125 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

In re Edison Mission Docket No. IN08-3-001

ORDER DENYING MOTIONS TO INTERVENE AND DISMISSING REQUESTS FOR CLARIFICATION AND REHEARING OF ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued October 7, 2008)

1. On May 19, 2008, the Commission issued its Order Approving Stipulation and Consent Agreement, closing the Commission's investigation in this docket.[1] On June 18, June 20, and July 2, 2008, various entities sought intervention in the captioned proceeding (collectively, movants), many for the purpose of seeking clarification or, in the alternative, rehearing of the Commission's May 19 Order. For the reasons discussed below, we deny the motions to intervene and, accordingly, dismiss the requests for rehearing and the other requests for relief.

I. Background

2. The background of this proceeding is set forth in some detail in the May 19 Order and in the Stipulation and Consent Agreement itself. In brief, the Commission's Office of Enforcement conducted a non-public investigation pursuant to Part 1b of the Commission's regulations (Part 1b investigation), 18 C.F.R. Part 1b, into the behavior of certain Edison Mission entities[2] in PJM Interconnection, LLC (PJM). These entities own and operate generation units that are designated as capacity resources pursuant to the PJM tariff. The Part 1b investigation focused on whether these entities may have violated any statute, rule or regulation administered by the Commission by engaging in a "high offer strategy." In simple terms, this high offer strategy involved offering capacity resource generation units in the day-ahead market at prices near the PJM bid cap, which

[1] *In re Edison Mission*, 123 FERC ¶ 61,170 (2008) (May 19 Order).

[2] The specific entities under investigation were Edison Mission Marketing & Trading, Inc.; Midwest Generation, L.L.C.; and Edison Mission Energy (together, Edison Mission).

resulted in those resources being taken in the PJM real-time market, rather than in the PJM day-ahead market. Throughout the investigation Edison Mission maintained that it had legitimate business reasons for engaging in the high offer strategy.

3. Over the course of the Part 1b investigation, Edison Mission made representations to staff that turned out to be incomplete or inaccurate, and which resulted in the misallocation and misdirection of staff resources. Edison Mission maintains that it did not intend to mislead staff, but it concedes that many of its responses to staff's inquiries lacked due care and that staff was misled as a result.

4. The Part 1b investigation was resolved by settlement, embodied in the Stipulation and Consent Agreement (Agreement), which provides that Edison Mission will pay a $7,000,000 civil penalty for violating its duty of candor to the Commission, and will implement a comprehensive compliance plan at an estimated cost of $2,000,000. The Agreement contains no stipulation with respect to the high offer strategy and no penalty associated with it. The Agreement stipulates, however, that Edison Mission voluntarily discontinued use of that strategy in April 2006, and commits not to engage in that strategy in the future.[3] The Agreement also provides that Edison Mission shall be released from any liability for claims arising out of or associated with "the misrepresentation violations . . . or the subject matter of the investigation."[4] The Commission approved the settlement on May 19, 2008.[5]

5. On June 18, 2008, motions to intervene and requests for clarification and/or rehearing were filed by the Public Service Commission of Maryland (Maryland PSC), the People of the State of Illinois (Illinois AG), the National Rural Electric Cooperative Association (NRECA), and a group styling themselves the "Joint Intervenors."[6] In

[3] Agreement at P 18.

[4] Agreement at P 32.

[5] *In re Edison Mission*, 123 FERC ¶ 61,170 (2008).

[6] The "Joint Intervenors" consist of the American Public Power Association; PJM Industrial Customer Coalition; American Municipal Power – Ohio, Inc.; Maryland Office of People's Counsel; Southern Maryland Electric Cooperative, Inc.; Public Power Association of New Jersey; Pennsylvania Office of Consumer Advocate; Public Service Commission of the District of Columbia; the D.C. Office of the People's Counsel; Portland Cement Association; Mittal Steel USA, Inc.; New Jersey Division of Rate Counsel; Pennsylvania Public Utility Commission; Electricity Consumers Resource Counsel; Delaware Public Service Commission; Consumer Federation of America; New Jersey Board of Public Utilities; Indiana Utility Regulatory Commission; the Public Utilities Commission of Ohio; and the Virginia State Corporation Commission.

addition, the Borough of Chambersburg, Pennsylvania and Old Dominion Electric Cooperative (Old Dominion) also filed motions to intervene on that date, but did not request clarification or rehearing. On June 20, 2008, additional motions to intervene were filed by the Ohio Office of Consumer Counsel (Ohio OCC) and the North Carolina Electric Membership Corporation (NCEMC). On June 30, 2008, the Illinois AG submitted a motion to supplement its original filing (Supplemental Motion), which withdrew certain of the assertions and requests contained in its original motion on the basis of newly-obtained evidence. On July 2, 2008, a motion to intervene and comments were filed by the Illinois Commerce Commission (ICC).[7]

6. On July 3, 2008, Edison Mission Energy filed an answer to all of the movants' motions, with the exception of the ICC's motion. On July 18, 2008, Edison Mission filed a motion seeking leave to answer the ICC's motion out-of-time, and an answer to the ICC's motion.

7. On July 16, 2008, Maryland PSC filed a motion for leave to answer and answer to Edison Mission's July 3 Answer. Responses to Edison Mission's July 3 Answer were also filed on July 18, 2008 by Old Dominion and the North Carolina Electric Membership Corporation, and by a group styling themselves the "Indicated Intervenors" – a group which includes NRECA and the Joint Intervenors.[8]

II. Motions to Intervene

A. Motions

8. Movants argue that the Commission should permit intervention because the settlement has the potential to impact various entities.[9] Some movants concede that they lack the right to intervene in a Commission enforcement proceeding such as this.[10] They maintain, however, that granting the requested interventions would be appropriate in this instance.

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[7] ICC's pleading is styled a "Notice of Intervention," but, as intervention by a state entity is not of right in an investigation under Part 1b (as opposed to an adjudication under Part 385), it is being considered as a motion to intervene.

[8] In the July 18 filing, ArcelorMittal USA replaces Mittal Steel USA, Inc. among the Joint Intervenors.

[9] NRECA Motion at 2; Joint Intervenors' Motion at 19.

[10] NRECA Motion at 2; Chambersburg Motion at 2; Joint Intervenors' Motion at 19.

9. Movants point out that they lacked the opportunity to intervene previously, given that the existence of the investigation was not revealed until the Commission issued the May 19 Order,[11] and contend that their interventions will be minimally disruptive at this late stage of the proceeding.[12] Some cite to precedent in which the Commission has previously permitted intervention in an investigative proceeding after the issuance of an order approving a stipulation and consent agreement.[13]

10. Joint Intervenors state that "the Commission has recognized that intervention [in a Part 1b proceeding] may be appropriate when, for example, a Part 1b investigation is concluded through a settlement that has 'potential impacts on other entities.'"[14] NRECA echoes this view, stating that the settlement in this case could potentially impact other entities, such as NRECA's members.[15]

11. For the most part, movants argue that they have a sufficient interest because they are directly affected by the prices in PJM's energy markets,[16] or because they represent market participants that are so affected.[17] Others argue that they have sufficient interest

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[11] *See* Joint Intervenors' Motion at 19; Chambersburg Motion at 2-3; NRECA Motion at 2.

[12] Joint Intervenors' Motion at 19.

[13] Chambersburg Motion at 2-3, n.3, *citing Williams Gas Pipelines Central, Inc.*, 94 FERC ¶ 61,285 (2001) (*Williams*) and *Columbia Gas Transmission Corp., et al.*, 85 FERC ¶ 61,437 (1998) (*Columbia Gas*); ICC Motion at 2, n.2 (same); Joint Intervenors' Motion at 20 (same).

[14] Joint Intervenors' Motion at 19, *quoting Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282, at P 19 (2007) (*ETP*).

[15] NRECA Motion at 2, *citing ETP*, 121 FERC ¶ 61,282 at P 19.

[16] Chambersburg Motion at 2; Old Dominion Motion at 3; Joint Intervenors' Motion at 2, 5.

[17] NRECA Motion at 1; Joint Intervenors' Motion at 3-4, 7, 8; Maryland PSC Motion at 2.

to warrant intervention because they are charged with protecting retail ratepayers,[18] or because they advance pro-consumer policy.[19]

12. Joint Intervenors state that they "seek intervention for a specific and defined purpose, *viz*., obtaining clarification as to whether and to what extent the Commission's approval of the Agreement is intended to affect PJM energy market purchasers' future exercise of their Federal Power Act rights in connection with Edison Mission's use of the High Offer Strategy."[20] Should the Commission decline to provide the requested clarification, Joint Intervenors seek intervention for the purpose of requesting rehearing of the May 19 Order.[21]

13. Maryland PSC states that it is in agreement with Joint Intervenors,[22] and likewise seeks intervention for the purpose of obtaining clarification, or, in the alternative, for the purpose of requesting rehearing.[23] Rather than addressing the scope of the settlement, however, Maryland PSC's requested clarification pertains to the legality of the high offer strategy. Specifically, Maryland PSC seeks clarification that the strategy is illegal, and that "the anti-manipulation rules do not permit high offer strategies to be used to technically satisfy but effectively circumvent the must-offer tariff requirement."[24]

14. NRECA seeks intervenor status to request clarification or, failing that, rehearing of the May 19 Order. Like Joint Intervenors, NRECA seeks assurance that the settlement's release provisions do not "immunize Edison against claims by market participants (including NRECA members) for proper application of PJM's tariff and associated market rules during the period in which prices and market operations were affected by Edison's conduct."[25] NRECA argues that its intervention is in the public

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[18] ICC Motion at 1; Joint Intervenors' Motion at 4, 6-10; Ohio OCC Motion at 1. Ohio OCC may have filed its motion in the wrong docket, as it makes reference to two unconnected proceedings and to substantive issues that are unrelated to the matters at hand.

[19] Joint Intervenors' Motion at 9.

[20] *Id*. at 18.

[21] *Id*. at 19.

[22] Maryland PSC Motion at 4.

[23] *Id*. at 4-6.

[24] *Id*. at 6.

[25] NRECA Motion at 5.

interest because NRECA seeks in this proceeding to vindicate a due process right or a right guaranteed to it by the Federal Power Act (FPA) or the Administrative Procedure Act (APA).[26]

15. The Illinois AG premises its motion to intervene broadly on its obligation to protect the people of the State of Illinois.[27] More particularly, though, the stated purpose of the Illinois AG's intervention is "to provide the Commission with evidence that is at odds with a major factual finding in the [May 19] Order."[28] The evidence, contained in an affidavit by Mr. Robert McCullough, purports to show that "Edison Mission did not discontinue use of the High Offer Strategy in April 2006, as stated in the Order."[29] The evidence proffered by the Illinois AG is drawn from three sources: Edison Mission's self-reported Electric Quarterly Reports (EQRs); Edison Mission's 10-K and 8-K reports to the Securities and Exchange Commission (SEC), and PJM's publicly-available bidding data.[30] According to the Illinois AG's Motion, "[t]hese reports show that in 2006, 2007 and 2008, Edison Mission sold energy in the real-time market from . . . units designated as capacity resources . . . that should have been selling into the day ahead market."[31]

16. In its Supplemental Motion, the Illinois AG concedes that, as shown in recent communications from PJM, much of Mr. McCullough's evidence was erroneous and derived from inaccurate data. Therefore it withdraws its request to intervene for the purpose of offering that evidence: "[T]his new information indicates that the evidence proffered in the Initial Filing does *not* show that Edison continued to use the High Offer Strategy after April 2006."[32] The Supplemental Motion did not otherwise modify the basis for the Illinois AG's motion to intervene, however. In particular, it left undisturbed Mr. McCullough's analysis of Edison Mission's EQRs and SEC reports.[33] The Illinois AG maintains that these reports, even without the PJM bid data, "show that in 2006, 2007 and 2008, Edison Mission sold energy in the real-time market from . . . units designated

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[26] *Id*. at 2.

[27] Illinois AG Motion at 2, *citing* 15 ILCS 205/6.5.

[28] Illinois AG Motion at 2.

[29] *Id*.

[30] *Id*. at 4-5.

[31] *Id*. at 5.

[32] Supplemental Motion at 1 (emphasis in original).

[33] *Id*. at 3.

as capacity resources that should have been selling into the day ahead market."[34] Mr. McCullough bases this inference on the fact that these reports indicate that the units he observed "sell electricity at prices that track the real time market, rather than the day ahead market."[35]

17. Although it endorses the arguments set forth in other movants' pleadings, the ICC advances a substantively unique position. ICC's position is that the bid data that is publicly available from the PJM market is inadequate, because it does not permit third parties to discern whether or not market participants are obeying the market rules or, *e.g.*, engaging in impermissible withholding.[36] ICC urges that the Commission either require PJM to revise the format in which its publicly available bid data is posted, or else "allow state regulators to access PJM's bid data files so that they can conduct necessary analyses and develop the necessary confidence that wholesale markets are generating just and reasonable wholesale prices to support their functions in the area of retail ratemaking."[37]

B. Edison Mission Answer

18. Edison Mission opposes all motions to intervene. According to Edison Mission, "[t]he Commission has never allowed entities to intervene in an enforcement proceeding with as weak an interest in the proceeding and as disruptive a purpose as the entities seeking to intervene in this docket."[38] In Edison Mission's view, movants' status as participants in PJM (or representatives of such participants) does not constitute a strong enough or a direct enough interest for intervention to be permitted under Commission precedent or under sound policy. According to Edison Mission, the Commission would be "significantly" expanding intervention rights in enforcement proceedings if it were to grant the requested interventions.[39]

19. Edison Mission argues that the cases cited by movants are distinguishable. It points out that, in *Columbia Gas*, the enforcement proceeding grew out of a restructuring proceeding, to which many entities were parties.[40] Edison Mission states that it was

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[34] *Id*.

[35] *Id*.

[36] ICC Motion at 7.

[37] *Id*. at 8.

[38] Edison Mission Answer at 1.

[39] *Id*. at 4.

[40] *Id*. at 5.

because of the close connection between the enforcement proceeding and the restructuring proceeding, as well as the fact that "the allocation of capacity among the pipeline's customers [was] involved," that the Commission granted the requested interventions.[41] As for *Williams*, Edison Mission emphasizes that the Missouri Public Service Commission (MoPSC), the would-be intervenor, merely sought to "clarify" certain regulatory and rate issues. "It is not surprising," states Edison Mission, "that the Commission exercised its discretion to answer the MoPSC's narrow and legitimate questions about the regulatory effects of the agreement, given that the MoPSC's request in no way stood to disrupt the resolution of the enforcement proceeding."[42]

20. In Edison Mission's view, the purpose of NRECA's and the Joint Intervenors' motions to intervene is "the most disruptive of purposes: voiding the Agreement that has been approved by the Commission."[43] Edison Mission urges the Commission to deny these interventions, because granting them "would 'undermine both the Commission's ability to settle investigations and its policies favoring settlement.'"[44]

21. As for the Illinois AG's motion to intervene, Edison Mission maintains that it "must be denied because its sole stated purpose is to raise an allegation that has proven false."[45] Edison Mission explains that Illinois AG affiant McCullough admits that information received from PJM shows his inferences about the bidding behavior of certain unnamed generators to be wrong.[46] Mr. McCullough's analysis of the EQR data is also wrong because, says Edison Mission, the information posted in its EQRs contains "inadvertent errors."[47] In particular, Edison Mission states that, "[t]hese EQRs correctly reported the volume of energy sales in PJM, but mistakenly reported the price as the Real-Time price, even for volumes that cleared in the Day-Ahead market."[48] Edison

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[41] *Id*. at 6, *quoting Columbia Gas*, 85 FERC ¶ 61,437 at 62,641.

[42] Edison Mission Answer at 6-7.

[43] *Id*. at 11.

[44] *Id*. at 11, *quoting Fact-Finding Investigation into Possible Market Manipulation of Electric and Natural Gas Prices*, 104 FERC ¶ 61,146, at 61,528 (2003).

[45] Edison Mission Answer at 2.

[46] *Id*.

[47] *Id*.

[48] *Id*. at 9.

Mission further explains that "[t]he corrected data show that Edison Mission's units did clear in the Day-Ahead market," and states that it has "submitted a corrected EQR for the first quarter of 2008 and is in the process" of correcting reports from earlier periods.[49]

22. Edison Mission addresses the ICC's motion in a separate filing (Second Edison Mission Answer), filed one day out of time. Edison Mission states that its untimely answer to the ICC's motion should be accepted because "no harm will result from the Commission accepting this answer one day out-of-time" and because it provides information Edison Mission deems "necessary for the Commission to reach a reasoned decision in this proceeding."[50] According to Edison Mission, the ICC states only a "speculative interest" in the proceedings, and argues that "[w]ere this speculative interest to suffice, the Commission would have to allow state utility commissions to intervene in every enforcement proceeding."[51]

C. Motions for Leave to Answer

23. On July 16, 2008, the Maryland PSC filed a response to Edison Mission's answer. Maryland PSC contended that good cause exists for the Commission to accept Maryland PSC's response to Edison Mission.[52] Maryland PSC disputes Edison Mission's position that Maryland PSC lacks the direct economic interest necessary to warrant the granting of intervention to Maryland PSC. Maryland PSC states that, "[t]he Commission's regulations do not require state utility commissions to establish a direct economic interest to intervene and participate as a party to FERC proceedings . . . . Rule 214 of the Commission's Rules of Practice and Procedure provides that the Maryland PSC became a party upon filing a timely notice of intervention."[53] Maryland PSC argues that the Commission's findings would be strengthened by "subjecting them to reasonable question" as Maryland PSC's request for clarification purports to do.[54] It reiterates its request that the Commission clarify that the high offer strategy constitutes a violation and states that, "knowing FERC's position on this behavior would be helpful for the investigation into market power tests in PJM in Docket EL08-47."[55]

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[49] *Id*.

[50] Second Edison Mission Answer at 2.

[51] *Id*. at 2-3.

[52] Maryland PSC Answer at 1.

[53] *Id*. at 2.

[54] *Id*. at 3.

[55] *Id*.

24. On July 18, 2008, two sets of entities filed responses to Edison Mission's answer. One set, comprised of Old Dominion and NCEMC, argued in their motion that Edison Mission's opposition to Old Dominion's and NCEMC's original motions to intervene was "based on a mischaracterization of the Commission's policy regarding intervention in enforcement proceedings and a misstatement of Old Dominion's and NCEMC's intent in seeking leave to intervene."[56] They take issue with Edison Mission's suggestion that their interest is too weak to warrant intervention in this proceeding, because, "their interventions are to ensure that in the event that their customers could be directly affected by the outcome of this proceeding, Old Dominion and NCEMC are able to represent their interests."[57] Old Dominion and NCEMC deny that they filed their motions to intervene with any disruptive purpose, and point out that they raised no substantive issues in their motions that could disrupt the proceedings.[58]

25. The second set of entities filing a response to Edison Mission's Answer styled themselves the "Indicated Intervenors," a group consisting of the "Joint Intervenors" plus NRECA. Indicated Intervenors contend that the question of whether or not they are entitled to intervene depends on whether or not the Commission grants the clarification they requested in their original motions.[59] In Indicated Intervenors' view, if the Agreement's release provision is given the broad scope Edison Mission asserts it to have, then this proceeding is a ratemaking proceeding, and therefore their interventions must be granted.[60] If, on the other hand, the Agreement's release provision is given the narrow scope Indicated Intervenors urge the Commission to give it, then this proceeding might be merely an enforcement matter to which the Commission could decline to grant the requested interventions.[61]

III. Procedural Matters

26. We will grant Edison Mission's motion to accept its answer to the ICC's motion one day out of time because it provided information that has assisted us in our decision-making process.

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[56] Old Dominion & NCEMC Answer at 1.

[57] *Id*. at 1-2.

[58] *Id*. at 2-3.

[59] Indicated Intervenors' Answer at 2.

[60] *Id*. at 3-5.

[61] *Id*.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest or an answer, unless otherwise ordered by the decisional authority.[62] We are not persuaded to accept the answers filed by Maryland PSC, Old Dominion, NCEMC or Indicated Intervenors and will, therefore, reject them.

IV. Discussion

28. As many of the movants acknowledge,[63] no entity has a right to participate in an investigative proceeding initiated under Part 1b of the Commission's regulations. The rule is clear: "There are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part."[64] Although the language of the regulations does not in all cases prohibit the Commission from granting intervention in proceedings originating in a Part 1b investigation, the Commission has made exceptions only rarely, and even then in unusual circumstances or on narrow grounds. Indeed, *Williams* and *Columbia Gas* are the only exceptions cited by movants. As explained below, each of these proceedings involved unique circumstances justifying the Commission's grant of intervention which are not present here.

29. In *ETP*, the Commission stated that interventions in proceedings arising out of Part 1b investigations are generally "inappropriate".[65] Movants observe that the Commission has stated that it might make an exception to its stated policy of denying intervention in Part 1b investigations in some instances when the settlement affects other

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[62] *See, e.g., KeySpan-Ravenswood LLC v. New York Independent System Operator Inc*., 111 FERC ¶ 61,336 (2005).

[63] NRECA Motion at 2; Chambersburg Motion at 2; Joint Intervenors' Motion at 19. Maryland PSC, however, does not acknowledge this fact, and neglects even to mention Part 1b in either of its filings. Instead it asserts that it has already become a party to the proceeding by operation of Rule 214 of the Commission's Rules of Practice and Procedure. Maryland PSC Answer at 2 (*citing* 18 C.F.R. § 385.214). Maryland PSC is incorrect: The rules applicable to adjudications under Part 385 – of which Rule 214 is one – do not control proceedings initiated under Part 1b.

[64] 18 C.F.R. § 1b.11 (2008).

[65] *ETP*, 121 FERC ¶ 61,282 at P 19.

entities.[66] While it is true that the Commission has left open the possibility that intervention in enforcement matters may be appropriate in limited circumstances,[67] those circumstances are not present here.

30. The Commission stated in *ETP* that where disgorgement is ordered in connection with an enforcement proceeding, it may permit interventions for the purpose of determining the proper allocation of the disgorged monies.[68] The situation here is quite different because disgorgement has not been ordered.

31. The precedent cited by movants is readily distinguishable. In *Williams*, the Commission granted the MoPSC's post-settlement motion to intervene where the MoPSC sought clarification of a settlement whose operation would have an ongoing impact on the consumers MoPSC is charged with protecting. The present circumstances are not similar. The Agreement's releases apply to past conduct only – future instances of the high offer strategy would not be protected by the releases and in fact would violate the Agreement. Similarly, the *Williams* settlement involved the establishment of a methodology that would have an impact on future rates; this settlement does not.

32. The *Columbia Gas* investigation grew out of Docket Nos. RS92-5 *et al*., a restructuring proceeding designed to implement Order No. 636.[69] The restructuring proceeding was an adjudicative proceeding, to which there were numerous parties. It was

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[66] *See* Joint Intervenors' Motion at 19, *citing ETP*, 121 FERC ¶ 61,282 at P 19.

[67] *See ETP*, 121 FERC ¶ 61,282 at P 19, n.28 ("If liability is found, and if the Commission considers disgorgement of unjust profits to be an appropriate remedial step, the Commission may consider allowing affected entities to demonstrate how allocations should be made."); *see also Ex Parte Contacts and Separation of Functions*, 123 FERC ¶ 61,158, at P 16 (2008) (seeking comment on a regulation that would state that there is no intervention as of right in proceedings arising from investigations under Part 1b, but would "leave open the possibility that intervention in an enforcement proceeding" might sometimes be permitted, such as when a third party wished to determine the impact of a sanction on its own interests).

[68] *ETP*, 121 FERC ¶ 61,282 at P 19 n.28.

[69] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A**,** FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

in this adjudicative restructuring proceeding that Columbia's noncompliance came to the Commission's attention, at which time it directed Columbia, in an order issued in the restructuring proceeding, to show cause why it had not unlawfully abandoned capacity.[70] In other words, there was a close nexus between the adjudicative proceeding (to which the would-be intervenors were already parties) and the Part 1b investigation; under the circumstances, the Commission permitted interventions in the docket established for the investigation and show cause proceeding.[71] In addition, the *Columbia Gas* proceeding involved the allocation of capacity, a matter which might prospectively affect the various parties to the restructuring proceeding, not unlike the situation discussed in *ETP*.[72]

33. Here, however, movants do not seek to address any allocation-related issues. Whether styled as requests for clarification or requests for rehearing, movants focus their concern on paragraph 32 of the Agreement. This paragraph states in full:

> Commission approval of this Agreement without material modification shall release Edison Mission and forever bar the Commission from holding Edison Mission or its employees liable for any and all administrative, civil claims arising out of, related to, or connected with the misrepresentation violations addressed in this Agreement or the subject matter of the investigation.

Movants generally seek assurance that this paragraph applies only to Commission-initiated actions, and does not foreclose any claims for relief that might be brought by other entities.

34. The *Columbia Gas* case was ultimately resolved through a settlement (the Columbia Agreement). Like the Agreement in this matter, the Columbia Agreement explicitly declined to resolve whether or not Columbia had committed any statutory,

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[70] *Columbia Gas Transmission Corp*., 64 FERC ¶ 61,365 (1993). A new docket was created for the show cause proceeding, but not for the Part 1b investigation, which was initiated in the same order. *Id*. at Ordering Paragraphs (K) and (L).

[71] None of this, however, persuaded the U.S. Court of Appeals for the D.C. Circuit that concluding the investigation through a settlement that foreclosed third parties from seeking relief was beyond the Commission's discretion. *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456 (D.C. Cir. 2001) (*BG&E*).

[72] *ETP*, 121 FERC ¶ 61,282 at P 19.

regulatory, or tariff violation.[73] The Columbia Agreement required Columbia to "conduct a 30-day open season to determine whether there is any demand for additional firm capacity on Columbia Gulf's mainline," and to make such capacity "available to all prospective shippers."[74] The Columbia Agreement did not, however, require Columbia to make any disgorgement to customers who may have incurred higher costs as a result of the reduction in Columbia's pipeline capacity.[75] The Columbia Agreement contained a broad release provision, stating that Columbia's implementation of its obligations under that agreement "shall fully resolve all issues raised by the Commission related to the show cause proceeding and the investigation, . . . will settle any and all civil and administrative disputes related thereto, . . . and is in lieu of any other remedy that the Commission might assess or determine concerning any of the matters related to such show cause proceeding or such investigation."[76]

35. BG&E, one of Columbia's customers, moved to intervene in the administrative proceeding and requested rehearing of the order approving the Columbia Agreement. It argued that the Commission erred by failing to submit the Columbia Agreement to public notice and comment prior to approval, and by failing to provide any relief for damages BG&E incurred due to the reduced capacity on Columbia's pipeline.[77] The Commission permitted BG&E's intervention but denied its request for rehearing.[78] BG&E appealed. As noted above, the Court of Appeals held that it was without jurisdiction to consider BG&E's appeal because "FERC's decision to settle with Columbia, and its consequent decision not to see its enforcement action through to fruition, is a *paradigmatic instance* of an agency exercising its presumptively nonreviewable enforcement discretion."[79]

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[73] *BG&E*, 252 F.3d at 457; *see also Columbia Gas Transmission Corp*., 80 FERC ¶ 61,220 (1997). The Columbia Agreement is appended to the Commission's August 8, 1997 Order.

[74] *Columbia Gas Transmission Corp*., 80 FERC ¶ 61,220, at 61,867 (1997) (Columbia Agreement sections IV.A, B).

[75] *BG&E*, 252 F.3d at 457.

[76] *Columbia Gas Transmission Corp*., 80 FERC ¶ 61,220, at 61,868 (1997) (Columbia Agreement section IV.F).

[77] *Columbia Gulf Transmission Corp.*, 85 FERC ¶ 61,437, at 62,640 (1998).

[78] *Id*. at 62,641 and 62,644.

[79] *BG&E*, 252 F.3d at 460 (emphasis supplied); *see also Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1028 (D.C. Cir. 2007); *N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209, 1211 (D.C. Cir. 1992).

36. *BG&E* emphasized that the Commission possesses wide latitude to decide whether to commence enforcement measures, as well as in whether and how to resolve an enforcement proceeding once initiated.[80] *BG&E* supports the Commission's right to resolve an enforcement proceeding by approving a settlement that precludes third parties from seeking relief for any injuries arising out of the subject matter of the investigation. In this respect, the releases contained in paragraph 32 of the Agreement and section IV.F of the Columbia Agreement are substantively equivalent. Movants' belief that they have an insuperable right to seek redress for past injuries arising from the behavior investigated notwithstanding the settlement is incorrect.

37. It is noteworthy, however, that paragraph 32 of the Agreement provides only that *the Commission* is barred from holding Edison Mission liable in any proceeding for the subject matter of the investigation. It does not purport to bar actions beyond the Commission's jurisdiction. However, the Commission's jurisdiction is very broad, and, in particular, the Commission possesses exclusive jurisdiction to enforce tariffs filed with us as part of the comprehensive regime for federal energy regulation of sales of electric energy at wholesale by public utilities.[81] Finally, because this proceeding addresses historical behavior, movants' ability to seek prospective relief for future actions is not impeded in any way.

38. NRECA's argument that good cause exists to permit its intervention because it seeks to vindicate a due process right or a right guaranteed it under the FPA or the APA

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[80] *BG&E*, 252 F.3d at 459-460; (*citing Heckler v. Chaney*, 470 U.S. 821,831 (1985), for "the general rule that an agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion"); *see also Columbia Gas*, 89 FERC ¶ 61,325, at 61,991 (1999). The Commission likewise has the right to settle an enforcement matter without resolving whether or not the actions at issue constitute violations. *Id*.

[81] *See, e.g., California ex rel. Lockyer v. Dynegy, Inc*., 375 F.3d 831, 851 (9th Cir. 2004) (rejecting an attempt to pursue a claim under California statutory law hinging on the interpretation of tariffs filed with FERC and concerning obligations arising under regulations issued pursuant to the FPA); *see also Pub. Util. No. 1 of Grays Harbor County, Washington v. IDACORP, Inc*., 379 F.3d 641 (9th Cir. 2004) (rejecting an attempt to pursue contract-related claims in state court on the ground that Congress had preempted the field). In addition, the FPA is clear that the Commission's enforcement authority with respect to market manipulation under 18 C.F.R. Part 1c, does not give rise to any third party causes of action. *See* 16 U.S.C. § 824v(b) and 18 C.F.R. § 1c.2(b).

is not persuasive.[82] NRECA's due process rights are not implicated here.[83] NRECA does not identify what rights it believes it possesses under the APA which would be denied to it by refusing to permit its intervention nor does it identify which section of the APA might give rise to such rights. In any event, as we note above, it is left to the Commission's discretion whether to impose retrospective remedies for conduct which may have had an adverse impact on the market.[84]

39. The *Maine PUC* case[85] invoked by movants[86] is distinguishable and not on point. *Maine PUC* involved the Commission's ratemaking authority under section 205 of the FPA, not its Part 1b enforcement authority. Because it was a proceeding to establish just and reasonable rates, it required notice and an opportunity to be heard. There were 115 parties to the rate proceeding in *Maine PUC*,[87] whereas no parties are required in the context of a Part 1b enforcement proceeding. In addition, *Maine PUC* involved agency action subject to judicial review under the APA,[88] whereas the investigation of Edison Mission involves matters committed to agency discretion by law.[89] In short, *Maine PUC* did not involve a Part 1b enforcement action resulting in a settlement but instead involved the establishment of just and reasonable rates through a settlement.

40. The specific allegations in the Illinois AG's motion to intervene have been undermined by subsequent events. As the Illinois AG concedes, the PJM bid data used in the McCullough Affidavit does not show what it originally purported to show regarding Edison Mission's supposedly continuing use of the high bidding strategy. Moreover, Edison Mission has also clarified that the EQR data relied upon by Mr. McCullough is

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[82] NRECA Motion at 2.

[83] NRECA claims a "fundamental right to rate schedule *enforcement*." NRECA Motion at 6 (emphasis in original). Law enforcement is not a protected due process right. *See Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005).

[84] *See Towns of Concord, Norwood and Wellesley v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992); *Columbia Gas*, 85 FERC ¶ 61,437 at 62,642.

[85] *Me. Pub. Util. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*).

[86] *See* Joint Intervenors' Motion at 31, NRECA Motion at 4, ICC Motion at 6.

[87] 520 F.3d at 469.

[88] *Id*. at 470, *citing* 5 U.S.C. § 706(2)(A).

[89] *See Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1030-32 (D.C. Cir. 2007) (distinguishing between final agency actions that are subject to judicial review, and agency enforcement actions, which are exempt from review under the APA).

incorrect. On July 3, 2008, Edison Mission submitted a corrected EQR for the first quarter of 2008, which shows, contrary to the Illinois AG's contentions, that Edison Mission's units were very active participants in the PJM day-ahead market. In fact, this new data shows that of the total energy sales that Edison Mission's Midwest Generation units made in the PJM energy market for the first quarter of 2008, approximately 95 percent of the energy sales was made in the day-ahead market.[90] In other words, the evidence indicates that Edison Mission has been acting in conformity with its obligations under the Agreement and not in violation of them. There is no evidence to the contrary, and no basis for reopening this proceeding. The Commission expects Edison Mission to live with its bargain. If at any time it appears that Edison Mission has strayed from its commitments, the Commission will take appropriate action.

41. The ICC has not adequately justified its request that the Commission take the extraordinary step of permitting its intervention in this investigative proceeding. ICC's request is misplaced, as it implicates a modification to PJM's tariff that could only be considered in a proceeding under sections 205 or 206 of the FPA. We therefore dismiss ICC's request.

42. Indeed, with respect both to the ICC and the other movants, we find that they have failed to demonstrate the extraordinary circumstances that might warrant intervention in this enforcement matter. The fact that the investigation in this case centered on behavior in the PJM markets does not mean that every participant (or every representative of a participant) in PJM should be permitted to intervene. Interventions will very seldom be granted in proceedings originating under Part 1b. Accordingly, the motions to intervene are denied.

43. Because the motions to intervene are denied, the requests for rehearing do not lie. Only a party to a proceeding may request rehearing of an order issued in that proceeding.[91] Accordingly, the requests for rehearing are dismissed.

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[90] This is readily seen by comparing the sales prices reported in the corrected EQRs and publicly available PJM nodal locational marginal prices. *See* ftp://www.pjm.com/pub/account/lmpda/index.html and ftp://www.pjm.com/pub/account/lmp/index.html. (PJM nodal LMPs can be also obtained from a commercial database, *e.g.*, Energy Velocity).

[91] 16 U.S.C. § 825*l*; *see also PG&E National Energy Group, LLC, et al*., 94 FERC ¶ 61,154, at p. 61,577 (2001), *order on reh'g*, 98 FERC ¶ 61,073, at 61,206-07 (2002), *affirmed, Calif. ex rel. Lockyer v. FERC*, 329 F.3d 700 (9th Cir. 2003).

The Commission orders:

(A) The motions to intervene are denied.

(B) The requests for clarification and/or rehearing and other relief are dismissed.

(C) The motions for leave to answer are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.