IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| PJM INTERCONNECTION, LLC, and PJM SETTLEMENT, INC., | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. N12C-11-062-CEB |
| CITY POWER MARKETING, LLC, ENERGY ENDEAVORS, LLC, ENERGY ENDEAVORS LP, and CRANE ENERGY, INC., | ) | |
| Defendants. | ) | |

Date Decided: June 12, 2013
Date Submitted: May 24, 2013

**MEMORANDUM OPINION.**
*Upon Consideration of Defendants' Motion to Stay.*
**DENIED.**

Richard A. Barkasy, Esquire and Fred W. Hoensch, Esquire, SCHNADER HARRISON SEGAL & LEWIS, LLP, Wilmington, Delaware. Han Nguyen, Esquire and Arleigh P. Helfer, III, Esquire, SCHNADER HARRISON SEGAL & LEWIS, LLP, Philadelphia, Pennsylvania. Attorneys for the Plaintiffs.

Theodore J. Tacconelli, Esquire and Rick S. Miller, Esquire, FERRY JOSEPH & PEARCE, P.A., Wilmington, Delaware. Jared S. des Rosiers, Esquire and Benjamin W. Jenkins, Esquire, PIERCE ATWOOD, LLP, Portland, Maine. Attorneys for the Defendants.

**BUTLER, J.**

## INTRODUCTION

The Court is here called upon to rule on a motion filed by defendants to stay this breach of contract action while other parties with similar interests litigate a similar dispute in the Court of Appeals for the District of Columbia Circuit. A second basis for defendants' request is that one of them has requested review of a key factual finding by the Federal Energy Regulatory Commission ("FERC").

## FACTUAL BACKGROUND

The complaint is brought by PJM Interconnections, L.L.C. and its affiliate PJM Settlement, Inc.[1] PJM is a Regional Transmission Organization ("RTO") that coordinates and directs the operation of the electric transmission grid over 214,000 square miles encompassing all or parts of thirteen states and the District of Columbia.[2] PJM is neither a manufacturer nor a direct supplier of electric power. Rather, it functions somewhat like the stock exchange, administering a competitive market in electricity. There are approximately 830 "members" of PJM who participate in the market administered by PJM. Broadly speaking, there are two types of "members" in the PJM wholesale market that are relevant to this motion: "load serving entities" who purchase and sell electricity from manufacturers or suppliers and sell it to downstream members to meet the demand of consumers,

[1] For purposes of this motion, the interests of both plaintiffs are aligned and they will be referred to collectively as "PJM."

[2] Amended Complaint ¶ 1.

and "financial members" who purchase and sell the rights to receive or sell electricity at the wholesale level. Defendants are each financial members of the PJM regional market.

PJM is heavily regulated by FERC. Indeed, RTOs themselves grew out of a FERC initiative.[3] The Commission encouraged the voluntary formation of RTOs to administer the transmission grid on a regional basis throughout North America. FERC Order No. 2000 delineated the characteristics and functions that an entity must satisfy in order to become an RTO.[4]

As an RTO, PJM has some autonomy from its constituent members, but very little autonomy from FERC. The controversy before the Court concerns certain rulings by FERC involving "line losses" and distributions ordered by FERC and then reversed by FERC.

"Line losses" refers to that amount of electric power that is lost, or dissipated, over the length of the transmission of power. Under FERC's rules, the producer of the electric power is entitled to compensation for the line losses that occur during transmission.[5] PJM duly collected a tariff from its members to compensate for these line losses. The exact methodology used to compute the

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[3] Amended Complaint ¶ 9.

[4] 89 FERC ¶61,285 (Issued December 1, 1999).

[5] Amended Complaint ¶14.

compensation was a matter of some dispute; PJM was directed to abandon its "average cost method" for computing line losses and replace it with a "marginal cost method." Apparently this change in methods resulted in PJM collecting more in revenues than was needed to cover the total loss costs.[6] FERC ordered that the "over collection" be reversed by payouts or rebates to members.

Pursuant to the FERC rulings, PJM made financial distributions of the loss surplus to defendants and others. These amounts were not insubstantial: defendant City Power Marketing, LLC ("City Power") received more than $17 million and defendant Energy Endeavors, LLC received over $6 million.[7]

In 2011, FERC was asked to reconsider its ruling. FERC did so and eventually reversed its previous position, directing PJM to recoup the payments made by reason of FERC's previous ruling.[8] By then, however, the payments had been made to defendants and defendants have thus far not agreed to return the money to PJM as ordered by FERC.

Defendants' resistance has been pronounced: they asked FERC to reconsider its reconsideration, an effort that was for naught.[9] They filed for an emergency

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[6] *See Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.* 136 FERC ¶61,040 (July 21, 2011).

[7] Amended Complaint ¶¶23, 24.

[8] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.* 136 FERC ¶61,040 (July 21, 2011).

writ with the U.S. Court of Appeals for the District of Columbia Circuit seeking to stay PJM's collection efforts. Again, they were denied.[10] They filed again with FERC seeking a stay and again they were rebuffed.[11] Other financial members of PJM (not these defendants) have sought further review of FERC's orders in the D.C. Circuit – an action that has been briefed, argued and is currently awaiting decision by that Court.[12] Because the "legitimacy" of FERC's order to recoup the payouts is central to this breach of contract action, defendants want this Court to stay plaintiffs' breach of contract action until the D.C. Circuit rules on whether FERC properly ordered the recoupment. It is defendants' view that if the D.C. Circuit reverses the FERC ruling ordering PJM to recoup the funds, defendants will not be required to pay anything and PJM will be forced to dismiss this complaint.

Taking plaintiffs' well pleaded allegations as true for the purposes of this motion, defendants received money to which (it turns out) they were not entitled, they are obligated to give it back, and they have not done so. The members of the

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

[10] *In re: Black Oak Energy, L.L.C. et al.*, United States Court of Appeals for the District of Columbia Circuit, No. 12-1274.

[11] Amended Complaint ¶28.

[12] *Black Oak Energy, L.L.C. et al. v. Federal Energy Regulatory Commission*, No. 08-1386, 11-1275, 12-1286 (consolidated).

PJM RTO are all signatories to an "Operating Agreement" that spells out the rights and responsibilities of the parties. Plaintiffs contend that defendants have breached the Operating Agreement and under its terms, should be ordered to repay the money in contract damages.

At some point, PJM apparently grew frustrated enough with one of the defendants here – City Power – to move its expulsion from membership with PJM.[13] PJM filed an action before FERC seeking approval of the ouster, urging that City Power had committed two or more "events of default" within a 12 month period – a necessary predicate for ouster under the Operating Agreement.[14] One of the two events of default cited by PJM was City Power's failure/refusal to return the $17 million it had received by reason of the (now reversed) FERC directive. City Power defended its retention of the money by pointing to language in the Operating Agreement that requires PJM to settle its accounts with its members within 2 years of a payment or be barred from further attempts to collect it.[15] In this way, FERC was called upon to decide whether this clause applied when the dispute was over PJM's efforts to collect monies it has been ordered by FERC to

[13] Section 4.1(c) of the Operating Agreement requires that a termination of any member must be filed and approved by FERC.

[14] Operating Agreement section 15.1.6.

[15] Operating Agreement section 15.6(a).

recoup. FERC rejected City Power's argument.[16] Pointedly, this is the same argument raised in defendants' sixth affirmative defense here as well as their counterclaim. That ruling is also subject to City Power's motion for reconsideration, currently pending before FERC.[17] Thus, according to City Power, this Court should stay this action because if FERC reverses its position, City Power's defense to this action will be complete and PJM will of necessity be forced to withdraw the complaint.

## ANALYSIS

Motions to stay proceedings are directed to the sound discretion of the Court.[18] The Court's discretion is informed by a close look at the contentions of the parties and the policies that underlie the grant or denial of a stay.

For example, a stay of discovery is often sought during the pendency of a motion to dismiss a complaint.[19] In such cases, the complaint and all its reasonable inferences is examined, unencumbered by an expanded record that would inevitably come with pretrial discovery. Discovery naturally comes with litigation

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[16] *PJM Interconnection, L.L.C.* 142 FERC ¶61,019 (Issued Jan. 8, 2013).

[17] *PJM Interconnection, L.L.C.* FERC Docket No. ER13-349-001 (Issued March 4, 2013).

[18] *E.g.*, *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 731 A.2d 811, 815 (Del. 1999) (*citing Am. Ins. Co. v. Synvar Corp.*, 199 A.2d 755, 757 (1964)); *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (1986).

[19] E.g. *Szeto v. Schiffer*, 1993 WL 513229 (Del. Ch. Nov. 24, 1993); *Delaware Dep't of Transp. v. Amec E & I, Inc.*, 2012 WL 1409307 (Del. Super. Jan. 3, 2012).

expense – expense that is unnecessary if the case is to be dismissed at the bare pleading stage. A stay of discovery while the complaint is reviewed is often cost beneficial and serves an important housekeeping function by allowing the Court to quickly and efficiently dispose of non-meritorious cases. But the Court must also be careful not to let a stay motion be used as a device to forestall inevitable discovery and to delay plaintiff's right to relief.

In this case, defendants have not moved to dismiss the complaint. Plaintiffs have moved to dismiss a counterclaim and an affirmative defense but the Court has ruled on this motion and plaintiffs are certainly not seeking a stay in any event. Therefore, the considerations that might apply where a stay is sought while a motion to dismiss is pending are not present here and the Court does not find these cases helpful in determining the issue presented.

A second common basis for seeking a stay is pending appeal. Of course, the stay in such cases is a stay of execution, not of discovery. In such cases, the balance of the equities has shifted strongly in favor of the nonmoving party.[20] Stays pending appeal to the Delaware Supreme Court "shall be granted upon filing and approval of sufficient security."[21] While plaintiffs here are drawn to this

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[20] *See, Kirpat v. Delaware Alcohol and Beverage Comm'n*, 741 A.2d 356 (Del. 1998)(Court must balance equities in deciding a motion to stay pending appeal).

[21] Delaware Supreme Court Rule 32(c).

analysis, defendants find it completely inappropriate. We note that nothing has been decided in this case and the "pending appeal" cases are therefore inapposite.

*McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, probably comes as close to the mark in informing the Court's discretion as can be found.[22] The "*McWane* doctrine" holds that principles of comity ought to be considered in deciding whether to stay litigation in favor of a dispute that has already been filed in another forum. *McWane* says that the Court's discretion "should be exercised freely in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues…"[23]

We can accept – without deciding for now – that the FERC ruling vitiating defendants' defense under the 2 year term in the Operating Agreement is at least highly relevant to this lawsuit. And it is unquestionably true that if the D.C. Circuit rules that FERC improperly ordered PJM to recoup the payments it made to defendants, such a ruling would have a profound impact on this case.

But the reverse is not also true: a ruling by the D.C. Circuit that FERC acted appropriately and that plaintiffs are right in their efforts to secure return of the money does not mean defendants will promptly make good on the debt. While

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[22] 263 A.2d 281 (Del. 1970).

[23] *Id.* at 283.

defendants are quick to point out that should they receive favorable rulings from either forum this lawsuit will be either severely hobbled or disappear altogether, they have not suggested that unfavorable rulings will be similarly dispositive here. Indeed, we can fully expect that if and when there is a "final" ruling from either forum against defendants they will continue to seek relief from those rulings, thus bottling up this dispute for the interminable future.[24]

What distinguishes this dispute from the guidance of the "*McWane* doctrine" is that the litigation that is ongoing in the District of Columbia is not in a forum that affords plaintiff access to complete relief. Indeed, defendants have urged in defense of their counterclaim that the counterclaim had to be filed in this state court action because FERC has no power to issue awards of money damages against a litigant. So even defendants agree that neither FERC nor the D.C. Circuit is "capable of doing prompt and complete justice." This factor speaks clearly against granting a stay in this case.

There are other difficulties with defendants' position. If plaintiffs' complaint is correct, defendants collectively have received more than $20 million that they must give back. According to the FERC opinion ratifying the ouster of defendant City Power from PJM, City Power is an entity with but one employee

[24] *See generally, Harbor Ins. Co. v Newmont Min. Corp.*, 564 A.2d 352 (Del. Super. 1989)(stay denied where action in the other jurisdiction is not between the same parties and lies in an intermediate appellate court, thus assuring further litigation: the other forum does not promise prompt resolution of the disputed issue).

and upon receiving the invoice from PJM for the $17 million recoupment, it responded that it did not have the money.[25] Additionally, in their motion to stay, defendants affirmatively aver that "any post-judgment proceeding could be followed by additional litigation in the bankruptcy court" – a statement that does not bode well for the *res* that is the subject of this litigation.[26] Finally, plaintiffs have appended a letter from defendant Energy Endeavors, LLC advising that it has withdrawn from PJM and that "Energy Endeavors, LP does not have any assets or the intention to pay any amounts reflected on the threatened billing adjustments."[27] Plaintiffs suggest that Energy Endeavors has already distributed the funds it received as a result of the reversed FERC order to its members, deeply complicating plaintiffs' efforts at recovery. While none of these factors individually is determinative, taken together they leave the Court concerned whether defendants' efforts to stay this litigation are completely benign.

Plaintiffs' position is that there is nothing for which to wait. There have already been "final rulings" by FERC -- first that PJM should commence procedures to recoup the money and second that the 2 year limitation in the Operating Agreement is ineffective as a defense to those efforts. Neither ruling

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[25] *PJM Interconnection L.L.C.* 142 FERC ¶61,019 (issued Jan. 8, 2013).

[26] Brief in Support of Defendant's Motion to Stay at 8.

[27] Ex. A to Plaintiffs' Response to Defendants' Motion to Stay.

has been stayed by either FERC or the D.C. Circuit even though both were asked, both have the power to do so, and both have declined.

The Court understands and takes seriously the principles of comity expressed by the *McWane* doctrine. The Court is reluctant to issue final rulings in this case without the benefit of rulings on the issues currently before FERC and the D.C. Circuit. On the other hand, the Court is currently assigning trial dates in mid 2014, providing more than enough time for those forums to rule on the matters before them.

There is a final consideration that the Court considers significant but is not often discussed. The parties do not fundamentally disagree on what happened here: defendants received money pursuant to an order from FERC and when FERC reversed its decision and said they received the money improperly, defendants have refused to give it back, causing plaintiff to sue. Defendants urge they do not owe the money because the Operating Agreement bars plaintiffs' effort to recover. While either or both parties may dispute the observation, this does not appear to be a case in which factual disputes will predominate. Although the Court is sensitive to the expense of pretrial discovery, this is not a case in which discovery will be the cost driver it is in other cases. On the other hand, delay is frequently no friend of justice and a stay of discovery can sometimes be used as a vehicle to forestall a conclusion to the litigation. A different case might balance the equities differently,

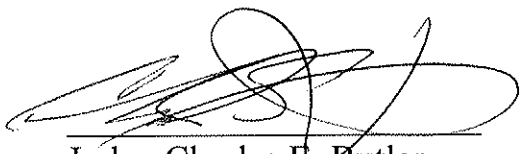
this one has some very direct issues that do not lend themselves to intensive, expensive discovery.

The Court therefore believes the prudent course is to allow the parties to engage in such discovery as is necessary to prepare this case for a prompt trial once FERC and/or the D.C. Circuit have ruled. This is not to suggest that the Court is powerless to rule until there has been a further order from one of those bodies; only that we are not convinced we should wait to begin to flesh these issues out.

**CONCLUSION**

For all of the above reasons, the defendants' motion to stay these proceedings is **DENIED.**

**IT IS SO ORDERED.**



Judge Charles E. Butler