L.P., EPIC Merchant Energy, L.P., EPIC Merchant Energy NJ/PA, L.P., and SESCO Enterprises, L.L.C. are petitioners on appeal. City Power Marketing, L.L.C., Summit Energy, L.L.C., Twin Cities Energy, L.L.C., and TC Energy Trading, L.L.C. intervene in support of the petitioners.

⁶ *Black Oak Energy, LLC v. FERC*, 725 F.3d 230 (D.C. Cir. 2013).

distinguish between denying refunds in the first instance and ordering the recoupment/repayment of such refunds *after* such refunds have been paid. The court stated:

There is a significant distinction between *denying* refunds and *recouping* them. As the virtual marketers argued in their request for rehearing of the July 2010 order, recoupment may reduce the confidence of participants in the smooth financing of the market in a way that straightforward denial of refunds does not. Yet, in its Recoupment Orders, FERC repeatedly obscured the fact that it was effectively ordering PJM to claw back money that has already been paid out. Instead of justifying recoupment, the Commission wrote as if it were denying the refunds outright. The order stated, “denying refunds . . . is the fairest approach” and “refunds should not be required. [citation omitted]. True enough, but there is more to this case than that, for the refunds at issue were already out the door. In addition to explaining why it should have denied the refunds in the first place, FERC must explain why *recouping* is warranted. Because FERC failed to explain how it analyzed this crucial aspect of the case, we hold that the Commission acted arbitrarily and capriciously. [Citations omitted]. It may well be that FERC’s policy reasons for effectively ordering recoupment outweigh its negative effects, but FERC must analyze that question, not ignore it. For that reason, we remand.⁷

4. The court remanded the case to the Commission for further consideration of the recoupment issue; however, the court did not vacate the Commission’s order directing the recoupment, because it found it plausible that the Commission could redress its inadequate explanation on remand and could still reach the same result.

5. On November 22, 2013, and corrected on November 26, 2013, Virtual Marketers submitted a motion requesting expedited response by the Commission to the Court’s remand directive because, among other reasons, the harm to Virtual Marketers from this uncertainty is “severe and ongoing.”⁸ PJM answered on December 9, 2013, averring that

⁷ *Id.* at 243-44.

⁸ Virtual Marketers Motion at 8.

Virtual Marketers ask the Commission to rescind the Recoupment Orders when the Court merely ordered the Commission to explain why recoupment is warranted. PJM further contended that Virtual Marketers reintroduce arguments that are beyond the scope of the remand. PJM maintains the existing record is incomplete regarding policy arguments for why recoupment is, or is not, warranted and, therefore, suggests that the Commission establish a briefing schedule to examine such policy, and related legal, arguments.⁹ In their December 17, 2013 response, Virtual Marketers maintain that if there is no justification for recoupment the proper course of action for the Commission to take on remand is to reconsider the underlying orders. And they contend that there is no Commission precedent supporting retroactive recoupment as applied here.¹⁰

II. Discussion

6. We will establish a briefing scheduled to permit the parties to address issues relating to the recoupment of refunds from the Virtual Marketers. Further briefing on these issues will help develop a more complete record to permit the Commission to better respond to the court's directive to reconsider the recoupment issue.¹¹

7. While parties may address all issues raised by the potential recoupment of refunds, we particularly request briefing on the following issues:

- a. The effects, if any, on the operations of the PJM market of requiring Virtual Marketers to return already-paid refunds;
- b. The legal and/or policy basis for not permitting recoupment of previously-paid refunds, when the Commission has agreed with rehearing requests seeking recoupment and determined that its initial order to originally direct refunds was in error;
- c. How much of the \$37 million refund amount has PJM already recouped, what amount is still outstanding, and what has PJM done with the amount already recouped;

⁹ See PJM Answer at 2, 3 n.16.

¹⁰ Virtual Marketers Reply at 4, 6.

¹¹ Such briefing is especially appropriate here, since PJM and other interested parties have not previously had an opportunity to address the recoupment issue, because the recoupment issue arose for the first time in Virtual Marketers' rehearing request to which answers were not permitted.

- d. If PJM were not permitted to recoup the refunds, which class(es) of customers should fund the refunds, and why. (Parties should particularly address how any such allocation should affect those class(es) of customers that initially sought rehearing of the refund requirement); and
- e. The potential effect on the timely payment of refunds ordered by the Commission in future proceedings, if the Commission cannot reverse on rehearing an erroneous decision that directed refunds.

8. Initial briefs must be submitted on or before 45 days from the issuance date of this order and reply briefs must be submitted on or before 30 days following the due date of the initial briefs. Such briefs should not exceed 30 pages in length.

The Commission orders:

Interested parties are invited to file briefs, as discussed in the body of this order, on or before 45 days from the date of issuance of this order and reply briefs on or before 30 days from the due date of initial briefs. Neither initial briefs nor reply briefs should exceed 30 pages in length.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.