ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 08-1386, *et al.* (consolidated)

BLACK OAK, LLC, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: December 21, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208 (March 6, 2008), JA 131;

2. *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 (October 16, 2008), JA 190;

3. *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (July 21, 2011), JA 651;

4. *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (May 11, 2012), JA 714;

5. *EPIC Merchant Energy NJ/PA, et al. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (May 10, 2010), JA 486 and

6. *EPIC Merchant Energy NJ/PA, et al. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,041 (July 21, 2011), JA 663.

C. Related Cases:

Two of the orders in this case, *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (July 21, 2011), JA 651, and *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (May 11, 2012), JA 714, were the subject of a mandamus petition before this Court, *In Re Black Oak Energy, LLC, et al.*, D.C. Cir. No. 12-1274 (denied July 6, 2012). Otherwise, this case has not previously been before this Court or any other court.

/s/ Samuel Soopper
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December 21, 2012

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GLOSSARY

DC Energy	DC Energy, LLC, *et al.*, parties in the administrative proceeding
EPIC	Petitioners EPIC Merchant/Energy NJ/PA, L.P., *et al.*
EPIC Complaint Order	*EPIC Merchant Energy NJ/PA, et al. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010), JA 486
EPIC Rehearing Order	*EPIC Merchant Energy NJ/PA, et al. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,041 (2011), JA 663
Integrys	Integrys Entergy Services, Inc., party in the administrative proceeding
July 2011 Remedy Order	*Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011), JA 651
March 2008 Complaint Order	*Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208 (2008), JA 131
May 2012 Rehearing Order	*Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (2012), JA 714
October 2008 Rehearing Order	*Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 (2008), JA 190
Virtual Marketers	Petitioners Black Oak Energy, LLC, *et al.*

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v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This case concerns the decision of the Federal Energy Regulatory Commission (Commission or FERC) to treat two different groups of market participants differently. One trades power in the mid-Atlantic wholesale market for the purpose of financial gain and without use of the regional transmission grid. The other procures power for the purpose of actually serving customers over the transmission grid. In the orders on review, the Commission made rate design

decisions (including refund decisions) that, in the view of the first group, unreasonably favor the second group. The questions presented are:

1. Whether the Commission reasonably exercised its regulatory authority by authorizing PJM Interconnection, LLC (PJM), the Regional Transmission Operator, to allocate surplus revenue from payments for transmission line loss among its transmission customers only to the extent that the customers contribute to the fixed costs of its regional transmission system.

2. Whether the Commission appropriately exercised its statutory authority and its remedial discretion in deciding that PJM was not required to make refunds to certain market participants for over-collection of line loss payments.

3. Whether the Commission reasonably dismissed as redundant a second complaint by certain market participants against PJM for its allocation of line loss over-collections, in view of an already pending complaint on the same issue by some of the same market participants.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum A to this brief.

STATEMENT OF THE FACTS

I. INTRODUCTION

PJM is a non-profit Regional Transmission Organization that operates the high-voltage transmission network in a number of mid-Atlantic states and the District of Columbia. *See, e.g.*, *Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011) (explaining PJM operations). This appeal concerns the redistribution of surplus marginal "line loss" revenues collected by PJM from participants in its organized energy market. As relevant here, PJM operates two energy market auctions daily, one a day ahead of actual operation, and the other in real time to accommodate subsequent changes in supply and demand.

The petitioners in these appeals, Black Oak Energy, LLC, *et al.*, are virtual marketers in PJM's energy market and will be collectively referred to as such in this brief.[1] Virtual Marketers, sometimes called arbitrageurs or financial marketers, are companies that participate in organized energy markets by "submit[ting] bids for purely financial purchases or sales of energy, which do not entail physical generation or consumption of energy." *New York Independent System Operator, Inc.*, 98 FERC ¶ 61,282 at 62,216 (2002); *see also ISO New England, Inc.*, 113 FERC ¶ 61,055 P 5 (2005) (explaining the role of Virtual

[1]The other petitioners are Coaltrain Energy LP, EPIC Merchant Energy LP, EPIC Merchant Energy NJ/PA, LP and Sesco Enterprises LLC.

Marketers). Virtual Marketers attempt to profit from differences in prices between PJM's day-ahead market and its real-time market, buying in one market and selling in the other.

Virtual Marketers challenge three sets of Commission orders in these appeals: In the first set, the Commission held that while Virtual Marketers are required to pay for line losses pursuant to PJM's Locational Marginal Pricing rate design, they were only eligible to receive a portion of PJM's over-collection of line loss revenue to the extent that they contributed to the fixed costs of PJM's transmission grid in the same manner as physical transmission customers. "Order Denying Complaint," *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208 (March 6, 2008), JA 131 (March 2008 Complaint Order); "Order Denying Rehearing in Part and Granting Rehearing in Part," *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 (October 16, 2008), JA 190 (October 2008 Rehearing Order).

In the second set of orders on review, the Commission held that while it had initially required PJM to pay refunds to the Virtual Marketers for erroneous line loss over-collection, upon reconsideration, refunds were not appropriate in the regulatory circumstances presented. "Order Granting Rehearing, Granting Motion, and Rejecting Refund Report as Moot," *Black Oak Energy, LLC, et al. v. PJM*

Interconnection, L.L.C., 136 FERC ¶ 61,040 (July 21, 2011), JA 651 (July 2011 Remedy Order); "Order Denying Rehearing and Denying Motions," *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (May 11, 2012), JA 714 (May 2012 Rehearing Order) (For the Court's convenience, Addendum B to this brief supplies a chronology of the events in Commission Docket No. EL08-14, in which the first four orders on review were issued.)

In the third set of orders on review, the Commission denied as redundant a second complaint by certain of the same Virtual Marketers concerning PJM's treatment of line loss over-collection. "Order Dismissing Complaint," *EPIC Merchant Energy NJ/PA, et al. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (May 10, 2010), JA 486 (EPIC Complaint Order); "Order Denying Rehearing," *EPIC Merchant Energy NJ/PA, et al. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,041 (July 21, 2011), JA 663 (EPIC Rehearing Order).

II. STATUTORY AND REGULATORY BACKGROUND

The Federal Power Act charges the Commission to employ its authority "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York v. FERC*, 535 U.S. 1, 6 (2002) (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)). A primary purpose of the Act is "to encourage the orderly development of a plentiful

supply of electricity . . . at reasonable prices." *Public Utils. Comm'n of California v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)).

Section 201(b) of the Federal Power Act confers upon the Commission jurisdiction over all rates, terms and conditions of electric transmission service and sales at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b). Section 205 of the Act prohibits unjust and unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. §§ 824d(a)-(b), while section 206 gives the agency the power to correct any such unlawful practices. 16 U.S.C. § 824e(a).

As part of approving PJM's establishment as an Independent System Operator administering an organized energy market, the Commission authorized PJM's employment of a Locational Marginal Pricing mechanism. *See Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997). *See also, e.g., Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) (explaining the development and independent operation of regional energy markets).

This Court has on more than one occasion affirmed Commission decisions approving the use of a Locational Marginal Pricing rate design for Regional

Transmission Operators. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 524-25 (D.C. Cir. 2010) (*Sacramento*); *Wisc. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 250-51 (D.C. Cir. 2007) (*Wisconsin*). "With [a Locational Marginal Pricing]-based rate structure," the Court has explained, "prices are designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid, and thus prices vary based on location and time." *Sacramento*, 616 F.3d at 525. Thus, pursuant to this rate design, each price paid by a transmission customer "consists of three components: (i) the cost of generation; (ii) the cost of congestion; and (iii) the cost of transmission losses." *Id.* (citation omitted).

Transmission line loss is the inevitable loss of megawatts when power is transmitted over transmission lines (*i.e.*, the difference between the megawatts produced and the megawatts received by customers at the end of the transmission line). *See Sacramento*, 616 F.3d at 525; *Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 2 (D.C. Cir. 2002) (*Sithe*). In order to make up for such losses, PJM, like all transmission providers, procures and delivers sufficient energy so that scheduled power demands can be met in a manner that maintains system reliability while taking these losses into account. Because Locational Marginal Pricing factors the cost of marginal line losses into the price of power, a transmission provider using this rate design, such as PJM, routinely over-recovers

its expenditures for losses. *See Sacramento*, 616 F.3d at 525 (explaining this process).

The primary issue in this case is whether the Commission's decision approving PJM's method for allocating this over-recovery among its transmission customers is reasonable.

III. THE PROCEEDINGS BEFORE THE COMMISSION

A. Events Leading Up To Virtual Marketers' Complaint

In recognition of the problem of over-collection of line loss revenues, in an earlier proceeding the Commission ordered PJM to develop a method to allocate such over-collections to its customers. *Atlantic City Elec. Co. v. PJM Interconnection, LLC*, 115 FERC ¶ 61,132, *on reh'g*, 117 FERC ¶ 61,169 (2006). There, the Commission established that "the over-collection" of line loss revenues "will be returned to market participants, since PJM is a not-for-profit entity, and cannot retain such over-collections." *Atlantic City Elec. Co.*, 115 FERC ¶ 61,132 P 23. However, the Commission also 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." *Id.* P 24. This was because, the agency explained, "[r]efunding the excess [Locational Marginal Pricing] revenues to those

who paid would result in those purchasers no longer paying the marginal cost of energy – the basic foundation of [Locational Marginal Pricing]." *Id.* & n.19 (quoting *Northeast Utilities Service Co.*, 109 FERC ¶ 61,204 P 21 (2004)).

On November 6, 2006, the Commission accepted as just and reasonable PJM's proposal to distribute line loss surplus to transmission customers representing PJM load, in proportion to each load customer's obligation to support the fixed and administrative costs of PJM's transmission grid. *Atlantic City Elec. Co.*, 117 FERC ¶ 61,169 P 27. "Load," this Court has recognized, "simply refers to demand for service on a transmission grid." *Wisconsin*, 493 F.3d at 249 (citation omitted). Load customers refer to PJM's utility transmission customers that receive energy from the PJM regional market.

PJM's tariff provision implementing this method of allocating surplus line loss revenue became effective on June 1, 2007.

B. The Virtual Marketers' Complaint

On December 3, 2007, Virtual Marketers filed a complaint with the Commission pursuant to section 206 of the Federal Power Act, 16 U.S.C. § 824e, alleging that they were discriminated against by PJM's tariff provisions governing the collection of transmission losses, as well as the crediting for the over-collection of these losses. R 1, JA 46. Virtual Marketers asserted that PJM discriminated

against them "by allocating over-collected marginal transmission line loss revenues only to load, even though both load and [Virtual Marketers] currently pay the same transmission line loss charge." *Id.* 14, JA 59. Thus, the Virtual Marketers argued that if they were obligated to pay for transmission line losses, they should be allocated "a fair share of any over-collected revenues." *Id.*

C. The First Set Of The Commission's Orders On Review

1. The March 2008 Complaint Order

On March 6, 2008, the Commission issued the first order on review here, denying the Virtual Marketers' complaint in its entirety. March 2008 Complaint Order, JA 131. First, the Commission held that Virtual Marketers must pay the same Locational Marginal Pricing energy price, including its line loss component, as any other participant in the PJM energy market. *Id.* PP 33-34. JA 145-146.

Second, the Commission rejected Virtual Marketers' claim that if they were required to pay for losses, they must accordingly be entitled to a share of PJM's over collection of such losses. In this regard, the Commission reiterated its finding in *Atlantic City* that "no party within PJM is entitled to receive any particular amounts through disbursement of the over-collections, since the price they are paying (based on marginal line losses) is the correct marginal cost for the energy they are purchasing." March 2008 Complaint Order P 46 & n.81, JA 150 (citing

Atlantic City, 115 FERC ¶ 61,132 P 5 and 117 FERC ¶ 61,169 PP 23-24)).

2. The October 2008 Rehearing Order

Virtual Marketers filed a timely request for rehearing of the March 2008 Complaint Order. R 30, JA 155. On October 26, 2008, the Commission issued the second order at issue here, granting rehearing in part. October 2008 Rehearing Order, JA 190. The Commission again rejected Virtual Marketers' argument that they should not be held accountable for line losses. *Id.* PP 24; 27-32, JA 196; 197-199. Virtual Marketers did not seek further Commission review on this issue, and it is not one of the issues they have brought before the Court.

The Commission also denied rehearing on Virtual Marketers' argument that if they were responsible for line loss payment, they should be credited with a full proportionate share of PJM's line loss over-collection. October 2008 Rehearing Order PP 36-47, JA 201-206. In the Commission's view, PJM's proposal to credit "the surplus to network service users based on their proportionate share of energy delivered to load" was reasonable as it "met the principle of not compromising the basis for using marginal cost pricing because this method does not credit the distribution based on incurrence of line losses." *Id.* P 38, JA 202. Moreover, the agency explained, "[t]his method of distribution returns the surplus to those parties that support and pay for the fixed costs of the transmission grid, which we continue

to find is a reasonable basis for determining the credit." *Id.*

However, the Commission agreed with the Virtual Marketers that they were entitled to some allocation of the line loss over-collection based on their payment of Up-To Congestion bids in the PJM market, which include a contribution to the fixed costs of the grid. October 2008 Rehearing Order PP 48-49, JA 206-207. (Up-To Congestion transactions are a rate mechanism designed to hedge congestion costs for transmission transactions. *See PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,244 (2010)). Therefore, because PJM's tariff limited "the surplus of the collected marginal line losses to 'Network Service Users' [*i.e.*, physical transmission customers] only," the agency required PJM to file a proposal to revise its tariff "to include a credit to others who pay for the fixed costs of the transmission system in proportion to the load represented by their transmission usage," or show why it was not necessary. *Id.* P 49, JA 207.

D. Events Leading Up To The Second Set Of Orders On Review.

PJM filed a request for clarification of the October 2008 Rehearing Order on whether the Commission intended that the credit for line losses should be allocated solely to transmission customers representing part of PJM's load, or to any transmission customer contributing to the fixed costs of the grid. R 38, JA 209.

Virtual Marketers did not seek rehearing of the October 2008 Rehearing

Order, but filed a pleading reiterating that they were entitled to a share of the surplus line loss for their payment of Up-To Congestion costs, and requesting maximum refund protection. R 39, JA 217.

On February 24, 2009, the Commission issued its order in response to PJM's inquiry, *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,164 (2009), JA 234 (February 2009 Clarification Order), the first of three orders which are not on appeal, but part of the administrative record. The Commission clarified PJM must "allocate transmission losses equitably among all parties that support the fixed cost of the transmission system, without regard to whether such parties serve load," (*id.* P 1, JA 234), including Virtual Marketers to the extent that they paid these costs for Up-To Congestion transactions. *Id.* P 15, JA 238. The Commission also indicated that Virtual Marketers' request for clarification regarding refunds was "premature, since the Commission has not determined whether refunds are owed." *Id.* P 16, JA 238-239.

On September 17, 2009, the Commission issued a further order, *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262 (2009), JA 297 (September 2009 Compliance Order). There, the agency accepted as just and reasonable PJM's tariff revision to correctly credit line loss allocations to "those who pay for the fixed or embedded costs of the transmission

system," including Virtual Marketers to the extent that they contribute to such costs by payment of Up-To Congestion transactions. *Id.* P 26, JA 306.

The Commission went on to find that pursuant to section 206(b) of the Federal Power Act, 16 U.S.C. § 824e(b), PJM's new tariff would become effective on June 1, 2009. *Id.* P 32, JA 308. Additionally, the Commission determined that PJM should pay refunds to all customers, including Virtual Marketers, for line loss surplus for which they should have been credited. Accordingly, the agency set the refund effective date as December 3, 2007 (the date of Virtual Marketers' complaint), and required PJM to pay refunds for the statutory fifteen-month period (*i.e.*, until March 3, 2009), and file a refund report. *Id.* P 35, JA 309.

The Commission's September 2009 Compliance Order generated a number of responses by various parties, including Virtual Marketers reiterating their argument that they should receive the same proportion of line loss over-payment credits as physical transmission customers. Additionally, a group of PJM transmission customers, DC Energy, LLC, *et al.* (DC Energy), which export energy from PJM into the Midwest Independent System Transmission Operator, filed a request for rehearing, asserting that such customers should retain their right to the line loss allocation credit, both prospectively and retroactively. R 55, JA 333. At the same time, PJM filed a request for an extension of time with respect to

the refunds mandated by that order, R 57, JA 358, which prompted a protest by the Virtual Marketers, R 65, JA 403.

On April 15, 2010, the Commission issued an order addressing these and various other filings by the parties. *Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024 (2010), JA 463 (April 2010 Rehearing Order). As relevant here, the Commission concluded that, based on PJM's refund report, it could not determine how PJM handled the issue raised by DC Energy, and ordered PJM to file a more detailed refund report. *Id.* P 42, JA 481-482.

On June 1, 2010, PJM submitted its revised refund report to the Commission. R 101, JA 509.

E. The Second Set Of Orders On Review

1. The July 2011 Remedy Order

On May 17, 2010, Integrys Energy Services, Inc. (Integrys) filed a request for rehearing of the April 2010 Rehearing Order, complaining that the Commission had "made no declaration with respect to whether PJM had to implement what Integrys [] considers a retroactive change to PJM's tariff for the December 2007-March 2009 refund period." R 99 at 2, JA 498. Therefore, Integrys asserted, "the Commission should declare that no refund/surcharges are due and collectable from customers who were allocated marginal loss surplus

amounts" during the refund period. *Id.*

On July 21, 2011, the Commission issued the July 2011 Remedy Order, JA 651, the third order on review in these appeals. In that order, the Commission granted Integrys' request for rehearing, concluding that, upon reconsideration, PJM would not have to pay refunds for erroneous line loss collection under its prior tariff. The Commission explained that PJM had "collected the proper level of revenues," but incorrectly allocated them among its customers. July 2011 Remedy Order P 25, JA 660. In such cases, the agency observed, it grants only prospective relief and "traditionally has declined to order refunds." *Id.* & n.36, JA 660 (citing judicial and agency precedent).

2. The May 2012 Order Rehearing Order

The Virtual Marketers sought rehearing of the July 2011 Remedy Order, as well as other relief. R 114, JA 672. On rehearing, the Virtual Marketers argued that the Commission's reversal of its prior refund order was *ultra vires* "because no party requested rehearing of this aspect of the September [2009 Compliance] Order." *Id.* 7, JA 678. In the Virtual Marketers' view, the refund directive in that order was thus "final and non-appealable." *Id.* 9, JA 680. Additionally, the Virtual Marketers complained that they "were given no notice that the Commission intended to revisit the issue of the eligibility of Up-To Congestion transactions to

receive a share of the line loss surpluses." *Id.* 20, JA 691.

On May 11, 2012, the Commission issued its May 2012 Rehearing Order, denying Virtual Marketers' request for rehearing. The Commission held that its decision to address the refund issue was fully consistent with its statutory authority, *id.* PP 25-34, JA 723-728; found that Virtual Marketers were on notice of possibility that the issue could be revisited, *id.* P 35, JA 728; and affirmed that this case came within the agency's policy to deny refunds where a utility had employed an incorrect cost allocation method. *Id.* PP 36-44, JA 728-731. [2]

F. The Third Set Of Orders On Review

On February 1, 2010, several among the Virtual Marketers that had filed the original complaint – EPIC Merchant Energy NJ/PA, L.P., *et al.* (collectively, EPIC) – filed a second complaint challenging PJM's allocation of transmission line loss and the distribution of the over-collection of those charges pursuant to its tariff. R 73, JA 430.

On May 10, 2010, the Commission issued the EPIC Complaint Order, JA 486, dismissing the complaint as "merely seek[ing] to relitigate the same issues as

[2]In the May 2012 Rehearing Order, the Commission also denied Virtual Marketers' request for a stay of its decision. Virtual Marketers filed a petition for mandamus in this Court contesting the decision, which the Court denied. *In Re Black Oak Energy, LLC, et al.*, D.C. Cir. No. 12-1274 (July 6, 2012).

raised in the prior case." *Id.* P 20, JA 492.

EPIC filed a timely request for rehearing of its complaint. R 102, JA 623. On July 21, 2011, the Commission denied EPIC's request on the ground that its complaint was "a collateral attack on . . . the Commission's resolution of the first complaint." EPIC Rehearing Order P 14, JA 668. The Commission further rejected EPIC's contention that its second complaint was necessary to establish a new refund effective date, because the earliest possible new refund date (February 1, 2010, the date the second complaint was filed) "comes well after the June 1, 2009 effective date" established for PJM to begin properly crediting line loss over-collections. *Id.* P 19, JA 669

These appeals followed.

SUMMARY OF ARGUMENT

1. The Commission reasonably exercised its discretion in authorizing PJM to credit line loss surplus only to transmission customers contributing to the fixed costs of the grid.

As the Commission explained, when a transmission operator charges customers pursuant to a Locational Marginal Pricing rate design, the price includes a component reflecting marginal line loss. Therefore, the Commission concluded, to avoid distorting the correct price signals that Locational Marginal Pricing is designed to provide, the line loss surplus should not be allocated to customers based on their sales transactions. The Commission's decision on this issue is a reasonable exercise of its regulatory expertise.

The Commission's further decision to allow PJM to distribute line loss revenues solely to those transmission customers contributing to the fixed costs of its transmission grid was an appropriate application of its broad remedial discretion. Not only does the approved remedy prevent the distortion of price signals, but also benefits the ultimate consumer because transmission providers serving load can pass through the surplus in the form of lower rates.

Contrary to the Virtual Marketers' claim, the Commission's decision does not violate cost causation principles. Cost causation principles are satisfied

because PJM's Locational Marginal Pricing rate design ensures that Virtual Marketers, like all participants in PJM's energy market, are paying the correct price for energy, and do not entitle any transmission customers to a share of the line loss credit.

Nor does limiting the credit to those transmission customers contributing to the fixed costs of the transmission system discriminate against Virtual Marketers. Because Virtual Marketers for the most part do not pay the fixed costs of the transmission system, they are not similarly situated to physical transmission customers that do so. To the extent that Virtual Marketers contribute to such costs, they receive an appropriate share of the allocation credit.

2. The Commission legitimately exercised its statutory power in holding that PJM was not required to pay refunds, in spite of its earlier decision to the contrary. In this regard, the Commission reasonably interpreted the terms of the Federal Power Act to invest the agency with plenary authority to correct a decision prior to its becoming final.

Contrary to Virtual Marketers' position, at the time the Commission reconsidered the refunds, the issue had been raised by a pending request for rehearing, and was implicated as well by outstanding issues concerning PJM's refund report. In any event, the Commission fully retained jurisdiction in the

Virtual Marketers' ongoing administrative proceeding until exclusive jurisdiction vested in the Court, long after the agency's reconsideration of the refund issue.

The Commission's decision not to order refunds here was also a reasonable exercise of the agency's broad remedial discretion. As the Commission explained, in cases involving allocation of costs, like this one, the agency's longstanding policy is only to provide a prospective remedy, to prevent a utility from an under-recovery of legitimate costs.

3. The Commission appropriately dismissed Virtual Marketers' second complaint as redundant. As the Commission explained, the dismissal was fully consistent with its precedent to dismiss complaints seeking to relitigate already-decided issues. Nor could Virtual Marketers' new complaint have any impact on refunds, as a refund effective date for the new complaint would have come well after PJM was already properly crediting line loss over-payments pursuant to its new tariff provisions.

ARGUMENT

I. STANDARD OF REVIEW

Under the familiar arbitrary and capricious standard, the Court will "affirm the Commission's orders so long as FERC examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Sacramento*, 616 F.3d at 528 (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)). Pursuant to this standard, the Commission's factual findings are conclusive if supported by substantial evidence. *East Texas Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000); Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b).

Additionally, "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley Capital Group Inc.*, 554 U.S. at 532; *see also Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (same).

Moreover, "[i]n evaluating FERC's interpretation of its own orders, [the Court] afford[s] the Commission substantial deference, upholding the agency's decision 'unless its interpretation is plainly erroneous or inconsistent' with the order." *Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067-68 (D.C. Cir. 2005)

(quoting *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1292 (D.C. Cir. 1996)).

I. THE COMMISSION REASONABLY ACCEPTED PJM'S PROPOSAL TO CREDIT LINE LOSSES TO TRANSMISSION CUSTOMERS PAYING THE FIXED COSTS OF THE GRID

A. The Commission's Decision Was A Reasonable Exercise Of Its Regulatory Discretion

The Commission's approval of PJM's crediting of line loss surplus solely to transmission customers contributing to the fixed costs of its transmission system was based on its prior, uncontested approval of PJM's Locational Marginal Pricing rate design.

The Commission reached this conclusion in two separate, but related, steps. First, as the Commission repeatedly explained, Virtual Marketers, like PJM's physical transmission customers, pay a just and reasonable price for transmission service via Locational Marginal Pricing, which includes a component for line loss. *See, e.g.*, March 2008 Complaint Order P 29, JA 144 (Locational Marginal Pricing "including marginal losses continue[s] to reflect the proper price of buying and selling power, because generation must be dispatched to account for marginal losses and keep the system in balance"); October 2008 Rehearing Order P 11, JA 193 (Locational Marginal Pricing for all market participants continues to be just and reasonable).

Accordingly, the Commission reasoned, the credit to transmission customers by PJM of its line loss surplus must bear no relation to the marginal line losses incurred by any individual party, to avoid distorting the correct price signals that adoption of Locational Marginal Pricing is designed to provide. *See* March 2008 Complaint Order P 46, JA 150 ("no party within PJM is entitled to receive any particular amounts through the disbursement of the over-collections, since the price they are paying (based on marginal line losses) is the correct marginal cost for the energy they are purchasing"); October 2008 Rehearing Order PP 36-38, JA 201-202 (same).

This Court has emphasized that, "in light of the technical nature of rate design, involving policy judgments at the core of the regulatory function," review of the Commission's decisions on such matters is "highly deferential." *Entergy Services, Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003) (citing *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999)). Under this standard, the Commission's reasonable decision that PJM's method of crediting the line loss surplus should not interfere with marginal cost principles is entitled to judicial respect.

Second, the Commission addressed the issue of a reasonable remedy by which PJM could allocate its line loss surplus consistent with its Locational

Marginal Pricing rate design. While acknowledging that "[w]ithin this constraint, there may be many different just and reasonable methods of distributing the line losses," the Commission concluded that PJM's proposal to allocate the line loss over-collection to transmission customers paying actual transmission costs was reasonable by "return[ing] the surplus to those parties that support and pay for the fixed costs of the transmission grid." October 2008 Rehearing Order P 38, JA 202. An additional benefit of the remedy proposed by PJM, in the agency's view, was that "crediting the excess revenues to load" paying the fixed costs of the transmission grid "is most consistent with protecting the ultimate consumer because such credits will be passed on to consumers in the form of lower retail rates." March 2008 Complaint Order P 49, JA 151.

It is "well settled" that this Court will "defer to [the Commission's] decisions in remedial matters." *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 22-23 (D.C. Cir. 2006) (quoting *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998)) (internal quotation marks omitted). Moreover, the Court has explained, because an organized electric market "presents 'intensely practical difficulties' demanding a solution from FERC … [the agency] must be given latitude to balance the competing considerations and decide on the best resolution." *Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009)

(quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968)). Applying these principles, the Court should sustain the Commission's authorizing PJM to credit the line loss surplus to its transmission customers contributing to the costs of its transmission grid, in a manner consistent with the operation of the PJM energy market.

B. The Commission's Decision Is Fully Consistent With Cost Causation Principles

In their brief, Virtual Marketers' fundamental argument is that the result approved by the Commission here contradicts basic Federal Power Act cost causation principles that "rates should produce revenues from each class of customers *which match, as closely as practicable, the costs to serve each class or individual customers*." Pet. Br. 24 (quoting *Alabama Elec. Co-Op, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982)) (emphasis the Court's).

Virtual Marketers claim to find support for their cost causation argument in several of this Court's decisions, including *Sacramento*. Pet. Br. 25, 37, 34. In fact, *Sacramento* supports the Commission's position. There, the Court affirmed the Commission's decision that it was reasonable for the California Independent System Operator "to credit excess revenues from marginal loss charges" arising from Locational Marginal Pricing "back to transmission customers on a *pro rata* basis by using those revenues to uniformly reduce the cost of each megawatt-hour

purchased on the system." 616 F.3d at 534.

The Court specifically rejected the petitioners' claim there that this method violated cost causation principles: "Although treating every customer as the marginal customer results in over-collection *in the aggregate*, that treatment is reasonable for each customer." 616 F.3d at 535 (emphasis in original). This was because, the Court reasoned, "[n]o customer is less deserving than another of being treated as the marginal customer; therefore, no customer is entitled to demand a refund greater than its *pro rata* share of the excess revenue collected." *Id.*

The Commission's decision here applies the principle upheld in *Sacramento*, with the refinement that it is reasonable to limit the distribution of the surplus to transmission customers who contribute to the cost of the physical transmission system over which energy flows. Payment for the costs of the transmission system is not part of the Locational Marginal Pricing system, but paid by customers based on a *pro rata* share of their usage. To the extent Virtual Marketers have been paying these costs (as part of their Up-To Congestion costs), they are entitled to a proportionate share of the line loss over-collection. However, because Virtual Marketers' purely economic transactions otherwise do not contribute to the fixed costs of the grid, they are not eligible for a line loss credit for those transactions.

Similarly, Virtual Marketers' reliance on *Wisconsin* on the cost causation

issue is misplaced. Pet. Br. 25, 27. As the Commission explained, in that case the Court "affirmed the Commission's acceptance of a method that distributed" line loss over-collection in a Marginal Cost Pricing rate regimen "to a balancing authority [*i.e.*, a geographically defined group of transmission customers], rather than tailoring the method to the costs imposed on individual customers." October 2008 Rehearing Order P 47, JA 206. Thus, the Court agreed with the Commission "that payment for transmission service could be a reasonable method of distributing the marginal loss surplus," which is fully consistent with the method the agency approved here. *Id.* & n.60 (citing *Wisconsin*, 493 F.3d at 265-66).

Nor do the other Court decisions cited by petitioners undermine the Commission's position in any manner. In *Sithe*, Pet. Br. 22, 25-27, 34, the Court faulted the Commission's decision concerning the allocation of marginal line losses for lack of explanation. 285 F.3d at 5. Here, however, the Commission fully "explained that in order to create appropriate price signals, the credit must not be based on the amount of marginal line losses paid." October 2008 Rehearing Order P 44, JA 205. Likewise, in *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511 (D.C. Cir. 1984) (Pet. Br. 23-26, 29, 35), the Court rejected the Commission's endorsing, without explanation, a "proposed rate design . . . charging high-load factor customers part of the costs of service to low-load factor

customers." 747 F.2d at 1516. This result has no bearing on the instant case, where the Commission provided a detailed explanation for its conclusion that PJM's allocation of line loss over-collection was reasonable.

Virtual Marketers nonetheless go on to contend that the Commission's decision limiting the credit for PJM's line loss surplus to transmission customers contributing to the fixed costs of PJM's transmission system cannot stand because "there is no connection between these fixed costs and the transmission loss overcharges." Pet. Br. 29, 30-31; *see also id.* 34-35.

But as the Commission repeatedly explained, the lack of connection between line losses and fixed costs was the whole point. Because Virtual Marketers, like all PJM market participants, were paying the correct price for energy which includes marginal losses, "the only fundamental principle to be applied" to the distribution of the line loss over-collection is that it "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." October 2008 Rehearing Order P 37, JA 201-202.

Virtual Marketers' position actually confuses the two distinct questions faced by the Commission here. Because Virtual Marketers are paying the correct price and deriving the benefit of selling (presumably) at a profit, cost causation

principles are satisfied. Whether the Commission approved a rational remedy to address the allocation of line loss surplus presents a separate question. On that issue, the Commission approved a remedy, distributing the surplus credits *pro rata* to transmission customers contributing to the fixed costs of the grid, which results in the benefits of the line loss surplus to "be passed on to consumers in the form of lower retail rates." March 2008 Complaint Order P 49, JA 151. The Commission thus specifically tied the distribution of the surplus to a fundamental purpose of the Federal Power Act, encouraging "development of a plentiful supply of electricity … at reasonable prices." *Public Utils. Comm'n of California*, 367 F.3d 925 at 929.

Finally, Virtual Marketers speculate that the magnitude of the line loss credit "represses any price signals theoretically supported by a non-pro rata refund" that excludes them. Pet. Br. 35. To the contrary, as the Commission explained, "[p]roviding credits in relation to marginal line losses, as urged by [Virtual] Marketers, would distort price signals because it would encourage inefficient longer [distance] transactions by artificially reducing the cost of transmission below the actual marginal cost for that transmission." April 2010 Rehearing Order P 36, JA 479 (footnote omitted). In any event, petitioners' speculation is entitled to no weight; there is no evidence in the record that PJM's energy market is not operating efficiently.

C. The Commission's Decision Does Not Unduly Discriminate Against Virtual Marketers

The Virtual Marketers also claim that the Commission's decision that they should not receive line loss credits from PJM, except to the extent that they actually contribute to the fixed costs of PJM's transmission system, is discriminatory because they, like actual transmission customers, pay for line losses. Pet. Br. 22, 24. However, as the Court has long recognized, undue discrimination violating the Federal Power Act is limited to situations where the Commission is treating similarly situated groups differently without a reason. *See, e.g.*, *Cities of Bethany v. FERC*, 727 F.2d 1131, 1138-39 (D.C. Cir. 1984) (not unduly discriminatory to subject utilities that are not similarly situated to different treatment).

Here, the Commission reasonably refuted the Virtual Marketers' position that those who pay line losses should be treated identically to those who receive a credit for their over-payment. As explained above, *see supra* pp. 23-24, it was a legitimate regulatory goal to ensure that a transmission customer's line loss payment be treated distinctly from the allocation of the line loss credit.

The real question with respect to undue discrimination, therefore, is whether Virtual Marketers are similarly situated to those transmission customers that do receive the credit. To the extent that Virtual Marketers contribute to the costs of

the grid (in Up-To Congestion charges), they are similarly situated; otherwise, they are not. *See* March 2008 Complaint Order P 49, JA 151 (unlike physical transmission customers, "arbitrageurs do not pay network and firm point to point transmission charges covering the cost of the transmission grid" except in Up-To Congestion charges).

The Commission found an additional distinction between Virtual Marketers and physical transmission customers. "Arbitrageurs," the agency explained, operate by taking advantage of "divergences between markets," and "create their own load by volume of their trades," unlike physical transmission customers who are serving actual load that must be delivered a particular amount of energy. March 2008 Complaint Order P 51, JA 152. Thus, allowing Virtual Marketers to "profit from the volume of their trades," the Commission reasoned, would allow them to make trades that are not based on "price differentials in [Locational Marginal Pricing]" or energy congestion, to the detriment of the PJM energy market. *Id.*

Virtual Marketers also see unlawful discrimination in the Commission's conclusion that PJM's allocation of line loss surplus to transmission customers paying the cost of the grid will benefit consumers in the form of lower rates, because "[t]his rationale . . . explicitly favors one class of customer over another."

Pet. Br. 33 (citing March 2008 Complaint Order P 49, JA 151).

Virtual Marketers, however, are in a class of commercial entities operating in PJM's wholesale energy market, along with other commercial entities (utilities serving load and generators). As a legal matter, ultimate consumers are not simply another "class of customer" with whom Virtual Marketers are competing; rather, protection of consumers is a purpose of the Federal Power Act. *See Public Utils. Comm'n of California*, 367 F.3d at 929.

This Court has observed that when the Commission is making regulatory distinctions, the "burden is on the petitioners to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a zone of reasonableness as distinct from whether the line drawn by the Commission is precisely right." *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002) (citations and internal quotation marks omitted). Virtual Marketers cannot meet this burden, as the agency here fully explained the rationale for authorizing PJM to draw the line crediting line loss over-collection only to transmission customers contributing to the fixed costs of the grid.

III. THE COMMISSION'S DECISION TO DENY REFUNDS SHOULD BE AFFIRMED BY THE COURT

A. The Commission Was Legally Authorized To Determine The Propriety Of Refunds

Virtual Marketers' contention that the Commission had been stripped of authority to reconsider the refund issue at the time of its July 2011 Remedy Order is without legal foundation and should be decisively rejected by the Court.

The Commission initially ordered PJM to pay refunds and file a refund report in the September 2009 Compliance Order. *See id.* Ordering Paragraph (B), JA 309. In accordance with that order, PJM filed a refund report on March 1, 2010, indicating that it issued refunds to various parties.

However, as described above, s*ee* p. 14, *supra*, DC Energy, a transmission customer that exports energy from the PJM region into the Midwest, sought rehearing of the September 2009 Compliance Order on the ground that "PJM is foreclosed from requiring customers to repay" from the refund effective date "any credits they had received based on export transactions" for which they did not pay transmission charges to PJM. April 2010 Rehearing Order P 42, JA 481. This prompted the Commission's decision that PJM's refund report "does not sufficiently describe the methodology used for calculating refunds nor the parties and amounts to whom refunds are owed or credits charged." *Id.* The Commission,

therefore, not only required PJM to file a revised refund report but also authorized "[p]arties . . . to brief any issues with respect to refunds" if they objected to the new report. *Id.*, JA 482.

Thus, the Commission was on firm ground in concluding that the refund issue was not final as of the April 2010 Rehearing Order because, in response to DC Energy's rehearing request, the agency had "deferred ruling on whether its requirement to pay refunds or require surcharges to fund such refunds should be revised until it could review a comprehensive refund report" on the issue. May 2012 Rehearing Order P 27, JA 724.

In any event, the Commission went on to hold that regardless of DC Energy's rehearing request, "the Commission upon the receipt of the refund report has the authority to act *sua sponte* on this issue, as it has authority under the [Federal Power Act], 'at any time, upon reasonable notice and in such manner as it shall deem proper, [to] modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.'" May 2012 Rehearing Order P 30 & n.42, JA 726 (quoting 16 U.S.C. § 825*l*(a) and citing *North Baja Pipeline LLC*, 102 FERC ¶ 61,239 P 12 n.14 (2003) (explaining that even though specific issues are not raised on rehearing, the Commission has the authority, *sua sponte*, to modify the original order, where the proceeding is not final)).

The Commission, therefore, correctly rejected Virtual Marketers' contention that their earlier petitions for review in this Court of the March 2008 Complaint Order and the October 2008 Rehearing Order had divested the agency of jurisdiction to reconsider the refund issue. "The filing of a petition for review," the Commission observed, "does not end the Commission's jurisdiction until the record is filed with the Court." May 2012 Rehearing Order P 34 & n.48, JA 727 (citing 16 U.S.C. § 825*l*(b)).

In their brief, Virtual Marketers argue that the Commission was without authority to reconsider the refund issue because "it cannot reverse an order when it has become final by virtue of no specific challenge on rehearing." Pet. Br. 40. But Virtual Marketers are confusing the statutory requirements applicable to a party seeking review of an order with those applicable to the Commission. While section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, requires a party to file a timely request for rehearing with the Commission to preserve its right to pursue a judicial appeal, that statutory provision does not limit the authority of the agency with respect to pending orders. Rather, as the Commission indicated (May 2012 Rehearing Order P 34 & n.49, JA 727-728), this Court has long recognized that "[t]he power to correct an order remains with the Commission until such time as the record on appeal has been filed with a court of appeals or the time for filing a

petition for judicial review has expired." (quoting *Pan Am. Petroleum Corp. v. FPC*, 322 F.2d 999, 1004 (D.C. Cir. 1963) (citing *Pub. Serv. Comm'n of State of New York v. FPC*, 284 F.2d 200 (D.C. Cir. 1960)).

Virtual Marketers' complaint, originally filed on December 3, 2007, was given the FERC Docket No. EL08-14. (Addendum B to this brief is a chronology of the relevant events before the Commission in this docket). Virtual Marketers sought review in this Court of the Commission's March 2008 Complaint Order and October 2008 Rehearing Order, but those appeals were held in abeyance until the entire underlying administrative proceeding in Docket No. EL08-14 was completed. As explained above, *see supra* p. 12-17, that proceeding continued until the Commission issued the May 2012 Rehearing Order, its final decision in that docket.

The administrative record of the proceeding was not filed with this Court until September 12, 2012. "Thus," the Commission properly concluded, "because the record [had] not yet been filed in the court of appeals" as of July 2011, the agency retained "authority to modify its prior order based on the further clarification provided by PJM in its refund report." May 2012 Order P 34, JA 728.

Virtual Marketers nonetheless spend a considerable portion of their brief asserting that no party challenged FERC's directive that PJM pay refunds to

market participants that conduct Up-To Congestion transactions. Pet. Br. 42-46. (It is also the main point of the Brief of Intervenors for Petitioners 17-27.) However, even taken on its own terms, Virtual Marketers' argument is contradicted by the record.

In its timely request for rehearing of the September 2009 Compliance Order, DC Energy specifically challenged the Commission's decision to permit PJM to retroactively surcharge certain market participants for previously-distributed line loss surplus allocations. Thus, DC Energy argued that "[t]he Commission should clarify that the unsolicited change in credits applicable to exports should NOT be effected retroactive to the refund effective date." DC Energy Rehearing Request at 12, JA 344 (emphasis in original). DC Energy also referenced the Commission's "long-standing policy of avoiding retroactive implementation of rates where, as here with respect to exports, retroactive application of charges ('rebilling') or resettlement would create substantial uncertainty in the markets … and undermine confidence in them." *Id*. at 12-13, JA 344-345 (citation omitted). Therefore, DC Energy maintained, because this was a case "where market participants can neither revisit economic decisions nor retroactively alter their conduct," the Commission should act in accordance with its consistent policy to deny refunds in such a circumstance. *Id*. at 15, JA 347.

Thus, the Commission reasonably read DC Energy's rehearing request as "argu[ing] that the Commission erred if its refund condition resulted in PJM collecting back (*i.e.*, surcharging) PJM-[Midwest] exporters" and that, if so, "the Commission should 'exercise its discretion and decline refunds.'" May 2012 Rehearing Order at P 25, JA 724 (quoting DC Energy Rehearing Request at 15, JA 347).

Virtual Marketers go on to argue that, by requiring the recoupment of the previously-ordered refunds, the challenged orders require PJM to impose an unjust and unreasonable rate in violation of sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e(a). Pet. Br. 46-47.

But the Commission's orders do no such thing. In the September 2009 Compliance Order, the Commission found that the method of distributing line loss surpluses in PJM's pre-existing tariff was unduly discriminatory, and that the new methodology (subject to revisions required by that order) was "just and reasonable and will become effective, as proposed by PJM, on June 1, 2009." September 2009 Compliance Order P 32, JA 308. When it subsequently determined that no refunds were required for past periods, the Commission did not order PJM to reinstitute an unduly discriminatory methodology; rather, it simply exercised its statutory discretion to decline to order refunds. *See* 16 U.S.C. § 824e(b) ("the

Commission may order refunds of any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate").

Thus, the Commission was not reinstating PJM's previous rate, but simply requiring that the application of PJM's new allocation methodology be applied in a solely prospective manner, a permissible exercise of the agency's remedial discretion provided by the Federal Power Act. *See, e.g., Second Taxing Dist. v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming determination to make only prospective rate design changes and noting that "[r]efunds are not mandatory; the Commission has discretion to decide whether a refund is warranted in light of the interests of the customer and the utility"); *Cities of Batvia v. FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982) ("a decision by FERC not to suspend (or refund) is an exercise of *discretion*") (emphasis in original).

B. The Commission Reasonably Exercised Its Equitable Discretion In Denying Refunds

There is no dispute that PJM applied the proper methodology for collecting transmission line losses from its customers. That methodology, however, necessarily results in collections that exceed PJM's total line loss costs. *See Atlantic City Elec. Co. v. PJM Interconnection, LLC*, 117 FERC ¶ 61,169 at P 4 (2006) (discussing why PJM's marginal line loss methodology necessarily results in over-collections). Where a company has applied the proper rate, but should

have allocated revenue generated by that rate differently, the Commission traditionally declines to order refunds. July 2011 Remedy Order P 25 & n.36, JA 660 (citing cases). Surcharging entities that were allocated too much revenue would penalize them in circumstances where they "cannot alter past decisions made in reliance on a rate design then in effect." *Id*. P 26, JA 660-661 (internal quotation omitted).

Moreover, "[w]ere the Commission to require refunds without such surcharges, PJM would suffer a loss of revenue and an under-recovery of legitimate costs." July 2011 Remedy Order P 28, JA 661. This is particularly true with respect to PJM, which, "is a limited liability, non-stock company, has no corporate funds of its own to pay refunds, and . . . would have to acquire such funds either through surcharges on through an up-lift charge to all members." May 2012 Rehearing Order P 28 n.40, JA 725.

That the Commission reached this conclusion belatedly, compelling PJM to recoup refunds it previously made, is not of legal consequence. *See, e.g., Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (noting that very purpose of rehearing is to afford the Commission the chance to reconsider its earlier decisions).

It is "well settled" that this Court will "defer to [the Commission's]

decisions in remedial matters." *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 22-23 (D.C. Cir. 2006) (quoting *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998)) (internal quotation marks omitted); *see also Consolidated Edison Co. v. FERC*, 510 F.3d 333, 339 (D.C. Cir. 2007) (the Court's review "is particularly deferential when a challenge 'relates to the fashioning of remedies' where '[a]gency discretion is often at its zenith'") (quoting *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)) (additional citations omitted). Under this standard, the Commission's decision that refunds were inappropriate in this case deserves deference and should be upheld by the Court.

On brief, Virtual Marketers' attempts to argue that the Commission's denial of refunds was an abuse of discretion are without foundation. They first assert that the Commission action was inconsistent with its policy of setting the earliest possible refund date in a complaint case arising under section 206 of the Federal Power Act, 16 U.S.C. § 824e. Pet. Br. 48-49. But this is an apples and oranges comparison; while the Commission has a policy to provide refunds at the earliest date possible when such refunds are appropriate, it also has a long-established policy that in "cases involving rate design and cost allocation issues … refunds should not be required." May 2012 Rehearing Order P 39; *see also id.* P 40 & n.53, JA 729 (citing *Second Taxing District*, 683 F.2d at 490 (affirming

Commission's rejection of refunds on the ground that "the Company might be subject to undercollections from the refund because it could not collect retroactively from other customers, and that retroactive changes in rates cannot affect customer demand"); *Union Electric Co.*, 64 FERC ¶ 61,355 at 63,468 (1993) (explaining this policy)).

Virtual Marketers do assert that the Commission's policy not to grant refunds in cost allocation cases is inapplicable here because "no party alleged that it would have done anything differently had it known that [Virtual Marketers'] Up-To Congestion transactions would be receiving a share of PJM's line loss surpluses." Pet. Br. 51. In fact, before the Commission, "parties point[ed] out that, although they were not assured any specific amount of credit, they relied on the existing PJM tariff in making business decisions to export from PJM, assuming they would be entitled to at least some credit." May 2012 Rehearing Order P 43, JA 731.

Finally, Virtual Marketers claim that application of the no refund policy is inappropriate here because "the refunds paid on Up-To Congestion transactions pose no risk of anyone underrecovering legitimate costs." Pet. Br. 51. But as the Commission explained, during the 15-month refund period, "PJM paid out more in refunds [*i.e.* line loss credit] to some customers and too little to [Virtual] Marketers

and other customers." May 2012 Rehearing Order P 42, JA 730. In the absence of surcharges, PJM "would have a net shortfall and would be unable to revise its rate design retroactively to recover those funds." *Id*. Virtual Marketers have thus failed to establish that the Commission's determination was arbitrary or capricious.

IV. THE COMMISSION APPRORIATELY DENIED THE VIRTUAL MARKETERS' SECOND COMPLAINT

The Commission gave two reasons for denying EPIC's 2010 complaint challenging PJM's allocation of line loss charges and the distribution of line loss over-collections. First, the Commission found, the Virtual Marketers "have not presented any new evidence or persuasive arguments" in their second complaint "upon which the Commission could base a reconsideration" of its decision concerning the earlier complaint. EPIC Complaint Order P 22, JA 493.

Second, the Commission rejected EPIC's contention that its complaint was necessary to extend refund protection for the Virtual Marketers. In this regard, the Commission explained that "[t]he earliest a refund effective date could be set based on this second complaint is February 1, 2010." EPIC Complaint Order P 26, JA 494. Because the Commission had already established that "PJM's revised tariff provisions relating to the allocation of marginal line losses" would be effective as of June 1, 2009, the agency concluded that a refund effective date for the second complaint would be superfluous. *Id.* P 25, JA 494.

Before the Court, the Virtual Marketers contend that the Commission ignored its own precedent where it "has permitted a second complaint despite a pending investigation addressing the same issue, establishing a new refund effective date." Pet. Br. 38 (citing *Southern Co. Services., Inc.*, 83 FERC ¶ 61,079, at 61,385-86 (1998); *Consumer Advocate Div. of the Pub. Serv. Comm'n of W.V. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288, at 62,000, *reh'g denied*, 68 FERC ¶ 61,207 (1994) (*Allegheny Generating*); *San Diego Gas & Elec. Co. v. Pub. Serv. Comm'n of N.M.*, 85 FERC ¶ 61,414, at 62,577 (1998)).

The Commission, however, distinguished the cases on which the Virtual Marketers rely, explaining that "[a]ll three cases . . . involve new rate proceedings based on updated financial information, not, as in this case, an identical complaint regarding the justness and reasonableness of the same tariff provision." EPIC Rehearing Order P 15, JA 668.

For example, the Commission explained that in *Allegheny Generating*, it had "permitted a second complaint regarding the justness and reasonableness of a utility's cost of equity even though an earlier complaint considering the cost of equity was still pending." EPIC Rehearing Order P 16, JA 668. There, the Commission observed, "the new complaint was permissible because the cost of equity in the new case could be different than the cost of equity in the prior case:

'a return on equity found to be reasonable at one point in time may not be reasonable at another point in time.'" *Id.* & n.17, JA 668 (quoting *Allegheny Generating*, 67 FERC at 62,000 n.7). Thus, the Commission concluded, while in *Allegheny Generating* the new complaint essentially established a new substantive claim – a different cost of equity for a different period – not simply a reiteration of previous allegations, here the Virtual Marketers "bring up no new set of financial data or facts; they simply reargue the same positions in their second complaint." *Id.*, JA 669

The Virtual Marketers maintain that the Commission's distinction is not valid, because their second complaint offered "additional information" showing, "for the first time, the full magnitude of the marginal loss overcollection." Pet. Br. 39. But the Virtual Marketers' "new information" is merely quantitative: namely, the longer that PJM charged for line losses, the greater the amount of money involved. As the Commission explained, this is different than the qualitative difference in the later complaints in *Allegheny Generating* and the other cited cases, which involved a different rate of return for a different time period, *i.e.*, a new rate based on new and different data. The Commission's reasonable reading of its own orders warrants the deference of this Court. *See, e.g., Consumers Energy Co.*, 428 F.3d at 1067-68. Applying this standard here, the Commission's

evaluation of its precedent concerning consecutive complaints should be sustained by the Court.

The Commission's second reason for denying the Virtual Marketers' second complaint was that their quest for a new refund effective date was unnecessary. As the agency explained, the Virtual Marketers' "first complaint proceeding establishes the just and reasonable rate to be followed" by PJM for line loss allocation and crediting as of "June 1, 2009, which is well before any refund effective period established by the Second Complaint," which would be February 1, 2010. EPIC Rehearing Order P 19, JA 669-670.

Virtual Marketers claim in their brief that the Commission failed to explain why a second complaint was unnecessary "to avoid a gap in the refund period." Pet. Br. 39. But no such gap exists. In its September 2009 Compliance Order, the Commission held that PJM's tariff revision governing distribution of line loss over-collections to those who paid fixed transmission costs, including the Virtual Marketers for their Up-To Congestion charges, would "become effective . . . on June 1, 2009." September 2009 Compliance Order P 32, JA 308. Once that happened, Virtual Marketers were entitled to receive the credit for their Up-To Congestion charges. Under Federal Power Act section 206(b), "[i]n the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier

than the date of the filing of such complaint. . . .” 16 U.S.C. § 824e(b). As EPIC filed the second complaint on February 1, 2010, the Virtual Marketers had already been receiving the credit for the over-collection they were due, obviating the need for refunds.

CONCLUSION

For the reasons stated, the Court should deny the petitions for review and affirm the Commission's orders in all respects.

Respectfully submitted,

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Black Oak Energy, LLC, et al. v. FERC **Docket No. EL08-14**
D.C. Cir. No. 08-1386, *et al.*

CERTIFICATE OF COMPLIANCE

In accordance with Fed.R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 10,088 words, not including the table of contents and authorities, the certificates of counsel and the addendum.

/s/ Samuel Soopper
Samuel Soopper
Attorney

Federal Energy Regulatory
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ADDENDUM A

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applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109–58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State

[1] So in original. Section 824e of this title does not contain a subsec. (f).

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

ADDENDUM B

Commission Docket EL08-14 Chronology (Commission orders on review in these appeals are indicated in **BOLD CAPITALS)**

12/3/2007	Virtual Marketers' Complaint filed, R 1, JA 46.
3/6/2008	**MARCH 2008 COMPLAINT ORDER,** 122 FERC ¶ 61,208 (2008), JA 131.
4/7/2008	Virtual Marketers' Request for Rehearing filed, R 30, JA 155.
10/16/2008	**OCTOBER 2008 REHEARING ORDER**, 125 FERC ¶ 61,042 (2008), JA 190.
11/17/2008	PJM's Request for Clarification filed, R 38, JA 209.
12/12/2008	Virtual Marketers file Petition for Review of March 2008 Complaint Order and October 2008 Rehearing Order in D.C. Cir. No. 08-1386.
2/24/2009	February 2009 Clarification Order, 126 FERC ¶ 61,164 (2009), JA 234.
9/17/2009	September 2009 Compliance Order, 128 FERC ¶ 61,262 (2009), JA 297.
10/19/2009	DC Energy Request for Clarification and Rehearing filed, R 55, JA 332.
4/15/2010	April 2010 Rehearing Order, 131 FERC ¶ 61,024 (2010), JA 463.
5/17/2010	Integrys Request for Rehearing filed, R 99, JA 497.
6/1/2010	PJM revised refund report filed, R 101, JA 509.
7/21/2011	**JULY 2011 REMEDY ORDER**, 136 FERC ¶ 61,040 (2011), JA 651.
8/3/2011	Virtual Marketers filed request for rehearing, R 114, JA 672.
5/11/2012	**MAY 2012 REHEARING ORDER**, 139 FERC ¶ 61,111 (2012), JA 663.

Black Oak Energy, LLC, et al. v. FERC **Docket No. EL08-14**
D.C. Cir. No. 08-1386, *et al.*

Black Oak Energy, LLC, et al. v. FERC
D.C. Cir. No. 12-1286

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 21st day of December 2012, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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