ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 12-1274

IN RE BLACK OAK ENERGY, LLC, ET AL.,
Petitioners,

RESPONSE OF FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

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JULY 3, 2012

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Commission or FERC	Federal Energy Regulatory Commission
Financial Marketers	Petitioners Black Oak Energy, LLC; SESCO Enterprises, LLC; Energy Endeavors LP; Twin Cities Power, LLC, Coaltrain Energy, LP, City Power Marketing, LLC, Twin Cities Energy, LLC, TC Energy Trading, LLC, and Summit Energy, LLC.
July 2011 Order	*Black Oak Energy, LLC v. PJM Interconnection, LLC*, 136 FERC ¶ 61,040 (2011).
May 2012 Order	*Black Oak Energy, LLC v. PJM Interconnection, LLC*, 139 FERC ¶ 61,111 (2012).
Petition	Emergency Petition for Writ of Mandamus, filed June 27, 2012.
PJM	PJM Interconnection, Inc.
Rehearing Request	Rehearing Request of DC Energy and American Electric Power Serv. Corp, filed Oct. 19, 2009 in FERC Dkt. EL08-14-002.
September 2009 Order	*Black Oak Energy, LLC v. PJM Interconnection, LLC*, 128 FERC ¶ 61,262 (2009).
Stay Order	*Black Oak Energy, LLC v. PJM Interconnection, LLC*, 140 FERC ¶ 61,003 (2012).

Financial Marketers' request for a writ of mandamus directing the Federal Energy Regulatory Commission ("FERC" or "Commission") to stay the effectiveness of its orders should be denied.[1] The request arises from a billing dispute between Financial Marketers and PJM Interconnection, Inc. ("PJM"), the non-profit operator of the wholesale transmission network in the Mid-Atlantic region. Financial Marketers contend that any recoupment of certain previously-issued refunds should await judicial review of the Commission's determination that such refunds were not required, while PJM seeks to recoup the refunds now. For its part, the Commission has authorized and encouraged PJM to establish reasonable repayment schedules with market participants where appropriate.

Financial Marketers' petition is premised on the notion that they will suffer irreparable harm if PJM were permitted to recoup the refunds in its July 2012 billing cycle. But when those refunds were initially disbursed in 2010, a number of parties had rehearing requests and protests pending before the Commission which challenged the propriety of the refunds. And in July 2011 – more than 11 months ago – the Commission determined that the refunds were not required. At

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[1] Petitioners, referred to herein as the "Financial Marketers," include Black Oak Energy, LLC, SESCO Enterprises, LLC, Energy Endeavors LP, and Twin Cities Power, LLC, all of whom were parties to the Commission proceedings. Petitioners also include Coaltrain Energy, LP, City Power Marketing, LLC, Twin Cities Energy, LLC, TC Energy Trading, LLC, and Summit Energy, LLC. The Commission denied these entities' request for untimely intervention.

the very least, therefore, Financial Marketers have had nearly a year to prepare for the possibility that PJM would recoup the previously-issued refunds. Any current "emergency" thus stems from their failure to prepare for this eventuality.

Moreover, Financial Marketers filed for extraordinary relief before affording the Commission time to act on their request for agency relief. On June 15, 2012, Financial Marketers filed an emergency stay motion with the Commission. On June 27 – only one day after responsive pleadings were due before the Commission – Financial Marketers sought mandamus from this Court. Today, the Commission issued an order denying Financial Marketers' stay request. *Black Oak Energy, LLC v. PJM Interconnection, LLC*, 140 FERC ¶ 61,003, at P 1 (2012) ("Stay Order"). In that order, attached as Exhibit A, FERC authorized PJM to negotiate reasonable repayment schedules with individual market participants – thereby rendering speculative Financial Marketers' purportedly irreparable injuries.

In addition, three petitions for review arising out of the Commission's proceedings have already been filed with the Court, and are currently being held in abeyance.[2] The ongoing agency proceedings will be complete upon resolution of a recently-filed request for rehearing of the May 2012 rehearing order by certain of the Financial Marketers. The Court will thus have the merits of this dispute before

[2] The relevant petitions are *Black Oak Energy, LLC v. FERC*, D.C. Cir. No. 08-1386, *DC Energy, LLC v. FERC*, DC Cir. No. 10-1136, and *EPIC Merchant Energy NJ/PA, LP v. FERC*, DC Cir. No. 11-1275.

it in due course. There is no reason to intervene now.

BACKGROUND

This matter concerns the redistribution of surplus marginal "line loss" revenues collected by PJM from market participants. "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). In order to make up for such losses, PJM procures and delivers sufficient energy so that scheduled power demands can be met in a manner that maintains system reliability. But the manner in which the cost of such marginal line losses is factored into the price of power results in PJM over-recovering its expenditures. *See Atlantic City Elec. Co. v. PJM Interconnection, LLC*, 115 FERC ¶ 61,132, at PP 3-5 (2006) (discussing line loss and collection methodology). Accordingly, the Commission ordered PJM to develop a method to allocate such over-collections to its customers. *Id*. at P 24.

A. Challenges To PJM's Line Loss Surplus Allocation Methodology

In December 2007, certain Financial Marketers challenged PJM's allocation methodology, arguing that it unduly discriminated against parties engaged in "virtual" trades. Virtual traders bid to buy or sell power in PJM's day-ahead market, and then unwind that transaction in the real-time market, in an effort to arbitrage price differentials between those markets. *See Black Oak Energy, LLC v.*

PJM Interconnection, LLC, 122 FERC ¶ 61,208, at P 31 (2008). The complainants argued that, because virtual trades do not involve an actual transmission of power, they should not be assessed line loss charges. Alternatively, if virtual traders are assessed such charges, then they should be permitted to share in PJM's disbursements of surplus line loss charges. The Commission found that virtual traders should be assessed line loss charges, but ordered PJM to establish a methodology that allocated line loss surpluses among all market participants who support the fixed costs of the transmission system. *See Black Oak Energy, LLC v. PJM Interconnection, LLC*, 126 FERC ¶ 61,164, at P 15 (2009).

In a September 2009 order, the Commission accepted revisions to PJM's tariff (subject to additional clarifications) which allocated line loss surpluses among market participants to the extent their transactions included payment of transmission access charges. This methodology included some types of virtual transactions and excluded some types of export transactions (*i.e.*, the transmission of power to customers outside of the PJM footprint). *Black Oak Energy, LLC v. PJM Interconnection, LLC*, 128 FERC ¶ 61,262, at PP 26-29 (2009) ("September 2009 Order").

Pursuant to section 206(b) of the Federal Power Act, 16 U.S.C. § 824e(b), the Commission ordered PJM to refund to market participants any amounts in excess of those that would have been paid under the new methodology for the

period December 2007 (the date of the complaint) through March 2009 (the end of the statutory 15-month refund period). September 2009 Order at PP 33-35. In addition to ordering further tariff revisions, the Commission required PJM to file a report detailing the manner in which it allocated the line loss surpluses among market participants during the refund period. *Id*.

B. Challenges To The Commission's Refund Order

In their request for rehearing of the September 2009 Order, DC Energy LLC and American Electric Power Service Corp. – both of whom engage in export transactions – challenged the Commission's determination that PJM's revised allocation methodology should be applied retroactively. They asserted that any changes to surplus credits allocated to export transactions "should NOT be effected retroactive to the refund effective date." Rehearing Request of DC Energy and American Electric Power at 12 (filed Oct. 19, 2009 in FERC Dkt. EL08-14-002) ("Rehearing Request"). It was argued that retroactive application of the new methodology would contravene the Commission's policy of making rate changes prospective only where "market participants cannot revisit their economic decisions in light of the rate design change." *Id*. at 13.

Integrys Energy Services Inc. similarly protested PJM's submission of tariff revisions in response to the Commission's September 2009 Order. Integrys argued that permitting PJM to surcharge exports for previously-received line loss surplus

credits would violate the Commission's policy of "avoid[ing] retroactive rates and resettlements that would create substantial uncertainty in the market." Protest of Integrys Energy Servs. Inc. at 7 (filed Nov. 9, 2009 in FERC Dkt. EL08-14-004).

C. The Commission's Review of PJM's Refund Methodology

On March 1, 2010, PJM submitted a report concerning the manner in which it allocated line loss surpluses for the December 2007-March 2009 refund period. The Commission found that the report did not "sufficiently describe the methodology used for calculating refunds nor the parties and amounts to whom refunds are owed or credits charged." *Black Oak Energy, LLC v. PJM Interconnection, LLC*, 131 FERC ¶ 61,024, at P 42 (2010). Accordingly, the Commission deferred ruling on the rehearing requests and protests contesting the retroactive elimination of surplus credits for export transactions, and ordered PJM to file a more detailed refund report. *Id*. The revised report was filed on June 1, 2010.

In a July 2011 order, the Commission explained that the changes to PJM's line loss surplus allocation methodology did "not affect the overall amount of the credit," but only "provide[d] larger amounts of credit to certain parties and lower amounts to other parties." *Black Oak Energy, LLC v. PJM Interconnection, LLC*, 136 FERC ¶ 61,040, at P 28 (2011) ("July 2011 Order"). PJM reallocated the line loss surplus by "surcharg[ing] those entities which had received a share of the

surplus but which had not contributed to the fixed system costs (*viz*., the exporters who conducted PJM-to-Midwest ISO transactions)" and distributing those surcharges as refunds to "entities [that] were due a larger portion of the allocated surplus payments." *Id*. at P 19. The Commission determined that where, as here, "the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently," refunds are inappropriate. *Id*. at P 25. In such circumstances, surcharges – used to create a pool for refunds – would penalize entities that are unable to alter past decisions made in reliance on a then-effective rate design. *Id*. at P 26. And where surcharges are inappropriate, requiring refunds would cause "PJM [to] suffer a loss of revenue and an under-recovery of legitimate costs." *Id*. at P 28. Accordingly, the Commission determined that no refunds were required. *Id*.

On rehearing, the Commission rejected the Financial Marketers' various challenges to the determination that PJM need not issue refunds. *Black Oak Energy, LLC v. PJM Interconnection, LLC,* 139 FERC ¶ 61,111 (2012) ("May 2012 Order"). In response to the claim that PJM's obligation to issue refunds to virtual traders was "final" as of the September 2009 Order, the Commission explained that DC Energy's and American Electric Power's timely rehearing request unequivocally challenged the propriety of retroactive surcharges and "recognized the connection between refunds and surcharges and cite[d] a number

of cases for the proposition that the Commission should not order refunds." *Id*. at P 32. Moreover, because "refunds and surcharges are so inextricably intertwined …, challenging the question of surcharge raises the question of whether refunds should not be required in the first place." *Id*. Thus, "the refund and surcharge issue was not final as of 30 days after [the September 2009 Order], but rather was preserved by the rehearing requests and the Commission's order on rehearing." *Id*. at P 29.

A request for rehearing of the May 2012 Order, brought by certain Financial Marketers who were denied late-intervention, is currently pending before the Commission.

D. The Financial Marketers' Stay Request

On June 15, 2012, Financial Marketers filed an emergency motion to stay PJM's attempt to recoup the previously-issued refunds in accordance with the Commission's July 2011 and May 2012 Orders. After shortening the normal 15-day period for responsive pleadings, the Commission denied the stay request in an order issued July 3, 2012. Stay Order at P 1. The Commission clarified, however, that "PJM is permitted to negotiate reasonable deferred payment schedules in appropriate circumstances." *Id*. at P 25.

ARGUMENT

A writ of mandamus "is an extraordinary remedy, to be reserved for

extraordinary situations" where there is a "clear and indisputable right" to relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271, 289 (1988). Here, Financial Marketers must establish (1) a strong showing that they are likely to prevail on the merits of their appeal; (2) that, without such relief, they will be irreparably injured; (3) the lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *Washington Metro. Area Transit Comm. v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977). Financial Marketers cannot rely on unsupported assertions to meet this stringent standard, but must instead "justify the court's exercise of such an extraordinary remedy." *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985).

A. Financial Marketers Have Not Established Irreparable Injury.

A claim of irreparable injury absent a stay must be "both certain and great; it must be actual and not theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). In addition, "the movant [must] substantiate the claim that irreparable injury is 'likely' to occur." *Id.* "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Id.*

Financial Marketers seek to justify a stay by pointing to the potential economic and reputational impacts that might befall them if PJM attempts to recoup the previously-issued refunds and enforce the collateral requirements and

default provisions of its tariff. *See, e.g.*, Petition at 5, 9-13. Initially, although Financial Marketers refused to allow PJM to inspect the confidential exhibits filed with the Commission and this Court, "PJM can state … that based on its review of the financial statements that market participants have provided to PJM, some affected companies have cash on their balance sheets that would cover their liabilities to PJM." Stay Order at P 24.

Moreover, while Financial Marketers contend that they have had "almost no time to attempt to raise capital or liquidate assets to repay the refunds" (Petition at 28), they have, in fact, been on notice of the need to prepare for possible recoupment for more than two years. Stay Order at P 27. The rehearing requests filed in response to the September 2009 Order squarely called into question whether PJM could retroactively recoup previously-issued line loss surplus credits from certain market participants. *See Black Oak Energy*, 131 FERC ¶ 61,024, at P 42 ("DC Energy and AEP contend that PJM is foreclosed from requiring customers to repay any credits they had received"). Given that the surplus is a fixed sum to be allocated among market participants, challenges to PJM's ability to surcharge – *i.e.*, the funding mechanism for refunds – placed the parties on notice "that the refund issue was in dispute and there was a risk of the Commission … requiring the repayment of refunds." Stay Order at P 27.

Any doubt was eliminated in July 2011 when the Commission flatly stated

that it "will not require PJM to pay refunds." July 2011 Order at P 25. After doing so, the Commission delayed any requirement to repay the refunds until after its consideration of requests for rehearing of the July 2011 Order, thus affording the Financial Marketers further opportunity to prepare for potential recoupment. *See* Stay Order at PP 10, 27. Financial Marketers thus have "had at least 10 months prior notice in which to plan for and ensure that they have adequate resources and capitalization to satisfy the creditworthiness requirements of the PJM tariff and reimburse PJM for their refunds." *Id*. at P 28. At this point, any injury stemming from the failure to prepare for this possibility (indeed, eventuality) "is self-inflicted, and self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003). *See also Lake Tribune Pub. Co. v. AT&T Corp*., 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable."); *Lee v. Christian Coal. of Am., Inc*., 160 F. Supp. 2d 14, 33 (D.D.C. 2001) (the "irreparable harm criterion [is not met] when the alleged harm is self-inflicted").

Financial Marketers speculate that PJM's current recoupment efforts could have adverse impacts upon "market confidence and stability." Petition at 14. But such generalized claims do not establish irreparable injury. *See e.g., Wisc. Gas*, 758 F.2d at 674 ("Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur."). Indeed, during the

course of this proceeding, PJM already revised its methodology for allocating line loss surpluses without any apparent adverse impact upon the functioning of the market. Nothing supports the notion that doing so again will wreak havoc on the market as a whole, apart from any impact upon those entities that failed to prepare for this possibility.

Financial Marketers also point to the "administrative challenge" associated with recoupment of the refunds. Petition at 14. But PJM – the administrator of the market – has stated that "[t]he exact amounts to be resettled were already known with certainty," and it can accomplish the necessary reversals "in a single billing cycle that does not require 3-4 months to implement." Comments of PJM on Request For Stay at 7 (filed June 26, 2012 in FERC Dkt. EL08-14-008). This hardly supports the notion that recoupment will pose an "administrative challenge."

In any event, the entirety of Financial Marketers' claim of irreparable injury is rendered impermissibly speculative by the fact that the Commission has authorized PJM to negotiate payment plans with market participants:

> Neither the July 21, 2011 nor May 11, 2012 order prohibited PJM from proposing a deferred implementation deadline. We clarify that, in appropriate circumstances, such as where a deferred payment schedule may minimize a potential default, PJM is authorized to negotiate a reasonable deferred repayment schedule with individual market participants without seeking further Commission approval.

Stay Order at P 32. Given that Financial Marketers have had at least 11 months to

prepare for the possibility of recoupment, and now have the opportunity to negotiate a more relaxed payment plan with PJM, the record fails to support their request for extraordinary relief. *See, e.g., Wisc. Gas*, 758 F.2d at 674 (moving party must show that the "injury complained of is of such *imminence* that there is a 'clear and present' need for equitable relief").

B. Financial Marketers Have Not Shown A Likelihood Of Success On The Merits.

1. The Commission possessed authority to determine that refunds were not required.

Financial Marketers contend that the September 2009 Order finally established their right to receive refunds from PJM's line loss over-collections, and that FERC lacked jurisdiction to revisit that decision. Petition at 19-21. But the assertion that no party "challenged FERC's directive that PJM pay refunds to market participants that conduct up-to-congestion transactions" is contradicted by the record. *Id*. at 20. In their timely request for rehearing of the September 2009 Order, DC Energy and American Electric Power challenged the Commission's decision to permit PJM to retroactively surcharge certain market participants for previously-distributed line loss surplus allocations:

- "The Commission should clarify that the unsolicited change in credits applicable to exports should NOT be effected retroactive to the refund effective date." Rehearing Request at 12;
- "The Commission has a 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;

- "where market participants can neither revisit economic decisions nor retroactively alter their conduct, the Commission has consistently declined to grant refunds. The Commission should exercise its discretion and decline refunds for these same reasons in this proceeding." *id*. at 15.

The Rehearing Request thus "argued that the Commission erred if its refund condition resulted in PJM collecting back (*i.e*., surcharging) PJM-MISO exporters, like themselves" and asserted "that the Commission should 'exercise its discretion and decline refunds.'" May 2012 Order at P 25 (quoting Rehearing Request at 15).

The contention that DC Energy and American Electric Power only raised the "one narrow issue" of surcharges to exporters (Petition at 20) ignores that "the question of refunds and surcharges are inextricably intertwined, particularly in the case of a regional transmission organization like PJM,[3] and surcharges are simply the antipodes of refunds." May 2012 Order at P 28. The Rehearing Request thus "raised both the issue of surcharges exacted from other parties and the refunds that caused the need for such surcharges." *Id*.

Financial Marketers point to a single sentence in a footnote in which DC Energy and American Electric state that they "'do not seek rehearing of the

[3] "PJM, which is a limited liability, non-stock company, has no corporate funds of its own to pay refunds, and it would have to acquire such funds either through surcharges or through an up-lift charge to all members." May 2012 Order at P 28, n.40.

Commission's decision to set December 3, 2007 as the refund effective date for … those customers engaged in Up-To-Congestion transactions.'" Petition at 21 n.40 (quoting Rehearing Request at 12 n.30). The Commission did "not read this single sentence as an indication that the decision to order refunds was distinct from the issue of surcharges raised by the rehearing request." May 2012 Order at P 32. Taken in its entirety, the Rehearing Request "recognized the connection between refunds and surcharges and cite[d] a number of cases for the proposition that the Commission should not order refunds." *Id*.

2. The Commission's orders did not violate the Federal Power Act.

Financial Marketers argue that the challenged orders "require PJM to reinstitute its unlawful tariff" in violation of sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d(a), (b), 824e(b). They do no such thing. In the September 2009 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 Order at P 32. When it subsequently determined that no refunds were required for past periods, the Commission did not order PJM to reinstitute an unduly discriminatory methodology; 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 paid under the just and reasonable rate"). The Commission's decision to make only prospective changes in PJM's allocation methodology is a permissible exercise of the 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"); *City 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*").

3. The Commission reasonably declined to order 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 Order at P 25. 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*. at P 26 (internal quotation omitted). And "[w]ere the Commission to require refunds without such surcharges, PJM would suffer a loss of revenue and an under-recovery of legitimate costs." *Id*. at P 28. That the Commission reached this conclusion belatedly, compelling PJM to recoup refunds it previously made, is hardly a basis for the extraordinary remedy of mandamus. *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 decision).

Financial Marketers claim this decision was arbitrary because "no party alleged that it would have done anything differently had it known that [virtual traders] would be receiving a share of PJM's line loss surpluses." Petition at 27. 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 Order at P 43.

Financial Marketers also claim that permitting them to retain their refunds "pose[s] no risk of anyone underrecovering legitimate costs." Petition at 27. But as the Commission explained, during the 15-month refund period, "PJM paid out more in refunds to some customers and too little to Financial Marketers and other

customers." May 2012 Order at P 42. 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*. Financial Marketers have thus failed to establish that the Commission's determination was arbitrary or capricious.

C. A Stay Will Harm Other Parties.

The Court must also consider whether "a stay would have a serious adverse effect on other interested persons." *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). While Financial Marketers claim that "[a] stay harms no one" (Petition at 28), the Commission found otherwise: "In fact, the greater risk in this case is that … continued delay in recovering funds from the Financial Power Marketers might lead to unrecoverable amounts if these firms leave the PJM market or cease to exist." Stay Order at P 31. *See also id*. at P 23 (noting that "some of the parties that will be required to repay amounts have withdrawn from PJM and may no longer exist"). As the Financial Marketers note, under the terms of PJM's tariff, losses occasioned by such defaults will be spread among all remaining PJM market participants. Petition at 13.

D. The Public Interest Does Not Favor A Stay

The public interest is a "crucial" factor in "litigation involving the administration of regulatory statutes designed to promote the public interest." *Va. Petroleum Jobbers*, 259 F.2d at 925. The Federal Power Act charges FERC with

regulating the interstate transmission and wholesale sale of electricity in the public interest. *See, e.g., New York v. FERC*, 535 U.S. 1, 6-7 (2002). Because the Commission is the "presumptive[] guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a request for stay. *North Atlantic Westbound Freight Ass'n v. Federal Maritime Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968).

Here, the Commission found that the public interest would not be served by delay. Prompt enforcement of the challenged orders would permit PJM to "ensur[e] that other customers are made whole and … ensur[e] that the Financial Power Marketers participating in PJM markets maintain sufficient creditworthiness to protect against the risk of further losses to PJM stakeholders." Stay Order at P 28.

Financial Marketers contend that the prompt recoupment of the contested refunds could threaten the viability of virtual traders (such as themselves) in the PJM market. Petition at 29. But any such risk is mitigated by the Commission's grant of authority to PJM to minimize potential defaults through negotiated deferred payment schedules where appropriate. Stay Order at P 32. Financial Marketers' objection to the timing of repayments is now best presented to PJM, not to the Commission or this Court.

CONCLUSION

For the foregoing reasons, Financial Marketers' petition should be denied.

Respectfully submitted,

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July 3, 2012

EXHIBIT A

140 FERC ¶ 61,003
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Black Oak Energy, L.L.C.
EPIC Merchant Energy, L.P. and
SESCO Enterprises, L.L.C.

Docket No. EL08-14-000

v.

PJM Interconnection, L.L.C.

ORDER DENYING MOTION FOR STAY AND CLARIFYING ABILITY TO USE DEFERRED REPAYMENT SCHEDULES

(Issued July 3, 2012)

1. On June 15, 2012, a group of market participants in PJM Interconnection, L.L.C. (PJM) (collectively, Financial Power Marketers),[1] submitted an emergency motion and request for stay, seeking that the Commission stay PJM's planned implementation of the Commission's May 11, 2012 order,[2] pending the outcome of any judicial review of that order. As discussed below, the Commission denies the motion for stay. The Commission also clarifies that in appropriate circumstances PJM may negotiate reasonable deferred repayment schedules with individual market participants.

[1] In this proceeding Financial Power Marketers include: Black Oak Energy, LLC; SESCO Enterprises, LLC; Energy Endeavors LP; Coaltrain Energy LP; City Power Marketing, LLC; Twin Cities Power, LLC; Twin Cities Energy, LLC; TC Energy Trading, LLC; and Summit Entergy [*sic*], LLC. We note that Coaltrain Energy LP; City Power Marketing, LLC; Twin Cities Energy, LLC; TC Energy Trading, LLC; and Summit Entergy [*sic*], LLC join in this motion, notwithstanding they lack party status.

[2] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (2012) (May 11, 2012 Rehearing Order).

I. Background

2. Original complainants, Black Oak Energy, LLC; EPIC Merchant Energy, LLP; and SESCO Enterprises, LLC (together, Complainants) initiated this complaint proceeding challenging the method by which PJM implements its marginal line loss methodology with respect to virtual traders or arbitrageurs.[3] In general, the Commission denied the complaint, but we did grant the complaint with respect to eligibility for virtual traders to receive marginal line loss compensation for "up-to" congestion trades.[4]

3. As relevant to this motion, in the Commission's September 17, 2009 order,[5] the Commission established a refund effective date of December 3, 2007 (the date of the complaint), and required PJM to pay refunds for the full fifteen-month refund period provided in the Federal Power Act (FPA) (i.e., until March 3, 2009). The Commission further required PJM to file a refund report, which PJM tendered on March 1, 2010.[6]

4. DC Energy, LLC, and American Electric Power Service Corp. (DC Energy and AEP) timely filed for rehearing of the September 17, 2009 order. With respect to the requirement to pay refunds, they argued that "the unsolicited change in credits applicable to exports should NOT be effected retroactive to the refund effective date [because] exporters to [Midwest Independent Transmission System Operator, Inc. (MISO)] simply had no notice that their export transactions might be subject to refund."[7] In particular, they argued "the Commission has a long-standing policy of avoiding retroactive implementation of rates where, as here with respect to exports, retroactive application of charges (*viz.*, rebilling) or resettlement 'would create substantial uncertainty in the . . . markets and would undermine confidence in them'."[8] The matter they raised was

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[3] For a more in-depth background, see, e.g., *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at PP 4-14 (2011) (July 21, 2011 Rehearing Order).

[4] *See Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at PP 33-35 (2009) (September 17, 2009 Compliance Order).

[5] *Id.*

[6] September 17, 2009 Compliance Order, 128 FERC ¶ 61,262 at PP 33-35. We discuss the procedural history of the refund requirement below.

[7] DC Energy and AEP Request, Docket No. EL08-14-002, at 12 (filed Oct. 19, 2009) (citing *N.Y. Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307 (2000), *reh'g denied*, 97 FERC ¶ 61,154 at 61,673 (2001)).

[8] *Id.* at 12-13.

characterized by the Commission as "surcharges," i.e., surcharging those who may have been over-paid, or over-credited, from the marginal line loss over-collections, in order to refund those who had not been properly credited by PJM during the fifteen-month refund period.

5. On October 19, 2009, PJM submitted a compliance filing revising its tariff as directed by the Commission. Integrys Energy Services, Inc. (Integrys) protested the compliance filing contending that changes proposed by PJM in the compliance filing "retroactively den[y] those Market Participants that exported energy from PJM to [MISO] credits relating to marginal line loss surplus beginning June 1, 2009 as well as for the fifteen month refund period and is unjust and reasonable and unduly discriminatory."[9] On March 1, 2010, PJM submitted its refund filing to the Commission for the fifteen-month refund period of December 3, 2007, through March 3, 2009.

6. In an order issued on April 15, 2010,[10] the Commission addressed the DC Energy and AEP rehearing request, the PJM refund report, and PJM's compliance filing. The Commission determined that it could not resolve at that time the issue raised on rehearing by DC Energy and AEP and therefore deferred ruling. In order to obtain additional information with which to respond to this issue, the Commission required PJM to submit a more comprehensive refund report, including "whether any entity was required to repay any credits and, if so, the amount of repayment required and an explanation of why such repayment is appropriate."[11] In the same order, the Commission also responded to Integrys's protest of the compliance filing by deferring its consideration of this issue until PJM submitted its required refund report.[12]

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[9] Integrys Protest, Docket No. EL08-14-004, at 3-4 (filed Nov. 9, 2009). DC Energy and AEP raised the same argument in its request for rehearing of the September 17, 2009 Order.

[10] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024, at P 42 (2010) (April 15, 2010 Rehearing Order). In this same order, the Commission also addressed and denied requests for rehearing submitted by Complainants and the Midwest LSEs.

[11] April 15, 2010 Rehearing Order, 131 FERC ¶ 61,024 at P 42.

[12] *Id*. P 46. On May 17, 2010, Integrys filed a request for rehearing of the April 15, 2010 Rehearing Order, arguing the Commission failed to address its argument that PJM should not be permitted to reclaim any of the credits paid to exporters of energy from PJM to the MISO in order to pay for the refunds to Complainants.

7. On June 1, 2010, PJM submitted the required comprehensive report on its calculation of refunds. Parties protested the refund report on the same grounds as discussed above.

8. The Commission addressed all of the deferred rehearing and compliance issues relating to the requirement to pay refunds in the July 21, 2011 Rehearing Order. As relevant here, in the July 21, 2011 order the Commission granted rehearing and determined not to require refunds retroactively (without surcharges) on the reasoning that "PJM would suffer a loss of revenue and an under-recovery of legitimate costs."[13] The Commission explained:

> [O]rdering refunds in such a case would be unfair because it would result in a loss of revenue from the reallocation when the utility would not have the opportunity to file a new rate case to recover those revenues:
>
> "In these cases, where the utility's cost-of-service, or revenue requirement, has not been found to be unjust and unreasonable, the Commission has found that it would be unfair to require the utility to suffer a loss in revenue for periods before it can file a new rate case. In *Union Electric*, we recognized that parties cannot alter past decisions made in reliance on a rate design then in effect. We also stated that retroactive implementation of such a rate design might result in an under-recovery of legitimate costs. Accordingly, while the Commission has the authority under the FPA to set a refund effective date earlier than the date of its order (as occurred here), we have also found that such a requirement would not be appropriate, or equitable, in the case of a rate design change where, as here, a transmission owner would not be permitted to make a rate filing to recover its legitimately incurred costs."[14]

Consistent with this line of precedent, the Commission granted the requests for rehearing and, consequently, rejected PJM's refund report as moot.

9. On August 3, 2011, Complainants submitted a request for clarification or, in the alternative, rehearing, of the Commission's July 21, 2011 Rehearing Order, with a motion

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[13] July 21, 2011 Rehearing Order, 136 FERC ¶ 61,040 at P 28 & n.42.

[14] *Id.* P 26 (quoting *Occidental Chemical Corp. v. PJM*, 110 FERC ¶ 61,378 (2005) and citing *Union Elec. Co.*, 64 FERC ¶ 61,355, at 63,468 (1993)).

for leave to intervene out-of-time and a motion for issuance of stay.[15] They contended that the only refund issue addressed in the July 21, 2011 Rehearing Order relates to whether the disqualification of the exports from PJM to MISO was properly given retroactive effect in the distribution of marginal line losses, i.e., whether surcharges (of the over-payments) were properly applied to these exporters. Complainants also requested that the Commission act upon the request for rehearing prior to PJM's planned issuance of a billing adjustment to recover those refunds. On August 9, 2011, PJM filed in support of expedited consideration of the Request for Clarification so as to quickly resolve outstanding ambiguity, provide certainty to market participants, and avoid unnecessary administrative burden to the affected parties.

10. On October 31, 2011, the Secretary of the Commission granted PJM an extension of time to comply with the July 21, 2011 Rehearing Order until 60 days after the issuance of an order on rehearing of the July 21, 2011 Rehearing Order.

11. On May 11, 2012, the Commission denied rehearing of the Commission's July 21, 2011 Rehearing Order and affirmed its determination to apply the traditional policy of denying refunds in cases involving rate design and cost allocation.[16] On June 11, 2012, Financial Power Marketers filed a second request for rehearing on the same issues.

II. Request for Stay

12. On June 15, 2012, Financial Power Marketers submitted a motion requesting the Commission to stay, within seven days, PJM's implementation of the directives in the Commission's May 11, 2012 Rehearing Order with respect to refunds. Financial Power Marketers state that PJM plans to issue billing adjustments to reclaim some of the refunds in its June month-end invoices. Financial Power Marketers cite to letters received from the Chief Financial Officer of PJM requesting, pursuant to the PJM tariff, that they demonstrate sufficient resources to meet PJM's credit requirements. These letters indicate that PJM intends to recoup these losses over a period of several months beginning with the June 2012 month-end invoice. The letter then inquires as to what assets Black Oak Energy, LLC has available to satisfy its current and future obligations related to these billing adjustments, and states that unfulfilled collateral calls will result in PJM declaring the company in default of the Credit Policy in Attachment Q of the PJM Open Access Transmission Tariff.

13. Financial Power Marketers maintain that the refunds were used to pay taxes, cover employee compensation, and make distributions to investors. They maintain that the

[15] *See supra* note 1. Four of the filing Financial Power Marketers are parties to this proceeding, five are not.

[16] May 11, 2012 Rehearing Order, 136 FERC ¶ 61,040 at PP 24, 32 & n.47.

Commission's action reversing the payment of refunds "has already led to great uncertainty and panic" and PJM's imminent proposed recovery of refunds already distributed for this time period "threatens to put some companies permanently out of business."[17]

14. Financial Power Marketers maintain that their request satisfies the standard for granting a stay. They argue that the stay is needed to protect the public interest from being harmed by the lost jobs, sullied professional reputations, and chilled markets that may result from some Financial Power Marketers defaulting on PJM's invoices and going out of business.[18] Financial Power Marketers characterize PJM's decision to recapture the already-paid amounts as "arbitrary" and a "hurry up and bill approach."[19] Financial Power Marketers contend they were caught off guard with the Commission's "spontaneous reversal" of its refund determination,[20] because they had no notice. They reiterate the arguments they previously proffered following the July 21, 2011 Rehearing Order; for example, no party raises the broader refund issue on rehearing. Financial Power Marketers also point out that the public interest could be harmed absent a stay because such market resettlements are complex and multiple resettlements would result in an unnecessary waste of time, money, and resources.

15. Second, Financial Power Marketers argue that a stay is needed to limit irreparable injury to them, namely, the defaults, suspended trading privileges, sullied reputations, and lost jobs that will be the result of PJM's "accelerated" recapturing of these refunds.[21]

16. Finally, Financial Power Marketers contend that no other parties will be harmed by the stay.

17. On June 20, 2012, Financial Power Marketers submitted a letter recounting their request for a stay and the timeline and renew their request for a shorted comment period. They request that the Commission act by noon on June 27, 2012.

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[17] Financial Power Marketers Motion at 3.

[18] *Id.* at 12 (averring a "strong likelihood that one or more companies will in turn be driven out of business entirely").

[19] *Id.* at 13, 21.

[20] *Id.* at 14, 16.

[21] *Id.* at 18.

III. Notice of Filing and Responsive Pleadings

18. On June 19, 2012, a notice was issued shortening the normal 15-day answer period from July 2, 2012, to June 26, 2012.[22]

19. On June 26, 2012, PJM filed an answer. While PJM takes no position on the request for stay, it does seek to correct misstatements of fact contained in the motion, describes how it is implementing the May 11, 2012 Rehearing Order, and describes certain other facts of which it is aware that bear on the request. PJM first points out that despite confidentiality protections in the PJM tariff, Financial Power Marketers refused to share the confidential affidavits with PJM. PJM states that, in contrast to the assertions of the Financial Power Marketers, it has never supported a stay, and could not have done so when Financial Power Marketers refused to share with it the information on which the stay was premised.

20. PJM asserts that its planned implementation of the May 11, 2012 Rehearing Order is required by the Commission's orders and PJM's tariff. PJM asserts that under its tariff, it will issue bills reflecting surcharges and credits on July 9, 2012, with payment due by July 13, 2012.

21. PJM maintains that, having initially received the specific refund amounts at issue two years ago, the Financial Power Marketers were fully aware of their payment obligations. PJM states that it had previously thought it would need a deferred payment schedule to make the required bill adjustments but that it now has determined it can make the adjustments to its billing software so that a deferred payment schedule is not necessary. PJM recognizes that its staff had discussed with Financial Power Marketers the possibility of staggering payments over a three to four-month period as indicated in the June 7th letters. However, it argues that PJM staff indicated to Financial Power Marketers that no final decision had been reached on any such deferred payment schedule. PJM states that it determined not to offer a deferred payment schedule because it read the Commission's orders as requiring an immediate rebill, if possible, and because, under its tariff, any such deferred reimbursement schedule would require Commission approval.

22. PJM further clarifies that the credit requirements in its tariff permit it to issue collateral calls to participants. Under Attachment Q § I.B.3 of its tariff, PJM states "if PJM Settlement determines that a Material change in the financial condition of the Participant has occurred, it may require the Participant to provide Financial Security

[22] Financial Power Marketers had requested a three-day answer period so that answers to their 24-page pleading plus attachments, filed on a Friday at 4:29 pm, would be due on the following Monday. The notice provided eight days for responsive answers.

within two Business Days." PJM states that consistent with its past practice, it only considers deferred payment plans if security is provided.

23. PJM points out that, according to Financial Power Marketers' own pleading, some of the parties that will be required to repay amounts have withdrawn from PJM and may no longer exist. PJM states that further delay would simply elongate this already extended proceeding and further delay the relief to the entities owed monies under the Commission's July 21, 2011 Rehearing Order.

24. PJM states that because Financial Power Marketers refuse to provide their confidential affidavits to PJM, PJM is unable to comment on any specific claims of irreparable harm that may be set forth in those affidavits. PJM can state, however, that based on its review of the financial statements that market participants have provided to PJM, some affected companies have cash on their balance sheets that would cover their liabilities to PJM.

IV. Discussion

25. We will deny Financial Power Marketers' motion requesting stay, as discussed below. We will also clarify that, under the Commission's orders, PJM is permitted to negotiate reasonable deferred payment schedules in appropriate circumstances.

26. Section 313(c) of the Federal Power Act states that neither the filing of rehearing nor the filing of an appeal operates to stay the effectiveness of a Commission order.[23] Rather, a party must specifically request a stay. The standard for the Commission to grant a stay under the Administrative Procedure Act is whether "justice so requires."[24] In the circumstances here, we do not find a basis for granting a stay.

27. Financial Power Marketers were aware of the requirements of the PJM tariff and PJM credit requirements and had sufficient time to prepare for such collateral calls. Financial Power Marketers were aware as early as the initial set of rehearings of the September 17, 2009 Compliance Order that the refund issue was in dispute and there was a risk of the Commission granting rehearing and requiring the repayment of refunds.[25] But even after the Commission determined in the July 21, 2011 Rehearing Order that the refunds would have to be returned, PJM did not require Financial Power Marketers to

[23] 16 U.S.C. § 825*l* (2006).

[24] 5 U.S.C. § 705 (2006); *see also, e.g.*, *City of Vernon*, 116 FERC ¶ 61,091, at P 12 (2006).

[25] Financial Power Marketers should not reasonably have considered the refunds to be final action when the refund mechanism was challenged on rehearing.

repay those refunds at the time. Instead, the requirement to repay refunds was delayed until the Commission ruled on the Financial Power Marketers' rehearing request. That order on rehearing was issued on May 11, 2012.

28. Financial Power Marketers have therefore had at least 10 months' prior notice in which to plan for and ensure that they have adequate resources and capitalization to satisfy the creditworthiness requirements of the PJM tariff and reimburse PJM for their refunds, starting from the date of the Commission's July 21, 2011 Rehearing Order. Moreover, as both Financial Power Marketers and PJM point out, some of the companies involved in these transactions no longer participate in PJM markets and some may no longer exist. Further delay in recovering these funds will only increase the possibility that funds will not be available to repay those other PJM customers to whom funds are now owed. In these circumstances, we find that justice does not require that the Commission prevent PJM from ensuring that other customers are made whole and from ensuring that the Financial Power Marketers participating in PJM markets maintain sufficient creditworthiness to protect against the risk of further losses to PJM stakeholders.

29. Moreover, the Commission "typically does not stay its orders."[26] The Commission's general policy is to deny requests for stay "to assure definiteness and finality in Commission proceedings."[27] As the Commission explained in *City of Vernon*, "the Commission follows a general policy of denying stays of refund obligations pending further review because there is a remedy to recover refunded amounts in the event the Commission's decision is reversed or revised."[28] In *City of Vernon*, the movant contended that it would be required to amend recently-issued financial statements, adjust critical financial commitments to creditors, and make substantial adjustments to its budget, which was established in a formal, public process. The Commission denied the stay because the harm incurred could be remedied.[29] Citing to *Wisconsin Gas Co. v.*

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[26] *City of Vernon*, 116 FERC ¶ 61,091 at P 11

[27] *Id.*

[28] *Id.* (citing *High Island Offshore Sys., LLC*, 112 FERC ¶ 61,087, at P 11 (2005); *see also Olympic Pipe Line Co.*, 102 FERC ¶ 61,055, at P 16 (2003)).

[29] *City of Vernon*, 116 FERC ¶ 61,091 at PP 12-13 (citing *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("It is also well settled that economic loss does not, in and of itself, constitute irreparable harm…. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.")).

FERC,[30] the Commission stated that it is well established that economic loss does not necessarily constitute irreparable harm.

30. The Commission similarly denied a motion for stay in *Olympic Pipe Line*, where the movant alleged, as Financial Power Marketers allege here, that it would be forced into bankruptcy or become insolvent if required to refund its obligations of $16 million plus interest.[31] Applying the standard set out for motions for stay, the Commission held that "irreparable injury must be more than unfavorable circumstances, loss or loss of profits."[32] Because either the Commission or the courts could grant relief and a remedy could be sought to recover lost revenue, the Commission found that a stay was not required by the interests of justice.[33]

31. Financial Power Marketers cite two 1977 Federal Power Commission cases, *Belco Petro. Corp.*[34] and *Area Rate Proceeding*,[35] where the Commission granted a stay pending appeal.[36] But these cases involved different factual circumstances. In these cases, the refunds to producers would be disbursed to consumers and therefore might not be recoverable if the movant succeeded on appeal. Moreover, in *Belco*, the company placed the potential refunds in an escrow account to ensure they would be available if the Commission's order were affirmed. This case does not involve similar circumstances, since no refunds are being paid to consumers. In fact, the greater risk in this case is that, as noted above, continued delay in recovering funds from the Financial Power Marketers might lead to unrecoverable amounts if these firms leave the PJM market or cease to exist.

32. PJM states that it reads the Commission's July 21, 2011 and May 11, 2012 orders, and its tariff, as not permitting it to negotiate deferred payment schedules. Neither the

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[30] 758 F.2d at 674.

[31] A protesting party in this proceeding asserted that the movant's financial difficulties were caused by it paying out $51.1 million in dividends in addition to making poor investments.

[32] *Olympic Pipe Line*, 102 FERC ¶ 61,055 at P 17.

[33] *Id*. The Commission did permit a deferred payment schedule in *Olympic* to permit the pipeline time to adjust its financing and cash flow. *Id.* at P 19.

[34] *Belco Petro. Corp.*, 58 FPC 2306 (1977)

[35] *Area Rate Proceeding*, 58 FPC 1931 (1977).

[36] Financial Power Marketers Motion at 11.

July 21, 2011 nor May 11, 2012 order prohibited PJM from proposing a deferred implementation deadline.[37] We clarify that, in appropriate circumstances, such as where a deferred payment schedule may minimize a potential default, PJM is authorized to negotiate a reasonable deferred repayment schedule with individual market participants without seeking further Commission approval. Given the unique circumstances of this proceeding, we encourage PJM to negotiate such a deferred payment schedule with individual marketers when appropriate.

The Commission orders:

Financial Power Marketers' request for stay is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

[37] Since PJM was not provided with the confidential information attached to Financial Power Marketers' motion, PJM was unable to fully evaluate the claims of irreparable harm from an immediate collection of funds. PJM does note, however, that certain of the entities implicated here have sufficient cash on hand to cover their liabilities to PJM.

Financial Power Marketers' failure to make confidential information available to parties, we add, is inconsistent with Commission regulation and practice. *See West Deptford Energy, LLC*, 134 FERC ¶ 61,189 (2011) (finding that fairness requires that parties to a proceeding be able to access confidential information pursuant to appropriate protective agreements); *cf.* 18 C.F.R. § 385.206(e) (2010) ("[I]f a complainant seeks privileged treatment for any documents submitted with the complaint, the complainant must submit . . . a proposed form of protective agreement.").

In re Black Oak Energy **D.C. Cir. No. 12-1274**

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 3rd day of July 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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