131 FERC ¶ 61,130
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

EPIC Merchant Energy NJ/PA, L.P.,
SESCO Enterprises, L.L.C., and
Coaltrain Energy L.P.

Docket No. EL10-40-000

v.

PJM Interconnection, L.L.C.

ORDER DISMISSING COMPLAINT

(Issued May 10, 2010)

1. On February 1, 2010, EPIC Merchant Energy NJ/PA, L.P. (EPIC), SESCO Enterprises, L.L.C. (SESCO), and Coaltrain Energy L.P. (collectively, Financial Marketers) submitted a complaint challenging the allocation of transmission line loss charges and the distribution of the over-collections of such charges under the currently effective open access transmission tariff (OATT) and Operating Agreement of PJM Interconnection, L.L.C. (PJM). In this order, the Commission dismisses the complaint, as discussed below.

I. Background

2. A detailed background and description of these issues can be found in an earlier complaint proceeding in Docket No. EL08-14-000.[1] In brief, when electric power is transmitted over high voltage transmission lines, electric power is lost and additional power needs to be purchased to make up for this loss of power. Transmission line losses increase as the distance between generation source and consuming load increases. Transmission line losses also increase as the number of megawatts of power moved increases. Under PJM's tariff, the Locational Marginal Price (LMP) for power includes the marginal price paid to cover transmission line losses. The marginal line loss collected

---

[1] *See, e.g.*, *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024 (2010) (April Rehearing Order).

by PJM therefore exceeds the actual expense that PJM incurs in purchasing additional power.[2] PJM accordingly credits its overcollections to its customers.

3. In December 2007, Financial Marketers submitted a complaint challenging PJM's marginal line loss methodology as applied to them and the related methodology for disbursing over-collected line loss charges.[3] The Financial Marketers maintained either that they should be exempt from the payment of marginal line losses or that they should receive a proportion of such distributions because they bought and sold power in a manner similar to load.[4]

4. The Commission granted the complaint in part. First, the Commission found that charging Financial Marketers marginal line losses is appropriate and reasonable. The Commission reasoned that calculating LMP based on marginal line losses establishes the correct price to be paid by all market participants, including Financial Marketers.[5] Since

---

[2] 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 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 line loss method, therefore, will always result in a higher figure than the average line loss method.

[3] In the original complaint "Financial Marketers" included Black Oak Energy, L.L.C. (Black Oak), EPIC, and SESCO, the latter two of whom are participating in the instant complaint.

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

[5] "Billing on the basis of marginal costs ensures that each customer pays the proper marginal cost price for the power it is purchasing." *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 22 (2006) (May 1, 2006 Order); *see also id.* P 4; *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,169, at P 27 (2006) (November 6, 2006 Order) (concluding, "the customer will face the correct price signal"); Complaint Order, 122 FERC ¶ 61,208 at P 28, 29, 34, 41; *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at P 27, 32 (2008) (Rehearing Order); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C*, 128 FERC ¶ 61,262, at P 29 (2009) (Compliance Order).

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.[6]

5. Second, as to the Financial Marketers' eligibility for a share of the credits, the Commission found, as discussed above, that charging marginal line losses leaves PJM with an over-collection that it must credit back to its customers. The Commission however rejected the Financial Marketers' argument that the line loss credit should bear a relation to the amount of marginal line losses paid. The Commission found that whatever crediting mechanism is used, in fact, should bear no relation to the marginal line losses incurred by any party.[7] Basing the credit on the marginal line losses incurred by individual parties would distort the very price signals that adoption of marginal line loss pricing is designed to provide.[8] While the Commission found that any crediting mechanism that does not distort the pricing signals may be acceptable,[9] the Commission held that once PJM has chosen a methodology for crediting line losses, it must apply that methodology on a not unduly discriminatory basis.[10] Therefore, because PJM chose to

[6] 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.").

[7] 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.

[8] "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.

[9] For example, if PJM had proposed to use the over-collections 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.

[10] "Once having chosen a just and reasonable method, PJM cannot unduly

base the credit on customers' access and transmission charges for using the network, the Commission determined that PJM must provide a credit to all customers incurring those charges. Since Financial Marketers do pay transmission charges, specifically for a set of transactions known as Up-To Congestion transactions, the Commission required PJM to either show cause why these transactions did not qualify for a credit or to propose tariff provisions providing for a credit.

6. The Commission subsequently accepted a compliance fling by PJM that provided a credit to the Financial Marketers based on their contribution to the fixed costs of the grid. The Commission established a refund effective date pursuant to section 206(b) of the Federal Power Act (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.[11] The Commission further adopted PJM's proposal to make its revised tariff effective June 1, 2009.

II. <u>Complaint</u>

7. On February 2, 2010, Financial Marketers submitted a second complaint.[12] They state that, "for all of the same reasons, and for several new reasons," PJM's transmission line loss allocation methodology was infirm when Financial Marketers filed their original complaint. Financial Marketers again maintain that, unlike physical transactions, virtual transactions do not cause transmission line losses and, therefore, such transactions should be exempt from transmission line loss charges. They reiterate that virtual transactions are subject to the same line loss charges as load and should receive the same amount of the surplus as load. Consequently, Financial Marketers maintain that basing the surplus allocation on whether a market participant contributes to the fixed costs of the transmission system is an unreasonable and unduly discriminatory standard.[13] They again state in this complaint that approximately 40 percent of the total over-collected transmission line loss charges is paid by virtual transactions.

---

discriminate among the class entitled to the distribution." Rehearing Order, 125 FERC ¶ 61,042 at P 49.

[11] *Id.* P 32-33, 35, and Ordering Paragraph (A).

[12] In the instant complaint, "Financial Marketers" include EPIC, SESCO, and Coaltrain Energy L.P. In this second complaint, Financial Marketers refer to "their" original complaint in Docket No. EL08-14-000, filed on December 3, 2007. Second Complaint at 2.

[13] Second Complaint at 3.

8. Financial Marketers also are concerned that with the passage of time since the original, December 3, 2007 complaint was filed, the Commission or another party will invoke the 15-month limitation in section 206(b) of the FPA as a basis for denying Financial Marketers relief for the period post-March 3, 2009. They maintain that this second complaint will help preserve their refund effective date by establishing a second refund effective date going-forward from the date of this complaint.

III. Notice and Responsive Pleadings

9. Notice of the compliance filing was published in the *Federal Register*, 75 Fed. Reg. 8322 (2010), with interventions and protests due on or before March 1, 2010. Timely motions to intervene were filed by: American Municipal Power, Inc.; PJM Industrial Customer Coalition; Black Oak; Exelon Corporation; Integrys Energy Services, Inc.; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Pepco Holdings, Inc.; Allegheny Power and Allegheny Energy Supply Company, LLC (Allegheny); PSEG Companies.[14] Timely motions to intervene and comments were filed by Dominion Resources Services, Inc. (Dominion); DC Energy, AEP, and Shell Energy North America (US) L.P. (DC Energy, AEP, and Shell); Tenaska Power Services Co. (Tenaska); City Power Marketing, LLC (City Power); Dayton Power and Light Company (Dayton); Madison Gas and Electric Company and WPPI Energy (together, MGE and WPPI); and Duke Energy Ohio, Inc. (Duke). A timely protest was filed by Allegheny. Old Dominion Electric Cooperative (Old Dominion) filed a motion to intervene out-of-time.

10. On February 22, 2010, PJM filed an answer and motion to dismiss the instant complaint.

11. In its answer and motion to dismiss, PJM maintains that the Commission has already heard the arguments, and facts, in this complaint and, therefore, this second complaint is a “clear impermissible collateral attack” on the Commission’s prior orders.[15] PJM explains that “[f]undamental principles of *res judicata* prohibit the re-litigation of identical issues, based upon the same recitation of facts, between identical parties.”[16] PJM contends that Financial Marketers’ assertion that the present complaint differs from the earlier, original complaint, because it seeks to establish a new refund period and challenges the provisions of PJM’s tariff and Operating Agreement filed in compliance

---

[14] PSEG Companies include: Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

[15] Answer at 2-3; *see id.* at 6 (stating, “Financial Marketers simply parrot their prior arguments,” etc.).

[16] *Id.* at 4 (citation omitted).

with the Commission's orders, fails to establish a material difference. In further support, PJM contends that Commission precedent prohibits the setting of successive 15-month refund effective dates for duplicative complaints.[17] Dominion adopts the position and reasoning proffered by PJM in its answer.

12. Allegheny protests Financial Marketers' complaint as an impermissible collateral attack and an unlawful attempt to circumvent section 206(b) of the FPA. Allegheny recites Financial Marketers' alleged new arguments and quotes the Commission's past discussions and findings related to those arguments.[18] With respect to the new proposed effective date, Allegheny argues that the Commission is not entitled to waive or extend deadlines or timeframes (such as the 15-month refund limitation) that are established by Congress. Moreover, Allegheny maintains that Financial Marketers have not demonstrated that the one exception to the 15-month limitation—i.e., dilatory behavior by the public utility—applies here.

13. Tenaska reiterates its arguments against the elimination of disbursements of the marginal line loss charge over-collections to export transactions except for those transactions for which exporters paid for transmission service during the hour in which the export transaction occurs. Tenaska maintains that, prior to the Compliance Order, the Commission gave no indication that it intended to preclude PJM-MISO exports from sharing in such disbursement payments.[19] Tenaska states that the Commission may only change the existing rate on file and order any consequent refunds on a prospective basis. According to Tenaska, retroactive refunds are inequitable because customers have no notice of the change and therefore cannot effectively revisit their economic decisions; retroactive resettlement would create substantial uncertainty in the markets.[20]

14. Dayton maintains that Financial Marketers are precluded from re-litigating the same issues involving the same parties. On substantive grounds, Dayton states that virtual transactions can and often do cause line losses. As in the earlier complaint, Financial Marketers are looking at only one side of the equation: the price of an arbitrageur's purchases in the market may include the marginal loss amounts, but the same arbitrageur making an offsetting sale is receiving the marginal loss revenue.

[17] *Id.* at 7 (citing *Consumer Advocate Div. of the Pub. Serv. Comm'n of W. Va. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288 (1994)).

[18] Allegheny Protest at 8-11.

[19] MISO stands for Midwest Independent Transmission System Operator, Inc.

[20] Tenaska Comments at 7 (citations omitted).

15. DC Energy, AEP, and Shell agree that the Commission should summarily dismiss this complaint. They state that any adjustment of the allocation methodology should be raised initially through the stakeholder process. They also state that virtual transactions are evaluated in the Day-Ahead market solution like any other injection or withdrawal of energy. They contend that virtual traders do not systematically pay for 40 percent of transmission line losses because, over a period of time, financial transactions may pay *or receive* a credit for marginal line losses.[21]

16. Duke continues to advocate dismissal of this complaint as Duke has advocated with respect to the earlier, original complaint.

17. MGE and WPPI express concern that the payments they make toward the "grid's fixed costs" are recognized as satisfying eligibility requirements to participate in the disbursement of marginal line loss charges over-collections.

18. City Power requests Commission action on this second complaint as soon as possible.

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant Old Dominion's motion to intervene out-of-time given its interest, the early stage of this proceeding, and the absence of undue prejudice or delay.

B. Commission Determination

20. We dismiss the complaint. This complaint merely seeks to re-litigate the same issues as raised in the prior case citing no new evidence or changed circumstances. Indeed, other than the statement that "for all of the same reasons [provided in the first complaint], and for several new reasons,"[22] Financial Marketers' complaint is devoid of any specific reference to or indication of any new reason or evidence, except for the argument that the complaint is necessary to establish a new refund effective date.

21. In any event, Financial Marketers' substantive arguments raised in this second complaint have been addressed in the related complaint proceeding in Docket

[21] DC Energy, AEP, & Shell Comments at 6-7.

[22] Second Complaint at 2.

No. EL08-14.[23] In the April Rehearing Order, we reiterated the four principles that governed our determination, as discussed above.[24] The Commission explained that, first, the LMP, which includes marginal line losses, establishes the correct price to be paid by all market participants, including Financial Marketers. Thus, longer transactions have higher prices in order to send proper price signals, because longer transactions incur greater costs to cover the line losses. Second, charging line losses on a marginal basis leaves PJM with an over-collection that it must credit back to its customers. Third, the credit should bear no relation to the marginal line losses incurred by any party, because doing so would distort the correct price signals that adoption of marginal line loss pricing is designed to provide. Lastly, PJM must apply the methodology for allocating the over-collections on a not unduly discriminatory basis. The Commission concluded, therefore, that having chosen to base the credit on customers' access and transmission charges for using the network, PJM must provide a credit to all customers paying those charges.

22. Financial Marketers have not presented any new or persuasive arguments upon which the Commission could base a reconsideration of its earlier decision. For the reasons articulated in the prior orders relating to the original complaint,[25] therefore, we find no basis to change our determination of the proper marginal line loss credit to which Financial Marketers are entitled.

23. Financial Marketers also maintain that this complaint should be granted in order to establish a new refund effective date under section 206 of the FPA to preserve their refunds. However, this complaint will not change or otherwise affect the refunds or payments that the Commission determined are owed to Financial Marketers resulting from the first complaint.[26]

24. Under section 206 (a) of the FPA, the Commission, upon determining that a rate, charge, or classification is unjust and unreasonable, "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be

---

[23] May 1, 2006 Order, 115 FERC ¶ 61,132 (2006); November 6, 2006 Order, 117 FERC ¶ 61,169 (2006); Complaint Order, 122 FERC ¶ 61,208 (2008); Rehearing Order, 125 FERC ¶ 61,042 (2008); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,164 (2009) (Clarification Order); Compliance Order, 128 FERC ¶ 61,262 (2009); April Rehearing Order, 131 FERC ¶ 61,024 (2010).

[24] *See supra* P 5 and accompanying notes.

[25] *See* Complaint Order, 122 FERC ¶ 61,208 (2008); Rehearing Order, 125 FERC ¶ 61,042 (2008); Clarification Order, 126 FERC ¶ 61,164 (2009); Compliance Order, 128 FERC ¶ 61,262 (2009).

[26] *See* April Rehearing Order, 131 FERC ¶ 61,024 (2010).

thereafter observed and in force, and shall fix the same by order." In addition, section 206(b) of the FPA provides that upon the filing of a complaint, the Commission must establish a refund effective date that is no earlier than the date of the complaint and no later than five (5) months subsequent to the date of the complaint.[27] Further, section 206(b) provides that the Commission may order refunds of amounts in excess of those which would have been paid under the just and reasonable rate for a period of fifteen (15) months subsequent to the refund effective date.

25. In the first complaint case, the Commission followed both provisions of section 206. It found that the existing tariff of PJM was unjust and unreasonable and established a refund effective date pursuant to FPA section 206(b) as of the date of the original 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.[28] Moreover, pursuant to section 206(a) the Commission established the rate which would be thereafter "observed and in force" by accepting PJM's revised tariff provisions relating to the allocation of marginal line losses, to be effective June 1, 2009.[29] Therefore, going forward from June 1, 2009, arbitrageurs or virtual traders such as Financial Marketers will receive their appropriate credit from the over-collection of marginal line losses.

26. The earliest a refund effective date could be set based on this second complaint is February 1, 2010. Since this date comes well after the June 1, 2009 effective date of the Commission's section 206 finding, a second refund effective date is unnecessary.[30] As a result of the prior order, Financial Marketers will be credited for their share of over-collected marginal line loss starting June 1, 2009, and continuing thereafter. Thus, it is not necessary to grant this complaint to protect any refunds.

---

[27] *See* FPA § 206(b), 16 U.S.C. § 824e(b) (2006).

[28] Compliance Order, 128 FERC ¶ 61,262, at P 35.

[29] *Id.* P 23, 35.

[30] The only reason for filing a second complaint to preserve refunds is if the Commission has not acted on a complaint before the refund period has expired. Once the Commission has acted and established the effective tariff to be thereafter observed, no second complaint is necessary to preserve refunds.

<u>The Commission orders</u>:

Financial Marketers' complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.