

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PUBLIC POWER ASSOCIATION, AND  
NATIONAL RURAL ELECTRIC COOPERATIVE  
ASSOCIATION, *et al.*,  
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
Respondent.

CASE NO. 09-1051;  
CONSOLIDATED WITH  
NOS. 09-1052, 09-1054,  
AND 09-1055

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**ANSWER TO DISPOSITIVE MOTIONS**

Pursuant to FRAP 27(a)(3), Petitioners American Public Power Association (“APPA”), National Rural Electric Cooperative Association (“NRECA”), Indiana Utility Regulatory Commission (“IURC”), Maryland Public Service Commission (“MPSC”), and Pennsylvania Public Utility Commission (“PPUC”), and intervenor the PJM Industrial Customer Coalition (“PJMICC”), hereby answer the dispositive motions filed on March 26 and April 2 by Edison Mission Energy (“EME”) and FERC, respectively. Movants maintain that in deciding whether and on what terms to absolve a seller of charges that it illegally manipulated electricity markets, FERC may refuse to even consider the comments and interests of affected consumers, their associational representatives, and their state regulators, and

entirely preclude judicial review of its course, through a simple expedient: just deny intervenor status to those who are affected and want to be heard. Movants would jettison the Commission's consumer-protection mission,<sup>1</sup> common sense, and the rule of law.

## **I. BACKGROUND**

Our present petitions call for the Court to consider only a single, procedural issue: whether FERC should have considered on their merits the comments proffered by affected entities other than EME, rather than dismissing those comments by denying those entities' motions to intervene.<sup>2</sup> Because that issue is intertwined with the issues raised in the Motions, the Motions effectively accelerate, so as to precede the record, the briefing of the appeal itself. Some factual background, extending to additional issues that will arise only in the event of a remand, is therefore necessary to place the present issue in its context.

The Court is generally familiar with the PJM Interconnection and its energy markets. *See, e.g., Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002), *aff'd*, 329 F.3d 856 (D.C. Cir. 2003). The present case arose because the "Independent

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<sup>1</sup> *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. \_\_\_, 128 S. Ct. 2733, 2749 (2008) (FERC's "'first and foremost duty is to protect consumers from unjust and unreasonable rates,'" quoting Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904, P 6 (July 20, 2007)).

<sup>2</sup> The IURC has asserted additional issues, but realizes that the intervention issue discussed herein is likely dispositive.

Market Monitor,” an ombudsman employed by PJM and funded by ratepayers, became suspicious that EME, through its pattern of submitting bids to supply electric power in PJM’s centralized market, was improperly manipulating that market and thereby substantially increasing the price of PJM-area electricity.<sup>3</sup> Under FERC’s rules, however, the Monitor was not permitted to alert market participants. Instead, he was obliged to, and did, inform FERC, which sequestered the relevant information until it had completed a non-public investigation, entered into a Settlement Agreement with EME, and approved that Agreement through an explicitly final order.<sup>4</sup> Under the Agreement, EME admitted that it had misled FERC, and, as a consequence, agreed to institute a prospective compliance program and pay \$7 million to the U.S. Treasury. However, EME admitted no market manipulation, paid nothing to PJM, and paid nothing to PJM’s ratepayers and market participants. Apparently attempting to close the door on potential third party claims, the Agreement also provided that

Commission approval of this Agreement without material modification shall release Edison Mission and forever bar the Commission from holding Edison Mission or its

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<sup>3</sup> Specifically, the IMM suspected that EME was effectively withholding from PJM’s day-ahead market energy that EME had previously committed to sell to PJM, as consideration for lucrative forward capacity payments previously paid to EME and funded by load-serving entities, including consumers represented by the parties joining this Answer.

<sup>4</sup> *In re Edison Mission*, Order Approving Stipulation and Consent Agreement, 123 F.E.R.C. ¶ 61,170 (May 19, 2008). This is the first of the three orders identified in the petitions for review, and is before the Court as Attachment A to FERC’s motion. The subject Settlement Agreement is attached to that order.

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.

123 F.E.R.C. ¶ 61,170, Stipulation and Consent Agreement, P 32.

Through the same order that made public the existence and outcome of its investigation, and making no findings with respect to EME's market conduct, the Commission approved this release and the rest of the Agreement, without change.<sup>5</sup>

Upon simultaneously learning of EME's suspicious bidding and FERC's order approving this release, several PJM-area state regulators, associations, and consumer-owned utilities, representing among them much of PJM's consuming public, sought to intervene for the purpose of requesting clarification and/or rehearing on the issue of, among other things, whether the Commission intended to diminish their potential third-party rights to obtain redress for EME's actions. Examples of the motions to intervene and rehearing requests are provided as Appendix A. Among other things, these pleadings asserted that the Agreement could be read to compromise away, for inadequate value to consumers, the rights of PJM market purchasers, contrary to *Maine Public Utilities Commission v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *petition for cert. filed*, No. 08-674 (Nov. 21, 2008) and *N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993), and without weighing their compromised interests against agency resource savings, as

required under *Columbia Gas Transmission Corp.*, 80 F.E.R.C. ¶ 61,220 (1997), *reh'g denied*, 85 F.E.R.C. ¶ 61,437 (1998) (“*Columbia*”), *on reh'g*, 89 F.E.R.C. ¶ 61,325 (1999), *appeal denied sub nom. Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456 (D.C. Cir. 2001) (“*BG&E*”).

FERC did not consider the merits of any of these pleadings. Instead, it simply “dismissed” them.<sup>6</sup> The sole articulated basis for dismissal was that because FERC had decided not to allow the entities filing them to intervene, “the requests for rehearing do not lie.”<sup>7</sup> FERC also reinforced the Agreement’s preclusive effect as to further remedies,<sup>8</sup> leading to further requests for rehearing — which the Commission denied by operation of law,<sup>9</sup> thereby again declining to address any merits.

Movants make essentially three arguments in support of precluding judicial review and thereby avoid having to defend the procedures through which FERC reached this result. First, EME asserts that FERC’s denial of intervention creates a Catch-22, because only parties may seek judicial review. But this Circuit has

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<sup>5</sup> *Id.* PP 10-12.

<sup>6</sup> *In re Edison Mission*, Order Denying Motions to Intervene and Dismissing Requests for Clarification and Rehearing, 125 F.E.R.C. ¶ 61,020 (Oct. 7, 2008). This is the second of the three orders identified in the petitions for review, and is before the Court as Attachment B to FERC’s motion.

<sup>7</sup> *Id.* P 43

<sup>8</sup> *Id.* P 37 & n.81.

<sup>9</sup> *In re Edison Mission*, Notice of Denial of Rehearing by Operation of Law, 125 F.E.R.C. ¶ 61,278 (Dec. 8, 2008). This is the third of the three orders identified in the petitions for review.

rejected that argument many times over, in decisions spanning more than a half-century. See Part II below. Second, both Movants argue that FERC had no reason to consider the views of other regulators and consumers, because it has unlimited discretion to settle enforcement claims. That argument piles a *non sequitur* atop a false premise: FERC here went beyond settling enforcement claims, and even if it had stayed within the scope of its enforcement discretion, it was obliged to consider others' views before exercising that discretion. See Part III below. Third, EME and FERC argue that this Court cannot remedy FERC's denial of intervention, because a Court order requiring that FERC allow intervention might not change the substantive outcome. But they cannot deny that a Commission that considered the intervenors' views in good faith might come to a different result, and that is enough to establish standing. See Part IV below.

## **II. FERC'S DENIAL OF INTERVENTION DOES NOT SHIELD FROM REVIEW FERC'S DENIAL OF INTERVENTION**

Citing Federal Power Act ("FPA") Section 313(b), 16 U.S.C. § 825l which provides for judicial review only when sought by an aggrieved "party to a proceeding," EME asserts (at 10-11) that "Petitioners fail the standing requirements as they were not parties to the proceedings that give rise to their complaint ... ." Nonetheless, EME proceeds to concede (at 11-12) that under FPA § 313 "the question of whether FERC erred in denying Petitioners' motions to intervene" may be "properly before the Court."

That is precisely the question Petitioners seek to pursue,<sup>10</sup> and it is indeed properly before the Court. The Court's precedents clearly provide that under the Federal Power Act and similar statutes, a would-be intervenor whose intervention is denied is an aggrieved "party" eligible under FPA § 313(b) to petition for review. "It would be grossly unfair to deny judicial review to a petitioner objecting to an agency's refusal to grant party status on the basis that the petitioner lacks party status. Such a petitioner must obviously be considered a party for the limited purpose of reviewing the agency's basis for denying party status," *City of Orrville v. FERC*, 147 F.3d 979, 989 n.12 (D.C. Cir. 1998) (quoting *N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984)); *Loveland*, 534 F.2d at 960 n.1 (D.C. Cir. 1976) (reviewing, under similar language in the Interstate Commerce Act, an agency decision to deny a motion to intervene, and remanding it as an abuse of discretion); *Pub. Serv. Comm'n of N.Y. v. FPC*, 284 F.2d 200, 203 (D.C. Cir. 1960) ("[A] would-be intervenor is .... within the statutory term 'Any party to a proceeding' .... to the extent that he has pending before the Commission a pleading the disposition of which affects his interest in

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<sup>10</sup> See, e.g., Non-Binding Statement of Issues to Be Raised by Petitioners APPA and NRECA, at 4 (Mar. 11, 2009) as in [*S. C. Loveland Co. v. United States*, 534 F.2d 958 (D.C. Cir. 1976)("Loveland")] 'the only issue properly before this court is the propriety of the Commission's denial of the right to intervene,' *id.* at 960. Petitioners maintain that the Court should, as it did in *Loveland*, find that the Commission acted improperly in denying intervention, and therefore should 'direct the Commission to permit ... intervention and to reopen ... [its prior orders] for reconsideration,' *id.* n.1.').

the subject-matter of the controversy. ... [A] would-be intervenor is aggrieved, within the meaning of the statute.”), *later proceeding*, 295 F.2d 140 (D.C. Cir. 1961); *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921 (D.C. Cir.) (under parallel provisions of the Natural Gas Act, “if [an entity] ha[d] a right to intervene ...[,] it likewise ha[d] a right to judicial review in this court of the order denying intervention.”), *later proceeding*, 265 F.2d 364 (D.C. Cir. 1958) (reiterating the conclusion that any entity wrongfully denied intervention has standing to vindicate its right to intervention through a petition for review).

In short, there is no merit to EME’s suggestion that FERC’s denial of intervention precludes judicial review of FERC’s denial of intervention.

### **III. FERC’S ENFORCEMENT LATITUDE MAKES IT ESSENTIAL, NOT A MATTER OF UNREVIEWABLE DISCRETION, THAT FERC CONSIDER THE OBJECTIONS OF INTERESTED PERSONS**

Both motions contend that FERC has unreviewable discretion to withhold enforcement, and that FERC therefore need not permit intervention by representatives of adversely-affected consumer and state public interests before exercising its discretion. To correct the record, although this matter reached FERC (after the market monitor’s referral) as an enforcement investigation, FERC later went beyond its “prosecutorial discretion in settling its *own* claims” and “purported to cancel or release the settling parties’ own private claims,” thereby “exercis[ing] authority beyond that of a prosecutor and more akin to that of a court.” *Burlington*

*Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008); *cf. New York State Dep't of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (construing settlement agreement so as to avoid releasing private claims). FERC thus stepped outside the area within which it has enforcement discretion. But even if this case had remained purely an enforcement matter, Movants' conclusion would not follow.

Under controlling statutory and case law authorities, interested persons have the right to be heard before an agency exercises its discretion in a way that substantially affects their interests. And the limitations on reviewing the merits of how FERC chooses to exercise its enforcement discretion make it all the more important that FERC follow proper procedures and become fully informed before exercising that discretion, especially when that exercise of discretion adversely affects third party rights by precipitously foreclosing other avenues to redress. The fact that FERC has its hands on the steering wheel is all the more reason why it should not close its eyes, especially when the result of doing so is to run over the pedestrian consumers FERC is statutorily bound to protect.

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 555, "[s]o far as the orderly conduct of public business permits, an interested person may appear before an agency ... for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function." The "federal agency...

obligation to facilitate public participation” extends to FERC.<sup>11</sup> FERC itself formerly recognized that this obligation applies to it, even in the context of a settlement of a purely investigative proceeding. In *Tenneco, Inc.*, 7 F.E.R.C. ¶ 61,258, at 61,543 n.59 (1979), FERC held that before “[a]n offer of settlement can be made, considered, and accepted in [an] investigative proceeding,” those affected by the settlement must be given notice and an opportunity to be heard: “Of course, all interested persons would have to be given an opportunity to intervene and comment.”<sup>12</sup> Here, interested persons cited *Tenneco* in their motions to intervene, but FERC dismissed those motions without even acknowledging, much less satisfactorily explaining, its change of course.

FERC’s statutory obligations to consider the views of the affected consuming public are enforceable, including through judicial review, even where the agency’s ultimate determination on the merits will be committed to its unreviewable discretion. “[U]nder the APA the ultimate availability of substantive

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<sup>11</sup> See e.g. *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (1969) (“*Citizens*”) (“The Citizens group was entitled to intervene and to have a meaningful opportunity for hearing”); *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 899 n.124 (D.C. Cir. 1987) (citing *Citizens* in support of finding a right to intervene under 5 U.S.C. § 555). With respect to the state commission intervenors, and independent of the APA, this obligation to consider comments applies because the FPA “contain[s], throughout, directions to the Federal Power Commission to receive and consider the views of State commissions.” *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 526 (1945) (quoting a report of the House Committee on Interstate and Foreign Commerce).

<sup>12</sup> Notably, this decision was re-affirmed in *BG&E*, on which Movants heavily rely. See *Columbia*, 85 F.E.R.C. at 62,641.

judicial review is *distinct* from the question of whether the ... familiar notice and comment provisions of the APA [apply]. ... The APA's procedural requirements are enforceable apart from the reviewability of the underlying action, and, indeed, support several important functions wholly distinct from judicial review."<sup>13</sup>

Among those important functions is the essential one of ensuring that to the extent FERC has discretion, it exercises that discretion after considering the views of affected persons. *See AMA* at 1134 (“Whether or not these parties can ultimately bring suit in court, notice-and-comment gives them an opportunity to marshal what may be persuasive arguments before the agency.”); *see also American Gas Ass’n v. FERC*, 912 F.2d 1496, 1504-05 (D.C. Cir. 1990) (“AGA”) (“we review a no-investigation decision under [Natural Gas Act] § 5 ... to ensure that the Commission has considered all the relevant factors” (quoting in part *General Motors Corp. v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979)); *Scenic Hudson Preservation Conference v. FPC*, 354 F. 2d 608, 612 (2d Cir. 1965) (“While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission’s decisions receive that careful consideration which the statute contemplates”); *Michigan Consolidated Gas Co. v. FPC*, 283 F.2d 204, 226 (D.C. Cir. 1960) (while Court

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<sup>13</sup> *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995) (“*AMA*”) (internal quotation marks removed).

could not direct Commission to approve a unilaterally proffered settlement, it could require the Commission to consider it on the merits).

Accordingly, this Circuit enforces a broad “standing to appear before administrative agencies”<sup>14</sup> that, while it starts with all entities possessing standing to eventually appeal the merits of the agency’s ultimate determination, *see NWRO*, extends further to encompass all affected members of “the consuming public,” *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), and entities “well suited to represent an element of the public interest,” *NWRO* at 738.

FERC’s prior practice was to consider, as a matter of acknowledged right, the views of stakeholders affected by its settlement approvals, by considering them on the merits at the rehearing stage. *See, e.g., Columbia*, 85 F.E.R.C. at 62,641 (1999) (in the administrative proceeding underlying the *BG&E* opinion on which Movants principally rely, finding that “those seeking intervention have a sufficient interest to justify granting intervention for the purposes of considering the requests for rehearing of the approval of the Consent Agreement”); *Tenneco Inc.*, 7 F.E.R.C. ¶ 61,258 (1979). The Commission has presented no reason for departing from this longstanding practice. The *post hoc* rationale set out in its Motion for

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<sup>14</sup> *Koniag, Inc., v. Andrus*, 580 F.2d 601, 606 (D.C. Cir. 1978) (quoting *Nat’l Welfare Rights Org. v. Finch*, 429 F.2d 725, 732 n.27 (D.C. Cir. 1970) (“NWRO”).

doing so relies on *BG&E*, but that case is no justification: the aggrieved person there, namely *BG&E*, was permitted to intervene after the settlement at issue became public, and FERC considered *BG&E*'s comments on their merits. *See* 252 F.3d 458. After considering *BG&E*'s comments, FERC concluded that any unremediated *BG&E* injury was “speculative,” “difficult to estimate,” clouded by bankruptcy issues, and at best dependent on “lengthy hearings which would tax the Commission’s resources,” to the point that the substantial value provided to *BG&E* through the settlement was fair. In short, FERC evaluated *BG&E*'s comments, but decided that affording *BG&E* an even larger remedy was not worth the necessarily large administrative effort, and therefore approved a contested settlement.<sup>15</sup> Here, numerous alternative remedies were suggested and should have been considered. An alternative remedy more protective of PJM-area consumers might, for example, have been as simple as re-directing to PJM, for distribution to affected consumers, the \$7 million that *EME* had already agreed to pay.<sup>16</sup> But far from considering alternative remedies as it had in *BG&E*, FERC refused to allow intervention and on

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<sup>15</sup> This approach was fully consistent with FERC’s contemporaneous decision in *Trailblazer Pipeline Co.*, 85 F.E.R.C. ¶ 61,345 (1998), *reh’g denied, clarification granted, on reh’g*, 87 F.E.R.C. ¶ 61,110, *reh’g denied*, 88 F.E.R.C. ¶ 61,168 (1999) (providing for approval of contested settlements where the interest in a more complete remedy was “attenuated”).

<sup>16</sup> *See, e.g., Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 103 F.E.R.C. ¶ 61,019, P 4 (2003), which was cited to FERC below with the notation that it “affirm[ed] \$13.8 million settlement, paid to affected customers, for two days of alleged withholding, after ... making clear that such payment was in addition to any potential remedy for other market misconduct.”

that basis dismissed all comments. It therefore falls to this Court to consider (in due course, after full briefing) whether that refusal was lawful.

The rule adopted through FERC Order 718, which EME (but not FERC) cites as purportedly eliminating this Court’s jurisdiction,<sup>17</sup> does not purport to limit, and in any event could not override, FERC’s statutory obligations to consider the views of the affected consuming public. At the time the state regulator-petitioners presently before this Court sought to intervene, they were entitled to do so “as of right” by notice. All the new rule does is provide that interventions in future proceedings arising from investigations will require a motion, as distinguished from the 18 C.F.R. § 214(a)(2) intervention “notice” that state regulators and certain other parties may file in certain proceedings as of right. In promulgating the rule (which it did after improperly denying interventions in this case), FERC made clear that it would consider intervention motions on a case-by-case basis.<sup>18</sup> The motion requirement merely ensures — prospectively — that FERC gives each intervention request in new such matters its case-by-case

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<sup>17</sup> See EME Motion at 8-9 (citing *Ex Parte Contacts and Separation of Functions*, 125 F.E.R.C. ¶ 61,063 (2008) (“Order 718”). The rule will be codified in relevant part at 18 C.F.R. § 385.214(a)(4). As of this writing, the revised regulation is listed on the Government Printing Office website (at <http://www.access.gpo.gov/cgi-bin/cfrassemble.cgi?title=200918>) as “under development,” but publication is expected shortly.

<sup>18</sup> See Order 718, P 13 (“nothing in the proposed revisions to Rule 214 precludes intervention in enforcement proceedings”); *id.* P 19 (“The revisions to Rule 214 ... will leave the Commission with the ability in appropriate cases to permit the participation of third parties, but that participation will be tailored to appropriate situations based on factors that are unique to the particular enforcement context”).

attention and therefore has an opportunity to exercise its discretion after considering the relevant factors.<sup>19</sup> It neither reaches back to correct FERC's error in this case nor empowers FERC to ignore those factors and abuse its discretion.<sup>20</sup>

#### **IV. FERC'S WRONGFUL DENIAL OF INTERVENTION IS READILY REDRESSABLE**

EME asserts (at 12) that "Petitioners' do not have a redressable injury as their denial of intervention claims cannot be remedied by this Court." That is patently wrong. A remand order directing FERC to allow the interventions and consider the rehearing requests on their merits would fully remedy the "denial of intervention claims." The Court has issued remand orders providing this remedy in prior cases, *see, e.g., S.C. Loveland Co., Inc. v. United States*, 534 F.2d 958, 960 n.1 (D.C. Cir. 1976); *Va. Petroleum Jobbers Ass'n v. FPC*, 265 F.2d 364 (D.C. Cir. 1959), and it should do so here. The far-afield cases that EME cites at 14 are not to the contrary.<sup>21</sup>

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<sup>19</sup> This rule is a departure from the normal of-right entitlement State commissions have traditionally been afforded in light of the pervasive FPA language directing FERC to consult with and consider the views of State commissions. *See* note 11 above.

<sup>20</sup> *See, e.g., AGA*, 912 F.2d at 1504-05.

<sup>21</sup> EME cites *NAACP v. U.S. Sugar Corp.*, 84 F.3d 1432, 1438 (D.C. Cir. 1996), but Petitioners here are not asking FERC to condition some future benefit on retroactively revisiting the outcome of this case. Petitioners are seeking relief, limited at this point to the grant of intervention, that would re-open the potential for further relief to be provided within this case. EME also cites *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419, 431 (D.C. Cir. 1989), but the relief Petitioners seek here does not require a standardless search for representatives who can provide more "balance" on a committee with a fixed number of members. It requires only that the Commission hear the views of the eminently manageable number of affected entities that stepped forward to seek intervention.

In the same vein, FERC’s motion asserts (at 7) that “even if petitioners were to prevail on their procedural claim, they would be foreclosed from a substantive remedy.” But the only identified basis for foreclosure is that “the Court is without jurisdiction to review the Commission’s Consent Order on the merits.” *Id.*

Assuming *arguendo* that the Court lacked such merits jurisdiction, that would not foreclose the potential that on remand FERC may grant a substantive remedy, or otherwise take into account the views and concerns of those who sought to intervene below, if this Court directs FERC to review their rehearing requests on the merits. Conversely, even if FERC ultimately withheld a substantive remedy after considering intervenor comments, that could not render unredressable the procedural claim that is currently before the Court. A meaningful judicial remedy is therefore available, which is all that is required in order to satisfy the redressability test for standing to bring the present Petitions.<sup>22</sup>

EME asserts (at 13) that in the event of a remand directing FERC to permit intervention, “the Commission could reject Petitioners’ arguments on the merits of the settlement and... FERC’s order on remand approving the settlement agreement would not be reviewable by this Court. Because FERC’s remand order would be

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<sup>22</sup> See *Klamath Water Users Ass’n v. FERC*, 534 F.3d 735, 740 (D.C. Cir. 2008) (the potential that a court order might “significantly increase the chances of favorable action” suffices to meet the redressability test for standing); *Nat’l Parks Conservation Ass’n v. Manson*, 414 F.3d 1, 6-7 (D.C. Cir. 2005) (potential that Montana might be persuaded to reach a different result if the Court remanded a Clean Air determination to EPA sufficed to establish redressability).

unreviewable, Petitioners' injury, their inability to participate in the enforcement proceeding, ultimately is unredressable" (footnote omitted). But when an agency exercises its discretion through improper procedures, the possibility that an exercise of discretion following proper procedures might yield the same substantive result does not deprive interested persons of standing to demand proper procedures. As the Supreme Court has explained, "Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground."<sup>23</sup>

EME believes that a remand would be "an exercise in futility," because FERC has already "necessarily reviewed all of the issues raised in the Requests for Clarification/Rehearing."<sup>24</sup> But FERC speaks through its orders,<sup>25</sup> and its orders state that the rehearing requests were dismissed for lack of intervention, not that FERC reviewed the rehearing issues on their merits. We prefer to trust, in accord

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<sup>23</sup> *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998). See also *Bennet v. Spear*, 520 U.S. 154 (1997) (fact that Bureau of Reclamation could retain its Klamath water allocations even if the Court remanded a challenged Fish and Wildlife Service Biological Opinion does not preclude judicial review of the Biological Opinion); cf. *Nat'l Coal Ass'n v. FPC*, 191 F.2d 462, 466-67 (D.C. Cir. 1951) (Commission's authority "to permit or deny intervention at its discretion" does not preclude judicial review, because the Commission "may not abuse its discretion").

<sup>24</sup> EME Motion at 13 & n.11.

<sup>25</sup> See, e.g., *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 581 n.11 (1981); *Indianapolis Power & Light Co.*, 48 F.E.R.C. ¶ 61,040, at 61,203 & n.29 ("The Commission speaks through its orders.")

with the presumption of regularity,<sup>26</sup> that FERC would approach a remand from this Court with an open mind, providing intervenors with the fair notice and opportunity to be heard that the challenged orders wrongfully refused. In a very recent decision, in which FERC considered with an open mind whether a settlement agreement negotiated by its own enforcement staff provided adequate relief, FERC concluded that the agreement did not provide consumers sufficient relief, and rejected the settlement. *See Amaranth Advisors L.L.C.*, 126 F.E.R.C. ¶ 61,112 (Feb. 12, 2009). If FERC is directed to allow intervention and consider the dismissed rehearing requests, it may yet grant them.

## **V. CONCLUSION**

For the foregoing reasons, the Court should deny both motions.

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<sup>26</sup> *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926).

Respectfully submitted,

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April 17, 2009

## CERTIFICATE OF SERVICE

In accordance with Circuit Rule 25, I hereby certify that I have on this 17<sup>th</sup> day of April, 2009, caused the foregoing documents to be served upon each person listed below:

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