

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.)	Docket No. EL08-44-000
Accord Energy, LLC)	
BJ Energy, LLC)	
Franklin Power, LLC)	
GLE Trading, LLC)	
Ocean Power, LLC)	
Pillar Fund, LLC)	
Power Edge, LLC)	
Tower Research Capital, LLC)	
Tower Research Capital Investments, LLC)	

**MOTION TO INTERVENE OUT-OF-TIME
AND REQUEST FOR REHEARING OF THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
AND THE AMERICAN PUBLIC GAS ASSOCIATION**

Pursuant to Rules 212, 214 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.212, 385.214, and 385.713 (2008), the National Rural Electric Cooperative Association (“NRECA”) and the American Public Gas Association (“APGA”) (together, “Joint Trade Associations”) hereby move to intervene out-of-time in the above-referenced proceeding, for the limited purpose of seeking rehearing of issues raised by the Commission’s Order Denying Complaint in Part, issued on April 2, 2009.¹ As further explained herein, and consistent with the concerns expressed in the Request for Rehearing on behalf the Indicated Entities² also being filed today in this proceeding, the Joint Trade Associations are concerned that the April 2 Order, together with the

¹ *PJM Interconnection, L.L.C. v. Accord Energy, LLC*, 127 FERC ¶ 61,007 (2009) (“April 2 Order”).

² See *Request for Rehearing of Old Dominion Electric Cooperative, et al.*, at page 9.

Commission's orders in the Docket No. IN08-3-000 investigation of Edison Mission Energy³, creates a lack of procedural due process that reduces the public's faith in the Commission's well-intentioned enforcement process. In support hereof, the Joint Trade Associations state as follows:

I. COMMUNICATIONS

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II. RELEVANT BACKGROUND

On March 7, 2008, PJM Interconnection, L.L.C. ("PJM") filed a complaint in this proceeding under Federal Power Act ("FPA") Sections 206, 222 and 306⁴ against Accord Energy LLC, BJ Energy LLC, Franklin Power LLC, GLE Trading LLC, Ocean Power LLC, Pillar Fund LLC, Power Edge LLC ("Power Edge"), Tower Research Capital LLC, and Tower Research Capital Investments LLC (collectively, "Tower Companies" or "Respondents"). PJM's Complaint alleged that several of the Tower Companies engaged in market manipulation and fraud, by: (1) colluding to purchase offsetting financial transmission rights ("FTR") positions

³ See *In re Edison Mission*, 125 FERC ¶ 61,020 (2008), *appeal pending*, *American Public Power Association, et al. v. FERC*, D.C. Cir. No. 09-1051.

that manipulated the PJM market; (2) artificially creating congestion in the PJM day-ahead energy market using increment and decrement bids in order to increase some affiliates' profits while worsening the Power Edge default that all PJM Members would have to cover; and (3) fraudulently distributing to Power Edge investors or shareholders funds that could have been used to pay Power Edge's obligations on counterflow FTRs.⁵ As relief, PJM requested, among other things, that the Commission (1) investigate the Tower Companies' conduct to determine all violations of the Commission's rules prohibiting market manipulation; (2) initiate an expedited public hearing, with discovery; and (3) impose civil penalties and order the disgorgement of unjust revenues and profits, to be refunded to affected PJM Members.⁶

By Order issued April 30, 2008, the Commission held PJM's Complaint in abeyance, pending the completion of an ongoing investigation by the FERC Office of Enforcement ("OE").⁷ In that Order, the Commission stated that it did not have sufficient information to grant or deny the complaint, directed the Office of Enforcement to provide the Commission with a report of its ongoing investigation, and stated that "[f]ollowing that report, the Commission expects to issue a further order on the complaint."⁸

In the April 2 Order, the Commission attached and incorporated into the record the Enforcement Staff's report on its investigation.⁹ The Commission determined that "because PJM provided, and OE found, no evidence that the Tower Companies' dealings with Power Edge

⁴ 16 U.S.C. § § 824e, 824v, and 825e.

⁵ PJM Complaint at 22-35.

⁶ PJM Complaint at 35.

⁷ *PJM Interconnection, L.L.C. v. Accord Energy, LLC*, 123 FERC ¶ 61,103 (2008).

⁸ *Id.* at P 16.

⁹ *Non-Public Investigation Into Possible Market Manipulation by Tower Research Capital Affiliates in the Financial Transmission Rights Markets Operated by PJM: Alleged Wrongful Coordination of FTR Strategies and Affiliate Risk-Shifting*, Enforcement Staff Report, Docket No. EL08-44, March 11, 2009 ("Enforcement Report").

constituted a scheme or artifice to defraud with the requisite scienter”, the Commission would take no further action on PJM’s allegations with respect to manipulation of the FTR market and the deliberate under- or de-capitalization of Power Edge.¹⁰ This determination by the Commission is the entirety of the analysis contained in the April 2 Order. While the Enforcement Report is made a part of the record in this proceeding, the Commission itself does not either address the merits of PJM’s complaint or provide any explanation as to how the Enforcement Report defeats PJM’s asserted establishment of a *prima facie* case that the Tower Companies have engaged in prohibited market manipulation.

III. MOTION TO INTERVENE OUT-OF-TIME

NRECA is the not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives. NRECA’s members encompass both (a) distribution cooperatives that operate primarily at retail over lower-voltage distributions systems and provide retail electric service to over 42 million consumer-owners in 47 states, and (b) 65 generation and transmission (“G&T”) cooperatives that supply wholesale power to their distribution cooperative owner-members and/or operate higher-voltage transmission systems.

APGA is a national, not-for-profit association of more than 700 municipal and other publicly-owned local distribution systems in 36 states. APGA members own and operate natural gas distribution systems serving their communities and are served by interstate natural gas pipeline systems located across the country. Publicly-owned gas systems are not-for-profit retail distribution entities owned by and accountable to the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities. Of the some 1200 local distribution

¹⁰ April 2 Order at P 4.

companies in the United States, almost 1000 are publicly-owned local gas distribution systems serving more than 4.6 million natural gas customers.

The Joint Trade Associations have an interest in their own right, and on behalf of their members, in the precedent set by the April 2 Order, as discussed below. NRECA also has several members within PJM whose interests are directly affected by the April 2 Order, which dismisses portions of PJM's Complaint that seeks to protect PJM Members from harm caused by the Tower Companies' alleged market manipulation.

In deciding whether to grant a motion to intervene out-of-time, the Commission may consider: (1) whether the movant had good cause for failing to timely intervene; (2) any disruption in the proceeding that might result from permitting intervention; (3) any prejudice or additional burdens upon existing parties that might result from granting the intervention; and (4) whether the movant's interest is not adequately represented by other parties in the proceeding.¹¹ The Joint Trade Associations respectfully submit that their request for intervention satisfies these criteria and, therefore, should be granted.

First, the Joint Trade Associations had good cause for failing to timely intervene because the aspect of the April 2 Order that gave rise to this motion could not have been known prior to the issuance of the April 2 Order. Specifically, the Joint Trade Associations seek party status in this proceeding solely to address the Commission's failure to engage in reasoned decision-making by relying upon the Enforcement Report as the basis for dismissing portions of PJM's Complaint, as discussed in Section IV below. Until the issuance of the April 2 Order, the Joint Trade Associations reasonably expected that the Commission would use its regular, public

¹¹ 18 C.F.R. § 385.214(d)(2008).

process for resolving complaints.¹² PJM filed its Complaint publicly, under the FPA and the Commission's regulations implementing same.¹³ The Commission's usual and expected process, as set forth in its regulations, is to resolve such complaints through either (1) dispute resolution or settlement procedures; (2) an order on the merits based upon the pleadings; or (3) by establishing evidentiary hearing procedures.¹⁴ The Joint Trade Associations had no reason to expect that the Commission would not proceed as usual on PJM's Complaint. It was not until the Commission issued its April 2 Order that it became apparent that the Commission would depart from the expected complaint resolution procedures. Instead, the Commission simply incorporated into the record the Enforcement Report and in a two-sentence ruling determined that PJM's claims "do not rise to the level of a violation of 18 C.F.R. § 1.c.2. (2008)" and, therefore, the Commission would take no further action on two of PJM's allegations of market manipulation by the Tower Companies.¹⁵ The Commission's deviation from its usual complaint resolution procedures, in favor of relying on a closed-door enforcement investigation and providing no analysis or explanation of the basis for dismissing PJM's Complaint in part, was not reasonably foreseeable by the Joint Trade Associations nor, indeed, by anyone. The Joint Trade Associations have concerns about the Commission's using its non-public investigation procedures to completely resolve complaints filed under the Federal Power Act. Therefore, good cause exists to permit the Joint Trade Associations to intervene at this time, in order to address this issue. Further, unless intervention is granted, the Joint Trade Associations will lose the ability to address this issue that could affect any number of current and future complaint

¹² See 18 C.F.R. § 385.206(g)(2008).

¹³ 18 C.F.R. § 385.206 (2008).

¹⁴ 18 C.F.R. § 385.206(g)(2008).

¹⁵ April 2 Order at P 4.

proceedings because, to the Joint Trade Associations' knowledge, this issue is not currently pending in any proceeding of general applicability.

Second, the Joint Trade Associations submit that their participation at this point will not unduly disrupt the proceedings or burden any of the parties. The Joint Trade Associations do not seek to challenge the record in this proceeding, and accept the limited record that has been made available to date. Instead, the Joint Trade Associations' concern is the lack of due process afforded to the Complainant and interested parties, including the Commission's use of a non-public enforcement investigation to dismiss PJM's Complaint. Thus, the Joint Trade Associations' intervention will not unduly disrupt the proceedings, nor will any party be unduly burdened by the Joint Trade Associations' intervention.

Third, given NRECA's unique status as the national service organization for distribution and G&T cooperatives and APGA's unique status as the national, not-for-profit association of publicly-owned local gas distribution systems, and in light of the fact that some of their members will be directly and adversely affected by this proceeding as PJM Members and others could be directly affected by the process used by the Commission to resolve PJM's Complaint, the Joint Trade Associations' interests cannot be adequately represented by any other party to the proceedings, and their intervention is in the public interest. Therefore, for all of these reasons, the Joint Trade Associations request that they be permitted leave to intervene in this proceeding out-of-time.

IV. REQUEST FOR REHEARING

A. Statement of Issues and Specification of Error

Pursuant to Rule 713(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(1)(2008), the Joint Trade Associations submit that the April 2 Order erred

in (1) effectively converting PJM's Complaint into an enforcement investigation, which did not provide parties an opportunity to participate and/or respond to the matters addressed in the Enforcement Report; (2) relying upon the non-public enforcement investigation and Enforcement Report in order to dismiss portions of the PJM Complaint; and (3) failing to provide a decision, on the merits, addressing PJM's Complaint.

Pursuant to Rule 713(c)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(1)(2008), the Joint Trade Associations submit the following statement of issues:

1. Whether the April 2 Order is arbitrary and capricious, fails to represent reasoned decision making, and violates principles of due process by deferring the resolution of PJM's Complaint to the non-public enforcement investigation. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1065), *cert. denied*, 384 U.S. 941 (1966); *Northern States Power Co. v. FERC*, 30 F.3d 177 (D.C. Cir. 1994)(citations omitted); *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006).
2. Whether the April 2 Order is arbitrary and capricious and fails to represent reasoned decision making, and violates principles of due process by relying completely on the Enforcement Report without providing an opportunity for interested parties to participate in or respond to the matters addressed in the Report. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1065), *cert. denied*, 384 U.S. 941 (1966); *Northern States Power Co. v. FERC*, 30 F.3d 177 (D.C. Cir. 1994)(citations omitted); *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006).

3. Whether the April 2 Order is arbitrary and capricious and fails to represent reasoned decision making for failing to provide any explanation on the merits of the Commission's decision to dismiss portions of PJM's Complaint. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1065), *cert. denied*, 384 U.S. 941 (1966); *Northern States Power Co. v. FERC*, 30 F.3d 177 (D.C. Cir. 1994)(citations omitted).

B. Argument

The Commission has a statutory obligation to ensure that rates for jurisdictional services are just, reasonable, and not unduly discriminatory or preferential. In discharging its duty to protect the public interest, the Commission must provide “active and affirmative”¹⁶ protection to the public, which must necessarily involve affording a reasonable opportunity to be presented with evidence, addressing all such evidence and legal argument that has been presented for decision, and of great importance here, explaining the basis for its decision. As the courts have previously held, “the Commission must be able to demonstrate that it has ‘made a reasoned decision based upon substantial evidence in the record’ . . . and the ‘path of [its] reasoning must be clear.’”¹⁷

The April 2 Order fails completely in meeting the Commission's statutory obligation. In its Complaint, PJM provided extensive evidence in support of its allegations that the Tower Companies have violated the Commission's rules prohibiting manipulation of the electric energy markets. The Commission initially deferred addressing the merits of PJM's Complaint pending a

¹⁶ *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1065), *cert. denied*, 384 U.S. 941 (1966).

¹⁷ *Northern States Power Co. v. FERC*, 30 F.3d 177, 180-182 (D.C. Cir. 1994)(citations omitted).

report on the Office of Enforcement's investigation.¹⁸ Once the Enforcement Report was issued, the Commission issued the April 2 Order. However, in dismissing PJM's Complaint in part, the Commission did not provide any analysis of the evidence put forth, or even address the arguments made by PJM and others in support of the Complaint. Instead, the April 2 Order makes the Enforcement Report part of the record in this proceeding, states that the Office of Enforcement found no evidence of market manipulation, and recounts the elements of a claim for market manipulation. The entirety of the Commission's "analysis" of the Complaint is as follows:

PJM's claims with respect to the two allegations addressed by the OE report, as discussed above, do not rise to the level of a violation of 18 C.F.R. § 1.c.2. (2008), because PJM provided, and OE found, no evidence that the Tower Companies' dealings with PowerEdge constituted a scheme or artifice to defraud made with the requisite scienter. As a result we will take no further action regarding these instances of PJM's allegations of market manipulation.

April 2 Order at P 4.

The April 2 Order does not provide any decision making at all, much less reasoned decision making. Therefore, the April 2 Order does not satisfy the Commission's obligation under FPA Section 206 to address the evidence put before it and provide a reasoned basis for its decision. In response to the Complaint, the Commission has taken the action, unprecedented to the Joint Trade Associations' knowledge, of simply deferring the matter to its Enforcement Staff, without ever providing an opportunity for public procedures or addressing the merits of the Complaint. The Joint Trade Associations do not take issue with the Commission's April 30, 2008 decision to defer an order on the merits of PJM's Complaint pending receipt of the Enforcement Report. However, the Commission must not use the investigation process itself to replace public complaint procedures. A non-public enforcement investigation proceeding, by its

¹⁸ *PJM Interconnection, L.L.C. v. Accord Energy, LLC*, 123 FERC ¶ 61,103 (2008).

very nature, cannot possibly afford interested parties the notice and opportunity to be heard that is vital to the Commission's resolution of FPA Section 206 Complaints. Therefore, the Enforcement Report cannot substitute for the Commission's obligation to provide an analysis and explanation for its decision.

As the Commission has made clear, there is no right to intervene in Part 1b investigations.¹⁹ Thus, the public was not provided with an opportunity to observe, let alone participate in or respond to, the extensive discovery and evidence produced during the investigation proceeding.²⁰ Despite the closed nature of the investigation, the Commission has used the Enforcement Report to dismiss two of the counts in PJM's Complaint.

The Commission's decision to circumvent the usual complaint processes through an investigative proceeding, and to summarily dismiss portions of the PJM Complaint without any explanation whatsoever, are errors that must be corrected on rehearing. The Commission provided assurance in its Order No. 670²¹ that complaints alleging prohibited market manipulation would be processed in the same manner as other FPA Section 206 complaints. In the Order No. 670 proceeding, parties requested that the Commission adopt procedures "that will permit involvement of affected market participants in manipulation complaints, including intervention and full participation by affected parties, and availability of all remedies . . ."²², in order to "provide due process for those damaged by manipulation"²³ and "assure that the

¹⁹ See *In re Edison Mission*, 125 FERC ¶ 61,020 (2008) ("*Edison Mission*"); *appeal pending, American Public Power Association, et al. v. FERC*, D.C. Cir. No. 09-1051.

²⁰ See Enforcement Report at 17-18 (summarizing the review of a "large volume of internal documents and transactional data" conducted by OE, as well as depositions, meetings and consultations).

²¹ *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006) ("Order No. 670"); *reh'g denied*, 114 FERC ¶ 61,300 (2006).

²² Order No. 670 at P 68.

²³ Id.

Commission considers all relevant factors in resolving the complaint.”²⁴ The Commission rejected such requests for procedures as unnecessary, and stated that “[a]s to the procedures to be followed when a complaint alleging manipulation is filed, the Commission will process the filing under the procedures currently set forth in Rule 206 of the Rules of Practice and Procedure.”²⁵

The Commission’s regulations provide three procedural options for resolving complaints: (1) alternative dispute resolution or settlement judge procedures; (2) “an order on the merits based upon the pleadings”; or (3) a hearing before an Administrative Law Judge.²⁶ The options for resolving a complaint certainly do not envision the Commission summarily dismissing a complaint, based entirely on an investigation process where the public is excluded from participation. The Commission did not establish any dispute resolution or evidentiary hearing procedures, and the mere incorporation of the Enforcement Report into the record in this proceeding is not “an order on the merits based on the pleadings.”²⁷ Therefore, the Commission’s April 2 Order defies both due process and the Commission’s own pledge in Order No. 670 that complaints alleging market manipulation would be processed in the same manner as other complaints under Section 385.206 of the Commission’s regulations.

The errors in the April 2 Order are even more glaring when considered in light of the *Edison Mission* orders. In this proceeding, by converting the PJM Complaint into an enforcement investigation, the Commission improperly constrained the participation of the Complainant and affected interested parties and failed to meaningfully address the merits of the complaint. In *Edison Mission*, public participation was not allowed, even though the

²⁴ Id.

²⁵ Order No. 670 at P 70 (citation omitted).

²⁶ 18 C.F.R. § 385.206(g).

²⁷ 18 C.F.R. § 385.206(g).

Commission was approving a settlement that closed the door on any public participation in that matter, even preempting parties' right to file a complaint to seek customer redress. The Commission terminated that proceeding without ever making public the results of the enforcement investigation, except to the very limited extent recited in a Settlement Agreement to which the investigated public utilities consented. If the worst elements of both cases are combined, the Commission would appear to have the power to settle an FPA Section 206 complaint out from under a complainant, without revealing its own view of the merits, and without considering submissions by the complainant or any other affected party, other than the *ex parte* views of the investigation target. Especially when considered together, these cases are antithetical to transparency and materially reduce the public's faith in an otherwise well-intentioned FERC enforcement process.²⁸

For all of these reasons, the April 2 Order is arbitrary and capricious and is a failure of reasoned decision making. Therefore, the dismissal of portions of PJM's Complaint is also arbitrary and capricious. On rehearing, the Joint Trade Associations request that the Commission establish a public procedure, such as evidentiary or paper hearing procedures, in order to afford interested parties an opportunity to address the data and recommendations in the Enforcement Report. Following such public procedures, the Commission should then issue an order on the merits of the PJM Complaint, consistent with its complaint resolution procedures. Alternatively, the Commission must at least on rehearing provide a reasoned basis for its decision, that addresses the record evidence and arguments.

²⁸ The Joint Trade Associations have heretofore supported FERC's assertion of broad enforcement authority. *See, e.g.*, NRECA's December 17, 2007 Comments in *Conference on Enforcement Policy*, Docket No. AD07-13-000, at 2 ("NRECA supports a robust enforcement program"), and the September 28, 2007 *amicus* brief joined by the Joint

V. CONCLUSION

WHEREFORE, for these reasons, the Joint Trade Associations request that the Commission (1) grant this motion to intervene out-of-time, with all rights attendant thereto; and (2) grant rehearing of the April 2 Order, as discussed above.

Respectfully submitted,

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Trade Associations in *CFTC v. Amaranth Advisors, LLC*, 523 F. Supp. 2d 328 (S.D.N.Y. 2007), *reconsideration denied*, 2008 U.S. Dist. LEXIS 45638 (S.D.N.Y. June 10, 2008).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon each party on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, D.C., this 4th day of May 2009.

/s/ Adrienne E. Clair