

142 FERC ¶ 61,019  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket No. ER13-349-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued January 8, 2013)

1. On November 9, 2012, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> PJM Interconnection, L.L.C. (PJM) filed proposed revisions to its Amended and Restated Operating Agreement (Operating Agreement). In its filing, PJM proposes to revise Schedule 12 of the Operating Agreement to reflect the permanent termination of City Power Marketing, L.L.C. (City Power) as a PJM member in accordance with sections 15.1.6(c) and 4.1(c) of the Operating Agreement.<sup>2</sup> As discussed below, we accept PJM's proposed Operating Agreement changes, to become effective, as requested, on January 8, 2013.

**I. Background**

**A. Termination of PJM Membership**

2. On October 30, 2009, PJM filed revisions to its credit policy to, *inter alia*, establish rules related to the reinstatement of members that fail to meet their payment and/or collateral obligations to PJM.<sup>3</sup> Pursuant to revised section 15.1.6, if a member fails to make timely payments when due once, or fails to follow any other credit policies twice, during any 12-month rolling period, then the member loses PJM voting rights and

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> PJM Operating Agreement, Schedule 12 (9.0.0); PJM Operating Agreement § 15.1.6(c) (2.0.0); PJM Operating Agreement, § 4.1(c) (0.0.0).

<sup>3</sup> See generally *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,294 (2009).

access to any unsecured credit for the subsequent 12-month period.<sup>4</sup> If during any rolling 12-month period a member fails to make timely payments when due twice, or adhere to any of its credit obligations to PJM three times, then its membership shall be terminated in accordance with section 4.1(c) of the Operating Agreement and its forward market positions will be liquidated.<sup>5</sup>

3. A member may appeal such a determination utilizing PJM's dispute resolution procedure as set forth in Schedule 5 of the Operating Agreement (provided, however, that a member's decision to utilize these procedures shall not operate to stay the ability of PJM to exercise any and all of its rights under this Agreement and the PJM Open Access Transmission Tariff (OATT)). A member may be reinstated provided that the member can demonstrate: a) that it has otherwise consistently complied with its obligations under this Agreement and the PJM OATT; and b) the failure to comply was not material; and c) the failure to comply was due in large part to conditions that were not in the common course of business."<sup>6</sup> Pursuant to section 4.1(c) of the Operating Agreement, PJM must make a FPA section 205 filing with the Commission to terminate a member.

**B. Black Oak Proceedings**

4. On December 3, 2007, a group of financial power traders, including Black Oak Energy, LLC, EPIC Merchant Energy, LP, and SESCO Enterprises, LLC, filed a complaint challenging the marginal method of allocating transmission losses.<sup>7</sup> They complained that their 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 financial transactions are assigned marginal line losses they should receive, as do the load serving entities, a share of the line

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<sup>4</sup> PJM Operating Agreement, § 15.1.6(b) (2.0.0). A member that has been declared in default or fails to otherwise comply with PJM's credit policies once in any rolling 12 month period may be reinstated in full after remedying such default. *Id.* § 15.1.6(a).

<sup>5</sup> *Id.* § 15.1.6(c).

<sup>6</sup> *Id.* § 15.1.6(d).

<sup>7</sup> The marginal (versus average) line loss methodology allows PJM to change its dispatch of generators (by considering the effects of losses) in a way that reduces the total cost of meeting load. Use of a marginal line loss methodology results in PJM collecting more in line loss payments than it pays to generators.

loss surplus. The Commission denied the complaint.<sup>8</sup> On rehearing, the Commission agreed with complainants that they were entitled to some allocation of the line loss surplus based on their payment of up-to congestion bids in the PJM market, which include a contribution to the fixed costs of the grid.<sup>9</sup> On September 17, 2009, the Commission accepted PJM's OATT revision to credit line loss allocations to among all parties that support the fixed costs of the transmission system, without regard to whether such parties serve load, and directed PJM to pay refunds.<sup>10</sup> The Commission established a refund effective date of December 7, 2007.<sup>11</sup> PJM states that, consistent with this order, it then paid refunds to City Power of its share of marginal line loss surpluses.<sup>12</sup> Parties sought rehearing of the Commission's order accepting PJM's compliance filing specifying disbursement of over-collected transmission line loss charges, and on July 21, 2011, the Commission granted the request for rehearing. The Commission concluded that, upon reconsideration, PJM did not have to pay refunds for erroneous line loss collection because PJM had collected the proper level of revenues but incorrectly allocated them among its customers.<sup>13</sup> In doing so, the Commission applied its long-standing policy of not requiring refunds in cost allocation and rate design cases.<sup>14</sup> On May 11, 2012, the Commission denied rehearing of the Commission's July 21, 2011 order and affirmed its determination to apply the traditional policy of denying refunds in cases involving rate design and cost allocation.<sup>15</sup>

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<sup>8</sup> *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208 (2008).

<sup>9</sup> *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 (2008).

<sup>10</sup> *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 26 (2009).

<sup>11</sup> *Id.* P 35.

<sup>12</sup> *See* PJM Transmittal Letter at 3.

<sup>13</sup> *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at P 28.

<sup>14</sup> *Id.* P 26.

<sup>15</sup> *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (2012).

5. On June 15, 2012, a group of financial power marketers, which included City Power, submitted an emergency motion and request for stay, seeking that the Commission stay PJM's planned implementation of the Commission's May 11, 2012 order, pending the outcome of any judicial review of that order. The Commission denied the motion for stay.<sup>16</sup>

## **II. Details of the Instant Filing**

6. PJM states that it seeks to terminate City Power as a PJM member based on City Power's failure to make timely payments twice during a 12-month period. PJM states that City Power failed to pay a June 2012 monthly invoice in the amount of \$17,139,172.05, based on marginal line loss allocations as a result of the Commission's determinations. On July 17, 2012, PJM declared City Power to be in default.<sup>17</sup>

7. In addition, PJM states that City Power failed to pay an August 2012 invoice for \$927.24 for Balancing Operating Reserve charges from May and June 2009.<sup>18</sup> PJM explains that these charges resulted from a claim from a customer seeking billing corrections beginning in September 2009.<sup>19</sup> On September 18, 2012, PJM declared City Power to be in default a second time within a 12-month period.<sup>20</sup>

8. PJM states that the OATT's two-year limitation on billing adjustments does not apply.<sup>21</sup> While the June 2012 invoice was submitted over two years after the initial

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<sup>16</sup> *Black Oak Energy, L.L.C., et al.*, 140 FERC ¶ 61,003 (2012).

<sup>17</sup> PJM Transmittal Letter at 3.

<sup>18</sup> We note that PJM describes the August 2012 invoice as in the amount of "\$972.24." However, the invoice attached as Exhibit A of City Power's protest shows an amount of "\$927.24."

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> "No claim seeking an adjustment in the billing for any service, transaction, or charge under the OATT may be asserted with respect to a month, if more than two years has elapsed since the first date upon which the billing for that month occurred. The Transmission Provider and PJMSettlement may make no adjustment to billing with respect to a month for any service, transaction, or charge under this OATT, if more than two years has elapsed since the first date upon which the billing for that month occurred,

(continued...)

October 2009 - January 2010 invoices, PJM asserts that the June 2012 invoice is not a “billing adjustment” within the meaning of the provision because it implements a Commission order on rehearing. PJM argues that, if it was within the meaning of the provision, the provision would preclude any Commission action on rehearing, in any ongoing proceeding, more than two years after a bill was rendered. Furthermore, PJM explains that even if the limitations provision was applicable, the provision expressly does not apply when “a claim seeking such adjustment had been received by the Transmission Provider prior” to the running of the two-year limitations period and timely requests for rehearing were filed with the Commission within the two-year period.<sup>22</sup> Likewise, PJM asserts that it received the claim that led to the August 2012 invoice within the two-year period. PJM further argues that neither the OATT nor Operating Agreement oblige it to notify members that a claim seeking billing adjustment has been received by PJM.<sup>23</sup>

9. PJM also argues that the pending appeals before the Court of Appeals for the District of Columbia Circuit do not preclude the termination.<sup>24</sup> PJM contends that the pending appeals do not affect this filing because parties sought stays from the Commission and the court and were denied, so the *Black Oak* orders are fully effective.

10. PJM also argues that City Power’s resort to the PJM dispute resolution procedures to reconsider the termination does not stay the termination. PJM explains that section 15.6.1(d) provides that a member’s decision to utilize dispute resolution procedures does not operate as a stay on the exercise of PJM’s rights. PJM states that it could not acquiesce through dispute resolution to a reinstatement of City Power because, in light of its second default, it cannot meet the requirement for reconsideration that “it has otherwise consistently complied with its obligations under this Agreement and the PJM OATT.”<sup>25</sup>

11. While City Power may argue that its sole employee was out of the country when PJM issued its August 2012 invoice and attempted to pay its invoice when it learned of

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unless a claim seeking such adjustment had been received by the Transmission Provider prior thereto.” PJM OATT, § 10.4(a) (1.0.0); Operating Agreement, §15.6(a) (1.0.0).

<sup>22</sup> PJM Transmittal Letter at 5.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Id.* (citing PJM Operating Agreement, § 15.1.6(d)).

the bill, PJM asserts that it has no authority to excuse non-payments based on the inattention of its members. Furthermore, PJM states that all members are expected to have “appropriate personnel resources, operating procedures and technical abilities to promptly and effectively respond to all PJM communications and directions.”<sup>26</sup>

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

12. Notice of PJM’s filing was published in the *Federal Register*, 77 Fed. Reg. 69,618 (2012), with protests and interventions due on or before November 30, 2012. City Power filed a timely motion to intervene and protest. American Municipal Power, Inc. (AMP) also filed a timely motion to intervene.

13. On December 17, 2012, PJM filed an answer to City Power’s protest.

#### **A. City Power’s Protest**

14. In its protest, City Power explains that, after receiving the June invoice for \$17,139,172.05 on July 9, 2012, City Power informed PJM that it did not have sufficient resources to pay the invoice or post additional credit of \$25,223,500. City Power states that on July 15, 2012, PJM declared City Power to be in breach for failure to make timely payment, and when City Power was not able to cure by July 17, 2012, PJM declared City Power in default, suspending its stakeholder rights for one year. With respect to the August 2012 invoice for \$927.24, City Power explains that, at the time PJM tendered the August 2012 invoice, City Power’s principal was outside the country and was not expecting to receive an invoice because the company was not conducting business in PJM’s markets at the time. City Power explains that it similarly did not see the September 14, 2012 breach notification until September 18, 2012. City Power represents that it then contacted PJM and offered to pay the \$927.24, but PJM informed City Power that it intended to terminate City Power’s membership even if it paid, so City Power did not pay the invoice.

15. City Power further states that, by letter dated October 22, 2012, it sought to appeal the termination because the August 2012 invoice amounts were barred by the two-year billing limitation and the June 2012 invoice amount was subject to appeal in the United States Court of Appeals. City Power represents that PJM responded to its letter on October 31, 2012, stating that it would not reconsider its decision to terminate City Power.

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<sup>26</sup> *Id.* at 7 (citing PJM OATT, Attachment Q (11.0.0), Appendix 1 at P 4).

16. City Power explains that the August 2012 invoice was comprised of two billing adjustments for balancing operating reserve charges for May 2009 (\$690.69) and June 2009 (\$164.27) and one billing adjustment for a planning period congestion uplift charge (\$72.28) for May 2012. City Power argues that PJM is prohibited from making the 2009 balancing operating reserve adjustments because PJM failed to provide notice to City Power within the two-year billing period.<sup>27</sup> With respect to the May 2012 planning period congestion uplift charge, City Power contends that it did not conduct any business in PJM's markets during May 2012, and therefore there does not appear to be a reasonable basis for PJM to adjust its bill for that month. City Power asserts that PJM's filing fails to explain this adjustment, but regardless of PJM's explanation, the \$72.28 is immaterial and it would not be just and reasonable to terminate a company's membership over this amount. City Power also asserts that the entire \$927.24 is not material.

17. City Power argues that PJM violated its Operating Agreement by denying City Power its right to appeal the termination decision under section 15.1.6(d) of the Operating Agreement. City Power asserts that PJM failed to seriously consider its appeal request, engage in good faith negotiation under Schedule 5, or refer the matter to the alternative dispute resolution coordinator, if good faith negotiation was unsuccessful, as required by Schedule 5. City Power argues that PJM did not give City Power the ability to meet the three-pronged test for appeal and reinstatement under section 15.1.6(d). City Power urges the Commission to reject PJM's filing without prejudice to a future filing, if necessary after City Power's appeal is resolved.

18. Finally, City Power argues that the Commission should reject PJM's filing for failure to meet the requirements of section 205 of the FPA because no evidence supports its filing. In the alternative, City Power requests that the Commission suspend PJM's filing for the full five-month period and hold in abeyance its determination pending the outcome of the appeal before the United States Court of Appeals for the District of Columbia Circuit in *Black Oak Energy, L.L.C. v. FERC*.

## **B. PJM's Answer**

19. In its answer, PJM argues that City Power does not dispute its failure to make full and timely payment of the issued invoices. PJM states that, pursuant to section 15.1.3 of the Operating Agreement, members must "make full and timely payment" of their invoices, "notwithstanding any disputed amount." PJM contends that, if City Power believed the issued invoices were incorrect, it should have made full and timely payment

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<sup>27</sup> City Power Protest at 7 (citing *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,030 (2012) (PJM Order)).

and then sought to dispute the charges. PJM asserts that the principle issue is not whether the June 2012 and August 2012 invoices were ultimately correct, but whether they were paid. Because of City Power's nonpayment, all other PJM members were left to cover the shortfall.

20. PJM argues that, while City Power contends that the August 2012 invoice is immaterial, City Power's failures, when viewed together, are indeed material and very detrimental to PJM and its members. PJM also argues that City Power's failure to pay the June 2012 invoice establishes that City Power did not meet the first threshold requirement for an appeal of a termination pursuant to section 15.1.6(d) of the Operating Agreement—showing that the member has consistently complied with its obligations to PJM. PJM reiterates that a request to appeal a termination does not prevent PJM from pursuing termination in proceedings before the Commission.

21. PJM asserts that City Power is incorrect in its claim that the Operating Agreement requires PJM to notify members before processing billing corrections brought to PJM's attention by other members. PJM contends that the plain language of the Operating Agreement shows that no such requirement exists. In addition, PJM contends that the precedent relied upon by City Power is inapposite because that case addresses PJM's notification requirements to members when PJM seeks to correct its own mistake.

#### **IV. Discussion**

##### **A. Procedural Matters**

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>28</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,<sup>29</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answer filed by PJM because it has provided information that assisted the Commission in the decision-making process.

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<sup>28</sup> 18 C.F.R. § 385.214 (2012).

<sup>29</sup> 18 C.F.R. § 385.213(a)(2) (2012).

## **B. Substantive Matters**

24. As discussed below, we accept PJM's proposed revisions reflecting City Power's termination.

25. In order for PJM to terminate a member's membership rights based on defaults, PJM must demonstrate that the member failed to make timely payments when due twice during a rolling 12-month period.<sup>30</sup> PJM has done so.

### **1. First Default**

26. We find that City Power defaulted the first time when it failed to pay the approximately \$17 million in its June 2012 invoice. The June 2012 invoice was not prohibited by the two-year limitation on the rebilling provision of section 10.4 of the OATT.<sup>31</sup> This provision does not prohibit collection of the June 2012 invoice amount because City Power was on notice at least as early as July 21, 2011, the date of the first *Black Oak* rehearing order,<sup>32</sup> which was issued within two years of PJM's payment of refunds on approximately March 1, 2010.<sup>33</sup> Moreover, the record shows that PJM, in fact, informed financial marketers prior to August 3, 2011, well within the two-year period, that it would seek repayment of the refunds previously paid.<sup>34</sup> The only reason

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<sup>30</sup> "A Member that has been declared in default of this Agreement for failing to: (i) make timely payments when due twice during any prior 12 month period...shall not be eligible to be reinstated as a Member to this Agreement and its membership rights pursuant to this Agreement shall be terminated..." PJM Operating Agreement, § 15.1.6(c).

<sup>31</sup> PJM OATT, § 10.4. Section 10.4 provides that the "Transmission Provider and PJMSettlement may make no adjustment to billing with respect to a month for any service, transaction, or charge under this Tariff, if more than two years has elapsed since the date upon which the billing for that month occurred, unless a claim seeking such adjustment had been received by the Transmission Provider prior thereto."

<sup>32</sup> *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011).

<sup>33</sup> PJM Report of Refund (March 1, 2010).

<sup>34</sup> Request of Financial Marketers for Clarification, or, in the Alternative, Request for Rehearing, Motion of Financial Marketers Not Currently Parties for Leave to Intervene Out-of-Time, and Emergency Motion for Issuance of Stay Within Seven Days, Docket No. EL08-14-003, *et al.* (Aug. 3, 2011).

the claim was delayed was because City Power requested a stay of the recovery of the funds (which the Commission granted), which pushed the recovery outside the two-year period. City Power cannot avail itself of the protection of the two-year limitation when it was the one who requested and was granted a delay in such collection.

27. Therefore, we find that City Power was responsible for paying the claim for repayment of the approximately \$17 million, and that it has defaulted on that obligation.

## 2. Second Default

28. We find that City Power defaulted the second time in a rolling 12-month period when it failed to pay the approximately \$927 in the August 2012 invoice. City Power asserts that section 10.4 of the OATT prohibits PJM from making the 2009 Balancing Operating Charge adjustments contained in the August 2012 invoice because PJM failed to notify City Power within the two-year period of the potential for an adjustment as required by the PJM Order.<sup>35</sup> Section 10.4 provides that the “Transmission Provider and PJM Settlement may make no adjustment to billing with respect to a month for any service, transaction, or charge under this OATT, if more than two years has elapsed since the date upon which the billing for that month occurred, *unless a claim seeking such adjustment had been received by the Transmission Provider prior thereto*” (emphasis added).<sup>36</sup> Thus, when a party other than PJM, as in this instance, makes a claim for adjustment and that claim is received by PJM within the two-year rebilling period, section 10.4 does not prohibit the adjustment. In the PJM Order cited by City Power, PJM independently determined that an adjustment was warranted, and the Commission determined that, for one company, the two-year billing period should not run from the date PJM first discovered its error and discussed this matter with that one company. Instead, it should run from the date that PJM gave written notice of the adjustment to all companies.<sup>37</sup> Neither the PJM Order, nor section 10.4 of the OATT, requires PJM to provide written notice to potentially-affected entities when another party makes a claim for adjustment.<sup>38</sup>

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<sup>35</sup> PJM Order, 139 FERC ¶ 61,030.

<sup>36</sup> PJM OATT, § 10.4.

<sup>37</sup> PJM Order, 139 FERC ¶ 61,030 at P 37.

<sup>38</sup> Moreover, the PJM Order in question was resolved by a Settlement prior to Commission action on rehearing. *PJM Interconnection, LLC*, 141 FERC ¶ 61,115 (2012).

29. City Power also argues that, because it had ceased trading in PJM as of August 31, 2011, there is not a reasonable basis for the May 2012 planning period congestion uplift adjustment. City Power was still a member of PJM in May 2012, however, and so it is not unreasonable that City Power would still be responsible for certain charges despite not trading in PJM during that period.

30. Finally, City Power argues that the August 2012 invoice amount is not material enough to warrant termination. According to section 15.1.6 of the Operating Agreement, the membership of an entity that has defaulted twice within a 12-month period “shall be terminated,” and does not depend on the size of the default.<sup>39</sup> The question of materiality and the reasonableness of reinstatement arises, as discussed below, only when a terminated member seeks reinstatement.

31. With respect to City Power’s request for appeal of the termination, we disagree that PJM violated section 15.1.6(d) of the Operating Agreement and that therefore PJM would be barred from terminating City Power’s membership. That provision states that “a Member may appeal a determination” and “may be reinstated provided that the Member can demonstrate” that it has met three requirements.<sup>40</sup> Thus, section 15.1.6(d) merely provides PJM members with an *opportunity* to appeal, and PJM has the discretion to reinstate a member provided it can satisfy certain requirements for reinstatement. Contrary to City Power assertions, PJM did not violate this provision by exercising its discretion to not reinstate City Power. As demonstrated by the letter from PJM to City Power in response to City Power’s request for appeal,<sup>41</sup> PJM considered City Power’s request for appeal and reasonably determined that City Power could not meet the requirement for reconsideration that City Power “has otherwise consistently complied with its obligations under this Agreement and the PJM OATT.”<sup>42</sup> Furthermore, section 15.1.6(d) specifically states that “a Member’s decision to utilize these procedures shall not operate to stay the ability of PJM to exercise any and all of its rights under this Agreement and the PJM OATT.”<sup>43</sup> We cannot find that PJM’s determination is arbitrary or unreasonable, and we add that City Power has still not repaid the approximately

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<sup>39</sup> PJM Operating Agreement, § 15.1.6(c).

<sup>40</sup> *Id.*

<sup>41</sup> Exhibit D to City Power Protest.

<sup>42</sup> PJM Transmittal Sheet at 6.

<sup>43</sup> PJM Operating Agreement, § 15.1.6(d).

\$17 million it owes. Thus, PJM was not required to come to a resolution on City Power's appeal before making the instant filing.

32. We reject City Power's argument that PJM's filing should be dismissed for failure to meet the requirements of FPA section 205 and find that PJM has provided sufficient information to accept the instant filing. City Power argues that PJM did not provide a copy of a notice to City Power of the adjustments within the two-year rebilling period, but as discussed above, no such notice was required.

33. Finally, we decline to hold our determination in abeyance pending the outcome of the court appeal. Section 313(c) of the FPA states that neither the filing of rehearing nor the filing of an appeal operates to stay the effectiveness of a Commission order.<sup>44</sup> The Commission denied financial marketers' request for a stay, finding that they "were aware of the requirements of the PJM OATT and PJM credit requirements and had sufficient time to prepare for such collateral calls."<sup>45</sup> Thus, the *Black Oak* orders are fully effective, and we do not find it necessary to hold this determination in abeyance.

The Commission orders:

PJM's proposed Operating Agreement revisions are hereby accepted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>44</sup> 16 U.S.C. § 825l (2006); accord 18 C.F.R. § 385.713 (2012).

<sup>45</sup> *Black Oak Energy, L.L.C., et al.*, 140 FERC ¶ 61,003 at P 27. We note that, should the Court of Appeals reverse the Commission's determination, PJM will be required to repay the financial marketers with interest.