

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	Case No. 14-1297-EL-SSO
Edison Company for Authority to Provide for)	
a Standard Service Offer Pursuant to R.C.)	
4928.143 in the Form of An Electric Security)	
Plan)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM
CONTRA CPV SHORE, LLC’S MOTION TO INTERVENE OUT OF TIME**

I. INTRODUCTION

CPV Shore, LLC (“CPV”), a wholesale power generator based in New Jersey, seeks to intervene in this proceeding regarding an application by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (“the Companies”) for approval of an electric security plan. This motion should be denied. To begin, CPV has filed its motion to intervene out of time. Pursuant to the Commission order setting the procedural schedule for this case, motions to intervene were due on October 1, 2014. CPV filed its Motion to Intervene Out of Time (the “Motion”) on January 22, 2015—114 days after the deadline for motions to intervene. CPV provides no real reason for its delay. For this reason alone, the Commission should deny CPV’s Motion. Further, as its Motion makes clear, CPV has no real and substantial interest in this proceeding. The Companies are not seeking Commission approval for the proposed wholesale purchased power transaction with which CPV is ostensibly concerned. Moreover, CPV’s presence would be superfluous and duplicative because whatever interests it might have in this proceeding are more than adequately represented by multiple parties, including PJM Power Providers Group (“Power Providers”), the Electric Power Supply

Association (“EPSA”), Exelon Generation Company, LLC (“Exelon”), and IGS Energy (“IGS”), among others. As well-settled Commission authority holds, CPV thus fails to meet the requirements for intervention provided for in Rule 4901-1-11, O.A.C. As demonstrated below, the Commission should deny CPV’s motion.

II. RELEVANT FACTS

On August 4, 2014, the Companies filed their Application for their fourth electric security plan, Powering Ohio’s Progress (“ESP IV”). One component of ESP IV is the Economic Stability Program. Application at 9. As shown in the Companies’ Application, the Economic Stability Program “will act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term.” *Id.* The Economic Stability Program includes a description of a proposed purchased power transaction between the Companies and First Energy Solutions Corp. (“FES”) whereby the Companies would purchase all of the generation output of certain assets owned by FES. Direct Testimony of Jay A. Ruberto at 3 (Aug. 4, 2014). In turn, the Companies would “offer this output into the PJM markets, and net 100% of the revenues against costs, with the differences being passed along to customers through [proposed] Rider RRS.” *Id.* Importantly, the proposed purchase power transaction that would underlie the Retail Rate Stability Rider (“Rider RRS”) would be a FERC jurisdictional contract which is not under review here. Ruberto Test. at 3. As part of ESP IV, the Companies are seeking Commission approval of only Rider RRS.

On August 29, 2014, the Commission set the original procedural schedule for this proceeding as follows:

- October 1, 2014: Deadline for intervention.
- December 1, 2014: Discovery cutoff.

- December 5, 2014: Intervenor testimony due.
- December 19, 2014: Staff testimony due.
- January 9, 2015: Prehearing conference scheduled.
- January 20, 2015: Hearing scheduled to commence.

See Entry at 2 (Aug. 29, 2014). Although the Attorney Examiner has modified the procedural schedule in this proceeding on three occasions (*see* Entry at 5 (Oct. 6, 2014); Entry at 9 (Dec. 1, 2014); Entry at 2-3 (Jan. 14, 2015)), the October 1, 2014 deadline for timely intervention has remained the date for intervention throughout the case.

Approximately fifty parties filed timely motions for intervention. Among the intervenors in this proceeding are Power Providers, EPSA, Exelon, and IGS. In their motion to intervene, Power Providers and EPSA define themselves as the “Wholesale Suppliers.” Joint Motion for Leave to Intervene of the PJM Power Providers Group and the Electric Power Supply Association at 1 (Oct. 1, 2014). In that motion, Power Providers describes itself as a “nonprofit trade association whose corporate members are engaged in electric generation and sales in the PJM” region. *Id.* at 2. Further, Power Providers members “own over 75,000 megawatts of power” in “the PJM region-encompassing 13 states and the District of Columbia.” *Id.* EPSA “is a national trade association representing competitive power generators and suppliers. EPSA members own or operate 480 generation facilities totaling over 200,000 MW of capacity.” *Id.* In its motion to intervene, Exelon states that it “owns or controls approximately 35,000 megawatts of generating capacity nationwide.” Joint Motion to Intervene of Exelon Generation Company, LLC and Constellation NewEnergy, Inc. at 2 (Oct. 1, 2014). In its motion to intervene, IGS describes itself as a member of “the IGS family of companies (which also include IGS Generation...).” Motion to Intervene of IGS Energy at 4 (Aug. 18, 2014).

On January 23, 2015, CPV filed its motion to intervene out of time. CPV describes itself as a *prospective* wholesale generator “that is currently constructing, and will own and operate, a 725 MW (nameplate) combined-cycle electric generating facility in Woodbridge, New Jersey.” Motion at 1. CPV further states that it intends to “sell its electricity at wholesale into the thirteen-state region whose transmission system is operated by PJM.” *Id.* Nowhere in its Motion does CPV claim that it has any connection to the state of Ohio. CPV filed its Motion 114 days after the October 1, 2014 deadline for intervention in this proceeding. CPV wholly fails to explain why it could not have sought timely intervention by the due date for such motions.

III. STANDARD OF REVIEW

Rule 4901-1-11, O.A.C., governs intervention in Commission proceedings. Pursuant to Rule 4901-1-11(B):

In deciding whether to permit intervention under paragraph (A)(2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner shall consider:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues;
- (5) The extent to which the person’s interest is represented by existing parties.

Intervention is not permissible unless the party seeking to intervene can demonstrate that it has a “real and substantial interest” in the relevant proceeding and that its interests cannot be “adequately represented by existing parties.” *See* Rule 4901-1-11(A)(2), O.A.C.

The Commission routinely denies intervention to parties who fail to satisfy the requirements of Rule 4901-1-11. *See, e.g., In the Matter of the Investigation of The East Ohio Gas Company d/b/a Dominion East Ohio Relative to Its Compliance with the Natural Gas*

Pipeline Safety Standards and Related Matters, Case No. 12-380-GA-GPS, 2012 Ohio PUC LEXIS 392, *7 (April 20, 2012) (denying party’s motion to intervene in Commission-initiated GPS enforcement proceeding due to lack of statutory basis for intervention); *In the Matter of the Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 as amended, to Establish an Interconnection Agreement with Cincinnati Bell Telephone Company*, Case No. 08-537-TP-ARB, 2008 Ohio PUC LEXIS 567 at *4 (Aug. 26, 2008) (denying motion to intervene because movant “failed to assert facts that would lead to a finding that it has a real and substantial interest”); *In the Matter of the Application of Maximum Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Display, Tone-Plus-Voice, and Alphanumeric Radio Paging Service in all or parts of Auglaize, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Delaware, Fairfield, Franklin, Greene, Hamilton, Knox, Licking, Madison, Mercer, Miami, Montgomery, Morrow, Pickaway, Preble, Shelby, Union, and Warren Counties, Ohio*, Case No. 90-212-RC-ACE, 1990 Ohio PUC LEXIS 833 at *6-7 (July 20, 1990) (denying intervention because party “failed to show a real and substantial interest in [the] proceeding”).

IV. ARGUMENT

A. CPV Filed Its Motion to Intervene Out Of Time.

1. The Commission routinely denies motions to intervene that are filed out of time.

Pursuant to the August 29, 2014 scheduling order in this proceeding, the Commission set a deadline of October 1, 2014 for timely motions to intervene. *See* Entry at 2 (Aug. 29, 2014). As noted, none of the subsequent revised scheduling orders altered or modified the intervention deadline. If CPV desired to intervene in this proceeding it should have done so in a timely fashion. Instead, CPV waited until January 23, 2015 to file its motion to intervene—114 days

after the deadline for timely intervention. Notably, CPV does not provide any explanation or excuse for missing the intervention deadline by more than three months.

Satisfying the requirements of Rule 4901-1-11 presupposes that a party has filed a “timely motion” to intervene. *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20, Case No. 11-3549-EL-SSO, 2011 Ohio PUC LEXIS 1090, *1 (Oct. 4, 2011). See also, In the Matter of Muskingum River Plant for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility, Case No. 10-911-EL-REN, 2010 Ohio PUC LEXIS 883 (Aug. 26, 2010) (denying parties’ motions to intervene out of time because the parties failed to demonstrate that “extraordinary circumstances exist for granting their untimely motions to intervene, as required by Rule 4901-1-11(F)”); In the Matter of the Petition of The Avon Lake Subscribers of The Century Telephone Company of Ohio, Case No. 93-911-TP-PEX, 1995 Ohio PUC LEXIS 162 at *4-6 (Feb. 17, 1995) (denying untimely motion to intervene in the absence of any “extraordinary circumstances”); In the Matter of the Commission Investigation into the Provision of Intrastate Interexchange Operator Assisted Services in Ohio, Case No. 88-560-TP-COI, 1989 Ohio PUC LEXIS 688 at *15 (July 18, 1989) (denying motion to intervene because it was “grossly untimely”).* CPV has failed to file a timely motion to intervene and therefore the Commission should deny CPV’s motion for this reason alone.

2. The decisions and cases relied on by CPV are inapposite.

CPV's attempt to resort to a claim of "extraordinary circumstances" that justify its untimely motion or its intervention generally makes little sense, and has even less merit. CPV vaguely refers to decisions of the U.S. Courts of Appeals of the Third and Fourth Circuit. Motion at 2. Presumably, CPV means to refer to *PPL Energy Plus v. Solomon*, 766 F.3d 241 (3rd Cir. 2014), and *PPL Energy Plus v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), two cases mentioned (albeit inappropriately, given the clear distinctions between those cases and this one) by some intervenors' witnesses. Yet, those cases were decided on September 11, 2014 and June 2, 2014, respectively. The pendency of those cases (even if they had any bearing on this case) hardly justifies a 114 day delay in filing for intervention here, especially given that both cases were decided *before* the due date for intervention motions in this case.

The limited Commission authority relied on by CPV is also inapposite. For example, CPV relies on *In the Matter of the Application of Ohio Power Company*, Case No. 13-2385-EL-SSO, Entry (May 21, 2014) and *In the Matter of the Application of Dayton Power and Light Company*, Case No. 08-1094-EL-SSO (Feb. 5, 2009), to support the proposition that granting CPV's "motion to intervene would be consistent with the disposition of similar requests to file motions to intervene out of time in other SSO proceedings." Motion at 3. The entity seeking intervention out of time in *Ohio Power*, however, was a newly formed association of Ohio-based energy brokers that held its first meeting two weeks before the deadline for intervention. *Ohio Power* at 1. The association moved for intervention approximately thirty days after the intervention deadline. *Id.* In *Dayton Power*, three movants were granted intervention out of time. *Dayton Power* at 2. Two of the movants' motions were unopposed and the third movant was a small neighborhood coalition made up of members who lived in the utility's service territory. *Id.* at 2-3. Here, CPV is a well-established, sophisticated wholesale market participant

that is seeking to intervene well over three months after the deadline for intervention has passed. Hence, the fact patterns in *Ohio Power* and *Dayton Power* are far removed from the one presented here.

Moreover, the cases cited by CPV to support its apparent contention that the Commission should grant intervention under almost any circumstances have no bearing on the present matter. In neither *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St. 111 Ohio st. 3d 384 (2008), nor *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 85-675-EL-AIR, 1986 Ohio PUC LEXIS 479 (Jan. 14, 1986), is there any indication that the movants sought to intervene out of time. Again, CPV filed its motion to intervene 114 days after the intervention deadline in the absence of any explanation or purported excuse. CPV's untimely motion to intervene should thus be denied.

B. CPV Has No Real And Substantial Interest In This Proceeding.

In its Motion, CPV fails to demonstrate that it has a real and substantial interest in this proceeding. To justify its untimely intervention, CPV claims that its proposed generating facilities are “being constructed without the benefit of the types of contracts that the Companies are seeking herein.” Motion at 2. CPV again refers to the “long-term contracts that are being proposed by the Companies” and “long-term, state-approved agreements.” *Id.* at 2; 3. CPV is laboring under a fundamental error.

As noted, the proposed purchase power agreement that underlies Rider RRS, and to which CPV is referring, is a FERC jurisdictional contract. Ruberto Test. at 3. Pursuant to this proposed transaction, the Companies would offer the generation output of FES's generating assets directly into the PJM markets at wholesale. *Id.* This agreement is not under consideration here, nor could it be. Indeed, the proposed purchase power agreement in which CPV allegedly

has a real and substantial interest falls under the exclusive jurisdiction of the FERC because the proposed transaction would involve the sale of electricity at wholesale. Specifically, Section 201(b)(1) of the Federal Power Act provides: “The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.” 16 U.S.C. § 824(b)(1) (2014). “In 1935, Congress enacted Part II of the Federal Power Act....which delegated to.....the Federal Energy Regulatory Commission exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production.” *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1981). *See also, Transmission Agency v. Sierra Pac. Power*, 295 F.3d 918, 928 (9th Cir. 2002) (“Part II of the Federal Power Act...delegates to the Federal Energy Commission exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.”)

Because this proposed transaction is not under consideration here, CPV cannot have any real and substantial interest in this proceeding. *See In the Matter of the Petition of Intrado Communications*, 2008 Ohio PUC LEXIS 567 at *4 (denying motion to intervene due to movant’s lack of a real and substantial interest in the proceeding); *In the Matter of the Application of Maximum Communications*, 1990 Ohio PUC LEXIS 833 at *6-7 (same). Thus, CPV’s Motion should be denied on this ground as well.

C. CPV’s Interests Are Already Adequately Represented By Power Providers, EPSA, Exelon, And IGS.

CPV brings nothing new to this case because CPV’s interests are already adequately represented by four parties to this proceeding; namely, Power Providers, EPSA, Exelon, and IGS. Therefore, CPV fails to satisfy the fifth criterion provided for in Rule 4901-1-11(B), *i.e.*, that its interests are not already adequately represented by other parties. The Commission denies

untimely motions to intervene where the interests of the party seeking intervention are already adequately represented by other parties to the proceeding. *See, e.g., In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20, Case No. 11-3549-EL-SSO, 2011 Ohio PUC LEXIS 1090, *5 (Oct. 4, 2011) (denying untimely motion to intervene because “the attorney examiner does not believe that the [movant] has a unique interest in these proceedings that is not adequately represented by other parties already granted intervention”).*

Any interest CPV might have in this proceeding is already well represented by Power Providers, EPSA, Exelon, and IGS. Power Providers is a trade association that expressly advocates on behalf of wholesale generators based in PJM such as CPV. Power Providers’ “corporate members...own over 75,000 megawatts of power...serve nearly 12.2 million customers and employ over 55,000 people in the PJM region.” Power Providers/EPSA Mot. to Intervene at 2. Power Providers describes itself as an advocate for “wholesale market participants,” like CPV, in the PJM market. *Id.* In fact, Power Providers has several members with generating assets in New Jersey, including Exelon.¹ Power Providers already represents whatever attenuated interest CPV may have in this proceeding.

Likewise, EPSA is a national trade association that represents “competitive power generators and suppliers.” Power Providers/EPSA Mot. to Intervene at 2. Given CPV’s self-

¹ The following link is to Power Providers’ membership list:
<http://www.p3powergroup.com/sitecontent.cfm?page=about>. Power Providers’ members Exelon, Calpine Corporation, and PSEG Energy and Trade Resources, LLC have generating assets in New Jersey.

described status as a competitive generator, EPSA should be more than able to represent whatever alleged interests CPV claims that it can bring to the table this late in the day. Exelon owns generating assets throughout the United States, including New Jersey, and describes itself, like CPV, as an “active supplier” with a keen interest in the “PJM Regional Transmission Organization system.” Exelon Mot. to Intervene at 2. Similarly, IGS describes itself as an affiliate of IGS Generation, a competitive generator and wholesale market participant. IGS Mot. to Intervene at 2. Thus, any interest CPV might have in this proceeding is already more than adequately represented by several parties to this case.

V. CONCLUSION

For the foregoing reasons, the Commission should deny CPV’s Motion to Intervene Out of Time.

Date: January 27, 2015

Respectfully submitted,

/s/ David A. Kutik

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com
Email: dunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
Email: dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon the following parties via electronic mail on January 27, 2015.

/s/ David A. Kutik

David A. Kutik

cmooney@ohiopartners.org
drinebolt@ohiopartners.org
tdougherty@theoec.org
joseph.clark@directenergy.com
ghull@eckertseamans.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com
larry.sauer@occ.ohio.gov
Michael.schuler@occ.ohio.gov
joliker@igsenergy.com
mswhite@igsenergy.com
myurick@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
callwein@wamenergylaw.com
jfinnigan@edf.org
wttpmlc@aol.com
mkl@bbrslaw.com
gas@bbrslaw.com
ojk@bbrslaw.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
lesliekovacik@toledo.oh.gov
Cynthia.brady@exeloncorp.com
David.fein@exeloncorp.com

Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
athompson@taftlaw.com
Marilyn@wflawfirm.com
Blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us

ccunningham@akronohio.gov
bojko@carpenterlipps.com
Allison@carpenterlipps.com
hussey@carpenterlipps.com
gkrassen@bricker.com
dborchers@bricker.com
asonderman@keglerbrown.com
mfleisher@elpc.org
jscheaf@mcdonaldhopkins.com
mitch.dutton@fpl.com
matt@matthewcoxlaw.com
todonnell@dickinson-wright.com
dwolff@crowell.com
rlehfeldt@crowell.com
Jeffrey.mayes@monitoringanalytics.com
toddm@wamenergylaw.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
mhpetricoff@vorys.com
Thomas.mcnamee@puc.state.oh.us
Ryan.orourke@puc.state.oh.us
sfisk@earthjustice.org
msoules@earthjustice.org
tony.mendoza@sierraclub.org
Lael.campbell@exeloncorp.com
dstinson@bricker.com

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