

167 FERC ¶ 61,250
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Black Oak Energy, LLC
EPIC Merchant Energy, LP and
SESCO Enterprises, LLC

Docket No. EL08-14-012

v.

PJM Interconnection, L.L.C.

ORDER ON VOLUNTARY REMAND AND GRANTING REHEARING

(Issued June 20, 2019)

1. This case is before the Commission on voluntary remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).¹ At issue on remand is whether the Commission erred in: (1) directing PJM Interconnection, L.L.C. (PJM) to refund certain line loss over-collection amounts to certain financial marketers also known as virtual traders (described herein as Financial Marketers); and (2) determining that these Financial Marketers should repay the refunds that they had previously received from PJM. In this order, the Commission finds that refunds to the Financial Marketers are appropriate in these circumstances.

I. Background

2. The detailed background of this case has been set out in prior orders and will not be repeated here.² As relevant to this order on remand, Black Oak Energy, L.L.C., EPIC Merchant Energy, L.L.P., SESCO Enterprises, L.L.C., and other interested Financial Marketers initiated a complaint pursuant to section 206 of the Federal Power Act (FPA)

¹ *Energy Endeavors, LP v. FERC*, No. 16-1172 (D.C. Cir. Nov. 9, 2016) (order granting unopposed motion for voluntary remand).

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

relating to the collection of charges for transmission line losses and the disbursement of the over-collection of these charges that inevitably results from setting the locational marginal pricing (LMP) based on marginal line losses. Briefly explained, line losses occur because megawatts (MW) are lost when power is transmitted over transmission lines, i.e., the total MW-hours received by customers at the end of a transmission line are less than the total MW-hours of energy transmitted upon being produced. PJM has to dispatch additional generation to cover these losses. In order to set correct pricing signals and efficient dispatch, PJM includes in its LMP calculation the marginal price incurred in paying for the additional generation to cover line losses.³ However, including the marginal cost in LMP results in PJM collecting more in line losses than it pays to generators, resulting in a surplus.⁴ Under the PJM Open Access Transmission Tariff (tariff) at the time of the complaint, PJM would credit the over-collected amount to load, because load pays network and point-to-point transmission charges, and marginal losses are part of the payment for transmission service.⁵ The Commission, however, required that the amount of the credit could not be a direct, one-to-one reimbursement to customers for their marginal loss payments, finding that such crediting of the excess LMP revenues to those who paid would result in those purchasers no longer paying the marginal cost for energy—the basic foundation of LMP.⁶ Load, therefore, could not count on receiving any particular exact amounts of line loss credit from a transaction.

³ Other things being equal, customers near generation centers pay prices that reflect smaller marginal line loss costs while customers far from generation centers pay prices that reflect higher marginal line loss costs.

⁴ The marginal line loss price is the price PJM pays for the last MW needed to cover the amount of line loss. But this amount when applied to all the MW required for line losses exceeds the amount PJM is required to pay overall. The amount of line losses increase as load increases, so the marginal line loss exceeds the average loss for which PJM charges (e.g., if one customer with 10 MW of load causes a 1 MW line loss, and adding another customer with 10 MW of load, for a total of 20 MW of load, causes a total of 3 MW loss, PJM *charges* each customer the marginal price for the 2 MWs of line losses associated with the marginal load, although it only incurs costs for 1½ MWs per customer). For a more complete discussion of this issue, see *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 5 (2006) (*Atlantic City*).

⁵ *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,169, at P 29 (2006).

⁶ *Atlantic City*, 115 FERC ¶ 61,132 at P 24. The Commission found that “refunding excess loss revenues to the participants who incurred the losses would undermine the usefulness of including marginal losses in the LMP calculations.” *Id.*

3. The Commission denied the Financial Marketers' complaint contending that they should not be assigned marginal line losses as part of their LMP price.⁷ The Commission also denied the Financial Marketers' request that they receive a proportionate share of the marginal line loss credit, finding that the Financial Marketers are not similarly situated to load because, unlike load, they do not pay network and firm point-to-point transmission charges covering the cost of the transmission grid.

4. On rehearing, the Financial Marketers contended, in relevant part, that they should receive at least some payment for marginal line losses for their Up-To Congestion contracts that require the payment of firm point-to-point transmission charges.⁸ In 2008 and 2009, the Commission granted rehearing and ultimately found that PJM had incorrectly excluded Financial Marketers that paid transmission charges for Up-to-Congestion transactions from the allocation of marginal line loss over-collections.⁹ In addition, the Commission set the refund effective date and required PJM to pay refunds to the Financial Marketers, and submit a refund report.¹⁰

5. Two parties timely sought rehearing of the Commission's 2009 Refund Order, contending that PJM improperly imposed a retroactive surcharge in order to collect the funds to pay the refunds directed by the Commission to those entities engaging in Up-to-Congestion transactions. PJM subsequently submitted a refund report.¹¹ Based on those rehearing requests and the refund report, on April 15, 2010, the Commission directed

⁷ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208, at P 46 (2008) (concluding that all parties should pay the correct marginal price for energy).

⁸ Up-To Congestion bids, at that time, required the customer to pay transmission charges and hence contributed to the transmission system's fixed costs.

⁹ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at PP 36-49 (2008) (requiring PJM either to pay credits to the Financial Marketers or show cause why such credits should not be provided); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 23 (2009) (2009 Refund Order) (accepting PJM's proposed crediting mechanism).

¹⁰ 2009 Refund Order, 128 FERC ¶ 61,262 at PP 33-35.

¹¹ PJM, Report of Refund, Docket No. EL08-14-005 (filed Mar. 1, 2010), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12279732>.

PJM to provide additional information on how it calculated the refunds, including whether PJM assessed surcharges to obtain the refund amounts.¹²

6. PJM stated that it had recalculated the line loss credits based on the requirement in the order that parties receiving the credit needed to pay support for the PJM transmission grid. In so doing, PJM determined that load in the Midcontinent Independent System Operator, Inc. (MISO) would not be eligible for refunds as it did not pay for the PJM transmission system.¹³ PJM therefore determined that the Financial Marketers who used Up-To-Congestion transactions received refunds as did other load in the PJM system. PJM imposed surcharges on other customers to collect the funds to pay for the refunds, including load in the MISO zone that conducted transactions in PJM.

7. After receiving the additional information showing that PJM imposed a surcharge on some customers to pay the refunds to the Financial Marketers, the Commission granted rehearing and reversed its determination that PJM should pay refunds.¹⁴ The Commission noted that PJM had surcharged certain parties (by reclaiming the credits previously paid to them) in order to pay the refunds to Financial Marketers, and explained that, “[w]ere the Commission to require refunds without such surcharges, PJM would suffer a loss of revenue and an under-recovery of legitimate costs.”¹⁵ The Commission pointed to *City of Anaheim v. FERC* as indicating that section 206(b) “authorizes only retroactive refunds (rate decreases), not retroactive rate increases.”¹⁶ Because the case involved a change in the allocation of costs, the Commission reasoned

¹² *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024, at P 42 (2010).

¹³ The MISO load would not be eligible for receiving line loss credits because they receive transmission in PJM at no cost due to Commission orders eliminating the payment of through and out charges between PJM and MISO load. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 152 FERC ¶ 61,213, at PP 4-8 (2015); *see also* PJM, Second Report of Refund, Docket No. EL08-14-007 (filed June 1, 2010), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12357579> (explaining that PJM recaptured via surcharges allocations of marginal line loss payments surplus that previously had been paid to the MISO exporters).

¹⁴ 2011 Rehearing Order, 136 FERC ¶ 61,040 at P 25.

¹⁵ *Id.* P 28.

¹⁶ *Id.* P 28 n.42 (citing *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) (*City of Anaheim*)).

that, in keeping with what the Commission described as its general no-refund policy in cost allocation and rate design cases, it would not require refunds.¹⁷

8. The Commission affirmed its determination on rehearing.¹⁸ The Commission stated that its general no-refund policy in rate design and cost allocation cases is based on two rationales: (1) retroactive implementation might result in an under-recovery of costs; and (2) parties cannot alter past decisions made in reliance on a rate design then in effect.¹⁹ The Commission found its no-refund policy particularly applicable to independent system operators (ISO) and regional transmission organizations (RTO), like PJM, because they are not-for-profit entities for which any payment of refunds would result in a shortfall, and the ISO/RTO would not be able to recover those funds without a direct surcharge to other customers or up-lift charges.²⁰ The Commission found that PJM would incur such a shortfall here and would be unable to revise its rates retroactively to recover those funds, because section 206(b) authorizes only retroactive refunds (rate decreases), not surcharges (retroactive rate increases).²¹

9. On appeal, the D.C. Circuit affirmed the Commission's determination regarding line loss crediting, but remanded regarding refunds. The court found that the Commission did not sufficiently distinguish between denying refunds in the first instance and ordering recoupment after such refunds already had been paid to the Financial Marketers.²² The court stated that, in addition to explaining why it should have denied the refunds in the first place, the Commission must explain why recouping is warranted.²³

¹⁷ *Id.* P 25.

¹⁸ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 (2012) (2012 Rehearing Order).

¹⁹ *Id.* P 40.

²⁰ *Id.* PP 29, 42.

²¹ *Id.* P 42 & n.55 (citing *City of Anaheim*, 558 F.3d at 524).

²² *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 243 (D.C. Cir. 2013) (*Black Oak*).

²³ *Id.* at 244.

10. On remand, the Commission affirmed its previous determination that PJM should be able to recoup the refunds from the Up-to-Congestion holders.²⁴ Further, the Commission maintained that Financial Marketers were on notice that the Commission's initial decision to issue refunds was in question and that authorizing a return of those refunds would put all parties as closely as possible in the position in which they would have been had the Commission not departed from precedent in authorizing refunds.²⁵ The Commission reiterated on rehearing of the 2015 Remand Order that its denial of refunds was based on application of its long-standing, policy of denying refunds in cost allocation and rate design proceedings and that, under section 206(b) of the FPA, PJM would be unable to surcharge customers to cover the cost of the refunds.²⁶ The Commission concluded that its policy of not providing refunds in cost allocation and rate design cases was particularly justified in the case of a not-for-profit ISO/RTO because PJM "cannot retroactively collect more from any customer (than) that (which) has already been collected."²⁷ Having concluded that it had committed legal error by ordering refunds in the first instance, the Commission concluded that recouping refunds is consistent with court precedent permitting both refunds and retroactive surcharges to correct legal error.²⁸

11. Energy Endeavors filed an appeal at the D.C. Circuit of the 2015 Remand Order and the 2016 Rehearing Order, challenging the Commission's decisions related to the recoupment of refunds.

12. During briefing before the D.C. Circuit, the Commission submitted an unopposed motion for voluntary remand.²⁹ In that motion, the Commission identified a case it decided after the orders on review before the court, in which the Commission held that its remedial authority allows it to order surcharges to fund refunds in certain

²⁴ *Black Oak Energy, LLC v. FERC*, 153 FERC ¶ 61,231, at PP 41-49 (2015) (2015 Remand Order).

²⁵ *Id.* P 45.

²⁶ *Black Oak Energy, L.L.C v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013, at P 10 (2016) (2016 Rehearing Order) (citing *FPC v. Tenn. Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962) (*Tennessee*) and *City of Anaheim*, 558 F.3d at 524).

²⁷ *Id.* P 12 (quoting *Cities of Batavia v. FERC*, 672 F.2d 64, 85 (D.C. Cir. 1982)).

²⁸ *Id.* PP 19-26.

²⁹ *Energy Endeavors, LP v. FERC*, Unopposed Motion for Voluntary Remand, No. 16-1172 (D.C. Cir. filed Nov. 4, 2016).

circumstances.³⁰ The Commission sought a voluntary remand to allow the Commission to consider that subsequent order, *MISO*, in the context of this case. On November 9, 2016, the court granted the Commission's request for a voluntary remand. On July 31, 2018, the D.C. Circuit upheld the Commission order in *MISO*.³¹

II. Commission Determination

13. We grant rehearing, as further explained below.

14. Upon further consideration of the relevant case law and recent Commission precedent, we find that refunds are appropriate in these circumstances and reverse our refund determinations in the 2011 Rehearing Order, 2012 Rehearing Order, 2015 Remand Order, and 2016 Rehearing Order. Specifically, in assessing the equities here, we find that PJM must pay refunds of misallocated marginal line loss over-collection amounts in excess of those that would have been paid under the just and reasonable rate.³² We further find that PJM has the authority to collect such refunds from the parties that received an overpayment of the line loss credit.

A. The Commission's Refund Policy

15. The Commission in the past has referenced a general policy of not ordering refunds in cost allocation and rate design cases.³³ However, as discussed below, we find

³⁰ *Pub. Serv. Comm'n of Wisc. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205, at PP 48, 49 (2016) (*MISO*) (discussing, among other issues, the D.C. Circuit's interpretation of the Commission's remedial authority in *Xcel Energy Services, Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016) (*Xcel*)).

³¹ *Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018) (*Verso*) (*cert. denied*).

³² Financial Marketers that have not returned the amount of refunds they are due to PJM (as described below) may retain that amount.

³³ See, e.g., *Ameren Services Co.*, 127 FERC ¶ 61,121, at PP 143-148, 157 (2009) (granting rehearing of a refund order in market design case); *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193, at P 5 (2004) (accepting rate design change on a prospective basis); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983); *accord Second Taxing Dist. v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming determination to make rate design changes prospective only); *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,378, at P 10 (2005) (stating that the "Commission's long-standing policy is that when a Commission action under Section 206 of the FPA requires

that the Commission has greater discretion with respect to this refund-related issue under sections 309 and 206(b) of the FPA than was indicated by those statements.

16. The courts have recognized that section 309 of the FPA³⁴ provides the Commission with broad remedial authority, including the ability to act retroactively to correct unjust situations and to ensure that what “should have been done” is done. For instance, in *Xcel*, the Commission had allowed certain Southwest Power Pool (SPP) rates filed on behalf of a non-jurisdictional entity to go into effect without following its policy of requiring a voluntary refund commitment from the non-jurisdictional entity.³⁵ Although the Commission later admitted it made a legal error in failing to insist on a voluntary refund commitment, the Commission held that it was powerless to do more than order SPP to fix a just and reasonable rate prospectively pursuant to section 206 of the FPA.³⁶ The D.C. Circuit remanded the Commission’s orders, citing section 309 of the FPA and stating that the Commission has the authority to correct its legal error.³⁷ The court concluded that section 309 “vests the Commission with broad remedial authority” and “unquestionably gives [the Commission] the authority, in fashioning remedies, to consider equitable principles, one of which is to regard as being done that which should have been done,” and that such authority includes acting retroactively.³⁸ The court emphasized that the “primary aim [of the FPA] is the protection of consumers from excessive rates and charges” and that “[c]onsistent with this purpose, the Commission has

only a cost allocation change, or a rate design change, the Commission’s order will take effect prospectively”).

³⁴ Section 309 states, in relevant part: “The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.” *See* 16 U.S.C. § 825h (2012).

³⁵ *Xcel* 815 F.3d at 949.

³⁶ *Id.* at 953.

³⁷ *Id.* at 954.

³⁸ *Id.* at 954-55. The court pointed to its holding that the Commission could order abandonment authorizations of natural gas certificates to take effect retroactively, notwithstanding the Commission’s objection that the statute did not permit retroactive authorizations. *Id.* at 955 (citing *N. Natural Gas Co. v. FERC*, 785 F.2d 338, 341 (D.C. Cir. 1986)).

a general policy of providing refunds in the exercise of its remedial discretion.”³⁹ The court stated that “no precedent is cited, and we are aware of none, for the proposition that the Commission’s equitable authority does not encompass refunds as well as surcharges.”⁴⁰

17. As the D.C. Circuit later stated in *TNA Merchant Projects, Inc. v. FERC (TNA)*, “[t]he decision in *Xcel* makes it clear that [the Commission] enjoys broad authority when its past actions are determined to be wrong.”⁴¹ In *TNA*, the D.C. Circuit further discussed the Commission’s remedial authority under section 309 of the FPA. The court held that, beyond specific statutory strictures, section 309 affords the agency broad authority to remedy its errors and correct unjust situations, including through use of means of regulation not spelled out in detail in the FPA.⁴² Indeed, the court discussed its decision in *Black Oak* as holding that the Commission has authority to deal with the issue of whether to require PJM to recoup refunds previously ordered and paid.⁴³

18. In its recent *Verso* decision, the D.C. Circuit further addressed the Commission’s authority under the FPA to order refunds and surcharges. In the orders leading up to that decision, the Commission had granted a complaint alleging that MISO’s cost allocation method for System Support Resources (SSRs) was unjust and unreasonable because it did not follow cost causation principles.⁴⁴ The Commission eventually accepted a revised

³⁹ *Id.* at 952-53.

⁴⁰ *Id.* at 955. The court, however, did not rule on whether the Commission should order refunds or could collect surcharges, remanding that issue to the Commission. On remand, the Commission ordered both refunds and surcharges, relying on court precedent concluding that refunds and surcharges are appropriate when the Commission has committed legal error. *See Southwest Power Pool, Inc.*, 156 FERC ¶ 61,057 (2016).

⁴¹ 857 F.3d 354, 361 (D.C. Cir. 2017).

⁴² *Id.* at 359.

⁴³ *Id.* (“The breadth of FERC’s remedial authority is also evident in *Black Oak Energy . . .*”) (citing *Black Oak*, 725 F.3d at 243-44).

⁴⁴ *Verso*, 898 F.3d at 5. MISO may designate a generation resource as an SSR if operation of that resource is necessary for reliability; if MISO finds that SSR status is justified, that resource and MISO enter into an agreement to pay the resource for its continued operation on a cost-of-service basis. MISO’s tariff had provided that the costs of compensating an SSR unit in the ATC zone would be allocated on a *pro rata* basis to

SSR cost allocation method and ordered MISO to pay refunds; the Commission determined that MISO could implement the refunds through surcharges to those parties that paid too little under the previous cost allocation method.⁴⁵

19. On appeal, petitioners challenged the Commission's authority under the FPA to order surcharges to compensate MISO for the refund amounts. The D.C. Circuit upheld the Commission's refund and surcharge determinations.⁴⁶ The court began by explaining that section 206(a) of the FPA authorizes the Commission to fix rates prospectively, after it concludes that a rate is inappropriate, and that section 206(b) permits the Commission to order refunds where the previous rate was unfairly high, effectively setting the rate as of the date that the section 206 proceeding began.⁴⁷ The court noted that, while no concomitant authority exists to retroactively correct rates that were too low, section 309 of the FPA gives the Commission expansive remedial authority to advance remedies not expressly provided by the FPA, as long as they are consistent with the FPA.⁴⁸ The court found that the reallocation of SSR costs, including through surcharges, is well within the Commission's remedial authority under section 309, read in harmony with section 206; the court noted that, while the surcharges resulted in some customers paying more for past services than they were charged originally, that cost increase to a subgroup of ratepayers was not a retroactive rate increase because the aggregate rate remained the same, divided differently among the constituent payers.⁴⁹

20. The court rejected the petitioners' reliance on *City of Anaheim*, which it characterized as a case where the Commission ordered a rate increase and applied it retroactively; the court stated that rate changes may be prospective only and that "*City of Anaheim*... stands for the unremarkable proposition that [the Commission] cannot order

all load-serving entities (LSE) in the footprint of ATC. *See Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at PP 59-61 (2014).

⁴⁵ *Verso*, 898 F.3d at 7 (citing *MISO*, 156 FERC ¶ 61,205 at P 51).

⁴⁶ The court also upheld the Commission's determination that charging a *pro rata* portion of SSR costs to certain customers was unjust and unreasonable under the FPA. *Id.* at 9.

⁴⁷ *Id.* at 10 (citing 16 U.S.C. § 824e(b) (2012)).

⁴⁸ *Id.* (citing 16 U.S.C. § 825h (2012); *TNA*, 857 F.3d at 359; *Xcel*, 857 F.3d at 954-56).

⁴⁹ *Id.* at 10-11.

through surcharges what it could not otherwise accomplish directly.”⁵⁰ The court agreed with the Commission’s statement that ““*City of Anaheim* involved the Commission’s direct imposition of retroactive surcharges to effectuate a rate increase,”” while in *MISO*, ““the Commission ha[d] not changed the SSR rates.””⁵¹ The court concluded that, because the Commission’s remedial authority allows for rate reallocation, the Commission’s use of surcharges to effectuate the reallocation was squarely within its authority.

21. Having established that the Commission has the statutory authority to order a reallocation of SSR costs through refunds and surcharges, the D.C. Circuit in *Verso* next found that the circumstances supported the Commission’s decision to order refunds paid for by surcharges.⁵² The court noted that the Commission has no general policy of granting refunds where a rate has been unfairly allocated between multiple constituent payers, but the utility has received no net over-recovery. The court noted that the Commission’s default policy with respect to reallocation of refunds relies on two premises: (1) that typically it would be difficult for the utility to recover its costs fully because it would be difficult or inequitable to extract recompense from customers that paid too little; and (2) that customer firms that had made operational decisions in reliance on one set of rates would be unable to undo those transactions retroactively in light of the new, corrected rates.⁵³ The court then agreed with the Commission that neither of these circumstances was present in *MISO*. First, the court found no risk of under-recovery because *MISO* had a record of the SSR costs paid by each party and could calculate the exact amount of SSR costs that should be assessed to each party that underpaid in order to refund parties that overpaid based on the revised methodology.⁵⁴ The court also noted that *MISO*’s pertinent customer population had not changed, and so the calculation of over- and under-payments did not present any concern of inequitable recovery. Second, the court found that no challenger identified any particular decisions made in reliance on the previous SSR cost allocation methodology.⁵⁵ The court agreed with the Commission that SSR cost allocation is an out-of-market process; thus, there are no markets involved and there is no undermining of those markets, nor is there previous

⁵⁰ *Id.* at 11.

⁵¹ *Id.* (citing *MISO*, 156 FERC ¶ 61,205 at P 48).

⁵² *Id.* at 12.

⁵³ *Id.* at 12-13 (citing *La. Pub. Serv. Comm’n v. FERC*, 883 F.3d 929, at 933 (D.C. Cir. 2018) (*LPSC*)).

⁵⁴ *Id.* at 13.

⁵⁵ *Id.* (citing *MISO*, 156 FERC ¶ 61,205 at P 45).

market conduct that would have been adjusted to account for eventual refunds.⁵⁶ In other words, the court found, because the SSR costs cannot be avoided, changing rate design does not implicate market-reliance concerns.

22. Finally, the court in *Verso* found that the Commission's rationale for distinguishing the reallocation at issue was particularly compelling in light of the unique nature of the short-term, compulsory SSR agreements, and because MISO is a non-profit that itself lacks any funding to cover the costs of refunds to the parties that paid too much.⁵⁷ As a result, the court recognized that, without the ability to surcharge, the refund provision of section 206(b) would not serve as protection for customers: "[t]he only way that [the Commission's] ordered refunds may be accomplished is by collecting the necessary funds from MISO's customers."⁵⁸

23. In the instant case, we recognize that, in the 2016 Rehearing Order, the Commission referenced *City of Anaheim* and *Tennessee* for the proposition that section 206(b) of the FPA does not authorize retroactive surcharges, such as those that PJM would need to assess to other parties in order to cover the refunds paid to Financial Marketers. However, in light of the court precedent cited above, we have reconsidered our application of the *City of Anaheim* and *Tennessee* precedents and conclude that these precedents do not bar the Commission in this proceeding from ordering refunds and surcharges to enable PJM to collect such refunds from the load that received a disproportionate share of the line loss credit surplus.

24. As the D.C. Circuit found in *Verso*, *City of Anaheim* addressed the Commission's *direct* imposition of retroactive surcharges to effectuate a Commission-directed rate increase that the parties could not have foreseen. *City of Anaheim* does not prohibit surcharges in a case in which the retroactive surcharges are necessary to permit the exercise of the Commission's ability to order refunds pursuant to section 206(b).⁵⁹ Here, the Commission did order refunds to the Financial Marketers, which complies with the refund provision of section 206(b). The surcharges to other customers are necessary only because, as a not-for-profit entity, PJM must obtain those funds from the overpaid

⁵⁶ *Id.* (citing *MISO*, 156 FERC ¶ 61,205 at P 46).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 11 ("*City of Anaheim* ... stands for the unremarkable proposition that [the Commission] cannot order through surcharges what it could not otherwise accomplish directly. But reallocation is a different animal altogether, and the surcharges ordered here are part and parcel of that reallocation.").

customers. As the court found in *Xcel* and *TNA*, the Commission has the authority to act retroactively when necessary to implement the goals of the statute to correct unjust situations. Much as the court in *TNA* recognized that the Commission's discretion to act under section 309 must "conform[] with the purposes and policies of Congress and cannot contravene any terms of the [FPA],"⁶⁰ the ordering of surcharges in this case conforms with the FPA, as the Commission is ordering any surcharges required to implement the payment of refunds ordered pursuant to FPA section 206(b).

25. In the 2016 Rehearing Order, the Commission also referred to the U.S. Supreme Court's decision in *Tennessee*. In *Tennessee*, the Supreme Court ruled that when pipelines file rate cases under section 4 of the Natural Gas Act (NGA),⁶¹ the refund provision of the NGA does not authorize a pipeline to implement retroactive surcharges to some customers to cover the refunds due to other customers. The Court stated: "[An] analysis of the policy of the [NGA] clearly indicates that a natural gas company initiating an increase in rates under [section] 4(d) assumes the hazards involved in that procedure."⁶² Based on *Verso*, *Xcel*, and *TNA*, we find that our prior application of *Tennessee* is overly restrictive and that the case does not bar the exercise of the Commission's remedial authority to provide for surcharges in order to implement the refund provision of FPA section 206(b). The Commission's remedial authority to order surcharges to facilitate refunds in cost allocation cases under FPA section 206(b) was not before the Court in *Tennessee*; rather, *Tennessee* involved a pipeline's rate case filing under section 4 of the NGA in which the pipeline proposed to reallocate costs from one class of customers to another, and moved those rates into effect after a five-month suspension.⁶³ The Court concluded that the pipeline (and its shareholders) had "assume[d] the hazards involved" when it initiated a section 4 filing, including the risk of any refunds ordered under section 4, and could not recoup such refunds from those other customers who would have paid lower rates than ultimately ordered by the Commission.⁶⁴ Had *Tennessee* wanted to protect itself and its shareholders from refunds,

⁶⁰ 857 F.3d at 359.

⁶¹ 15 U.S.C. § 717c(e).

⁶² *Tennessee*, 371 U.S. at 152.

⁶³ 15 U.S.C. § 717c(e) (providing that rates become effective after a five-month suspension only "on motion of the natural gas company making the filing").

⁶⁴ *Tennessee*, 371 U.S. at 152.

it could have declined to move its cost allocation into effect until the proceeding had concluded.⁶⁵

26. Importantly, Tennessee had retained earnings and shareholders to absorb the risk the pipeline ran in moving its cost allocation into effect. As ISOs/RTOs are not-for-profit entities, they are unable to “assume the hazards” of paying refunds without the ability to obtain those funds from their stakeholders. Under this analysis, unless surcharges are permitted, the refund provision of section 206(b) would be inapplicable to ISOs and RTOs, which goes beyond *Tennessee*’s holding.⁶⁶ *Tennessee* recognized the importance of ordering refunds “since the purpose of the [NGA] is to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.”⁶⁷ Indeed, in affirming the Commission’s determination to order refunds in *Verso*, the court emphasized the difference between MISO (a non-profit entity) and pipelines with shareholders and retained earnings, concluding that surcharges were necessary in the case of a non-profit entity because otherwise customers would be left without relief from overcharges.⁶⁸ We conclude, therefore, that *Tennessee* does not prohibit retroactive surcharges in all circumstances, and refunds and surcharges are allowable in situations such as that presented here, in which surcharges are necessary if the statutory refund provision is to be honored.

27. In light of these precedents, the Commission will consider whether to require refunds in cost allocation and rate design cases based on the specific facts and equities of each case, even where such refunds must be funded through surcharges on certain parties. The Commission has an obligation under section 206(b) of the FPA to weigh the equities and provide refunds when appropriate to restore the just and reasonable rate in cost allocation and rate design cases. Indeed, the legislative intent behind passage of section 206(b) of the FPA was to correct an inequity under the statute in which customers

⁶⁵ Indeed, that is the common practice of pipelines with respect to cost allocation proposals. See *ANR Pipeline Co.*, 155 FERC ¶ 61,217 (2016).

⁶⁶ As illustrated by this proceeding and in *MISO*, ISO/RTO section 206 proceedings are typically cases involving cost allocation or rate design. Consequently, under *Tennessee* the Commission would be unable to order refunds in any FPA section 206 case.

⁶⁷ *Tennessee*, 371 U.S. at 154. The court, in fact, indicated that refunds would be expected, finding that when the rate of one class of customers is “subjected to excessive rates and a lower rate is ordered, the company must make refunds to them.” *Id.* at 152-53.

⁶⁸ *Verso*, 898 F.3d at 13.

did not receive the same refund protection when initiating a complaint as they did under section 205 rate filings by the utility.⁶⁹

B. Equitable Considerations Warrant Refunds

28. In *Black Oak*, the court found that the Commission had not sufficiently explained why it should have denied the refunds in the first place and why recouping those refunds from the Financial Marketers is warranted.⁷⁰ The courts have found that, in making such remedial determinations, the Commission's authority is at its "zenith."⁷¹ In light of the case law discussed above, we are exercising our equitable authority regarding refunds⁷² to require PJM to pay misallocated marginal line loss over-collection amounts to those Financial Marketers that engaged in Up-To-Congestion transactions. Some Financial Marketers have not returned to PJM the refunds they previously received; we will allow such Financial Marketers to retain the amount of refunds they are due.⁷³ However, as discussed below, in computing the amount of refunds and amounts that may be retained by Financial Marketers, PJM should treat MISO customers that export energy from the PJM region to MISO (the exporters) on an equal basis to PJM load.⁷⁴ We also find that

⁶⁹ See S. Rep. No. 100-491, at 3 (1988), as printed in 1988 U.S.C.C.A.N. 2684, 2685; 133 Cong. Rec. H29272-01 (statement of Rep. Moorhead); see also S. Rep. No. 100-491, at 5 (expecting the Commission "to grant refunds under section 206 [of the FPA] with comparable frequency to its granting of refunds under section 205").

⁷⁰ *Black Oak*, 725 F.3d at 244.

⁷¹ *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426, 429 (D.C. Cir. 2017) ("[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions."); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("[W]e observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions.").

⁷² *Xcel*, 815 F.3d at 956.

⁷³ Because some of the Financial Marketers already returned refunds to PJM, we will require PJM to pay refunds to all parties owed refunds. This will ensure that all parties are treated similarly whether they complied with PJM's requirement to return the refunds or retained the refunds.

⁷⁴ PJM therefore, should not eliminate completely the marginal line loss credits payable to MISO load.

PJM has authority to impose surcharges if necessary to implement this refund requirement, but should not surcharge the exporters, as discussed below.

29. In prior orders, the Commission declined to order refunds because it was concerned about its legal authority to authorize PJM, as a not-for-profit corporation, to obtain those funds through surcharges to those customers who received too large an allocation of credits. However, as discussed above, on further consideration and in light of recent case law, we find that the Commission can order such surcharges in appropriate circumstances. We find that the most equitable result here is to order refunds and permit PJM to surcharge customers.

30. Providing refunds to the Financial Marketers effectuates the refund provision in section 206 of the FPA by ensuring that the Financial Marketers received the proper amount of credit for the refund period, and we find that the equities favor ordering those refunds. This is not a case in which ordering refunds would “pull the economic rug out from under” firms “that had made operational decisions in reliance on one set of rates [and that] would be unable to ‘undo’ those transactions retroactively in light of the new, corrected rates.”⁷⁵ As noted, no party could count on receiving a specific amount of line loss credit from a particular transaction⁷⁶ and, therefore, no party could have made an operational decision based on the expectation of receiving a specific marginal line loss allocation. Moreover, because line loss credits are an out-of-market process,⁷⁷ the payment of refunds and surcharges does not affect market prices (i.e., LMP), and providing refunds would not require PJM to re-run the market and change the prices on which all customers rely. In addition, requiring refunds is particularly appropriate here because the Financial Marketers had received those payments from PJM prior to the Commission’s changing its position on rehearing.

31. While we find that refunds (and surcharges) are appropriate to ensure that the Financial Marketers receive the proper amount of credit for the refund period, we also find that PJM’s refund and surcharge calculations must account for the circumstances of

⁷⁵ *LPSC*, 883 F.3d at 933.

⁷⁶ *See supra* P 2.

⁷⁷ As explained above, *supra* note 4, the LMP market price with the line loss component determined on a marginal basis (rather than on an average basis) necessarily will result in an over-collection of line loss amounts. This over-collection is a mathematical result that happens outside of, and notwithstanding, the accurate per unit market price. Entities pay the correct LMP—comprised of the energy, congestion, and line loss components—even though the total collection of all the LMP funds produces a surplus of the line loss charge amounts on account of the marginal calculation.

the exporters to achieve an equitable result in this case. In determining refunds and surcharges, PJM originally applied its revised tariff provision (directing marginal line loss payments only to those parties that contribute to the cost of the PJM transmission system). Because the MISO load does not pay for the cost of the PJM transmission system as a result of the elimination of through and out payments, PJM paid refunds and assessed surcharges such that the exporters received no allocation of marginal line loss payments and would have to repay the marginal line loss credits they had received. In their request for rehearing of the 2009 Refund Order, certain exporters argued that they had no notice that the Commission would approve PJM's compliance filing that retroactively excluded their export transactions from credits related to marginal line loss surpluses.⁷⁸ They further argued that they had relied on the existing PJM tariff when they engaged in export transactions into MISO with the expectation that they would receive a *pro rata* share of the surplus revenues PJM allocated for transmission loss charges. They asserted that they would not have engaged in such transactions had they known that the credit methodology would change and that their export transactions would be subject to refunds.⁷⁹ They argued that the Commission should not permit PJM to surcharge them to recover refunds because market participants cannot revisit their past economic decisions.

32. Although the exporters, like other market participants, had no expectation of receiving any specific amount of line loss credits,⁸⁰ we find that the exporters should not have to repay the full amount of their marginal line loss payments and should be treated on the same proportionate basis as other PJM load. The Financial Marketers' complaint sought only a proportionate share of line loss credits and did not challenge the exporters' eligibility to receive such credits. We recognize that, in general, complaints put the parties on notice of the possibility that the challenged rate will change.⁸¹ Here, the complaint put the exporters on notice that they might lose a proportionate share of their marginal line losses.⁸²

⁷⁸ Request for Clarification and Rehearing of DC Energy and AEP, Docket No. EL08-14-002, at 11 (filed Oct. 19, 2009) (DC Energy and AEP Rehearing Request).

⁷⁹ *Id.* at 11-12; *see also* 2012 Rehearing Order, 139 FERC ¶ 61,111 at P 43.

⁸⁰ *Atlantic City*, 115 FERC ¶ 61,132 at P 24.

⁸¹ *See La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1304 (D.C. Cir. 2014) (effects on past decisions is "presumably true in every refund decision"); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 899 (D.C. Cir. 1995) ("every party's action or inaction involved some risk").

⁸² Complaint of Financial Marketers Against the PJM Tariff Provisions on the Collection and Allocation of Marginal Transmission Line Loss Revenues, Docket

33. However, the complaint did not provide notice that the exporters potentially could lose the entirety of their marginal line loss credits. The exporters, therefore, had a reasonable expectation of receiving at least some credit for line losses and their reliance would have factored into their business decisions.⁸³ In determining whether to schedule export transactions, the exporters would take into consideration the relative costs of energy in PJM and MISO, including a reasonable assumption about the receipt of a *pro rata* portion of marginal line losses.⁸⁴ Certain exporters pointed out that they would not have engaged in significant numbers of export transactions had they had notice that they would no longer be eligible for a *pro rata* share of marginal line loss allocations. DC Energy, for example, calculated that it would not have engaged in 350,000 MWh of transactions.⁸⁵ AEP stated that it engaged in over 2 million MWh of export transactions whose economics would be significantly affected by the need to repay all of its marginal line loss allocations in full.⁸⁶

34. Requiring the full disgorgement of the exporters' marginal line loss payments, in the absence of notice, would defeat those reasonable expectations. For this reason, we direct PJM to treat the exporters no differently than internal PJM load and to calculate:

No. EL08-14-000, at 14 (filed Dec. 3, 2007) (requesting a "fair share of any over-collected revenues," never challenging the tariff provision providing an allocation to exports).

⁸³ See *LPSC*, 883 F.3d at 934 (affirming the Commission's determination to order refunds based, in part, on a company's legitimate reliance on the prior rate in making business decisions); *Pub. Utils. Comm'n v. FERC*, 988 F.2d 154, 165 (D.C. Cir. 1993) (recognizing that notice has to be adequate to satisfy the filed rate doctrine).

⁸⁴ Brief of DC Energy and AEP, Docket No. EL08-14-007, at 10 (filed July 22, 2010) ("Exporters engaged in export transactions from PJM to MISO with the reasonable expectation that, under the filed and approved rate, they would receive on a per MWh basis, a *pro rata* share of the surplus revenues PJM collected for transmission loss charges."); Rehearing Request of Integrys, Docket No. EL08-14-006, at 8 (filed May 17, 2010) ("Exporters like [Integrys] engaged in export transactions from PJM into Midwest ISO with the expectation that under the PJM Tariff in effect at that time, it would receive a *pro rata* share of the surplus revenues PJM allocated for transmission loss charges... Substantial harm will arise to customers like Integrys Energy who relied reasonably on the Tariff then in effect and undertook transactions in an open and competitive market").

⁸⁵ DC Energy and AEP Rehearing Request at 10.

⁸⁶ *Id.*

(1) the refunds, with interest,⁸⁷ owed to the Financial Marketers; (2) the amounts of refunds previously paid, and not returned, that may be retained by Financial Marketers; and (3) the surcharges owed by PJM load and the exporters based on their proportionate share of the marginal line loss allocations taking into account the payment of refunds. This resolution provides the most equitable result, as it permits those engaging in Up-To-Congestion transactions to participate equally in the distribution of line loss credits while not unduly upsetting settled expectations.

The Commission orders:

(A) The Commission hereby grants rehearing, as discussed in the body of this order.

(B) PJM is hereby directed to: (1) pay refunds, with interest, and collect surcharges necessary to collect funds with which to pay those refunds, as discussed in the body of the order; and (2) allow Financial Marketers to retain the calculated amount of refunds that were previously paid to them.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁸⁷ 18 C.F.R. § 35.19a (2018).

Document Content(s)

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