December 30, 2015

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Re: *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR; *In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority*, Case No. 14-1694-EL-AAM

Dear Attorney Examiners:

On December 29, 2015, Ohio Power Company (AEP Ohio) filed a memorandum in opposition to PJM Interconnection's motion for late intervention. I am submitting an amended filing to fill in a string citation that was inadvertently left blank (but highlighted) in the original response. The Company's memorandum in opposition was filed well in advance of the deadline for responding and this amended response is also being submitted well in advance of the deadline for responding, so advance leave is not required in order to correct the error through an amended filing. The only change made in the amended response as compared to the original was to fill in the citations that start on the bottom of page 4 and carry over to page 5, which demonstrate the extensive discussion of PJM bidding issues in the existing evidentiary record.

Thank you for your attention to this matter.

Respectfully Submitted,

cc: Parties of Record

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider | ) | Case No. 14-1693-EL-RDR |
| In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority | ) | Case No. 14-1694-EL-AAM |

**AMENDED MEMORANDUM CONTRA OF OHIO POWER COMPANY TO PJM INTERCONNECTION, LLC'S MOTION TO INTERVENE**

PJM Interconnection, LLC (PJM) has moved to intervene in this proceeding based on its Independent System Operator and Regional Transmission Organization status. The PJM Motion to Intervene should be denied as untimely and unjustified. The deadline for intervention has passed months ago and, contrary to PJM's unsupported interpretation, nothing in the Joint Stipulation and Recommendation (Stipulation) justifies the extraordinary measure of intervention at this late stage in the proceedings in order to inject a new issue into this proceeding through testimony. While PJM's motion references testimony that was "concurrently filed" no such testimony was submitted in the docket within the established deadline for filing testimony. Accordingly, Ohio Power Company (AEP Ohio) opposes PJM's intervention and attempt to submit testimony. Alternatively, if the Commission is interested in PJM's point of view, the Commission can grant the PJM leave to file an *amicus curiae* brief on the policy issues after the adjudication process is completed. Thus, while the intervention should be denied outright, PJM

could be permitted to file an *amicus curiae* brief (subject to the parameters outlined below) if an accommodation is desired by the Commission.

## I. PJM does not meet the requirements for intervention and its request should be denied.

R.C. 4903.221 permits intervention only by persons who may be "adversely affected" by proceedings. Likewise, the Commission's intervention rule authorizes intervention only when:

> [t]he 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.[1]

In considering a motion to intervene, the Commission's rule directs that the Commission should consider: (1) the nature and extent of the intervenor's interest; (2) the legal position advanced by the intervenor and its probable relation to the merits of the case; (3) whether intervention will unduly prolong or delay the proceedings; (4) whether the intervenor will significantly contribute to full development and equitable resolution of the factual issues; and (5) the extent to which the intervenor's interest is represented by existing parties.[2]

### A. PJM does not have a real and substantial interest in this proceeding.

Notably, PJM has provided no showing of an interest that would play an appropriate role in this proceeding. PJM claims only that it operates the transmission system and administers capacity, energy and ancillary service markets in a region that includes AEP Ohio's service territory.[3] PJM never explains <u>how</u> this proceeding concerning retail electric service adversely affects PJM's ability to administer the wholesale markets. Nor does the PJM explain why it

[1] O.A.C. 4901-1-11(A).

[2] *See* O.A.C. 4901-1-11(B)(1)-(5); *see also* R.C. 4903.221(B)(1)-(4).

[3] PJM Motion, p. 2.

must intervene in this proceeding in order to perform its functions under federal law in administering the PJM markets. Moreover, as further explained below, PJM's entire premise for intervention and testimony is based on a misapprehension of Paragraph III.A.5.a of the Stipulation; therefore, its claimed interest in this proceeding is neither real nor substantial. PJM falls considerably short of making the required showing of "extraordinary circumstances" that could possible justify such late intervention.

PJM's function relates exclusively to federal law and it operates under the auspices of the Federal Energy Regulatory Commission (FERC). As is confirmed by its proffered testimony (which was referenced as being "concurrently filed" but was not docketed), PJM's interest relates to the operation and functioning of wholesale markets, not the issues presented in this case relating to the retail jurisdiction of the Commission under Ohio law. PJM may be seeking intervention to improperly advocate federal positions in a state proceeding. The Commission should retain its focus on the issues involving Ohio law and energy policy, and forego PJM's invitation to involve itself in matters that concern FERC-jurisdictional wholesale rates, or that concern the FERC-jurisdictional PJM markets. In sum, PJM has failed to establish that it has an appropriate interest justifying intervention under R.C. 4903.221 and its motion should be denied.

**B. The stated premise for PJM's interest is incorrect and misguided.**

Under R.C. 4903.221(B)(2), the Commission must consider the legal position advanced by the intervenor and its probable relation to the merits of the case. The premise of PJM's motion for intervention and testimony is explicitly limited to Section III.A.5.a of the Stipulation. PJM claims that clarification of this provision is needed to ensure continued support for an "efficient wholesale market in Ohio" and to ensure that "the proposed process in the Stipulation is compatible with" PJM tariffs. These statements completely overstate and distort the meaning and effect of Section III.A.5.a.

AEP will, of course, follow all legal requirements and applicable rules when performing bidding functions for the PPA Units. PJM (and FERC) can use their own administrative and regulatory authority to monitor and enforce such requirements. But PJM should administer and enforce its tariffs without enlisting the Commission to foray into an area occupied by the federal government. That is certainly not the intent of Section III.A.5.a of the Stipulation. As the plain language in Section III.A.5.a indicates, the provision relates exclusively to the Commission's retail recovery of costs incurred by the utility. The provision is limited to review of actions taken by the Company and places a potential cost disallowance risk on AEP Ohio (without affecting the price paid by the seller in the wholesale transaction) that are deemed unreasonable based on facts and circumstances known at the time such costs were committed and market revenues were received. None of those features of the provision – and none of the language use – supports PJM's apparent premise that some inappropriate bidding behavior will occur absent their participation in this proceeding. In short, there is no basis in the provision that triggers a need for PJM to get involved in this retail proceeding; anything PJM needs to do to administer its markets, it can and should do under federal law in a federal forum.

Moreover, there is nothing new presented in Section III.A.5.a as compared to the original Application or Amended Application relative to bidding activity involving the PPA Units. The claim that the new language in Section III.A.5.a, first appearing when the Stipulation was recently filed, triggers the sudden need for PJM involvement is completely inaccurate. AEP Ohio's role in overseeing the bidding and dispatch of the PPA Units has been transparently disclosed and discussed on the record throughout the prior evidentiary hearing in this case. Sierra Club Ex. 2 at 15 (Section 3.5); AEP Ohio Ex. 2 at 8 (AEP Ohio to direct offers into PJM); Tr. I at 282-86 (bidding mechanics and strategy); Tr. II at 492-95 (explanation of service

corporation support for bidding decisions and code of conduct rule), 347-50 (information sharing and PJM bidding rules), 358-59 (code of conduct as applied to bidding), 572-73 (current bidding practices). There is nothing new in this regard that is raised or disclosed for the first time in the Stipulation. Even giving PJM the benefit of the doubt that it was not aware of those openly-litigated issues and that it first became aware of them upon filing of the Stipulation, the Commission would still have to conclude that PJM is seeking to intervene and raise its voice way too late in the process to be permitted.

While PJM's motion references testimony that was "concurrently filed" with its motion, no such testimony was docketed by the deadline for filing testimony. Thus, while PJM states that it "accepts the record developed to date" and maintains that its intervention and testimony would not prejudice any party, the reality is that it is attempting to intervene in a longstanding docket on the eve of trial and after the discovery cutoff, it is apparently seeking to file testimony after the established deadline for doing so – a deadline under which all of the other active parties worked diligently to meet. Accordingly, to the extent PJM is not just using the Stipulation language as a mere pretext for coming into this case at the last possible moment, it is nonetheless inappropriate under the Commission's procedural rules and prejudicial to the Company and other parties that have been litigating and attempting to settle the issues for more than a year.

## II. As an alternative to intervention, the Commission could permit PJM to file an *amicus curiae* brief after completion of the adjudicative process if PJM wants to weigh in on policy issues.

If despite these valid concerns the Commission desires to have input from PJM, then the Company suggests that a more appropriate alternative may be that the Commission deny intervention and simply grant PJM leave to file an *amicus curiae* brief. The filing of a brief should provide the Commission with the assistance of PJM and satisfy PJM's apparent interest in

conveying its policy views, more appropriately after closing of the evidentiary record and without interrupting the hearing process in its role as wholesale market administrator. Of course, as an *amicus curiae*, PJM would – like all of the parties – be limited to the evidentiary record created by the hearing process and PJM could only make factual statements in its brief that are supported by the evidentiary record. Of course, as a corollary to avoiding the hearing process and discovery, PJM's *amicus curiae* status would not permit the sponsoring of testimony, conducting of cross examination, or participation in the pleadings in the case. But the *amicus curiae* status would be an adequate level of participation that would enable PJM to monitor the proceeding while conveying its advisory opinions without full participation as a party with interests in the case.

## III. CONCLUSION

PJM does not meet the requirements for intervention and its request should be denied. Alternatively, AEP Ohio does not oppose PJM's participation as an *amicus curiae* subject to the parameters described above.

Respectfully submitted,

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**Counsel for Ohio Power Company**

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Amended Memorandum Contra of Ohio Power Company was served by electronic mail upon the individuals listed below this 30th day of December, 2015.

/s// Steven T. Nourse
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Summary: Correspondence -Letter to AE with Amended Memorandum Contra to PJM Interconnection, LLC's Motion To Intervene electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company