

126 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

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

Docket No. EL08-14-001

v.

PJM Interconnection, L.L.C.

ORDER ON REQUEST FOR CLARIFICATION

(Issued February 24, 2009)

1. On November 17, 2008, PJM Interconnection, L.L.C. (PJM) filed a request for clarification of the Commission's October 16, 2008 Order.¹ As discussed below, the Commission clarifies that PJM must either propose tariff revisions that allocate transmission losses equitably among all parties that support the fixed cost of the transmission system, without regard to whether such parties serve load, or show cause why such a credit should not be provided to all those who pay transmission charges.

I. Background

2. On December 3, 2007, Black Oak Energy, L.L.C., EPIC Merchant Energy, L.P., and SESCO Enterprises, L.L.C. (collectively, Complainants) filed a complaint challenging the marginal loss method and the related allocation methodology in PJM's tariff. They complained that arbitrageurs' financial transactions do not create the flow of physical energy and concomitant transmission losses and, therefore, they should not be assigned marginal line losses. Complainants alternatively argued that if arbitrageurs' financial transactions are assigned marginal line losses they should receive, as do the load-serving entities (LSE), a share of the surplus.

¹ *Black Oak Energy, LLC, et al. v. PJM Interconnection, LLC*, 125 FERC ¶ 61,042 (2008) (October 16 Order).

3. In the Complaint Order,² the Commission reiterated that no party is entitled to receive any particular amounts through disbursement of the credit that inevitably results from using the marginal line loss methodology, since the price each is paying (based on marginal line losses) is the correct marginal cost for the energy each is purchasing.³ The Commission did not find the current allocation system to be unduly discriminatory as Complainants requested.

4. On April 7, 2008, Complainants filed a request for rehearing of the Complaint Order. Among other things, Complainants averred that arbitrageurs are entitled to receive a share of the marginal line loss surplus for the PJM transmission system, because they contribute to the fixed costs of that system.⁴ Complainants stated that they pay up to forty percent—perhaps as much as \$400 million per year—of all marginal line loss surplus, yet they are allocated none of the disbursements of these funds. They characterized this as an annual subsidy from arbitrageurs to the LSEs.⁵

5. The October 16 Order addressed Complainant's two fundamental issues: 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. The Commission denied rehearing on the first issue and granted rehearing on the issue of payment of over-collected amounts. The Commission directed PJM 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.

II. Request for Clarification

6. PJM requests clarification of the language in paragraph 49 of the October 16 Order, which directs PJM “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.”⁶ PJM maintains that its current allocation of over-collected marginal line losses already

² *Black Oak Energy, LLC, et al. v. PJM Interconnection, LLC*, 122 FERC ¶ 61,208 (2008) (Complaint Order).

³ *Id.* P 46.

⁴ Request for Rehearing at 21-24.

⁵ *Id.* at 24.

⁶ Request for Clarification at 4-5 (quoting October 16 Order, 125 FERC ¶ 61,042 at P 49).

conforms to the Commission's directive to credit those utilizing the transmission system in proportion to load.⁷ However, PJM contends that, elsewhere in the October 16 Order, the Commission appears to require PJM to credit others who contribute to the fixed costs of the transmission grid without the qualification that such credits be in proportion to the load represented by their transmission usage.⁸ PJM acknowledges that arbitrageurs pay transmission costs through their Up-To congestion bids, albeit at a nominal 0.4 percent of the fixed costs of the entire system. Moreover, PJM states that arbitrageurs create their own load through virtual trades, but do not actually deliver energy to load through the transmission system.

7. Complainants submitted an answer to PJM's request. They state that PJM has failed to revise its tariff with respect to distributing surplus transmission line loss revenues. Complainants acknowledge that PJM responded to the Commission's directive to show cause, but Complainants contend that the Commission should direct PJM to distribute transmission line loss surplus on an equitable basis—to all those who pay any form of PJM transmission costs.

8. Complainants contend that PJM has failed to show cause why its existing tariff provision is just and reasonable. Complainants suggest that an equitable way to include virtual transactions would be to allocate to virtual transactions based on their proportional share by volume of all day-ahead transactions (both virtual and physical).⁹

9. PJM responded to Complainant's answer. PJM contends that Complainants' arguments are nothing more than an attempt to obfuscate PJM's request for clarification and to re-litigate the issue of a just and reasonable apportionment of marginal line loss surplus payments. PJM characterizes the argument as a collateral attack on previous orders and *res judicata* of previously decided issues. PJM explained that the Commission found its current allocation methodology for line loss surplus, while just and reasonable conceptually, in practice excluded payments to others who may contribute to the fixed costs of the transmission system.¹⁰

⁷ PJM points out that, in addition to Network Service Users that the Commission recognizes, transmission customers exporting load outside the PJM region also receive such credits under the current PJM tariff.

⁸ Request for Clarification at 5 (citing October 16 Order, 125 FERC ¶ 61,042 at P 36).

⁹ *Id.* at 6.

¹⁰ *Id.* at 5 (citing October 16 Order, 125 FERC ¶ 61,042 at P 49).

10. PJM contends that the sole point of its request is to determine whether PJM's tariff should include a credit to others who pay for the fixed costs of the transmission system *in proportion to load represented by their transmission usage*, to use the language of paragraph 49 of the October 16 Order, or a credit to all participants who contribute to the fixed costs of the transmission grid, without regard to whether such customers serve load.

11. In response to Complainants' request that the tariff revisions be effective as of December 3, 2007, the date of the initial complaint, PJM responds that they be made effective prospectively, in accord with Commission precedent.¹¹

III. Discussion

A. Procedural Matters

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits a reply to an answer unless otherwise ordered by the decisional authority. We will accept PJM's reply to the Complainants' answer to the motion because it has provided information that assisted us in our decision-making process.

B. Commission Determination

13. The request for clarification relates to the statement in the paragraph 49 of the October 16 Order, in which the Commission directed PJM to "either propose a revision to 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."¹² PJM points to the use of the term "load" in paragraph 49 and questions whether the Commission's intent was to exclude those market participants that engage in virtual transactions, i.e., "virtual traders." PJM requests clarification whether it should revise its tariff in order to credit others in proportion to load represented by their transmission usage, or whether it should credit all participants who contribute to the fixed costs of the transmission grid without regard to whether such customers serve load.

14. We will grant clarification that we did not intend to exclude virtual traders from eligibility for the credit based on whether they serve load. In the October 16 Order, the

¹¹ *Id.* at 7 (citing *Golden Spread Elec. Coop., Inc.*, 123 FERC ¶ 61,047, at P 53 (2008)).

¹² *Id.*

Commission granted rehearing and found that PJM had failed to justify its differential treatment of parties that contribute to the fixed costs of the transmission system.¹³ As the Commission stated:

As described above, the PJM OATT distributes the surplus of the collected marginal line losses to “Network Service Users” only.¹⁴ While there may be alternative just and reasonable methods of distributing line loss surpluses, once having chosen a just and reasonable method, PJM cannot unduly discriminate among the class entitled to the distribution. We do not find that PJM satisfactorily has explained why its tariff limiting payment of the surplus to network service users only is just and reasonable and not unduly discriminatory, since other PJM services also support the fixed costs of the transmission grid.^{15]}

15. We will clarify that we did not intend to exclude virtual traders to the extent that those traders make transmission payments that contribute to the fixed costs of the transmission grid. Accordingly, the Commission clarifies that, within 30 days of the date of this order, PJM must either propose tariff revisions that allocate transmission losses equitably among all parties that support the fixed cost of the transmission system, without regard to whether such parties serve load, or show cause why such a credit should not be provided to all those who pay transmission charges.¹⁶

16. The parties’ requested clarifications regarding the time period applicable to refunds is premature, since the Commission has not determined whether refunds are

¹³ The parties concede that, at least, virtual traders have paid transmission charges related to Up-To congestion transactions, and that such transactions contribute approximately 0.4 percent towards the fixed costs of the transmission system.

¹⁴ PJM Operating Agreement, § 5.5(c) states: “the total Transmission Loss Charges accumulated by the Office of Interconnection in any month shall be distributed pro-rata to each Network Service User 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 and the total exports of MWhs of energy from such region during such month by all Transmission Customers.”

¹⁵ October 16 Order, 125 FERC ¶ 61,042 at P 49.

¹⁶ In addition to virtual traders who pay transmission charges associated with Up-To congestion transactions, such proposed revisions also would include any customer with point to point transmission service or grandfathered transmission service.

owed. Under section 206 of the Federal Power Act,¹⁷ the refund effective date for this complaint can be no earlier than the date of the complaint, December 3, 2007. Any arguments that the Commission exercise its refund authority not to require refunds back to that date may be advanced when, and if, PJM is required to provide refunds.

The Commission orders:

(A) The request for clarification is hereby granted, as discussed in the body of this order.

(B) PJM is required to make a compliance filing within 30 days of the date of this order, as discussed in the body of the order.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ 16 U.S.C. § 824e (2006).