UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In re Edison Mission	)	Docket No. IN08-3-000

**MOTION TO INTERVENE AND
REQUEST FOR CLARIFICATION OR,
IN THE ALTERNATIVE, REHEARING OF
THE AMERICAN PUBLIC POWER ASSOCIATION,
PJM INDUSTRIAL CUSTOMER COALITION,
AMERICAN MUNICIPAL POWER-OHIO, INC.,
INDUSTRIAL ENERGY USERS-OHIO,
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 DEPARTMENT OF THE
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PENNSYLVANIA PUBLIC UTILITY COMMISSION,
ELECTRICITY CONSUMERS RESOURCE COUNCIL,
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**

Pursuant to Rules 212, 214, and 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.214, and 385.713 (2007), the American Public Power Association ("APPA"), PJM Industrial Customer Coalition ("PJMICC"), American Municipal Power – Ohio, Inc. ("AMP-Ohio"), Industrial Energy Users-Ohio ("IEU-Ohio"), Maryland Office of People's Counsel ("MD OPC"), Southern Maryland Electric Cooperative, Inc.

("SMECO"), Public Power Association of New Jersey ("PPANJ"), Pennsylvania Office of Consumer Advocate ("PA OCA"), Public Service Commission of the District of Columbia ("DC PSC"), the D.C. Office of the People's Counsel ("DC OPC"), Portland Cement Association ("PCA"), Mittal Steel USA, Inc. ("Mittal"), New Jersey Division of Rate Counsel ("NJ RC"), Pennsylvania Public Utility Commission ("PaPUC"), Electricity Consumers Resource Council ("ELCON"), Delaware Public Service Commission ("DE PSC"), Consumer Federation of America ("CFA"), New Jersey Board of Public Utilities ("NJ BPU"), Indiana Utility Regulatory Commission ("IURC"), the Public Utilities Commission of Ohio ("PUCO"), and the Virginia State Corporation Commission ("VSCC"), (collectively, "Joint Intervenors") hereby: (i) move to intervene jointly and severally in this proceeding; and (ii) seek clarification or, in the alternative, rehearing, of the Commission's "Order Approving Stipulation and Consent Agreement" issued in this proceeding on May 19, 2008 (hereinafter, "May 19 Order" or "Order"). In support of their motion and request, Joint Intervenors state as follows.

I. MOTION TO INTERVENE

A. Description of Joint Intervenors

The individual sponsors of this submittal are: (1) purchasers of energy in the markets operated by PJM Interconnection, LLC ("PJM"), and/or transmission customers in PJM; (2) representatives of such purchasers and customers; (3) state governmental bodies with jurisdiction over retail sales of electricity in the PJM footprint; or (4) entities created by state law to represent the interests of retail electricity consumers. The following paragraphs furnish a more detailed description of each of the Joint Intervenors.

1. APPA

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power

systems provide over 15 percent of all kilowatt-hour ("kWh") sales to ultimate customers, and do business in every state except Hawaii. APPA utility members are Load-Serving Entities ("LSEs"), with the primary goal of providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. Many APPA members obtain wholesale power supplies and transmission service from Commission-regulated Regional Transmission Organizations ("RTOs") under rate schedules and tariffs on file with this Commission, including the PJM tariffs. APPA therefore has a vital interest in the rates, terms and conditions of service applicable to transmission of bulk electricity in interstate commerce and sale of wholesale power supplies by regulated RTOs such as PJM.

2. PJMICC

PJMICC is an ad hoc association of large commercial and industrial end-users of electricity. PJMICC members operate manufacturing and institutional facilities throughout the PJM footprint. PJMICC members are directly and adversely impacted by any behavior that unfairly or unlawfully increases prices in PJM energy markets.

3. AMP-Ohio

AMP-Ohio is a nonprofit Ohio corporation organized in 1971. Its members are municipalities that own and operate municipal electric utility systems, including, in the case of some members, generating and transmission facilities. AMP-Ohio's primary purpose is to assist its members in meeting their electricity needs in an economic and reliable manner, and, in that role, AMP-Ohio is a supplier of full or partial requirements service to many of its members. AMP-Ohio pursues the goal of providing economical and reliable service in a number of ways, including through the direct ownership of generating capacity, through the scheduling and dispatch of member-owned generation, and through power supply and transmission

arrangements that AMP-Ohio makes with third parties at the request of and on behalf of its members. Currently, 81 of Ohio's 85 municipal electric systems are AMP-Ohio members, as are two municipal electric systems in West Virginia, 27 in Pennsylvania, 7 in Michigan, 5 in Virginia and one in Kentucky.

4. IEU-Ohio

IEU-Ohio is an association of large Ohio energy consumers that spend collectively over $3 billion per year on electricity and natural gas for their plants and facilities located throughout Ohio. IEU-Ohio's members employ over 250,000 people in Ohio. Many IEU-Ohio members are located in the PJM region. IEU-Ohio has a direct and substantial interest in the resolution of the issues in this docket.

5. MD OPC

The Maryland Office of People's Counsel is an independent state agency that was established to represent the interests of residential consumers in utility cases. Maryland Public Utility Companies Code Annotated, Section 2-205(b)(2007), the People's Counsel "may appear before any federal or state agency as necessary to protect the interests of residential…users of [gas, electricity or other regulated services]." In January 1999, the Maryland General Assembly passed the Electric Customer Choice and Competition Act of 1999. Maryland Public Utility Companies Code Annotated, Section 7-501, et. seq. (2007). This act institutes competition for retail electric service beginning July 1, 2000. All retail customers in Maryland purchase electricity from suppliers that operate in the PJM market.

6. SMECO

SMECO is a cooperative, nonprofit membership corporation, incorporated under the Electric Cooperative Act of Maryland. Its headquarters are in Hughesville, Maryland. It was organized in 1937 by people in rural areas to obtain electric service because they were unable to

obtain such service from any other supplier. It is owned and controlled by its members, who elect the board of directors. Not only does the Electric Cooperative Act, under which it is incorporated, require SMECO to operate on a non-profit basis, but, in addition, its bylaws insure that it does operate on a non-profit basis. The bylaws constitute a contract between the Cooperative and its members. They provide that all amounts paid in by consumers under the applicable rate schedules, over and above the cost of furnishing electric service, are paid to the Cooperative not for the electric service, but as capital. The bylaws further provide that at the end of each calendar year, the amounts paid in, pursuant to the rate schedules, over and above the cost furnishing service, must be credited on the books of the Cooperative to the individual consumers on the basis of the consumers' patronage. Such amounts credited to the consumers are referred to as "capital credits". Whenever the Cooperative is in a financial position to do so, the capital credits are retired by cash payments or electric bill invoice credits.

At the present time, SMECO operates over 9,100 miles of line to serve over 135,000 consumers, located in the Maryland counties of Calvert, Charles, St. Mary's, and Prince George's. SMECO is a network transmission customer taking service under the PJM OATT in the Pepco zone.

7. PPANJ

PPANJ is a non-profit corporation whose membership consists of the public power and rural electric cooperative systems. The PPANJ Membership is comprised of the municipal electric utilities of the Boroughs of Butler, Lavallette, Madison, Milltown, Park Ridge, Pemberton, Seaside Heights, South River, the Vineland Municipal Electric Utility ("VMEU"), and Sussex Rural Electric Cooperative, Inc. Each PPANJ member pays for generation pursuant to the tariffs at issue in this docket.

8. PA OCA

PA OCA is statutorily authorized to represent the interests of Pennsylvania utility consumers in matters before the Pennsylvania Public Utility Commission, equivalent federal regulatory agencies, and before federal and state courts. 71 P.S. § 309-1 *et seq.* Nearly all Pennsylvania consumers are located in the PJM region.

9. DC PSC

The DCPSC is the agency of the District of Columbia created by the District of Columbia Home Rule Charter ("Home Rule Charter") to ensure that every public utility doing business within the District of Columbia provides service and facilities reasonably safe and adequate and in all respects just and reasonable. The Home Rule Charter also requires that the DCPSC ensure that public utility rates are just and reasonable. Further, the DCPSC has general supervision of all gas corporations and electric companies in the District of Columbia (*See* D.C. Official Code § 1-204.93; *See also*, D.C. Official Code § 34-301). Accordingly, the DCPSC is a "state commission" within the meaning of Rule 214 (a) (2) of the Commission's Rules of Practice and Procedure.

10. DC OPC

The D.C. Office of the People's Counsel ("DC OPC") is an independent agency of the District of Columbia government and is the statutory representative of District of Columbia consumers in public utility issues in proceedings before the District of Columbia Public Service Commission, federal regulatory agencies and state and federal courts.[1]

In December 1999, the Council of the District of Columbia passed the Retail Electric Competition and Consumer Protection Act of 1999, D.C. Code §34-1501, *et. seq*. (2008) ("the

[1] D.C. Code § 34-804 (d) (2008).

Act"). The Act provided for implementation of competition for retail electric service in the District of Columbia no later than January 1, 2004, leaving the precise date for implementation to be set by the Public Service Commission of the District of Columbia. By Order No. 11796, the Public Service Commission set January 1, 2001 as the implementation date for retail competition in the District of Columbia. Suppliers operating in the PJM market serve all retail consumers in the District of Columbia.

DC OPC and the retail consumers it represents have an interest in the actions of PJM. No other party to this proceeding can represent these interests. Consequently, the DC OPC must be allowed to intervene and participate in this proceeding in order to ensure that the interests of retail consumers in the District of Columbia are adequately represented, because DC OPC has a direct and material interest in the outcome of this proceeding, which interests cannot be adequately represented by any other party.

11. PCA

PCA is a trade association representing companies that produce Portland cement in the United States and Canada and who operate 107 manufacturing plants in 36 states and distribution centers serving all 50 states, including in several states in the PJM region.

12. Mittal

Mittal is the North American division of ArcelorMittal NV, the world's largest steel company with steel making operations in 27 countries. Mittal is also the largest steel company in the United States and North America with operations in ten U.S. States, Mexico and Canada. Mittal operates several plants in the PJM region.

13. NJ RC

The NJ RC, formerly the New Jersey Division of the Ratepayer Advocate, is the statutory representative of residential, commercial and industrial public utility customers in the State of

New Jersey. *N.J.S.A.* 52:27E-50 *et. seq.* This representation consists of proceedings before the New Jersey Board of Public Utilities, similar federal agencies, offices of administrative law, federal and state courts.

14. PaPUC

The PaPUC is a state administrative commission created by the General Assembly of the Commonwealth of Pennsylvania and charged with the regulation of electric utilities and licensing of generation suppliers within the Commonwealth of Pennsylvania. 66 Pa.C.S. §101, *et seq.* It is therefore a "state commission" within the meaning of Rule 214(a)(2) and intervenes pursuant to authority conferred by the provisions of the Pennsylvania Public Utility Code.

15. ELCON

ELCON is a national association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. The member companies of ELCON consume approximately five percent of all electricity in the United States. Many ELCON members operate major facilities and are consumers of electricity in the footprint of the PJM region and, therefore, will be directly affected by the outcome of this proceeding.

16. DE PSC

The DE PSC is an agency of the State of Delaware charged with supervising and regulating all investor-owned public utilities, including electric distribution companies and standard offer service suppliers, and may take appropriate actions to ensure that standard office service is "safe, adequate, efficient and reliable." 26 Del. C. §§ 201, 1010. Delaware’s standard

offer service supplier purchases electricity from the PJM market and from wholesale suppliers operating in the PJM market.

17. CFA

CFA is an advocacy, research, education and service organization established in 1968. CFA has as its members some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people. As an advocacy group, CFA works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts.

18. NJBPU

The NJBPU is an agency of the State of New Jersey charged under New Jersey law with the general supervision, regulation, jurisdiction and control over all public utilities in the State, including electric utilities and their rates and service, and has authority to initiate and intervene in proceedings before the Commission. See N.J.S.A. 48:2-13; N.J.S.A. 48:2-21.

19. IURC

The Indiana Utility Regulatory Commission ("IURC") is a state regulatory agency that has broad statutory obligations to ensure that its jurisdictional utilities provide their customers with safe and reliable electric power and energy at just and reasonable rates. PJM covers a significant portion of Indiana territory, ultimately affecting Indiana businesses and residents. The IURC, therefore, has a vital interest in the integrity of the wholesale markets and is very concerned about this particular finding of market abuse by Edison Mission. The IURC permitted its jurisdictional utilities to join Regional Transmission Organizations ("RTOs") and, in this instance, PJM, with the expectation that the Federal Energy Regulatory Commission and the RTOs would vigorously pursue instances of abusive conduct and install requisite safeguards to prevent such abuse. Because the IURC takes conduct that threatens reliability and economic efficiency very

seriously, its concerns in this matter go beyond the interests of the current parties in this proceeding. Specifically, because such abusive conduct could threaten reliability and/or result in undue discrimination in the application of FERC approved RTO tariffs, the IURC seeks assurance from the FERC that: (1) the FERC will aggressively review their market monitoring efforts; (2) the FERC will assess their sanction process to ensure just outcomes and to effectively deter future abusive conduct; (3) the FERC will develop protocols to alert states of abusive conduct that may adversely affect that state's statutory interests; and (4) the FERC will recognize that the RTOs' market monitors are the first and best line of defense against abusive conduct, that the FERC will enhance its coordination with the market monitors for each RTO and place greater reliance on their expertise.

20. PUCO

PUCO, a state regulatory commission created by the Ohio General Assembly under Ohio Revised Code Section 4901.02, is authorized to supervise and regulate all public utilities, including electric light companies, within the State of Ohio. Ohio ratepayers may be adversely affected by any behavior that unlawfully increases prices in the PJM wholesale energy markets.

21. VSCC

The Virginia State Corporation Commission ("VSCC") was established by the Virginia Constitution of 1902 to oversee the railroad and telephone and telegraph industries operating in the Commonwealth. The VSCC's powers are derived from the Constitution of Virginia and state statutes. The VSCC is charged with administering Virginia laws related to the regulation of public utilities, insurance, state-chartered financial institutions, investment securities, retail franchising, and utility and railroad safety. The jurisdiction of the VSCC extends to ensuring that public utilities, including electric utilities, within its jurisdiction furnish reasonably adequate service and facilities at reasonable and just rates.

B. Communications and Service

Joint Intervenors request that service in this proceeding be made upon, and communications directed to, the following:

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C. Grounds for Intervention

1. Background

The Order approved a "Stipulation and Consent Agreement" ("Agreement") between the Commission's Office of Enforcement ("OE") and Edison Mission Energy, Edison Mission Marketing & Trading, Inc. ("EMMT"), and Midwest Generation, LLC, (collectively, "Edison Mission"). The Order recites that, beginning in May 2004, Edison Mission pursued a bidding strategy in which it offered generating units into the PJM day-ahead (DA) energy market at prices near the $1,000/MWh bid cap "so that they would not be taken in the [DA] market and would instead be taken in the subsequent PJM real-time (RT) market (the high offer strategy)." Order at P 3. The Order further states that, after several months of interaction with Edison Mission regarding its use of the High Offer Strategy, the OE began a preliminary non-public investigation of Edison Mission's bidding practices. In the course of that investigation, according to the Order, "Edison Mission made a series of representations and produced data and documents to staff regarding its supply offer strategy that, upon further explanation by Edison Mission, were revealed to have resulted in misleading staff." *Id.* at P 2. Because of Edison Mission's conduct, which extended over a three-and-a-half year period, "[OE] staff was not only misled and misdirected, but expended an enormous amount of time and resources due to the misstatements." *Id.*

The Agreement (which is appended to the May 19 Order) provides for Edison Mission to pay $9,000,000 for violations of 18 C.F.R. § 35.41(b)(2007),[2] consisting of a $7,000,000 civil penalty to be paid into the U.S. Treasury and development of a comprehensive compliance plan (estimated to cost $2,000,000). Although the Order fails to explain the basis for the specific penalty amount,[3] it is apparent that the penalty relates solely to Edison Mission's misrepresentations and similar conduct during the course of the OE investigation. The Order does *not* penalize Edison Mission for its use of the High Offer Strategy, and, indeed, "[n]o findings with respect to Edison Mission's use of the high offer strategy are made in the Agreement …." *Id.* at P 10.

2. Joint Intervenors' Interest in This Proceeding

As noted, Joint Intervenors include parties (and representatives of parties) that either purchase wholesale energy in the PJM markets or whose charges for electricity service are directly affected by PJM energy market prices. As such, Joint Intervenors have a direct and substantial interest in the operations of PJM's centralized markets.

The subject matter of the OE investigation was a bidding tactic that had undisclosed (but perhaps substantial) impacts on energy prices in PJM's DA market, and possibly in the RT market as well. Starting in May 2004, Edison Mission implemented a strategy of offering a substantial portion of its available generation into the DA market at a price between $900/MWh

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[2] That regulation states as follows:

> (b) Communications. A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

[3] Neither the Agreement nor the May 19 Order provides any information with regard to how the $7 million civil penalty figure was calculated, a fact noted by Commissioner Moeller in his concurrence to the May 19 Order.

and $999/MWh, just under the PJM Tariff's offer cap of $1,000/MWh. This behavior was observed by the PJM Market Monitor, who then reported it to OE Staff. According to the Agreement (at ¶ 17), the Market Monitor advised OE that Edison Mission's high offers for many of its units "had the effect of keeping the units out of the DA market." According to the May 19 Order and the Agreement, Edison Mission engaged in this High Offer Strategy from 2004 until April 2006, when Edison Mission "voluntarily stopped the High Offer Strategy," Order at P 10; Agreement at ¶¶ 15-18. Edison Mission has committed not to resume that strategy in the future. Order at P 10; Agreement at ¶ 18.

As customers and representatives of customers in the PJM market, Joint Intervenors have a vital interest in ensuring that prices in PJM's markets are not the product of manipulation or the exercise of market power, and that parties that supply energy sold in the market abide by the terms of all applicable tariffs and market rules. These interests cannot be adequately represented by other parties to this docket. It therefore is appropriate for the Commission to grant Joint Intervenors' joint and several motion to intervene in this proceeding.

3. Purpose of Intervention

Joint Intervenors 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. As discussed in detail below, Joint Intervenors' concern arises from language in the Agreement that is subject to being construed as potentially impairing the rights of market purchasers to obtain monetary relief from any economic injury shown to have resulted from Edison Mission's use of the High Offer Strategy. Joint Intervenors therefore ask the Commission to clarify that, in approving the Agreement, the Commission did not intend to limit market purchasers' ability to pursue (and, if

they are successful, to obtain) monetary remedies through appropriate FPA complaint proceedings (*e.g.*, under FPA § 206 and/or § 306) If, on the other hand, the Commission did intend to limit purchasers' exercise of their rights in this regard, Joint Purchasers seek rehearing of that decision.

4. Joint Intervenors' Request is Supported by Commission Grants of Intervention in Similar Circumstances

The Order grows out of a non-public investigation conducted by OE under Part 1b of the Commission's Regulations, 18 C.F.R. Part 1b (2007). The Commission's rules currently state that intervention is not appropriate in Part 1b investigations. Specifically, 18 C.F.R. § 1b.11 provides in part that "[t]here 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." The reason Part 1b limits third-party participation is that third-party involvement might delay or complicate the investigation and sidetrack it from its purpose.[4] Notably, however, 18 C.F.R. § 1b.11 makes no distinction between the investigatory phase of a Part 1b docket and related post-investigation procedures and activities (*e.g.*, enforcement actions). For that reason (and when read in conjunction with 18 C.F.R. § 385.214), 18 C.F.R. § 1b.11 may be read to permit intervention at the post-investigation stage, following the public issuance of a Commission order.[5] Consistent with that view, the Commission has recognized that intervention may be appropriate when, for example, a Part 1b investigation is concluded through a settlement that has "potential impacts on other entities."[6]

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4 *See* Notice of Proposed Rulemaking, *Ex Parte Contacts and Separation of Functions*, Docket No. RM08-8-000, at P 14 (May 15, 2008).

5 *See id*. at P 15.

6 *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 19 (2007).

The Commission has granted intervention in investigation proceedings in circumstances similar to those presented here. In *Williams Gas Pipelines Central, Inc.*, 94 FERC ¶ 61,285 (2001), for example, the Commission allowed the Missouri Public Service Commission to intervene in an investigation proceeding after the Commission had issued an order approving a Stipulation and Consent Agreement. Intervention was allowed so that the Missouri Commission could obtain clarification of the effect of the Consent Agreement on the rights of participants in subsequent proceedings. As the Commission observed, the Missouri Commission "has an interest in how the [Consent] Agreement operates." *Id.* at 62,026. The Commission also has granted post-investigation intervention in Part 1b proceedings to allow parties to seek rehearing of the order concluding the investigation. *Columbia Gas Transmission Corp. et al*., 85 FERC ¶ 61,437, at 62,641 (1993), *citing Tenneco, Inc., et al*., 21 FERC ¶ 61,011 (1982).

Based on the foregoing, allowing Joint Intervenors to intervene for the purposes stated above would be consistent with Commission practice in similar circumstances. Moreover, since the Part 1b investigation of Edison Mission's bidding behavior has been concluded, the factors that might counsel against third-party intervention in ongoing investigations are no longer germane.

5. Timeliness of Joint Intervenors' Motion

Joint Intervenors' motion to intervene is not untimely. Joint Intervenors seek intervention at this juncture because this is Joint Intervenors' first opportunity to intervene. The first occasion on which the Commission publicly disclosed the existence of the OE investigation into Edison Mission's bidding behavior was the May 19 Order itself. Joint Intervenors could not have sought intervention at an earlier stage in the proceeding simply because, prior to May 19, the public in general and Joint Intervenors in particular had no notice (either actual or constructive) of the OE investigation or its potential impact on their rights and interests.

6. Conclusion

Joint Intervenors have direct interests in this proceeding and in the Agreement approved by the May 19 Order. Joint Intervenors also have an important interest in obtaining clarification of whether and to what extent the Order was intended to affect the future exercise of market purchasers' Federal Power Act rights with respect to Edison Mission's use of the High Offer Strategy. For these reasons, Joint Intervenors' motion to intervene should be granted.

Joint Intervenors wish to point out that, based on the facts available, they have no reason to fault the OE Staff for their conduct of the investigation that led to the May 19 Order. On the contrary, all indications are that OE Staff pursued the facts surrounding Edison Mission's conduct with tenacity and resolve, notwithstanding the feints and obstacles put in their path. Nevertheless, Joint Intervenors believe the terms of the settlement reached with Edison Mission may be unlawful, insofar as the Consent Agreement would deprive PJM market purchasers of certain of their statutory rights. Intervention and a request for clarification (or rehearing) is directed at the May 19 Order, not at the OE Staff investigatory efforts that led to that Order.

II. STATEMENT OF ERRORS

In accordance with Rule 713(c)(1), Joint Intervenors allege for the purposes of their alternative request for rehearing (*see* Part V below) the following errors in the Commission's May 19 Order:

1. The Commission erred by approving a settlement that bars non-parties to the settlement from obtaining monetary relief, pursuant to the Federal Power Act, for economic harm suffered due to Edison Mission's use of the High Offer Strategy.
2. The Commission erred by relinquishing its statutory authority and jurisdiction to order monetary remedies for the unjust and unreasonable prices resulting from Edison Mission's market conduct.
3. The Commission erred by agreeing with Edison Mission not to order monetary relief in any future proceeding involving Edison Mission's use of the High Offer Strategy, based on an investigation that the Commission describes as only "preliminary" in nature.

III. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2), Joint Intervenors provide the following statement of issues raised by their alternative request for rehearing of the May 19 Order:

1. Whether PJM Market Buyers have a statutory right to seek disgorgement and other remedies related to Edison Mission's High Offer Strategy. 16 U.S.C. § 824e(a); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on rehearing*, 107 FERC ¶ 61,175 (2004).
2. Whether the Commission may lawfully approve a settlement that bars non-parties from seeking monetary relief under the Federal Power Act for conduct that may have constituted a tariff violation, a manipulation of market prices, and/or an exercise of market power. 16 U.S.C. § 824e(a); *Maine PUC v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) ("*Maine PUC*"); *NY Dept. of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993).
3. Whether the Commission may lawfully relinquish its statutory authority to order disgorgement of profits or other monetary remedies in response to a complaint submitted under the Federal Power Act for conduct that may have constituted a tariff violation, a manipulation of market prices, and/or an exercise of market power. 16 U.S.C. § 824e(a); *New York v. FERC*, 535 U.S. 1 (2002); *NY Dept. of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993); *Louisiana Public Service Commission v. FERC*, 184 F.3d 892 (D.C. Cir. 1999).
4. Whether it was arbitrary, capricious, an abuse of discretion or otherwise unlawful for the Commission to enter into an agreement in which it committed not to order monetary relief in future administrative proceedings for certain conduct, based on an investigation of such conduct that the Commission concedes was only "preliminary" in nature. 16 U.S.C. § 824e(a); *Louisiana Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999).

IV. REQUEST FOR CLARIFICATION

Joint Intervenors hereby request clarification that, in approving the Consent Agreement between OE and Edison Mission, the Commission did not intend to foreclose affected PJM market purchasers from seeking relief, including monetary relief (such as disgorgement of profits), in future proceedings involving Edison Mission's use of the High Offer Strategy during the May 2004 – April 2006 period.

Joint Intervenors' request is motivated by the concern that Paragraph 32 of the Agreement might be interpreted as a commitment by the Commission not to issue any order in the future that requires Edison Mission to pay additional monies, beyond the $9 million settlement amount. The language in question reads as follows:

> 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*.

Agreement at ¶ 32 (emphasis added). Although Paragraph 32 does not expressly foreclose PJM market purchasers from initiating future proceedings in which they allege economic harm due to Edison Mission's use of the High Offer Strategy, this provision may be read as preventing such parties from obtaining a Commission order directing monetary relief. That reading of Paragraph 32 also could result from other language in the Agreement suggesting that the penalties imposed in the Agreement represent the sole and exclusive relief to be ordered in any proceeding involving Edison Mission's use of the High Offer Strategy during the 2004-2006 timeframe.[7]

The question posed by Joint Intervenors' clarification request is not an academic one. Although detailed market data showing the effects of the High Offer Strategy are not publicly available, Edison Mission's use of that strategy almost certainly impacted PJM market participants in ways that would afford them rights to relief under the FPA. Market purchasers

[7] *See* in particular, the prefatory language in Part III of the Agreement ("Edison Mission and Enforcement enter into this Agreement to resolve the investigation, Edison Mission's High Offer Strategy, and Edison Mission's representations to Enforcement regarding the same. For purposes of settling any and all civil and administrative disputes arising from Enforcement's investigation into the matter self-reported by Edison Mission, Enforcement and Edison Mission agree that on and after the effective date of this Agreement, Edison Mission shall take the following actions …").

are entitled to know whether, in approving the Agreement, the Commission intended to deprive them of those rights.

In more detail, the Order and the Consent Agreement both recognize that the intent and effect of the High Offer Strategy were to keep significant amounts of Edison Mission "Capacity Resource" generation from being committed to provide energy in the DA market. *See* Order at P 3, and Agreement at ¶ 2. By artificially reducing the amount of generation available to clear in the DA market at economic prices, the DA market necessarily (and predictably) would have cleared at higher price levels than if all of Edison Mission's available generation had been offered at reasonable prices. Edison Mission should have benefited from the higher DA clearing prices caused by its actions because it did not economically withhold all its available resources; some of Edison Mission's available generation did clear in the DA market, and so would have received the higher prices resulting from the economic withholding of other Edison Mission generation. Also, the withholding of large blocks of generation from the DA market was likely a low-risk proposition for Edison Mission because the withheld generation was available to Edison Mission to be offered into the RT market through the second commitment auction conducted each day. *See* Agreement at ¶¶ 2, 15. Otherwise, the High Offer Strategy may not have been economically advantageous to Edison Mission, and Edison Mission would have lacked the incentive to continue using the strategy as long as it did (*i.e.*, long past the point when Edison Mission's practices had been called into question by the PJM Market Monitor and the OE Staff).

In short, it is difficult to imagine that Edison Mission's use of the High Offer Strategy had any effect other than to produce artificial increases in PJM energy market prices.[8] Economic

[8] The evidence may demonstrate an impact on RT market prices, in addition to the likely impact on DA market prices.

withholding aimed at manipulating market prices is actionable under the FPA, not only by the Commission itself, but by customers that suffer economic harm as a result. Conduct of this nature effects a fraud on the market and represents a prohibited exercise of market power; it violates the Commission's anti-manipulation rules and, typically, one or more applicable public utility tariffs. If PJM market buyers were able to demonstrate that they were economically harmed by Edison Mission's bidding tactics,[9] they would be entitled to monetary and other remedies, including disgorgement of the profits obtained through the seller's impermissible actions. Disgorgement of unjust profits is a distinct and separate remedy from the Commission's new authority, conferred by EPAct 2005, to impose civil penalties. *See* "Revised Policy Statement on Enforcement," *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 (May 15, 2008) (hereinafter, "Revised Enforcement Policy Statement") at P 43.[10] Moreover, the disgorgement remedy may be applied in addition to any civil penalties imposed by the Commission through the exercise of its new authority under 16 U.S.C. ¶ 825o-1(b) (2006).[11]

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[9] Because the OE's investigation and the Market Monitor's analysis were confidential, Joint Intervenors do not currently have sufficient information to determine whether Edison Mission's conduct caused monetary injury and, if so, the extent of that injury. Joint Intervenors expect to continue efforts to determine the material facts.

[10] As the Commission pointed out in its Revised Enforcement Policy Statement, disgorgement is a well-established remedy that is entirely separate from the new civil penalty authority conferred by EPAct 2005:

> Requiring disgorgement of unjust profits is consistent with long-standing Commission practice, the 2005 Policy Statement, and the practice of other enforcement agencies such as the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). Our practice in this regard has not altered since enactment of EPAct 2005, including in those cases involving the imposition of civil penalties.

Revised Enforcement Policy Statement, at P 43.

[11] *See id*. at P 42 ("In the event an entity acquires unjust profits through a violation of a statute, regulation or order, the Commission may require disgorgement and order restoration of the unjust profits. It is important to note that the Commission has discretion to order disgorgement *not in lieu of, but in addition to, civil penalties* or other remedies that may be imposed on the wrongdoer.") (emphasis added).

PJM market buyers should retain the right to seek disgorgement of unjust profits received by Edison Mission through its use of the High Offer Strategy. As noted, however, Paragraph 32 of the Agreement is subject to being construed as precluding a disgorgement order in any future proceeding. Clarification of the Commission's intent is necessary to remove uncertainty and assure market purchasers adversely affected by the High Offer Strategy that: (i) their statutory rights remain intact; and (ii) the Commission is not precluded by Paragraph 32 of the Agreement from ordering disgorgement or any other appropriate remedy in a future proceeding initiated by market purchasers that were economically harmed by the High Offer Strategy. The requested clarification also would serve three more salutary purposes:

- First, it would avoid sending an undesirable signal to other PJM market sellers. If market sellers believe they may engage in manipulative bidding tactics without penalty as long as they avoid misleading the Commission staff (assuming their tactics are detected and reported), more frequent episodes of manipulation may be expected. Leaving the door open for a disgorgement action against Edison Mission would be more likely to deter the use of manipulative bidding tactics by other suppliers.

- Second, the requested clarification would leave intact the settlement between OE and Edison Mission without disturbing third-party statutory rights. In other words, the Commission could clarify that Paragraph 32 applies only to Commission-initiated actions, leaving in place the FPA rights of market purchasers to seek additional relief. Edison Mission would gain the comfort of knowing that it will have no additional liability resulting from

Commission-initiated proceedings, which is all that it may legitimately expect from a settlement in which OE was the sole counter-party.[12]

- Third, the Commission should grant the requested clarification for the reasons set forth in the Joint Intervenors' Alternative Request for Rehearing (Part V, *infra*), which demonstrate that failure to grant the requested clarification would result in the Commission's adoption of the Agreement constituting legal error.

V. ALTERNATIVE REQUEST FOR REHEARING

If the Commission declines to provide the clarification requested in Part IV, *supra*, Joint Intervenors seek rehearing of the May 19 Order. It would be arbitrary, capricious, an abuse of discretion, and otherwise unlawful for the Commission to foreclose PJM market purchasers from pursuing disgorgement of profits or other monetary remedies if there is evidence of Edison Mission's manipulation of PJM energy market prices.

A. PJM Market Buyers Have a Statutory Right to Pursue Disgorgement and Other Remedies For Edison Mission's Impermissible Bidding Tactics.

Although the Agreement and the May 19 Order decline to make findings with regard to whether Edison Mission's use of the High Offer Strategy was unlawful or otherwise impermissible, enough information is available to support the conclusion that Edison Mission's bidding tactics were impermissible, and therefore are actionable, under the FPA -- not just by the Commission itself but also by affected market purchasers. Among the relevant items of information are the following:

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[12] This outcome would be in accord with the settlement approved by the FCC and considered by the U.S. Court of Appeals in *N.Y. Dept. of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993) (construing Consent Decree as foreclosing the FCC's exercise of its authority to initiate *sua sponte* further proceedings, but preserving complainants' rights to seek further recovery for damages beyond those compensated by the Consent Decree).

- Between May 2004 and April 2006, Edison Mission consistently offered large portions of its available generation into the DA market at prices near the $1,000/MWh offer cap. Agreement at ¶¶ 2, 15.

- Edison Mission's conduct had the specific intent of "ensur[ing] that the generation was not taken in the DA market, thus allowing that generation to clear in the real time (RT) market …." Agreement at ¶ 2; *see also* Order at P 3, emphasis added ("The Edison Mission bidding strategy examined by staff in the Investigation was Edison Mission's offering its capacity resource generation units at prices near the $1,000/MWh PJM bid cap *so that they would not be taken in the PJM day-ahead (DA) market* and would instead be taken in the subsequent PJM real-time (RT) market …").

- Resources kept out of the DA market through the High Offer Strategy then were reoffered by Edison Mission for selection in the RT market. These offers either were accepted by PJM or self-scheduled by Edison Mission in the RT energy market. Agreement at ¶ 15.

- Edison Mission continued to implement the High Offer Strategy for approximately two years beyond the time when PJM's Market Monitor expressed concern about the practice, and, likewise, for approximately two years beyond OE Staff's first inquiry into the matter. Agreement at ¶¶ 17, 20.

- "Economic withholding" is the practice of "bidding available supply at a sufficiently high price in excess of the supplier's marginal costs and opportunity costs so that it is not called on to run and where, as a result, the market clearing price is raised."[13]

[13] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at n.57 (2003).

- Economic withholding is an example of the exercise of market power.[14]

- Participation in PJM's capacity market provided Edison Mission (and other capacity resource providers) a "significant economic benefit." Agreement at ¶ 8. Under the PJM Tariff, a unit that has elected to be a Capacity Resource *must* offer to provide energy to the DA market. *Id*. at ¶ 9. The intent and/or effect of the High Offer Strategy was to circumvent this express tariff requirement that Capacity Resources offer to provide energy into the DA market.

- During all but two months of the period during which Edison Mission applied the High Offer Strategy, Edison Mission's own Market-Based Rate Tariff included a Commission-mandated "market behavior rule" that expressly prohibited actions intended to manipulate market prices or conditions, or that foreseeably could have that effect. More specifically, Edison Mission's Market-Based Rate Tariff incorporated Market Behavior Rule 2 during the period between December 17, 2003 and February 27, 2006.[15] Market Behavior Rule 2 prohibited "actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric

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[14] *See* the PJM Member Training Presentation dated January 9, 2008, entitled "Market Monitoring in PJM" at slide 10. The presentation is posted at http://www.pjm.com/services/training/downloads/20080109-gen-301-market-monitoring.pdf.

[15] In 2003, the Commission issued an order requiring that entities with market-based rate authorization adopt as part of their tariffs a set of specific Market Behavior Rules. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on rehearing*, 107 FERC ¶ 61,175 (2004). Market Behavior Rule 2 prohibited "actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products." Edison Mission modified its Market-Based Rate Tariff to incorporate the Market Behavior Rules, effective as of December 17, 2003. *See Midwest Generation LLC, et al.*, 111 FERC ¶ 61,034 (2005) at P 10 and Ordering Paragraph (E). The Commission later rescinded Market Behavior Rule 2, effective as of February 27, 2006, but retained substantial parts of the Rule in its anti-manipulation regulations. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 (2006), published at 71 Fed. Reg. 9695 (Feb. 27, 2006); *see also* 18 C.F.R. § 1c.2. Thus, Market Behavior Rule No. 2 was in effect as an explicit component of Edison Mission's Market-Based Rate Tariff for almost all of the time period during which Edison Mission implemented the High Offer Strategy, and was generally applicable for the remainder of the period.

> energy or electricity products." To the extent that the High Offer Strategy was an exercise of market power and a tactic for manipulating PJM energy market prices, it violated this provision of Edison Mission's own Market-Based Rate Tariff.[16]

PJM market purchasers affected by Edison Mission's use of the High Offer Strategy should be able, if the facts warrant, to exercise their FPA statutory rights to: (i) initiate complaint proceedings based on the position that Edison Mission's use of economic withholding, considered in light of the pertinent facts and circumstances, violated the PJM Tariff, Edison Mission's Market-Based Rate Tariff, and, quite possibly, other rules and regulations governing the operation of PJM's markets; (ii) make an evidentiary showing that they suffered economic injury as a result of Edison Mission's bidding tactics; and (iii) pursue all available remedies, including disgorgement of profits resulting from Edison Mission's practices and conduct, in connection with their claims. As demonstrated in the next section, the Commission may not lawfully attempt to deprive potential complainants of those important statutory rights, either by limiting the complainants' ability to initiate Commission proceedings or by agreeing in advance (as it appears to have done here) not to adopt particular remedies at the conclusion of such proceedings.

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[16] Even if it were assumed arguendo that the High Offer Strategy did not violate express provisions of the PJM Tariff, this factor would not be dispositive of whether the High Offer Strategy might have violated other tariff requirements, including Market Behavior Rule 2 (as incorporated in Edison Mission's Market-Based Rate Tariff). In fact, the Commission specifically observed that "economic withholding and strategic bidding behavior" could, in context, be actionable under Market Behavior Rule 2. *See Investigation*, 107 FERC ¶ 61,175 at P 120.

B. The Commission Cannot Bargain Away the Statutory Rights of PJM Market Buyers That Were Injured by Edison Mission's Conduct.

In Part III of this pleading, Joint Intervenors request clarification that Paragraph 32 of the Consent Agreement does not foreclose any party from obtaining, at the conclusion of an appropriate FPA complaint process, monetary remedies for Edison Mission's use of its High Offer Strategy. If the Commission refuses to provide that clarification, it will have acted unlawfully in committing to Edison Mission never to grant (or even consider) monetary relief to complainants that were economically harmed by Edison Mission's High Offer Strategy.

Commission-approved settlements may not take away the statutory rights of those who are not parties to the settlement.[17] In *Maine PUC*, the Court held that the Commission cannot approve a settlement that binds non-parties to the *Mobile-Sierra* public interest standard because doing so would deprive those non-parties of their statutory rights to challenge rates and charges under the "just and reasonable" standard in Section 206 of the Federal Power Act.[18] The circumstances presented by the Edison Mission settlement are even more compelling than those presented by the Forward Capacity Market settlement at issue in *Maine PUC*. If the Commission denies the clarification requested above, it will be depriving market purchasers of the ability to secure FPA relief from rates that were influenced, and likely were rendered unjust and unreasonable, by Edison Mission's High Offer Strategy. Whatever comfort might be offered by the Commission's authority to defend purchasers' interests, "the existence of such powers does not justify derogation of the statutory right to 'just and reasonable' review of rates."[19]

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17 *Maine PUC*, 520 F.3d. at 476-477.

18 *Id.* at 478.

19 *See id*. at 478 n.9.

As noted, the circumstances presented by the Edison Mission settlement are even more compelling than those presented in *Maine PUC*. The settlement in that proceeding was the outgrowth of a long and contested proceeding in which the parties opposing the settlement had due notice and an opportunity to challenge the underlying basis for the settlement. Here, by contrast, affected customers were not aware that a settlement was being negotiated until the final, Commission-approved settlement was released to the public on May 19, 2008. Without notice, customers were unable to step in to defend their interests before the Commission approved a settlement agreement that would undermine those interests. Thus, the considerations of fairness that animates *Maine PUC v. FERC* are even more pertinent here, because customers only were made aware after-the-fact that their statutory interests were in jeopardy.

C. Under the FPA, The Commission May Not Relinquish Its Statutory Authority and Jurisdiction To Consider A Complaint Against Edison Mission's High Offer Strategy.

The Commission's commitment to Edison Mission violates the basic principle that the Commission may not voluntarily relinquish its statutory authority or jurisdiction. If a complainant were able to demonstrate that Edison Mission's conduct resulted in unjust and unreasonable charges to the PJM energy markets, the Commission would be required to act.[20] Yet, paragraph 32 of the Settlement states that the Commission is "forever bar[red] … from holding Edison Mission … liable for any and all administrative, civil claims arising out of, related to, or connected with … the subject matter of the investigation." Unless the Commission grants the clarification requested above, this language would preclude the Commission from

[20] *See, e.g., New York v. FERC*, 535 U.S. 1, 27 (2002) (if FERC were to find a violation of the Federal Power Act, FERC would be required to provide a remedy) (*citing* 16 U.S.C. § 824e(a)); *Louisiana Public Service Commission v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999) ("and as to matters within its jurisdiction, the Commission has the duty – not the option – to reform rates that by virtue of changed circumstances are no longer just and reasonable") (internal citations omitted).

granting relief under a complaint filed by a customer aggrieved by Edison Mission's High Offer Strategy. The Commission's prospective relinquishment of its remedial authority is impermissible and unlawful because, *inter alia*, it frustrates the intent of Congress in providing that authority, and deprives consumers of the protection put in place for their benefit by the FPA.

It would be unavailing for the Commission to respond that, because the choice of remedies is committed to its discretion, agreeing not to impose additional financial liability on Edison Mission is a case of "no harm, no foul." Joint Intervenors do not concede that the choice of whether to grant remedies is a matter of unfettered discretion, especially in the instance of such clear and continuing tariff violations.[21] By foreclosing the possibility of disgorgement, the Commission has acted contrary to its paramount obligation under the FPA to protect utility customers against unjust and unreasonable rates. "The Commission's primary statutory obligation under FPA sections 205 and 206 is to ensure that rates are just and reasonable . . . ."[22] The Commission has also recognized that its "first and foremost duty is to protect customers from unjust and unreasonable rates."[23] As the Commission has explained, "in fashioning remedies, [the Commission] must look to the purpose of the act in question and give priority to the interests that the Commission is obligated to protect."[24]

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[21] *See, e.g., N.Y. Dept. of Law v. FCC*, *supra* note 12, 984 F.2d at 1217 (*citing Heckler v. Cheney*, 470 U.S. 821at 833 n.4 (1985), for the proposition that "some exercises of [an agency's] broad discretion to forego forfeitures could arguably be so extreme as to 'amount to an abdication of [the agency's] statutory responsibilities'.").

[22] *See, e.g.*, Order No. 697, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, FERC Stats. and Regs. ¶ 31,252 at P 332 (2007); *accord Regulations Governing Independent Power Producers*, Proposed Rule, FERC Stats. and Regs. ¶ 32,456 at 32,107 (1988) ("The Commission protects consumers against excessive rates through its ratemaking authority conferred by sections 205 and 206 of the FPA") (footnote omitted).

[23] Order No. 697 at P 6.

[24] *See Ozark Gas Transmission System*, 42 FERC ¶ 61,198 at 61,689 (1988) (*Ozark*). While *Ozark* involved the NGA, the Commission has acknowledged that it has a parallel, primary statutory duty under the FPA.

Even if remedial discretion exists in this setting, judicial and Commission precedent are clear that the exercise of such discretion is not without limits. Even in this area, "[t]he Commission must be able to demonstrate that it has 'made a reasoned decision based upon substantial evidence in the record.'" *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (*quoting Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992)); *see also Consol. Edison Co of N.Y. v. FERC*, 510 F.3d 333, 341-42 (D.C. Cir. 2007). The court in *Louisiana Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) similarly held that the Commission's discretionary decisions must be based on substantial evidence: "To the extent the Commission made factual determinations in the course of exercising its discretion, we of course ask whether those conclusions are supported by substantial evidence." *Id*. at 225.

Thus, whatever discretion the Commission may possess as to its choice of remedies can be exercised only in the context of the specific equities of a case, as shown in the evidentiary record of the case. Here, there *was* no record, and, indeed, there were no "findings." It would exceed whatever discretion the Commission may possess for it to agree, uninformed by evidence and without making reviewable findings, that it will "forever" forbear from exercising its authority to order disgorgement in connection with a properly prosecuted complaint.

Finally, to the extent the equities are germane in determining appropriate relief, they point in a direction opposite from where the May 19 Order landed. As the Commission pointed out, Edison Mission's violations of the candor duty "were severe because they involved repeated conduct that misled staff in the course of an investigation." Order at P 8. Moreover, Edison Mission was on notice that a violation of its Market-Based Rate Tariff could result in

disgorgement of unjust profits and/or loss of its market-based rate authority.[25] In these circumstances, the equities should have caused the Commission to preserve its authority to order disgorgement in response to a customer complaint directed against the High Offer Strategy, rather than relinquishing that authority for a modest sum that will not even be directed to compensate parties that were injured by Edison Mission's practices. As noted, the $7 million monetary penalty assessed against Edison Mission is to be paid into the U.S. Treasury, rather than returned to market purchasers that paid higher prices because of the High Offer Strategy.

D. The Commission's Actions Deny Parties Injured by Edison Mission's Conduct a Remedy to Which They are Statutorily Entitled.

Refunds permitted by the Federal Power Act are remedial rather than punitive. The obligation to provide refunds is intended to put parties affected by unjust and unreasonable rates – or outright tariff non-compliance - back in the position they would have occupied had the rates been lawful. If the facts show that Edison Mission's conduct caused monetary injury, the Settlement does not put customers back in the position they would have occupied had Edison Mission not engaged in its High Offer Strategy. The Order merely punishes Edison Mission for its deception of OE Staff; it does nothing to remedy the market impacts of Edison Mission's actions.

The amount of the penalty is minimal compared to the price increases that likely resulted from Edison Mission's High Offer Strategy. The Settlement imposed only $7 million in direct fines and an additional $2 million for a compliance program that should have been in place since

[25] The Market Behavior Rules in effect under Edison Mission's Market-Based Rate Tariff during the relevant time period included the following admonition: "Any violation of these Market Behavior Rules will constitute a tariff violation. Seller will be subject to disgorgement of unjust profits associated with the tariff violation, from the date on which the tariff violation occurred. Seller may also be subject to suspension or revocation of its authority to sell at market-based rates and other appropriate non-monetary remedies."

Edison Mission was first granted market-based rate authority. Neither the Consent Agreement nor the Order approving it discusses whether these amounts are in any way calibrated to the price impacts that customers suffered due to the High Offer Strategy. As Commission Moeller correctly noted in his concurrence to the May 19 Order, there is no support for the penalty in any case.

That the calculation of refunds may prove to be complex and contentious is irrelevant in evaluating the lawfulness of Paragraph 32 of the Consent Agreement or the Commission's approval thereof. On the contrary, it would only invite more such abuses in the future if the conclusion to be drawn is that PJM's markets have become so complex that accurate refunds cannot - and, so, will not - be granted. If Paragraph 32 were interpreted as foreclosing disgorgement in response to a customer complaint, the remedial aspects of the Federal Power Act (which the Commission cites as a bulwark of its market-based rate authority program) will be left by the wayside.

Such a denial of recourse would be impermissible. Market purchasers have a statutory right to be assessed only such charges as are just and reasonable – which is to say, charges that are not tainted by tariff violations, price manipulation, and exercises of market power. That right is separate and distinct from the Commission's own organizational interest in assuring that its interactions with regulated entities are candid and complete. These rights may not be traded against one another; nor are the interests of market participants "chips" that the Commission may bargain away in the course of negotiating settlements with the subjects of enforcement actions. That would be true even if the Commission had extracted from Edison Mission an amount of money that bore some relationship to the impacts that Edison Mission's wrongful conduct had on

the PJM energy markets.[26] Here, the Commission may have bargained away the statutory rights of market purchasers for materially less. That action is wholly beyond the Commission's legal authority or discretion, and is, for that reason, arbitrary, capricious, an abuse of discretion, and otherwise unlawful.

[26] If the penalty ordered by the Commission were tied to market impacts and if the money were paid to market purchasers rather than the U.S. Treasury, the Commission could have presented double-recovery by market purchasers would be to offset their share of the penalty against any future payments ordered to be made in connection with a customer's complaint action. *See N.Y. Dept. of Law v. FCC*, *supra* (adversely affected customers retain the right to seek damages over and above the payments ordered by the agency). Foreclosing entirely and forever any additional monetary relief is not reasonable, equitable nor lawful.

VI. CONCLUSION

WHEREFORE, Joint Intervenors request the Commission to: (1) grant their joint and several motion to intervene in this docket, with all rights appurtenant to that status; and (2) provide the clarifications requested in Section IV of this pleading, or, in the alternative, grant rehearing as requested in Section V of this pleading.

Respectfully submitted,

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June 18, 2008

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon the parties identified on the Commission's official service list by electronic means or first class mail, postage prepaid.

Dated at Washington, D.C. this 18th day of June, 2008.

By **/s/ Robert A. Weishaar, Jr.** _____

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Summary: Motion Motion to Intervene, and Request for Clarification, or, in the Alternative, Motion for Rehearing submitted in FERC Docket No. IN08-3-000 on behalf of the Public Utilities Commission of Ohio, et al. electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio