

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

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

PJM Interconnection, L.L.C.

Docket Nos. ER12-195-000

DC Energy, LLC and
DC Energy Mid-Atlantic, LLC

EL12-8-001

v.

PJM Interconnection, L.L.C.

ORDER DENYING MOTION FOR CLARIFICATION AND MOTION FOR STAY

(Issued October 8, 2013)

1. On August 26, 2013, DC Energy, L.L.C and DC Energy Mid-Atlantic, L.L.C. (DC Companies) and Scylla Energy, L.L.C. (Scylla) filed a motion for clarification of the Commission's November 4, 2011 order,¹ which granted limited waiver of the billing provisions of PJM's tariff with respect to transactions that were the subject of a complaint by DC Companies. In this filing, DC Companies and Scylla request that the Commission clarify that this waiver extends until the orders denying the complaint and denying rehearing² are no longer subject to judicial review, or if that was not the Commission's intention, DC Companies and Scylla request that the Commission grant further waiver. In the alternative, the DC Companies and Scylla request a stay of the Commission's Complaint Orders. For the reasons discussed below, the Commission denies the motion for clarification or further waiver and the alternative motion for stay.

¹ *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,109 (2011) (Waiver Order).

² *DC Energy, LLC and DC Energy Mid-Atlantic, LLC v. PJM Interconnection, L.L.C.* 138 FERC ¶ 61,165 (2012) (Complaint Order), *order denying reh'g*, 144 FERC ¶ 61,024 (2013) (Rehearing Order) (collectively, Complaint Orders).

I. Background

2. On October 27, 2011, the DC Companies filed a complaint alleging that PJM's plan to rebill the DC Companies for Balancing Operating Reserve charges associated with certain internal bilateral transactions reported to PJM was unjust, unreasonable, and unduly discriminatory (Complaint). Scylla filed comments supporting the Complaint and representing that Scylla had engaged in similar transactions and was similarly situated to the DC Companies. On March 9, 2012, the Commission denied the Complaint, finding that it was appropriate for PJM to retroactively bill DC Companies and other similarly situated entities for Balancing Operating Reserve charges for the subject transactions the period July 2009 to July 2011.³ The DC Companies and Scylla sought rehearing of the Complaint Order, which the Commission denied on July 12, 2013.⁴ On September 9, 2013, the DC Companies and Scylla filed a petition for review of the Complaint Orders with the United States Court of Appeals for the District of Columbia Circuit.

3. On October 26, 2011, in anticipation of submission of the Complaint, PJM filed a request for temporary waiver of certain sections of its tariff to authorize PJM to suspend rebilling and associated payment obligations for the time period July 2009 to July 2011. PJM specified in its request that "the waiver will terminate after the Commission issues an order on the Complaint."⁵ On November 4, 2011, the Commission issued an order granting PJM's request for waiver "until the Commission's proceedings on the Complaint are final, including rehearing if applicable."⁶

4. In the instant pleading, DC Companies and Scylla state that, in August of 2013, PJM began invoicing the DC Companies for the Balancing Operating Reserve charges at issue in the Complaint proceeding. DC Companies and Scylla state that it is their understanding that PJM does not intend to take a position on the instant filing.⁷

³ Complaint Order, 138 FERC ¶ 61,165 at P 61.

⁴ Rehearing Order, 144 FERC ¶ 61,024.

⁵ PJM Request for Limited Tariff Waiver, Docket No. ER12-195-000 at 8 (filed Oct 26, 2011).

⁶ Waiver Order, 137 FERC ¶ 61,109 at P 16.

⁷ No motions to intervene or comments on the filing were submitted.

II. Motion for Clarification or Further Waiver and Alternative Motion for Stay

5. In their motion for clarification, the DC Companies and Scylla request that the Commission confirm that the waiver granted in the Waiver Order applies until proceedings related to the Complaint are final, including court review and further Commission proceedings on remand, if any. If that was not the Commission's intention, the DC Companies and Scylla state, then they request that the Commission extend the waiver to encompass judicial review and any proceedings on remand. The DC Companies and Scylla argue that, by confirming that the waiver is effective until the Complaint Orders are no longer subject to judicial review, the Commission can ensure that refunds, if any, will be calculated only once and as efficiently as possible.

6. In the alternative, the DC Companies and Scylla request a stay of the Complaint Orders pending judicial review. The DC Companies and Scylla argue that the DC Companies would be irreparably harmed in the absence of a stay because recent resettlement cases demonstrate that, if the DC Companies were to pay the retroactive charges now, they would likely be unable to recover those payments even if they were to succeed on appeal.⁸ The DC Companies and Scylla argue that public interest strongly favors a stay because resettling before judicial review is complete might result in an unnecessary waste of time, money, and resources. Finally, the DC Companies and Scylla argue that no other parties would be harmed if the Complaint Orders are stayed because, if the Complaint Orders were upheld, other parties would be repaid the same amount they would receive if they were repaid now.

III. Commission Determination

7. We deny the DC Companies' and Scylla's motion for clarification or further waiver. The DC Companies and Scylla request that the Commission clarify that, in the Waiver Order, it intended the waiver of the rebilling provisions of PJM's tariff to extend until the proceedings on the Complaint are final, including court review and any proceedings on remand, or alternatively that the Commission should extend the waiver. We deny the request and find it was not the Commission's intent that the waiver encompass judicial review, and we see no reason to extend the waiver.

8. In its original request for waiver, PJM specifically stated that "the waiver will terminate after the Commission issues an order on the Complaint" and "[a]ccordingly, the temporary waiver request is of limited scope...." The Commission granted the waiver in reliance upon this representation that the waiver would be of limited length. The Commission accordingly specified that it would grant the waiver "until the *Commission's*

⁸ Filing at 8-9 (citing *Black Oak Energy, LLC v. FERC*, No. 08-1036 (D.C. Cir. Aug. 6, 2013)).

proceedings on the Complaint are final, including rehearing if applicable.”⁹ Accordingly, the Commission did not intend the waiver to apply beyond the Rehearing Order and thus deny the DC Companies’ and Scylla’s motion for clarification.

9. Furthermore, the DC Companies and Scylla have not demonstrated that extension of the waiver is warranted, given the undefined time period that the court proceedings could take and the associated delay in returning the Balancing Operating Reserve charges owed to market participants pursuant to the Complaint Orders that would occur. We therefore deny the DC Companies’ and Scylla’s request for extension of the waiver.

10. The DC Companies and Scylla request that in the alternative, the Commission issue a stay of the Complaint Orders. Under the Administrative Procedure Act, the Commission grants a stay when “justice so requires.”¹⁰ To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its orders.¹¹ In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.¹² If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.¹³

11. We deny the motion for a stay. We find that the DC Companies and Scylla have not demonstrated that DC Companies will suffer irreparable harm absent a stay. The standard for showing irreparable harm is strict, as the D.C. Circuit has explained: “the injury must be both certain and great; it must be actual and not theoretical.... It is well established that economic loss does not necessarily constitute irreparable harm... [M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.”¹⁴ In determining whether an injury is

⁹ Waiver Order, 137 FERC ¶ 61,109 at P 16 (emphasis added).

¹⁰ 5 U.S.C. § 705 (2006).

¹¹ See, e.g., *Moussa I. Kourouma d/b/a Quntum Energy LLC*, 136 FERC ¶ 61,157 (2011) (*Moussa*); *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,142 (2005) (*Midwest ISO*).

¹² See, e.g., *Midwest ISO*, 111 FERC ¶ 61,142 at P 18.

¹³ *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,631 (1991).

¹⁴ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

irreparable, it is “well settled that economic loss does not, in and of itself, constitute irreparable harm.”¹⁵

12. Here, the harm identified is not sufficient to grant a stay, as it is merely economic in nature. Furthermore, the DC Companies’ and Scylla’s claim that the DC Companies would be irreparably harmed if their court appeal were successful and if PJM were unable to recover the refunds paid, is speculative at this point. Accordingly, we will deny the motion for stay.

13. We find that the recent court remand in *Black Oak Energy, LLC v. FERC*, does not compel a different result. The issue presented in *Black Oak* was whether, once the Commission has required the payment of refunds under section 206(b) of the Federal Power Act, it should require repayment of those refunds when the Commission has modified its policy on rehearing. In this proceeding, the Commission has not reversed an initial order granting a party refunds for overcharges. Moreover, in the *Black Oak* proceeding, the Commission denied and the court affirmed a motion for a stay of refund obligations pending appeal.¹⁶

The Commission orders:

The DC Companies’ motion for clarification or further waiver, and alternative motion for stay, are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁵ *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,238, at P 5 (2007) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d at 674).

¹⁶ *Black Oak Energy, L.L.C., EPIC Merchant Energy, L.P. and SESCO Enterprises, L.L.C. v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,003, at P 26 (2012); *In Re Black Oak Energy, LLC, et al.*, D.C. Cir. No. 12-1274 (July 6, 2012).