

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the 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)	

**REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE OUT OF TIME
OF CPV SHORE, LLC**

Pursuant to Rule 4901-1-12(B)(2) of the Ohio Administrative Code, CPV Shore, LLC (“CPV Shore”) responds herein to the Memorandum Contra CPV Shore’s Motion to Intervene (“Memorandum”) that was filed on January 27, 2015 by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company (together, “FirstEnergy” or the “Companies”).

The Companies raise three objections to CPV Shore’s intervention. First, they claim that CPV Shore’s interests are “adequately represented” by other parties to this proceeding and that CPV Shore’s participation in the docket would therefore be “superfluous and duplicative.” Memorandum at 1. The parties named by the Companies in no way, however, represent CPV Shore’s interests, and are in fact directly adverse in other proceedings to CPV Shore (and others) on the very topic as to which CPV Shore moved to intervene, i.e. the ability of States to support the development or continued operation of power plants through state-authorized, long-term contracts.

Second, the Companies dispute CPV Shore’s basis for intervening out of time. As set forth in its original motion, and more fully in this pleading, CPV Shore’s basis for intervening out of time is more than justified by exceptional circumstances. The timing of CPV Shore’s

Motion to Intervene was determined, in large part, by the progress of two related lawsuits, both of which raise legal issues relevant to the Companies' application, and which are the subject of recently filed petitions for *certiorari* before the United States Supreme Court.

Finally, the Companies argue that they "are not seeking Commission approval for the proposed wholesale purchased power transaction with which CPV is ostensibly concerned." Memorandum at 1. The Companies, however, are seeking Commission approval of an Economic Stability Program, including Retail Rate Stability Rider RRS ("Rider RRS"), that would authorize the Companies to "acquir[e] the generation output of specified generation plants through a purchased power transaction," with Ohio ratepayers subsidizing the costs of those agreements. Application at 9. The fact that the Companies have yet to seek approval of a particular form of power contract is irrelevant to the Companies' broader objective in this case of obtaining the Commission's approval to proceed with just such an arrangement.

CPV Shore's interest in seeing certain issues associated with the Companies' Rider RRS appropriately addressed is not adequately represented by other parties to this proceeding. Its participation in this docket will accordingly serve the public interest and, as discussed in its Motion to Intervene and herein, CPV Shore meets the Commission's standard for granting such intervention. CPV Shore agrees to take the record in this proceeding as it exists on the date of its Motion to Intervene, therefore neither the Companies nor other parties to the proceeding will be harmed by CPV Shore's presence in the docket. Therefore, CPV Shore respectfully asks the Commission to grant its motion.

A. CPV Shore's interests are not represented by other parties to this proceeding.

As set forth in its motion, CPV Shore is constructing a 725 MW combined-cycle natural gas plant to be located in Woodbridge, New Jersey. That plant, which will commence commercial operation within a year, will sell wholesale electricity into the PJM markets, as the

Companies also propose to do under the instant Economic Stability Program. However, CPV Shore, unlike the Companies, will receive all of its revenues from sales into the PJM wholesale market; by contrast, the Companies' revenue stream from generation assets that enter into power purchase agreements pursuant to Rider RRS of the Economic Stability Program will be established pursuant to those agreements, with "the costs and revenues [to be] netted" against PJM revenues and either charged to or rebated back to retail customers through a non-bypassable adjustment mechanism. CPV Shore, therefore, seeks to intervene because as a participant in the PJM markets, it may be affected by the Commission's decision on the Companies' Rider RRS.

CPV Shore began developing its New Jersey plant under an arrangement similar to the one proposed by the Companies in this docket. As a successful bidder in a state competitive procurement overseen by the New Jersey Board of Public Utilities ("NJBPU"), it entered into long-term contracts for differences with the state's four investor-owned utilities. Those contracts would have accomplished essentially what the contracts facilitated by Rider RRS proposed herein by the Companies would, i.e. pay the generator a fixed contractual payment (in CPV Shore's case, based on its successful competitive bid) that would be netted against revenues earned in the PJM wholesale markets.

What ensued demonstrates conclusively why the generators and trade associations whom the Companies characterize as "more than adequately represent[ing]" CPV Shore's interests in this docket in fact are doing nothing of the sort. Indeed, these entities are directly adverse to CPV Shore and its affiliates in lawsuits filed in New Jersey and Maryland. Exelon and others (including member companies of both PJM Power Providers Group ("P3") and the Electric Power Supply Association ("EPSA")) in fact sued the NJBPU, asking the federal district court to nullify CPV Shore's contracts (and other contracts authorized by the NJBPU in the same

solicitation) as unconstitutional. The district court ultimately granted the relief that Exelon sought; that judgment was affirmed by the Third Circuit Court of Appeals, and is currently the subject of a petition for *certiorari* before the United States Supreme Court.¹

P3 and EPSA have likewise taken positions with respect to the very types of long-term contracts that are proposed herein by the Companies that are directly adverse to CPV Shore and its affiliates in the Third and Fourth Circuit, and with respect to the resulting decisions that are currently before the Supreme Court on petitions for *certiorari*.² For example, EPSA's *amicus curiae* brief³ filed in the Fourth Circuit in *PPL v. Nazarian* urged the court to affirm the unconstitutionality of a Maryland procurement that awarded a long-term contract to CPV Maryland, an affiliate of CPV Shore, arguing that "compensating one generator, CPV, for the energy and capacity it sells in the [PJM markets] . . . at a price that differs from the market clearing price set through the processes approved by FERC . . . impermissibly invades a field that Congress exclusively reserved to FERC" and "impermissibly conflicts with federal law by interfering with the FERC-approved market rules that govern PJM's energy and capacity markets."⁴

Similarly, P3 filed four pleadings before the Maryland Public Service Commission ("MPSC") in the administrative docket that was collaterally attacked in federal court contesting both the legality and the wisdom of awarding long-term contracts to bidders seeking to meet that

¹ *PPL EnergyPlus, LLC v. Solomon*, 977 F.Supp.2d 372 (D.N.J. 2013), *aff'd*, 766 F.3d 241 (3rd Cir. 2014), *cert filed*, No. 14-634 (filed Nov. 26, 2014); *PPL EnergyPlus, LLC v. Nazarian*, 974 F.Supp.2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014), *cert filed*, No. 14-623 (filed Nov. 26, 2014).

² Neither CPV Shore nor its affiliates are members of either group.

³ The *amicus* brief was filed on behalf of both EPSA and the Edison Electric Institute ("EEI"). On information and belief, FirstEnergy and / or the Companies are members of EEI.

⁴ Brief of the Electric Power Supply Association and the Edison Electric Institute as Amici Curiae in Support of Appellees, Nos. 13-2419 *et al.* at 12 (Fourth Cir. filed Mar. 17, 2014).

State's reliability objectives. P3 argued that awarding such contract was "neither necessary in the short-run, nor beneficial in the long run," and would "lead to uneconomic development and thus higher costs to consumers over time" and "chill investments that would promote reliability."⁵

Far from "adequately representing" CPV Shore's interests, Exelon, EPSA and P3 have advocated positions in these cases that are diametrically opposed to those of CPV Shore. These entities do not and cannot represent CPV Shore's interests, and the Companies' arguments in this regard should be rejected outright by the Commission.

B. CPV Shore's late intervention should be allowed because of the status of two cases currently pending on petitions for *certiorari* before the United States Supreme Court.

The Companies wrongly dispute both the relevancy of the Third and Fourth Circuit decisions that are currently before the United States Supreme Court on petitions for *certiorari*, and the appropriateness of granting CPV Shore's motion for late intervention based on the pendency of those petitions.

The circuit court cases are directly relevant to the question raised by the Companies' request for authority to enter into long-term contracts to support generation assets that will sell into the PJM wholesale markets. That question is also at the heart of both cases, which address whether or how such resources may participate in the FERC-regulated PJM market and at the same time receive additional revenues (or rebate revenues that exceed the PJM price) through long-term agreements supported ultimately by retail ratepayers. While the Companies state, with no substantiation, that these cases "have no bearing on the present matter," Memorandum at 8,

⁵ Comments of PJM Power Providers Group, Case No. 9214 (Maryland PSC filed Jan. 11, 2010).

the Companies' proposal raises many of the same issues that are currently pending before the Supreme Court.

Notwithstanding the Companies' suggestion that there are "clear distinctions between those cases and this one," Memorandum at 7, those distinctions are by no means clear to, among others, the National Association of Regulatory Commissioners ("NARUC"), of which this Commission is a member. NARUC filed *amicus curiae* briefs in support of New Jersey and Maryland in these petitions for *certiorari*, arguing that "[i]f the decisions below stand, they can only significantly undermine State authority to ensure reliable electric service and invite countless inefficient lawsuits over related State programs that have a similar impact."⁶

The timeline for consideration of the petitions for *certiorari*, as shown in the attached Appendix A, underscores the reasons for CPV Shore's motion to intervene out of time. The States, CPV, NARUC and numerous other *amici curiae* recently filed their initial briefs. Briefs in opposition to the *certiorari* petition are due on February 11, 2015, and reply briefs are due on February 25, 2015. The petitions are unlikely to be taken by the Court until late in the year. In short, these are live, pending disputes that should provide some clarity to all stakeholders in the PJM as to permissible forms of State support for generation that participates in the PJM markets – even if the petitions for *certiorari* are denied. The schedule for these petitions was amended several times since the instant docket opened up: first in light of the substantial time gap between the issuance of the Fourth and Third Circuit opinions, and later in order to accommodate the parties' schedules. Since the States' decisions to petition for *certiorari* in these cases came late in the year, and the schedule was fluid until quite recently, CPV Shore's interest in the instant

⁶ Brief of Amicus Curiae National Association of Regulatory Utility Commissioners in Support of Petitioners, Nos. 14-634 *et al.* at 4 (U.S. Supreme Court filed Dec. 24, 2014) (emphasis in original).

proceeding was unclear. With the schedule now resolved, CPV Shore believes that it will be in a position to “contribute to full development and equitable resolution of the factual issues,” Rule 4901-1-11(b)(4).

3. CPV Shore has a “real and substantial interest in this proceeding.”

The Companies’ final argument is that CPV Shore lacks a “real and substantial interest” in this docket because the actual form of power purchase agreement that the Companies would utilize “is not under consideration here” and would in any event “fall[.] under the exclusive jurisdiction of the FERC because the proposed transaction would involve the sale of electricity at wholesale.” Memorandum at 9.

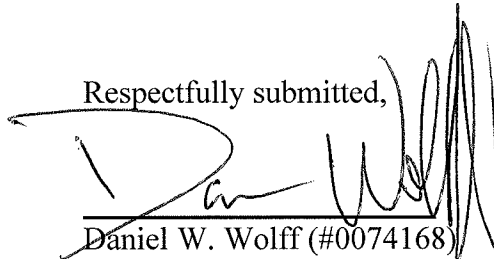
This argument elevates form over substance. The Companies are seeking the Commission’s approval to enter into a form of agreement that it has not yet filed with the Commission. Since these agreements would, as proposed, be backstopped by Ohio retail ratepayers, the Companies cannot proceed down this path without the Commission’s approval. If the Commission indeed approves the Companies’ request, the Companies indicate that they would file the as yet undisclosed contracts with FERC, and not the Commission, since they would fall under FERC’s “exclusive jurisdiction.”⁷ For this reason, CPV Shore’s participation in the proceeding is in fact needed at this time because, by the Companies’ own admission, there will be no future opportunity to address the issue: if the Commission approves Rider RRS, the horse will have left the barn, the Companies will proceed to FERC, and CPV Shore will be denied the chance to address the legality and appropriateness of what the Companies have proposed.

⁷ Of course, FERC alone -- not the Companies -- has the authority to determine whether a contract is FERC jurisdictional. This, too, is an issue in the appeals pending before the U.S. Supreme Court, notwithstanding the Companies’ view that they are irrelevant to the instant docket.

WHEREFORE, CPV Shore respectfully requests that its Motion to Intervene Out of Time be granted and that it be made a full party of record in this proceeding.

Dated: February 3, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Daniel W. Wolff', is written over a horizontal line. The signature is stylized with a large 'D' and 'W'.

Daniel W. Wolff (#0074168)

Richard Lehfeltdt* (PHV #2651-2015)

Crowell & Moring LLP

1001 Pennsylvania Ave., N.W.

Washington, DC 20004

Tel: (202) 624-2621

Fax: (202) 624-5116

dwolff@crowell.com

rlehfeltdt@crowell.com

**Pro hac vice* motion pending

Counsel for CPV Shore, LLC

APPENDIX A

<u>Ohio PUC Case Timeline</u>	<u>CPV Nazarian/Solomon Timeline</u>
Aug 4, 2014 – FirstEnergy Application filed with PUCO	June 2, 2014 - Nazarian (Fourth Cir.) Opinion Issued
	June 30, 2014 – Rehearing Denied in Nazarian (Fourth Cir.)
	Sep 11, 2014 – Solomon (Third Cir.) Opinion Issued
	Sep 12, 2014 – Application for Extension to file a Writ of Cert Petition re Nazarian (Fourth Cir.) filed with U.S. Supreme Court.
	Sep 15, 2014 – Chief Justice Grants Extension to File Writ of Cert Petition re Nazarian (Fourth Cir.) until Nov 27, 2014
Oct 1, 2014 – Due date for Interventions	Nov 26, 2014 – CPV files Writ of Cert Petitions re Nazarian (Fourth Cir.) and Solomon (Third Cir.)
Jan 21, 2015 – FirstEnergy Testimony Due	
Jan 23, 2015 – CPV files Motion to Intervene	
Jan 27, 2015 – FirstEnergy files Opp. to CPV Intervention	
Feb 5, 2015 – Intervenors Testimony Due	
	Feb. 11, 2015 – Responses are due in response to CPV Writ of Cert Petitions
Feb 13, 2015 – Due Date for Discovery Requests	
Feb 18, 2015 – Staff Testimony Due	

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served via electronic mail on this 3rd day of February, 2015 upon all the persons below:



Daniel W. Wolff

burkj@firstenergycorp.com
cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
cmooney@ohiopartners.org
drinebolt@ohiopartners.org
tdoughtery@theoec.org
joseph.clark@directenergy.com
ghull@eckertseamans.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
larry.sauer@occ.ohio.gov
kevin.moore@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
wtptmlc@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
lael.campbell@exeloncorp.com
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
jeremy.grayem@icemiller.com
BarthRoyer@aol.com
athompson@taftlaw.com
Marilyn@wflawfirm.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
selisar@mwncmh.com
ccunningham@akronohio.gov
bojko@carpenterlipps.com
allison@carpenterlipps.com
hussey@carpenterlipps.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
asonderman@keglerbrown.com
mfleisher@elpc.org

mitch.dutton@fpl.com
matt@matthewcoxlaw.com
todonnell@dickinsonwright.com
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com
jeffrey.mayes@monitoringanalytics.com
toddm@wamenergylaw.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
ryan.orourke@puc.state.oh.us
sfisk@earthjustice.org
msoules@earthjustice.org
tony.mendoza@sierraclub.org
laurac@chappelleconsulting.net
gthomas@gtpowergroup.com
stheodore@epsa.org
mdortch@kravitzllc.com
rparsons@kravitzllc.com
dparram@taftlaw.com

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Summary: Reply Memorandum in Support of Motion to Intervene Out of Time of CPV Shore, LLC electronically filed by Mr. Bradley Hutter on behalf of CPV Shore, LLC