

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

**In the Matter of the Review of the
Alternative Energy Rider Contained in
the Tariffs of Ohio Edison Company, The
Cleveland Electric Illuminating Company
and the Toledo Edison Company.**

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) **11-5201-EL-RDR**
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**OHIO POWER COMPANY’S MOTION TO INTERVENE
AND REOPEN PROCEEDINGS**

Pursuant to Ohio Revised Code § 4903.221 and O.A.C. 4901-1-11, Ohio Power Company Corp. ("AEP Ohio") moves to intervene in the proceeding. In addition, AEP Ohio moves pursuant to O.A.C. 4901-1-34 for the Commission to reopen the proceedings to take further comments on the impact of the positions in the case on the competitive renewable energy market and market participants. AEP Ohio has a number of real and substantial interests in this proceeding which may be prejudiced by the results. The development of this record exposed issues that require further involvement by another utility other than the FirstEnergy Companies being investigated. Precedent in this case could define business practices for years to come in a market that involves more than current parties to the docket. The importance of an independent market viewpoint to assist the Commission in its deliberations, along with the potential impact this decision may have on the overall renewable energy certificate market, provide the extraordinary circumstances justifying the intervention request.

The status of this docket does not erase the value and the importance of granting AEP Ohio's motion for intervention and the need for further comment in this docket. Although the confidential nature of certain information in this docket has prevented AEP Ohio from getting a complete picture of the issues raised, it is clear that there are issues in this docket that could benefit from further development. Typically intervention would be sought prior to the adjudicatory hearing, but that practice is not exclusive. The Commission's rules allow for intervention that is otherwise deemed "not timely" where "extraordinary circumstances" exist. O.A.C. 4901-1-11(F). Here, as further explained in the attached memorandum in support, the circumstances are extraordinary.

Wherefore, AEP Ohio respectfully moves the Commission to grant it intervention in this proceeding due to the extraordinary circumstances and the implications of the Commission's findings as it considers utility actions and the interconnection with renewable compliance and the renewable energy certificate market. Further, AEP Ohio seeks a reopening of the record to take further comment and input from AEP Ohio and other utilities that may provide useful information for the Commission in this docket.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction.

Ohio Power Company (“AEP Ohio”) seeks intervention in this docket. A motion for intervention must be assessed in light of the Commission's standard that is "liberally construed in favor of intervention" - a favorable standard applied in all Ohio courts. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 387 (2006) (emphasis added). For purposes of considering requests for leave to intervene in a Commission proceeding, OAC 4901-1-11(A) provides:

Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that: ... (2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

In addition, OAC 4901-1-11(F) provides that a motion to intervene which is not timely will be granted under extraordinary circumstances.

This request is being filed pursuant to O.A.C. 4901-1-11(F) due to extraordinary circumstances present in this case. The impact of these proceedings on the renewable energy certificate market, the additional perspective that AEP Ohio can provide to the Commission and the potential to avoid future complaint filings demonstrate extraordinary circumstances justifying intervention.

AEP Ohio also seeks a reopening of the docket under O.A.C. 4901-1-34 to provide the Commission with information related to the issues in the case. The Commission, legal director or attorney examiner may reopen a proceeding prior to the issuance of a final order. The rule instructs parties making such a motion to specify the nature of the request. As discussed below,

the nature of the issues involved in the case progressed beyond a limited audit of the FirstEnergy Companies' rider and now involve significant industry-wide questions relating to compliance with renewable standards. AEP Ohio is also concerned as a party participating in the renewable energy certificate market that this case includes facts that call into question certain affiliate transactions and may affect the integrity of that market. AEP Ohio believes that these issues should be explored further, and that the Commission will benefit from this intervention and reopening of the docket to allow AEP Ohio to provide the Commission with additional information on the market and the issues that have been raised as this docket has progressed beyond a limited audit of the FirstEnergy Companies' rider.

II. Extraordinary Circumstances Justify Intervention and Reopening of the Proceeding.

AEP Ohio's participation can provide the Commission with a unique point of view not currently represented in the docket. This docket considers a number of factors that implicate renewable compliance actions by a utility, corporate separation considerations, and utility and affiliate roles in the renewable energy certificate market. The Commission's findings in this docket will have implications for all utilities and the policy and future oversight of the Commission in all of these important areas. While the post-hearing pleadings are already filed, when matters of an individual case have an impact beyond the individual facts of a particular case the Commission has sought further comments from interested parties in the industry prior to issuing an order to ensure the industry-wide implications are fully vetted. That type of input is seen as valuable by the Commission and provides the extraordinary circumstances justifying late intervention.

The Commission recently demonstrated its willingness to ensure it has all the relevant positions developed before issuing an order in AEP Ohio's long-term forecast report proceeding, where the Commission sought further comment from the industry on important issues it was facing and allowed late intervention to ensure it was gathering all the necessary comments. (October 9, 2012 Entry, Commission Docket 10-501/10-502-EL-FOR). In that case, the Commission considered the need of a solar renewable resource in Ohio and the requirements for utilities under the R.C. 4928.64 standard for renewables. After the hearing and briefing in that case, the Commission determined further comments were prudent to consider the impact of the facts of the case to the rest of the industry and examine the implications its decision could have on state policy. (Id.) The Commission allowed late intervention and additional briefing after the schedule was complete to assist the Commission in its deliberations in that case. (Opinion and Order at 11-13, Commission Docket 10-501/10-502 EL-FOR). This is a valid blueprint for the present case.

The present case also has broad policy implications beyond the facts of the direct case as the Commission considers the record. Intervention by AEP Ohio, and an additional comment or briefing schedule, would provide a useful viewpoint for the Commission as it grapples with the impact its decision may have on other utilities that participate in the renewable energy certificate market. It is well established that the Commission has discretion to decide, in light of internal organization and docket considerations how it may best manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort. *Weiss v. Pub. Util. Comm'n* (2000), 90 Ohio St.3d 15, 19, 734 N.E.2d 775, 780 citing *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 559, 560, 433 N.E.2d 212, 214. When facing the functioning of the renewable energy certificate market and questionable purchases

from affiliates that could appear anticompetitive, a full consideration of the issues from multiple views is necessary to protect the integrity of the market and avoid abuses.

A. Arguments Provided in the Post-Hearing Briefs Indicate a Need for AEP Ohio's Intervention and a Reopening of the Record to Address the Gaps in Information Provided the Commission.

Based upon AEP Ohio's review of the post-hearing briefs there are numerous issues the Commission may rule upon that would benefit from other industry points of view.¹ For example, the FirstEnergy Companies argue that the Office of the Consumers' Counsel and the Exeter Report's reliance on other states' REC markets is inappropriate. (FE Companies Brief at 59-60, filed in the docket on May 30, 2013). If allowed, AEP Ohio will share with the Commission how it did consider lower cost RECs from other states to comply with Ohio standards. Similarly, AEP Ohio has topical information relevant to OCC's argument that the Exeter Report establishes that the FirstEnergy Companies' contingency planning was inadequate. (OCC Post Hearing Brief at 44-46.) The FirstEnergy Companies respond that the auditor did not review other utilities' plans for renewable energy procurement and so therefore there is nothing to suggest that its plan is inadequate. (FE Post Hearing Reply Br. at 25.) If allowed, AEP Ohio can show the Commission how it relied on the broker and bilateral markets as a contingency to obtain renewable energy certificates when faced with high costs of certificates held by a few bidders. The Commission may want to hear from other utilities that have operated in this same market when considering how to manage costs.

¹ AEP Ohio has been monitoring the proceeding as best it could with the prevalent confidential treatment claims in the record that culminated in FirstEnergy filing its initial post-hearing brief as only a cover page with no attempt at redactions of the limited confidential material. That document was recently filed (redacted) in the docket for outside parties to examine. As an observer of this docket and a market participant, AEP Ohio questions FirstEnergy's motives for its repeated attempts to shroud the market-related issues in this case under a veil of secrecy.

B. The Record Reveals Serious Affiliate Transaction and Potential Anticompetitive Questions, Justifying Intervention and the Need to Reopen the Proceedings.

AEP Ohio has concerns with affiliate transactions, market power, and potentially anticompetitive behavior with respect to FirstEnergy's activity in the renewable energy certificate market. The Exeter Report filed in the public docket indicates,

The FirstEnergy Ohio utilities should have been aware that the prices bid by FirstEnergy Solutions reflected significant economic rents and were excessive by any reasonable measure.

Final Report Redacted/Management/Performance Audit 11-5201-EL-RDR Finding 8 at iv, Filed August 15, 2012. The report recommends a disallowance of excessive costs associated with purchasing RECs to meet the FirstEnergy Ohio utilities' In-State Renewables obligations. (Id. Recommendation at iv.) Due to redactions, AEP Ohio is unable to ascertain from the record if the recommended disallowance relates to the renewable energy certificates that continued the significant economic rents in the excessive bids of its affiliate, FirstEnergy Solutions. If so, then there are serious concerns with affiliate abuse and anticompetitive behavior in the renewable energy certificate market that all utilities and other parties rely upon to comply with the renewable standards.² If transactions between the FirstEnergy Companies and FirstEnergy Solutions reflecting "significant economic rents" are indeed an issue in this case, then AEP Ohio and other participants in the renewable energy certificate market deserve the opportunity to develop the record further to ensure the integrity of the market and to address any potentially anticompetitive behavior.

² AEP Ohio is unable to determine certain facts regarding the integrity of the market because in other places in the record the counterparty providing the renewable energy certificates under scrutiny to the FirstEnergy Companies is considered confidential. While the price and certain key terms may be considered confidential, it is unclear to AEP Ohio why the identity of the provider would be protected from disclosure.

C. The State Policy in Ohio Revised Code 4928.02 Dictates a Need for Intervention and Further Review in this Docket.

AEP Ohio is willing and able to provide the Commission with its unique viewpoint as a renewable energy certificate market participant at the time in question in this docket. That experience may shed some light on the issues the Commission is considering. Ensuring appropriate behavior in securing certificates to comply with the renewable standards, especially when it involves affiliate transactions is an important aspect for consideration by the Commission. The FirstEnergy Companies appear to be of the view that, solely because they issued RFPs for renewable energy certificates the market is functioning properly and they should recover their costs. However, in light of the questions raised in this docket regarding “significant economic rents” paid to an affiliate, AEP Ohio as a market participant has serious concerns regarding potential anti-competitive behavior. The impact of the Commission’s decision will help define the reasonableness of renewable energy certificate market actions in the future. Having adequate resources and seeking input from knowledgeable parties is crucial. These factors qualify as an extraordinary basis to grant late intervention.

This case involves certain state policies that the Commission must consider in making its decision on this intervention and ultimately in this docket. R.C. 4928.02(A) requires the Commission to ensure adequate, reliable, safe, efficient, nondiscriminatory and reasonably priced retail electric service. Likewise, R.C. 4928.02(H) requires the Commission to ensure effective competition in the provision of retail service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service and vice versa. The facts in this case involve interactions between affiliated companies that will benefit from AEP Ohio’s input. How the Commission applies these facts to the policies impacting all participants in the market will be important and constitutes an extraordinary

circumstance to justify intervention by AEP Ohio. An even playing field is important, and any impropriety in affiliate transactions threatens to upset the balance. The appropriateness of affiliate transactions and the absence of anti-competitive conduct are important elements in a well-functioning market. Looking at the record, there appears to be unresolved questions in this area. AEP Ohio asserts that there is a need to further address these issues to ensure the functionality of this market and resolve concerns with potential market abuses.

D. Judicial Efficiency Justifies AEP Ohio's Intervention and the Reopening of this Docket.

Judicial efficiency is another extraordinary circumstance for the Commission to consider in the organization of its docket. Some of the issues alluded to in the Exeter Report and raised and defended by the FirstEnergy Companies in the docket discuss actions and interactions in the renewable energy certificate market and a utility's responsibility to comply with the renewable standards. Some of these issues concern AEP Ohio as a market participant and a utility subject to compliance. The potential anticompetitive behavior is a concern to AEP Ohio that could lead to the filing of a future complaint. However, Commission action in this case to ensure the integrity of the market and ensure an even playing field, could alleviate the need for a separate and distinct filing by AEP Ohio.

The nature of AEP Ohio's interests, the potential harm to the renewable energy certificate market, the unique circumstances of the proceeding involving state policy, and ultimately the need to ensure customers are being protected are extraordinary circumstances justifying intervention. Intervention and a reopening of the proceeding will allow for a deeper look into the issues that developed in this record and provide the Commission with helpful input.

III. AEP Ohio Satisfies the Intervention Standard.

There is a statutory right to intervene in Commission proceedings under R.C. 4903.221. The Commission also promulgated rules to guide it in the exercise of the authority provided it by the General Assembly. Pursuant to O.A.C. Section 4901-1-11(A), upon timely motion, any person is permitted to intervene in a proceeding before this Commission upon a showing that:

The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

Further, O.A.C. 4901-1-11(B) provides that the following factors are to be considered in evaluating requests to intervene:

- (1) The nature of the person's interest;
- (2) The extent to which the person's interest is represented by existing parties;
- (3) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; and
- (4) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice any existing party.

AEP Ohio should be granted leave to intervene in this proceeding for the extraordinary circumstances outlined above. AEP Ohio is subject to the same renewable standards as the FirstEnergy Companies and participating in the same market for renewable energy credits. The actions of the FirstEnergy Companies and their interaction with affiliates and other market participants impact the ability of AEP Ohio to comply with the renewable standards. The Commission's resolution of this case will impact the renewable energy certificate market and affect how market participants answer requests for proposals for renewable energy certificates to serve customers of Ohio EDUs. Thus, AEP Ohio has real and substantial interests in the instant proceeding and is entitled to pursue and protect those interests through intervention in this docket in which this Commission will assess the way a utility can interact with the market.

The other parties to this action do not adequately represent the interests of AEP Ohio, because they are not traditional utilities in Ohio subject to the renewable standards. The FirstEnergy Companies are traditional utilities but their actions are under investigation, potentially with affiliate code of conduct and anticompetitive behavior concerns, and therefore they are participating in a different mode than AEP Ohio. AEP Ohio would be able to offer an independent viewpoint from a utility participating in the market during that period that tests the representations made by and actions of the FirstEnergy Companies. This view will provide the Commission with a resource that must participate in the same renewable energy certificate market. As a participant in that market, AEP Ohio has much to contribute to the Commission and can provide context for any applications for rehearing any party may file attacking a Commission order. In addition, the appearance of potential affiliate transactions that include “significant economic rents” raises legitimate concerns about the market itself and justifies intervention by AEP Ohio and further proceedings. AEP Ohio believes that the renewable energy certificate market will benefit from further development of, and transparency into these issues.

Finally, permitting AEP Ohio to intervene will not unduly delay the proceeding or unduly prejudice any existing party. AEP Ohio takes the proceeding where it is but offers that the record appears in need of further development. Reopening the docket to other parties would assist the Commission in its review of industry and market issues. Under these circumstances, AEP Ohio should be permitted to intervene in this proceeding.

IV. Conclusion.

Ohio Power Company respectfully requests that the Commission grant intervention in this case for all of the foregoing reasons. The Company stands ready to provide the Commission whatever context and input is needed and seeks to protect its own important interests as this case continues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Ohio Power Company's Motion to Intervene and Reopen the Proceeding has been served upon the below-named counsel via traditional and electronic mail this 21st day of June, 2013.

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