155 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Black Oak Energy, L.L.C., EPIC Merchant Energy, L.P., and SESCO Enterprises, L.L.C. Docket No. EL08-14-011

v.

PJM Interconnection, L.L.C.

ORDER DENYING REHEARING

(Issued April 7, 2016)

1. On November 19, 2015, the Commission issued an order on remand from the United States Court of Appeals of the District of Columbia Circuit (D.C. Circuit) (Remand Order).[1] The Commission concluded that PJM Interconnection, L.L.C. (PJM) should recoup refunds, with interest, previously paid to virtual marketers (described herein as Financial Marketers) because the Commission erred in imposing the refund obligation as the refund contravened long-standing Commission precedent. Further, the Commission found in the Remand Order that requiring Financial Marketers to repay refunds, with interest, would put the parties back in the positions in which they would have found themselves if the Commission had not erred in requiring refunds in the first place. On December 21, 2015, Energy Endeavors, LP (Energy Endeavors) timely filed for rehearing of that order, and, as discussed below, we deny rehearing.

I. Background

2. The detailed background of this case has been set out in the Remand Order as well as the prior orders and will not be repeated here.[2] As relevant to this rehearing, in 2008

[1] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,231 (2015) (Remand Order).

[2] For a comprehensive history, *see Black Oak Energy, L.L.C v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011).

the Commission found under section 206 of the Federal Power Act (FPA) that PJM had incorrectly excluded parties such as Financial Marketers that paid transmission charges for Up-to-Congestion transactions from the allocation of marginal line loss over-collections.[3] This over-collection, credited to those that pay for the fixed costs of the transmission grid, is credited after day-ahead energy transactions have taken place.

3. In an order issued on September 17, 2009, the Commission established a refund effective date under section 206 of the FPA and required PJM to pay refunds and submit a refund report to the Commission.[4] On October 19, 2009, two parties timely sought rehearing of the Commission's order, contending that PJM improperly imposed a retroactive surcharge in order to collect the funds to pay refunds to those engaging in Up-to-Congestion transactions. PJM requested, and was granted, an extension until April 1, 2010, to pay and submit a refund report.[5] PJM submitted a refund report on March 1, 2010, indicating it had paid the refunds earlier than anticipated.[6] Based on those rehearing requests and the refund report, on April 15, 2010, the Commission required PJM to provide additional information on how it calculated the refunds, including whether PJM assessed surcharges to obtain the refund amounts.[7]

4. After receiving the additional information, the Commission granted rehearing, finding that under Commission policy, refunds should not be paid in rate design and cost allocation cases in which the company collects its proper revenue requirement, but the allocation of costs among the customers is unjust and unreasonable.[8] The Commission

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[3] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 (2008).

[4] *Black Oak Energy, L.L.*C. *v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262 (2009).

[5] PJM, Motion for Extension of Time, Docket No. EL08-14-004 (filed Oct. 19, 2009), http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12178144 (granting by notice dated October 26, 2009), http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12181652.

[6] PJM, Report of Refund, Docket No. EL08-14-005 (filed Mar. 1, 2010), http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12279732.

[7] *Black Oak Energy, L.L.*C. *v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024, at P 42 (2010).

[8] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (2012).

found this policy particularly applicable to regional transmission organizations (RTOs), like PJM, since they are not-for-profit entities whereby any payment of refunds would result in a shortfall, because the RTO cannot recover those funds through a surcharge to other customers. The Commission found that PJM would incur such a shortfall and would be unable to revise its rate design retroactively to recover those funds, because section 206(b) authorizes only retroactive refunds (rate decreases), not surcharges (retroactive rate increases).[9]

5. The D.C. Circuit affirmed the Commission's application of its no-refund policy in cost allocation and rate design cases but remanded for consideration of one issue: whether PJM, having already paid refunds, should be permitted to recoup those refunds.[10] The court found that the Commission had not sufficiently examined the distinction between denying refunds in the first instance and ordering recoupment after such refunds have been paid.

6. On remand, the Commission asked for briefing by the parties, and, in the Remand Order, determined, based on its own and court precedent that on balance PJM should be able to recoup the refunds from the Up-to-Congestion holders. The Commission reasoned that, according to its reading of the FPA, denying the recoupment remedy in such a case would dilute the incentive of parties to seek rehearing of potentially erroneous legal or policy determinations made by the Commission. Further, the Commission maintained that the rehearing requests put Financial Marketers on notice that the decision to issue refunds was in question and that authorizing a return of those refunds would put all parties as closely as possible in the position in which they would have been had the Commission not departed from precedent in authorizing refunds.[11]

7. Energy Endeavors seeks rehearing of the Remand Order. In seeking rehearing, Energy Endeavors maintains that: (1) PJM may impose a surcharge through an uplift charge notwithstanding its not-for-profit status; recoupment is impermissible as it does not remedy a prior erroneous Commission decision or precedent; (2) recoupment will have negative effects on the market; (3) no precedent allows for recoupment of an already-distributed refund; (4) recoupment exposes Financial Marketers to an illegal rate; (5) any change to Commission policy on recoupment should be prospective and; (6) if the Commission requires recoupment, it should waive interest.

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[9] *Id.* P 42 & n.55 (2012) (citing *Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009)).

[10] *Black Oak Energy, L.L.C. v. FERC*, 725 F.3d 230 (D.C. Cir. 2013).

[11] Remand Order, 153 FERC ¶ 61,231 at PP 41-49.

II. Discussion

8. In seeking rehearing, Energy Endeavors reiterates a prior argument, raising the issue of whether the Commission properly applied its no-refund policy in the initial order. Energy Endeavors contends that the Commission erred in concluding that PJM could not use surcharges to fund the refunds. Energy Endeavors further argues that PJM's not-for-profit status would not prevent it from issuing refunds and surcharging other parties to collect the refunded amount. It argues that PJM's ability to recoup the funds from the Financial Marketers illustrates its ability to surcharge parties.

9. We clarify the two distinct issues conflated by Energy Endeavors's rehearing request: (1) whether the Commission properly applied its policy of no-refunds in the case of cost allocation; and (2) whether the Commission, having found it improperly applied its no-refunds policy, properly authorized recoupment of the erroneously paid refunds to put the parties back in the same position in which they would have found themselves had the Commission properly applied its no-refunds policy in the first place.

A. PJM's Authority to Impose a Surcharge to Cover the Refund Costs

10. Energy Endeavors contends that the Commission had at its discretion the authority to order PJM to make refunds, and subsequently surcharge other parties to pay for those refunds. This argument revisits the question of whether the Commission properly applied its no-refund policy, an issue already resolved by the Court of Appeals.[12] Despite this issue having already been settled, we will address it here because Energy Endeavors's argument on recoupment is based on its assertion that the Commission could and should have required PJM to surcharge its other customers to obtain the funds necessary to pay the refunds.

11. In making this assertion, Energy Endeavors ignores the overall statutory scheme of the FPA, as well as the parallel provisions of the Natural Gas Act (together Acts), under which the authority to order refunds does not permit the Commission to authorize surcharges. The provisions of these Acts are intended to benefit customers by imposing a refund obligation when the pipeline or utility implements an increased rate, which the Commission, after a hearing, finds unjust and unreasonable. The Supreme Court explained in *FPC v. Tennessee Gas Transmission Co*. that the refund provisions of the Acts, however, do not authorize the Commission to order surcharges to cover the refunds

[12] *Id.* P 65 (citing *Black Oak*, 725 F.3d at 243 (reasoning that, "had FERC followed its precedent in the first instance, there would have been no $37 million refund. FERC would have required PJM to comply prospectively and left it at that")).

in rate design or cost allocation cases, in which rates to some customers may be too high while rates to other customers are too low.[13]

12. The Commission, therefore, established a policy of not ordering refunds in rate design and cost allocation cases to account for the utility's inability to retroactively charge customers in order to cover refund payments.[14] In *Cities of Batavia v. FERC*, parties challenged the Commission's electric no-refund policy, arguing that under the *Tennessee Gas* decision, they are entitled to a refund, regardless of whether the company is unable to surcharge other customers.[15] The court affirmed the Commission's no refund policy as a reasonable exercise of discretion. In its decision the Commission took into

[13] 371 U.S. 145, 152-53 (1962) (*Tennessee Gas*) (stating, "a rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter").

[14] *See Ameren Services Co.*, 127 FERC ¶ 61,121, at PP 143-148, 157 (2009) (granting rehearing of a refund order in market design case); *Occidental Chem. Corp. v. PJM*, 110 FERC ¶ 61,378, at P 10 (2005) (stating that the "Commission's long-standing policy is that when a Commission action under Section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively"); *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193, at P 5 (2004) (accepting rate design change on a prospective basis); *Consumers Energy Co.*, Opinion No. 429-A, 89 FERC ¶ 61,138, at 61,397 (1999) (same); *Union Elec. Co.*, 58 FERC ¶ 61,247, at 61,818 (1992) (same); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983); *accord Second Taxing Dist. v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming determination to make rate design changes prospective only); *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982) (same)); *Commonwealth Edison Co.*, 8 FERC ¶ 61,277, at 61,844 (1979) (stating that "any change of rate form due to modification in the demand rachet (sic) or in the form of energy charging . . . should not be given effect in computing refunds, if any, due under this decision" because the utility "cannot retroactively collect more from any customer than has already been collected subject to refund, even though a redesigned rate presumably would show some customers should be charged more and others less than under the rates in effect subject to refund").

[15] 672 F.2d 64, 85 (D.C. Cir. 1982).

account the "practical consequences" of ordering refunds.[16] The court found reasonable the Commission's explanation that the utility "cannot retroactively collect more from any customer (than) that (which) has already been collected subject to refund, even though a redesigned rate presumptively would show some customers should be charged more and others less than under the rates in effect subject to refunds."[17] This is particularly true in the case of RTOs, which are not-for-profit entities. RTOs, like PJM, have no retained earnings or other source of funds to pay refunds. PJM therefore cannot pay refunds to the Financial Marketers unless it was able to surcharge other customers to pay for those refunds.

13. The D.C, Circuit in *Anaheim v. FERC* reinforces this limitation on the scope of the Commission's refund authority as applied to section 206(b) of the FPA.[18] In that decision, the court specifically addressed the refund provision in section 206(b) of the FPA, rejecting the Commission's contention that this provision authorizes it to surcharge customers to pay retroactive rate increases. The court concluded that section 206(b) "authorizes only retroactive refunds (rate decreases), not retroactive rate increases like those at issue here."[19] In light of these precedents, the Commission reasonably determined on rehearing of this case to reverse its earlier refund order.

14. Energy Endeavors contends that the line of precedent establishing the Commission's no-refund policy should not be followed in this case because PJM's rules, with which all market participants agree to abide, provide that PJM can avoid a shortfall or under-recovery by socializing the amount in question through a default assessment on all PJM members. The only tariff provision Energy Endeavors cites in support of this

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[16] *Id.*

[17] *Id.* The Commission's policy under the NGA developed differently and the Commission ordinarily requires refunds in rate design and cost allocation cases such that the pipeline and its shareholders must absorb the cost of the refund. Nonetheless the Commission has exercised its refund discretion and held that refunds will not be paid when pipelines file to implement Commission rate design policies. *See Arkla Energy Resources*, 48 FERC ¶ 61,305, at 61,980 (1989) ("any rate changes required by applying the Commission's rate design policy statement will be implemented prospectively"). As a result of the Commission's different policy under the NGA, pipelines file rate design changes to become effective prospectively only. *See National Fuel Gas Supply Corp*., 140 FERC ¶ 61,114 (2012).

[18] 558 F.3d 521, 524 (D.C. Cir. 2009).

[19] *Id*. at 624.

proposition is section 15.22.2 of PJM's Operating Agreement.[20] Section 15.22.2, however, does not provide authority for PJM to impose surcharges in order to pay refunds. Rather, this section deals with PJM's "Enforcement of Member Obligations." The section authorizes PJM to pursue actions in court when it determines a member has defaulted on its obligation. The section also permits PJM to collect the default from other members while PJM is pursuing legal action against the defaulting member. This provision is limited to litigation based on defaults in payment by PJM members and makes no reference to using this collection method in the event of a Commission-ordered refund.[21]

15. Energy Endeavors maintains the Commission's practice has been to order refunds of amounts collected over the just and reasonable level and claims that the Commission's grant of rehearing in this proceeding involved the exercise of discretion, not a legal requirement.[22] While the Commission has stated its general policy is to grant refunds in

[20] PJM, Intra-PJM Tariffs, Operating Agreement, § 15.2 (Enforcement of Obligations) (3.0.0), § 15.2.2, http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=140929.

[21] Energy Endeavors mischaracterizes the Court of Appeals decision when it states that the court recognized PJM's ability to fund a refund through surcharges. Rehearing Request at 9 (citing *Black Oak*, 725 F.3d at 242). This was not a statement of law or fact by the court; rather, the court was merely citing to the Commission's earlier order in which the Commission stated, in full: "PJM, which is a limited liability, non-stock company, has no corporate funds of its own to pay refunds, and it *would have to* acquire such funds either through surcharges or through an up-lift charge to all members." *Black Oak Energy, L.L.C.*, 136 FERC ¶ 61,040, at P 28 n.42 (2011) (emphasis added). The use of the phrase "would have to" does not indicate the Commission found PJM could impose surcharges under section 206, but only that it would need to do so as a not-for-profit entity. Indeed, in the next sentence, the Commission found that PJM could not institute surcharges to pay for refunds under section 206 of the FPA, citing *Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) ("[Section] 206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate increases.").

[22] Energy Endeavors cites a 2003 order in *California Independent System Operator Corp.*, 103 FERC ¶ 61,114 (2003), in which the Commission required the California ISO to pay refunds despite its not-for-profit status. That case preceded the *Anaheim* decision by six years and no party raised, and the Commission, therefore, did not address, the issue of whether the California ISO could impose a surcharge to collect the refunds.

the case of overcharges,[23] the Commission also has stated that this policy does not apply in rate design and cost allocation cases in which the utility would suffer a loss if it paid refunds due to its inability to collect a retroactive surcharge from the customers who were overpaid.[24]

16. For example, as covered in detail in the Remand Order,[25] in *Ameren Services Co.* the Commission granted rehearing, concluding that "in cases involving changes in market design, the Commission generally exercises its discretion and does not order refunds when doing so would require re-running a market."[26] The Commission then ordered the Midwest Independent Transmission System Operator, Inc. to "cease the ongoing market resettlement, and to reconcile all invoices and payments issued therein."[27]

17. In *Ameren*, the Financial Marketers, including Energy Endeavors, opposed the use of surcharges and filed a motion to lodge the D.C. Circuit's *Anaheim* decision as support for their argument that the Commission could not order surcharges.[28] In this instant rehearing, Energy Endeavors attempts to distinguish *Ameren* arguing that the Commission found the refund in *Ameren* caused significant actual market disruption, the refund was not yet fully consummated, and that the refund could not be implemented

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[23] *See, e.g.*, *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (*Con Edison*) (stating that the Commission has a "'general policy of granting full refunds for overcharges" and citing as support *Towns of Concord*, 955 F.2d at 76); *Corp. Comm'n of the State of Oklahoma v. Am. Elec. Power Co.*, 125 FERC ¶ 61,237, at P 33 (2008) (stating that "the Commission's general policy is to order refunds for overcharges" and citing to language in *Con Edison* supported by *Towns of Concord*); *see also Central Power and Light Co.*, 97 FERC ¶ 61,157, at 61,698 n.24 (2001); *Ameren Corp.*, 147 FERC ¶ 61,225, at P 28 n.39 (2014).

[24] *See* cases cited *supra* note 14.

[25] 153 FERC ¶ 61,231, at P 47.

[26] *Ameren Services Co.*, 127 FERC ¶ 61,121, at PP 143-148, 157 (2009) (*Ameren*) (citing *Md. Pub. Serv. Comm'n. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, at P 49 (2008); *Bangor Hydro-Elec. Co. v. ISO New England Inc.*, 97 FERC ¶ 61,339 (2001) (finding that re-running markets even when an error was made would do more harm to electric markets than is justifiable)).

[27] *Id.* P 157.

[28] *Id.* P 46.

accurately.[29] Yet, whatever the factual distinctions between this case and *Ameren*, Energy Endeavors does not attempt to refute or distinguish the applicability of *Anaheim*'s holding that section 206(b) of the FPA does not authorize a utility to impose a surcharge to one group of customers to pay for the refunds to the other customers.

18. Energy Endeavors maintains that if the Commission may authorize the recoupment of refunds from the Financial Marketers, it must also logically have the authority to permit PJM to surcharge other customers in order to pay refunds to the Financial Marketers. We find that these two situations are not parallel. Both the FPA and Commission policy prohibit the assessment of surcharges pursuant to the "refund" provisions of section 205 and 206. . However, as discussed in the Remand Order, when the Commission corrects an error in law or policy on rehearing, surcharges are appropriate to correct that error and put the parties in the same position in which they would have been had the Commission not misapplied its policy in the first place. We discuss in the next section why authorizing recoupment of refunds in this case is appropriate.

B. Recoupment of Refunds

1. Recoupment of Refunds is Necessary to Correct Legal Error Based on Established Precedent

19. Energy Endeavors maintains that no legal precedent supports recoupment of refunds after they have been paid.[30] We disagree. As discussed in the Remand Order, Commission and court precedent support recoupment when the Commission changes its position on rehearing.[31] Further, the Financial Marketers were on notice that the refunds they received were tentative pending the outcome of rehearing.[32] As discussed in detail in the Remand Order, multiple court findings have held that surcharging customers to correct errors on rehearing does not violate the filed rate doctrine or rule against

[29] Rehearing Request, at 22.

[30] Rehearing Request at 19-22.

[31] Remand Order, 153 FERC ¶ 61,231 at PP 41-49.

[32] *Black Oak*, 725 F.3d at 242-43 ("[I]t is reasonable for FERC to hold that the scope of the April 2010 order placed the virtual marketers on notice that their refunds might be reconsidered.").

retroactive ratemaking.[33] As the Commission found, failing to authorize PJM to recoup those refunds paid to the Financial Marketers would reduce incentives in future refund cases for parties to seek rehearing since they would derive no financial benefit if successful. In these specific circumstances, any balancing of the equities has to lie with the established policy of putting all customers back to the position in which they would have been had the Commission applied policies and court precedent correctly in the first order.

20. On rehearing, Energy Endeavors continuously refers to recouping previously paid refunds as a new policy unsupported by precedent and contends that recoupment is not appropriate absent a court determination that the Commission committed legal error. However, the very purpose of the FPA rehearing provision is to enable the Commission to rectify its own errors prior to appeal; the Commission need not wait for a court determination before it grants rehearing and returns the parties to the position in which they would have found themselves.

21. Nor is ordering recoupment of refunds a new policy, as Energy Endeavors claims. The Commission has a long-standing practice of ordering recoupment "with the objective of placing the parties as closely as possible in the position they would have been in if the Commission had not erred."[34] In *Occidental Chemical Corp.*,[35] for example, the Commission itself requested a voluntary remand to correct its legal error in ordering refunds and required that PJM provide both refunds and surcharges to correct that error. Energy Endeavors seeks to distinguish *Occidental*, arguing that a proceeding on

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[33] *Can. Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 899 (D.C. Cir. 1995); *W. Res., Inc. v. FERC*, 72 F.3d 147, 151 (D.C. Cir. 1995).

[34] *Northwest Pipeline Corp.*, 69 FERC ¶ 61,359, at 62,330-31 (1994) (emphasis added), *reh'g denied*, 71 FERC ¶ 61,012 (1995); *see also Occidental Chemical Corp.*, 110 FERC ¶ 61,378 (2005) (requiring PJM to calculate refunds and surcharges when the Commission erred in ordering refunds); *Ameren Services. Co.*, 127 FERC ¶ 61,121, at PP 143-148, 157 (2009) (granting rehearing of refund order and requiring reconciliation of accounts); *Sea Robin Pipeline Co.*, 48 FERC ¶ 61,335, at 62,124 (1989) (reversing the grant of refunds, together with interest thereon through the date paid and collected from its customers); *Texas Eastern Transmission Corp.*, 25 FERC ¶ 61,409, at 61,918 (1983) (reallocation of costs will result in the payment of refunds and the imposition of surcharges).

[35] 110 FERC ¶ 61,378 (2005) (*Occidental*).

voluntary remand is different from acting on rehearing.[36] This argument fails to recognize that the Commission requested a voluntary remand precisely because it had failed to act properly on rehearing. Energy Endeavors's position that the Commission cannot order surcharges based on its rehearing order, but must await (or request) remand is illogical and circular as it seemingly would require the Commission to first deny rehearing and wait to see if a party challenges that decision in court, in which case, the Commission would reverse its position. The more straightforward interpretation is for the Commission to take appropriate action on rehearing, as the Commission has in past cases. The court has also recognized the Commission's administrative precedents in recognizing the Commission's authority to order recoupments.

> These judicial and administrative precedents, as well as the logic of the statute itself, strongly suggest that the Commission did not exceed its statutory authority, or act arbitrarily, capriciously, or not in accordance with law, by authorizing recoupment payments in this case. Without such corrective power, pipelines would be substantially and irreparably injured by FERC errors, and judicial review would be powerless to protect them from much of the losses so incurred.[37]

22. Indeed, the court in *Transcontinental Gas Pipe Line Corp. v. FERC* [38] found the Commission's failure to order recoupment on rehearing amounted to legal error. In that case, the pipeline and its customers reached agreement on using straight-fixed-variable or

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[36] Energy Endeavors also argues that, unlike PJM, the transmission owners in *Occidental* would under-recover. Rehearing Request at 22. Energy Endeavors does not explain why PJM would not under-recover. Indeed, as discussed earlier, PJM would be in a more dire predicament than a for-profit transmission owner because PJM does not have retained earnings from which to pay the refunds.

[37] *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074-75 (D.C. Cir. 1992). Energy Endeavors distinguishes *Tennessee Gas Pipeline Co.*, 65 FERC ¶ 61,138 (1993) (cited by the PJM Market Monitor), claiming it is based on a court remand of the Commission's order, rather than on the Commission's exercise of discretion. But, as discussed earlier, the Commission's determination to grant rehearing was based not on discretion but rather on the Commission's determination to follow court and Commission precedent, and, as *Natural Gas Clearinghouse* recognizes, the Commission need not wait for a court remand to correct its errors.

[38] 54 F.3d 893, 899 (D.C. Cir. 1995).

SFV rate design for an expansion. In the certificate order, the Commission found the SFV rate design unjust and unreasonable, and accepted a certificate for service on the condition that the pipeline change the rate design to modified-fixed-variable (MFV). The pipeline instituted service and charged rates based on the MFV rate design. On rehearing, a year later, the Commission determined that it had failed to follow its policy of not honoring such customer-pipeline rate agreements and granted rehearing to permit SFV rate design. The Commission, however, declined to order refunds and surcharges, concluding that the effective date of the rate design change should be the date of its rehearing order, rather than the date on which service started, because parties may have relied on the MFV rate design in making business decisions.

23. The court reversed and remanded the Commission's determination to make its rehearing order effective prospectively from the date of the rehearing order and not to make the parties whole for the year in which MFV rate design was effective. The court found that the pipeline's "petition for rehearing of the initial MFV order put customers on notice that the SFV methodology might ultimately prevail." While the court recognized that during the rehearing period "every party's action or inaction involved some risk, it concluded that in balancing these interests, application of the "right rate, i.e., whatever rate the Commission lawfully determines to be right" seemed most appropriate because "the expectations of those who act in anticipation of the right rate are protected, and they would seem presumptively the most deserving."[39] In order to place the parties in the position in which they would have been had the Commission not erred, recoupment was required.[40]

24. In *Xcel Energy Services v. FERC*,[41] the D.C. Circuit similarly reversed the Commission for failing to correct its legal error when the Commission granted rehearing. In *Xcel*, the Commission failed to suspend an FPA section 205 rate increase filed by the Southwest Power Pool to implement a formula rate of a non-jurisdictional participating transmission owner. On rehearing, the Commission found that it had failed to apply its usual policy with respect to such filings by accepting and suspending the filing where the

[39] *Id.*

[40] *See* Transcontinental Gas Pipeline Co., Refund/Surcharge Report, Docket No. CP88-760-021 (filed Apr. 1, 1995) http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=8278637; *Transcontinental Gas Pipeline Co.*, Docket No. CP88-760-021 (Feb. 5, 1997) (delegated letter order) (accepting refund/surcharge report), http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=8209789.

[41] No. 14-1282, 2016 WL 874746 (D.C. Cir. Mar. 8, 2016).

non-jurisdictional entity agrees to pay refunds or rejecting the filing and establishing a section 206 proceeding to review the proposed rates if the non-jurisdictional entity refuses to permit refunds.[42] Despite recognizing its error, the Commission denied the rehearing request, determining that it had no authority retroactively to suspend the rate filing after it has taken effect.

25. The court held that having failed to follow its policy and suspend the rate increase filing that had not been shown to be just and reasonable, the Commission erred in not granting the rehearing to "undo what is wrongfully done."[43] The Court found that section 309 of the FPA[44] would permit the Commission to remedy its legal error in its initial rate order. The Court recognized that in correcting such a legal error, the Commission's authority encompasses both refunds and surcharges.[45]

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[42] *See Lively Grove Energy Partners, LLC*., 140 FERC ¶ 61,252, at P 47 & n.59 (2012), cited by *Xcel*, slip op. at 4, 2016 WL 874746, at 2.

[43] *Xce*l, slip op. at 13, 2016 WL 874746, at 6.

[44] 16 U.S.C. § 825(h). While the court finds that section 309 of the FPA provides the Commission broad authority to rectify its legal error on rehearing, we do not find that that *Xcel's* interpretation of section 309 requires the Commission to pay refunds to the Financial Marketers and surcharge other PJM customers to fund those refunds. First, Xcel concerns a rate increase filing, not a cost allocation or rate design case, and the court's opinion does not purport to reverse the Commission's no-refund policy as established in *Batavia*, 672 F.2d 64, and other cases. Second, section 309 of the FPA is not so broad as to authorize the Commission to take equitable action not permitted under the statute. *See Public Service Comm'n of State of NY v. FERC*, 866 F.2d 487, 491 (D.C. Cir. 1989) (holding that section 16 of the NGA, the provision comparable to section 309, did not permit the Commission to take actions that would "demolish the balance that the Act establishes in §§ 4 and 5"); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C.Cir.1973) (Section 16 "cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined"; *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 269 (1st Cir. 2003) ("Congress cannot have intended such "any and all acts" provisions to constitute an independent grant of unbounded authority". As In Part A, *FPC v. Tennessee* and *Anaheim* provide that the term "refund" in the statute does not authorize the Commission to impose surcharges as part of its refund order.

[45] *Xce*l, slip op. at 14, 2016 WL 874746, at 7 (citing *Nat. Gas Clearing House v. FERC*, 965 F.2d 1066, 1073 (D.C.Cir.1992)).

26. The Commission in this case reached the same conclusion. The rehearing petitions as well as the Commission's order requesting more information regarding the refunds put the marketers and all parties on notice of the possibility the refund decision would be overturned. The expectations of the rehearing petitioners who sought relief from the surcharges imposed by PJM—the parties seeking the "right rate"[46]—therefore, deserve to be protected.

2. Recoupment Does Not Affect Operation of the PJM Energy Market

27. Energy Endeavors reiterates prior arguments that the Commission should not order recoupment because of the potential effects on the PJM organized energy market. Energy Endeavors cites to Dr. Hogan's affidavit stating that: "[S]uccess of the market also requires some finality in choosing such a balance and ordering refunds."[47] Dr. Hogan analogizes the refund decision to contracts and appears to argue that once the refund decision is made a high threshold is necessary to revoke that determination.

28. As the Commission pointed out in the Remand Order, the payment of refunds is unrelated to energy market transactions.[48] While Dr. Hogan discusses in his affidavit the various ways in which organized markets set efficient prices, these practices are unaffected by the allocation of marginal line loss over-collection issues in question here. All parties, including the Financial Marketers, paid the correct prices for energy in the day-ahead market. As the Commission has made clear from the outset of marginal line loss pricing proceeding, the payment of marginal line loss surplus must be separated from energy market pricing.[49] The refunds and recoupment are strictly billing adjustments between the parties.[50]

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[46] *Transcontinental Gas Pipe Line Corp.* 54 F.3d at 899.

[47] Rehearing Request at 17.

[48] Remand Order, 153 FERC ¶ 61,231 at P 53.

[49] *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 24 (2006) ("[T]he Commission has made clear that the method for disbursing the amounts of any over collections should not directly reimburse customers for their marginal loss payments, as such a collection would interfere with the goal of basing prices on marginal losses.").

[50] *See Exelon Corp. v. PPL Elec. Utils. Corp.*, 111 FERC ¶ 61,065 (2005) (correcting billing errors retroactively), *reh'g denied*, 114 FERC ¶ 61,298 (2006).

29. The PJM Independent Market Monitor (Market Monitor) agrees that recoupment of refunds does not affect the PJM market: "[N]either the payment of refunds nor the recoupment of refunds wrongfully paid has relevance to market operations. These are instead billing matters that impact the accounts of Market Participants."[51] The Market Monitor further points out that, even if one were to broadly construe market operations as Dr. Hogan does, the effect of recoupment is positive: "If the Commission means to broadly construe "market operations," then the impact on markets and on market incentives is positive. Participants should expect that they will not be permitted to retain payments that result from mistakes, and that any such payments already made are subject to review and recoupment up through the final decision of the final authority."[52] We find the view of the Market Monitor better accords with the appropriate determination of whether market impacts occurred.[53]

30. Dr. Hogan analogizes to the law of contracts and assumes that the provision of refunds was certain at the time they were paid and that requiring recoupment would undo that certainty.[54] But, as discussed above, the D.C. Circuit concluded that the Financial Marketers had no expectation of certainty under the FPA, since the rehearing petitions as well as the Commission's order requiring PJM to provide justification for its refund report provided sufficient notice that the refunds were subject to reconsideration.[55] Moreover, application of Dr. Hogan's contractual certainty position in this case does not provide a clear-cut answer as to whose certainty should be honored. PJM's earlier

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[51] Market Monitor Initial Brief at 1.

[52] *Id.* at 2.

[53] *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378, (1989) (reasoning that, "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts"); *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 702 (D.C. Cir. 2007) (explaining that, "where expert witnesses dispute a factual issue 'the resolution of which implicates substantial agency expertise,' our role is only to verify that the agency has 'relied upon sufficient expert evidence to establish a rational connection between the facts and the choice made,'" quoting *Wisc. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746, 747 (D.C. Cir. 2001).

[54] We note that Dr. Hogan based his opinion, at least in part, on the incorrect assumption that the Commission's "refund of refunds decision is without precedent." Brief of Financial Marketers on Remanded Reconsideration of Recoupment Orders, Docket No. EL08-14-010, App. at 5 (filed Apr. 7, 2014).

[55] *Black Oak*, 725 F.3d at 242-43.

payments of line loss surplus to the surcharged parties presumably also would be entitled to the same contractual certainty as the payments of refunds to the Financial Marketers. Dr. Hogan does not explain why the certainty principle only extends to one set of parties and not others, particularly since the Commission deviated from its policy in ordering the refunds in the first place. As the court determined in *Transcontinental Gas Pipe Line Corp*., in choosing between the two groups, the parties challenging the incorrect Commission policy are "the most deserving."[56]

3. Financial Marketers Are Not Subject to Disparate Treatment

31. Energy Endeavors maintains that recoupment is merely a form of equitable relief and the Commission exposes Financial Marketers to the same type of harm as that of the exporters which raised the refund issue on rehearing. It maintains that any expectation of the exporters to recoupment of these refunds should be considered less settled than the expectations of the Financial Marketers after the refunds were distributed.

32. As discussed previously, however, the question of whether the Commission can surcharge customers to obtain the funds needed to pay refunds is not simply a question of equity, as the courts have found that the refund provision of section 206 of the FPA does not authorize the Commission to order retroactive surcharges. We reiterate our finding in the Remand Order here that the "Commission was not treating Financial Marketers differently from other customers of PJM by granting exporters' request for rehearing."[57] As the Commission found in the Remand Order, Financial Marketers had been on notice both from the rehearing requests and the Commission's order requiring justification of any surcharges that these refunds were being challenged.[58] Further, as the Market Monitor points out, a failure to require recoupment would be at odds with the FPA's rehearing requirement as parties "will have less incentive to seek rehearing of Commission orders, even in the case of faulty decisions that the Commission would likely reverse given an opportunity."[59] In this circumstance, the equities lie in favor of

[56] 54 F.3d at 899.

[57] Remand Order, 153 FERC ¶ 61,231 at P 62.

[58] *Id.*

[59] Brief of the Independent Market Monitor for PJM, Docket No. EL08-14-010 at 4 (Apr. 7, 2014).

requiring recoupment as challenging the incorrect Commission policy are "the most deserving."[60]

4. Recoupment of Refunds Does Not Expose Financial Marketers to an Illegal Rate

33. Energy Endeavors contends that recouping the refunds exposes Financial Marketers to an illegal rate for the refund period. This argument, however, is tantamount to arguing that the Commission is obligated to issue refunds in every case under section 206 of the FPA. However, as described earlier, the courts have affirmed that the Commission's refund authority is discretionary and, as found in *Cities of Batavia*, the Commission reasonably can determine not to issue refunds in cases involving cost allocation and rate design in which the utility "cannot retroactively collect more from any customer (than) that (which) has already been collected subject to refund."[61]

5. Recoupment of Incorrectly Paid Refunds is Not a New Policy Requiring Prospective Application

34. Energy Endeavors maintains that if the Commission wants to implement a new policy of recouping refunds when the Commission reverses a refund order on rehearing, it should do so only prospectively. Energy Endeavors cites to *SEC v. Chenery*[62] for the proposition that retroactive application of a new recoupment practice with respect to refunds undermines just and reasonable rates and for the general proposition that refunds should be imposed.

35. We reiterate here our finding from the Remand Order, where the Commission did "not find that recouping refunds is a change in Commission Policy."[63] First, as discussed above, the recoupment of refunds upon the grant of rehearing is by no means a new policy.[64] Second, *SEC v. Chenery*, in fact, rejected the argument that the SEC could only proceed prospectively in adopting a new approach to a situation with which it had not previously been confronted. Nor does ordering recoupment of refunds produce "a result

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[60] *Transcontinental Gas Pipe Line Corp.*, 54 F.3d at 899.

[61] 672 F.2d at 85.

[62] 332 U.S. 194, 203 (1947).

[63] Remand Order, 153 FERC ¶ 61,231 at P 57.

[64] *See* cases cited at note 34, *supra*.

which is contrary to a statutory design or to legal and equitable principles."[65] The recoupment of refunds here rectifies the Commission's failure to adhere to the statutory scheme and Commission policy in ordering PJM to pay refunds. Failure to order recoupment would deny the other members of PJM what is legally and equitably theirs, by preventing the return of the unjustified surcharges for which PJM billed them.

C. Waiver of Interest

36. Energy Endeavors finally maintains that if the Commission does permit PJM to recoup the refunds, the Commission erred in applying interest to the recoupment amounts. Energy Endeavors maintains that requiring interest is inequitable given the extended period of time that has elapsed and cites two cases for the proposition that the Commission has discretion in whether to order refunds in crafting a remedy.[66]

37. We deny rehearing, continuing to find that payment of interest is necessary to put the parties in the position in which they would have found themselves had the Commission not erred. We see no basis to craft an exemption from our usual policy of requiring interest in this case.[67] As the court indicated in its remand order, the Financial Marketers were on notice both by the rehearing petitions challenging the surcharges and by the Commission's order examining the propriety of requiring surcharges that they could not necessarily rely on retention of the refunds.[68] In such circumstances, requiring the payment of refunds is necessary to correct the Commission's error.

38. Moreover, the cases cited by Energy Endeavors demonstrate that only in exceptional circumstances may the Commission waive interest. In the *Trunkline* and *Panhandle* cases, the Commission accepted the pipelines' proposals to retroactively "direct bill" customers for certain production related costs. After the court reversed that determination for violating the filed rate doctrine, the Commission had to determine what refunds would be owed; the Commission directed refunds of principal but not interest. The Commission justified its determination to waive interest because under the peculiar

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[65] 332 U.S. at 203.

[66] *Panhandle Eastern Pipe Line Co*., 69 FERC ¶ 61,048, at 61,189 (1994); *Trunkline Gas Co*., 69 FERC ¶ 61,047, at 61,184 (1994).

[67] *See* § 18 C.F.R. 35.19a (2015) (providing for payment of interest); *Public Service Co. of New Mexico*, 44 FERC ¶ 61,232 (1988) (applying section 35.19 to filings under section 206 that were not suspended).

[68] *Black Oak*, 725 F.3d at 242-43.

factual circumstances governing the recovery in these cases "there is no way to restore the parties to the positions they would have occupied had there been no Commission error."[69] Neither *Trunkline* or *Panhandle* involved a mere delay in payment, as is the case here, but a change to the markets such that no order could restore parties to the same position in which they would have been absent Commission error. In this case, the amount of refunds paid to the Financial Marketers is the same amount that would need to be recouped to make other parties whole, and therefore interest should be paid to reflect the time value of money.[70]

39. In contrast to the unusual examples in *Trunkline* or *Panhandle*, the courts have rejected Commission efforts to exclude interest from refunds or to truncate refund payments due merely to delay. In *Southeastern Michigan Gas Co. v. FERC*,[71] the Commission sought to exclude interest in ordering refunds to "ease the adverse effects" of its legal error.[72] But the court reversed (without remanding) the Commission's exclusion of interest, finding that the Commission ignored its own regulation requiring the payment of interest.[73] In *Public Service Co. of Colorado v. FERC*,[74] the court rejected the Commission's effort to limit the scope of refunds, concluding that the refunds should reflect "the full amount" of the unlawfully collected amount.[75]

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[69] *Trunkline Gas*, 69 FERC at 61,184. These cases involved the Commission's error in allowing the pipelines to direct bill certain customers retroactively for production-related costs. The Commission concluded that had it not approved the direct bill, the pipelines would have been able to recover some of the money in question through their Purchased Gas Adjustment clauses, and the customers would have paid some of that money. Because neither aside could determine how much the pipelines would have been able to recover, the Commission's determination to waive interest, achieved rough justice.

[70] *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999).

[71] 133 F.3d 34 (D.C. Cir. 1998)

[72] *Id.* at 43; s*ee Great Lakes Gas Transmission Limited Partnership*, 72 FERC ¶ 61,081, at 61,430 (1995).

[73] *Southeastern Michigan Gas*, 133 F.3d at 43.

[74] 91 F.3d 1478 (D.C. Cir. 1996).

[75] *Id.* at 1490.

40. Based on *Southeastern Michigan Gas* and *Public Service Co. of Colorado*, the Commission subsequently denied a claim to waive interest on refunds despite the passage of such an extended period of time that the interest amounted to 160 percent of the principal. [76] In *Anadarko Petroleum*,[77] the court affirmed the Commission's decision to require interest, finding, "the Commission's legal errors and the snail-like pace of its administrative proceedings are cause for complaint, but are not in themselves grounds for altering the producers' interest obligation."[78] Following this line of precedent, we therefore find that any delay in ordering recoupment in this proceeding does not justify waiver of the requirement to pay interest to make all parties whole.

The Commission orders:

Rehearing hereby is denied as discussed in the body of the order.

By the Commission. Commissioner Clark is not participating.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[76] *Public Service Company of Colorado*, 80 FERC ¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998)

[77] *Anadarko Petroleum*, 196 F.3d at 1268 (affirming *Pub. Serv. Co. of Colo.*, 82 FERC ¶ 61,058 (1998)).

[78] *Id*. at 1268.