

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Black Oak Energy, L.L.C.,	)	
EPIC Merchant Energy, L.P.,	)	
SESCO Enterprises, L.L.C.,	)	
Energy Endeavors, LP, and	)	
Solios Power, L.L.C.	)	
	)	
v.	)	Docket No. EL08-14-000
	)	
PJM Interconnection, L.L.C.	)	
	)	
	)	
	)	
EPIC Merchant Energy NJ/PA, LP,	)	
SESCO Enterprises, L.L.C.,	)	
Coaltrain Energy LP,	)	
	)	
v.	)	Docket No. EL10-40-000
	)	
PJM Interconnection, L.L.C.	)	

**MOTION TO DISMISS AND  
ANSWER OF PJM INTERCONNECTION, L.L.C.**

Pursuant to Rules 206, 212 and 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, 18 C.F.R. § 385.206, 212, 213 (2008), PJM Interconnection, L.L.C. (“PJM”) hereby submits this answer to the joint and several complaint filed with the Commission on February 1, 2010 (“Complaint”) by EPIC Merchant Energy NJ/PA, LP, SESCO Enterprises, L.L.C., and Coaltrain Energy, LP (collectively, “Financial Marketers”)<sup>1</sup>, challenging the lawfulness and reasonableness of PJM’s allocation of

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<sup>1</sup> As discussed below, the present Complaint filed by the Financial Markets is not materially different than the pending complaint filed by the same Financial Marketers (with the exception of an additional party, Coaltrain Energy, LP) at Docket No. EL08-14. As a result, out of an abundance of caution, and because the Financial Marketers have captioned this Complaint with, both, the EL08-14 complaint docket and a new complaint docket, PJM submits this answer to the joint and several complaint filed by all parties to these proceedings. As such, the term “Financial Marketers,” as used in this Answer, will refer, collectively to the parties identified above, and

transmission line loss charges and distribution of transmission line loss surpluses pursuant to the PJM Open Access Transmission Tariff (“PJM Tariff”) and the Amended and Restated Operating Agreement of PJM (“Operating Agreement”).<sup>2</sup> PJM also moves to dismiss the Complaint on the grounds that it is moot and constitutes a collateral attack on the Commission’s Orders in Docket No. EL08-14 (the “Marginal Line Loss Complaint Proceeding”).

## I. COMMUNICATIONS

All correspondence, communications, pleadings and other documents related to this proceeding should be addressed to and served upon:

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## II. SUMMARY

Compounding an already protracted proceeding, the Financial Marketers have now added the present Complaint to a long line of filings seeking to overturn a prior Commission decision based upon arguments, and facts, already heard and considered. Simply stated, the complaint of the Financial Marketers in this instance is untimely, administratively inappropriate, and,

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should also be deemed to include Complainants, Black Oak Energy, L.L.C., and EPIC Merchant Energy, LP (participating Complainants at Docket No. EL08-14).

<sup>2</sup> Financial Marketers state that they challenge, both, the currently effective, and relevant, PJM Tariff and Operating Agreement provisions, as well as those PJM Tariff and Operating Agreement provisions submitted to the Commission as part of PJM’s October 19, 2009, compliance filing in Docket No. EL08-14, suggesting that those provisions are somehow different. Complaint of Financial Marketers, pp. 1-2. However, it should be pointed out that the currently effective and relevant PJM Tariff and Operating Agreement provisions are the ones that were submitted to the Commission in PJM’s compliance filing since those provisions were conditionally approved by the Commission in its September 17, 2009 Order Accepting Compliance Filing, 128 FERC ¶ 61,262 (2009).

constitutes a clear impermissible collateral attack on the Commission's prior Orders in the Marginal Line Loss Complaint Proceeding, which is still pending disposition of several Requests for Reconsideration and/or Rehearing filed by interested parties relating to aspects of the proceeding.<sup>3</sup> The present complaint does not set forth new facts, or even new arguments,<sup>4</sup> which would warrant a re-litigation of the issues presented and, save for the addition of one new Complainant, involves the same parties who are parties to the underlying Marginal Line Loss Complaint Proceeding.<sup>5</sup>

Despite the procedural shortcomings of the Financial Marketers' latest round of assertions, PJM is compelled, out of an abundance of caution, to incorporate by reference all prior arguments, assertions and conclusions of law that have been made, and reiterated, by PJM in the Marginal Line Loss Complaint Proceeding.<sup>6</sup>

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<sup>3</sup> See, e.g., Request for Clarification and Rehearing of DC Energy, LLC and American Electric Power Service Corporation, FERC Accession No. 20091019-5091 (October 19, 2009); Request for Rehearing of Black Oak Energy, L.L.C., et al., of the September 17, 2009 Order under EL08-14, FERC Accession No. 20091019-5099 (October 19, 2009); Protest of Black Oak Energy, LLC, et al., and Motion for Leave to Intervene of Energy Endeavors, LP and Solios Power, L.L.C., under EL08-14, FERC Accession No. 20090416-5063 (April 16, 2009); Motion of Tenaska Power Services Company, FERC Accession No. 20100120-5053 (January 1, 2010).

<sup>4</sup> In fact, it appears that much, if not most, of the present Complaint is taken word-for-word from the Financial Marketers prior pleadings in the Marginal Line Loss Complaint Proceeding.

<sup>5</sup> Adding to the complexity of this proceeding, on October 19, 2009, the Financial Marketers filed a Request for Rehearing of the Commission's September 17, 2009 Order accepting PJM's Compliance Filing. However, and compounding the procedural quagmire Financial Marketers have created through the filing of multiple documents imploring the Commission to revisit its determination on this issue, the Financial Marketers' Request for Rehearing improperly seeks to raise the same exact issues and collaterally attack the Commissions' underlying Complaint Order and Rehearing Order, which is clearly beyond the province of a compliance proceeding. While limited, the Financial Marketers have yet to exhaust the administrative remedies available to them in the Marginal Line Loss Complaint Proceeding and, at a minimum, should be required to follow that proceeding through to its conclusion before filing a complaint in a separate docket.

<sup>6</sup> Specifically, PJM incorporates by reference the following pleadings: Answer of PJM Interconnection, L.L.C., in Docket No. EL08-14-000, FERC Accession No. 20071226-5068 (December 26, 2007); Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C. in Docket No. EL08-14, FERC Accession No. 20080304-5041 (March 4, 2008); Request of PJM Interconnection, L.L.C. for Clarification of FERC's October 16, 2008 Order

### III. MOTION TO DISMISS COMPLAINT

Fundamental principles of *res judicata* prohibit the re-litigation of identical issues, based upon the same recitation of facts, between identical parties.<sup>7</sup> Undeniably, even the most permissive reading of this doctrine would preclude the Financial Marketers' Complaint from moving forward, but the Commission has clearly expanded upon the doctrine of *res judicata* and, as a policy matter, restricts collateral attacks on final orders by parties that were active in the earlier case as doing so would thwart the finality and repose that are essential to administrative, and judicial, efficiency.<sup>8</sup> The Commission regularly applies this policy where, clearly, it serves no administrative or judicial interest to re-argue the same facts, between the same parties in interest, and should be applied in this proceeding to bar the Financial Marketers' Complaint.

In summary, the Commission has previously determined that PJM's marginal line loss surplus payment allocation is just and reasonable to the extent that it allocates the distribution of

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re Black Oak Energy, L.L.C. et al., in Docket No. EL08-14-001, FERC Accession No. 20081202-5097 (December 2, 2008); Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C., under EL08-14-001, FERC Accession No. 20081217-5142 (December 17, 2008); PJM Interconnection, L.L.C. submits revised Open Access Transmission Tariff and Restated Operating Agreement sheets to comply with the directives in the FERC February 24, 2009 Order in Docket No. EL08-14, FERC Accession No. 20090327-0017 (March 26, 2009); Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C., in Docket No. EL08-14-002, FERC Accession No. 20090501-5121 (May 1, 2009); PJM Interconnection, L.L.C., submits request for Extension of Time to Pay Refunds and File Refund Report as Required by Commission Directive in the September 17, 2009 Order at Docket No. EL08-14-004, FERC Accession No. 20091020-0049 (October 19, 2009).

<sup>7</sup> See, *National Commission for the New River, Inc. v. Federal Energy Regulatory Commission*, 433 F.3d 830, 834, 369 U.S. App. D.C. 63 (D.C. Cir. 2005) (quoting *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004)).

<sup>8</sup> *San Diego Gas and Electric Company v. Public Service Commission of New Mexico*, 86 FERC 61,253 (1999), see also, *Pacific Gas & Electric Company*, 121 FERC 61,065 at P.38 (2007); *Alamito Company*, 41 FERC 61,312 at 61,829 (1987), order on reh'g, 43 FERC 61,274 (1988), citing, *Central Kansas Power Company, Inc.* 5 FERC 61,291 at 61,621 (1978) ([I]n the absence of new or changed circumstances requiring a different result, 'it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have finally been determined.'")

that surplus to those participants who contribute the fixed costs of the transmission system.<sup>9</sup> Financial Marketers, apart from specific Up-to Congestion transactions, do not contribute to the fixed costs of the transmission system and, therefore, are not entitled to a distribution of the surplus of those marginal line loss payments.<sup>10</sup> The Commission has approved, and clarified that, although there may be a number of lawful alternatives, this method is just and reasonable because the parties to whom the surplus is allocated bear the fixed costs of the grid, and the Financial Marketers, through the balance of this proceedings, have offered no justification whatsoever for the Commission to reverse this holding.<sup>11</sup> The issue of whether Financial Marketers should pay marginal line losses and the notion that the surplus of those payments should be allocated to those who pay any form of transmission costs, including transmission line losses on a volumetric basis, have already been considered and denied by the Commission.

In spite of these findings, the Financial Marketers have, again, attempted to use an improper procedural vehicle to attack the Commission's prior determinations on this issue, resembling an approach they utilized in the Marginal Line Loss Complaint Proceeding. As the Commission observed there:

[Financial Marketers] reiterate in their protest and answer what the [Financial Marketers] previously have argued, namely, that they believe the most equitable allocation of the marginal line loss surplus would be to consider the virtual transactions' proportional share by volume of all Day-Ahead transactions. [Financial Marketers] argue again that, because virtual transactions are going to be subject to transmission line loss charges, it is just and reasonable that such transactions be included in any distribution of transmission line loss over-collections. This argument was addressed and rejected in the Rehearing Order; their protest here is a collateral attack on the Commission's decision in that order. Moreover, as we have stated throughout this proceeding and reiterate again,

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<sup>9</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 (2008) ("Rehearing Order").

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, clarified at, *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 126 FERC ¶ 61, 164 (2009) ("Clarification Order").

the payment of marginal line losses should not be the criteria for determining who receives the credit...[a]ccordingly, as the Commission previously said, we continue to find PJM's method of distributing returns of the surplus to those parties that support and pay for the fixed costs of the transmission grid to be a reasonable basis for determining the credit.<sup>12</sup>

Despite this previous admonishment by the Commission, the Financial Marketers have continually squandered the administrative process in the interim, thereby requiring PJM, and Intervenors, to expend resources unnecessarily in responding to complaints, requests for rehearing and/or reconsideration and protests on matters already decided by the Commission.

Plainly, the Financial Marketers are aware of this procedural limitation and have attempted to assert that the present Complaint differs from the underlying Marginal Line Loss Complaint Proceeding because it seeks to establish a new refund period and is a challenge to the provisions of the PJM Tariff and the Operating Agreement which were filed in compliance with the Commission's directives in the Marginal Line Loss Complaint Proceeding.<sup>13</sup> But, these assertions, by themselves, fail to establish a material difference. The Financial Marketers simply parrot their prior arguments relative to the unjustness and unreasonableness of PJM's allocation of marginal line loss surpluses; indeed, they even adopt, by reference, all the allegations and assertions they have made in prior pleadings in the Marginal Line Loss Complaint Proceeding, and then reiterate the same arguments in the remainder of the present Complaint.

Additionally, the assertion that the Financial Marketers' Complaint is somehow legitimized as an instrument to ensure that no party to this proceeding will "...invoke the 15 month limitation in Section 206(b) of the Federal Power Act as a basis for denying Financial

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<sup>12</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262 at P. 31 ("Compliance Order").

<sup>13</sup> Complaint of Financial Marketers, pp. 1-2, 5.

Marketers relief for the period beyond March 3, 2009” is, clearly, not a valid basis to abandon the principle of *res judicata* since Commission precedent prohibits the setting of successive 15-month refund effective dates for duplicative complaints.<sup>14</sup> Meanwhile, the proper proceeding to challenge PJM’s current Tariff and Operating Agreement provisions, filed in compliance with the Commission’s directives in the Marginal Line Loss Complaint Proceeding, is in the course of that proceeding, which is still pending (although, a very limited and narrow opportunity to challenge those provisions exists). Therefore, Financial Marketers’ contentions here fail to provide a proper basis to defeat PJM’s Motion to Dismiss in this instance.

Clearly, the Financial Marketers are disappointed with the Commission’s ruling in the Marginal Line Loss Complaint Proceeding as evidenced by their request for rehearing of the September 17, 2009 Order. The Financial Marketers, however, cannot utilize the present Complaint to reiterate their arguments as doing so is an impermissible collateral attack on the Commission’s prior orders in Docket No. EL08-14-000. As a result, under the Commission’s precedent, and the established doctrine of *res judicata*, Financial Marketers’ claims are barred and the Commission should dismiss the Complaint.

#### **IV. ANSWER**

Even if the Commission does not dismiss the Complaint as a collateral attack on an existing Commission order, the Commission should, in any event, dismiss the Complaint because the Financial Marketers are requesting relief that would be in contravention of the Commission’s orders, PJM Tariff and Operating Agreement. However, rather than burdening the Commission by addressing those issues in-kind once again, PJM incorporates, by reference,

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<sup>14</sup> *Consumer Advocate Division of the Public Service Commission of West Virginia, et al. v. Allegheny Generating Company*, 67 FERC 61,288 (1994).

all prior arguments, assertions and conclusions of law that have been made, and reiterated, by PJM in the Marginal Line Loss Complaint Proceeding.

## V. CONCLUSION

For the foregoing reasons, PJM respectfully requests that the Commission dismiss Financial Marketers' Complaint. In the alternative, PJM respectfully requests that the Commission afford due consideration to this answer and deny the relief requested by the Financial Marketers in their Complaint.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.



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