

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA PJM INTERCONNECTION’S
MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

As a matter of law, rule, and fairness to Ohio consumers, the late-filed motion to intervene by PJM Interconnection, LLC (“PJM” or “Movant”) should be denied. Ohio law provides that a motion to intervene will not be considered timely if it is filed later than either five days before the scheduled date of the hearing on the matter or the specific deadline established for intervention in the particular matter.¹ In this case the Public Utilities Commission of Ohio (“PUCO” or “Commission”) issued an Entry setting the deadline for intervention at October 1, 2014.² PJM, however, moved to intervene in this proceeding on December 29, 2015, nearly a year and three months after the deadline for intervention. The Motion to Intervene is extremely untimely. FirstEnergy opposed PJM’s intervention, in a filing dated January 4, 2016.

¹ R.C. 4903.221.

² Entry at 2 (Aug. 13, 2015).

The PUCO's rules provide that an untimely motion to intervene will be granted only under extraordinary circumstances.³ Here there are no extraordinary circumstances. And PJM's last-minute intervention would be unfair to consumers and the party (the Consumers' Counsel) that represents them. PJM's Motion to Intervene should be denied.

II. ARGUMENT

PJM's motion to intervene is untimely and prejudicial, and it fails to show there are extraordinary circumstances that warrant granting its intervention.

The time to intervene in this case was October 1, 2014, over a year ago. Movant did not meet that deadline.⁴ Its motion to intervene is untimely under the law. Under the PUCO's rules,⁵ "[a] motion to intervene which is not timely will be granted only under extraordinary circumstances." And despite Movant's claims to the contrary, it has not shown extraordinary circumstances that warrant the PUCO granting its intervention. Indeed, the controlling precedent on PJM's motion is just days old, where the PUCO denied PJM's motion under the same circumstances in a case affecting AEP's consumers.⁶

Movant seems to claim that there are extraordinary circumstances (and good cause⁷) that justify its untimely motion to intervene. Movant seeks to intervene to "clarify" (as a non-stipulating party) the review process⁸ agreed to in the Stipulation.

³ Ohio Admin. Code 4901-1-11(F).

⁴ Ohio Rev. Code 4903.221 requires that intervention meet a specific deadline established by order of the commission.

⁵ Ohio Admin. Code 4901-1-11(F).

⁶ *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, Entry (Jan. 7, 2016).

⁷ Ohio Rev. Code 4903.221(A)(2).

⁸ Stipulation, Paragraph V. (B)(5)(a).

Specifically, Movant focuses on Paragraph V.(B)(3)(a) of the Stipulation which reads:

The rigorous review process set forth in the Companies ' ESP IV filing in the testimony of Company Witness Mikkelsen supporting the Application should be adopted. Specifically, the Companies agree to participate in annual compliance reviews before the Commission to ensure that actions taken by the Companies when selling the output from generation units included in Rider RRS into the PJM market were not unreasonable. The Companies, not their customers, would be responsible for the adjustments made to Rider RRS based on actions deemed unreasonable by the Commission, including any costs (after proper consideration of such costs and netting of any bonus payments) associated with performance requirements in PJM's markets. Any determination that the costs and revenues included in Rider RRS are unreasonable shall be made in light of the facts and circumstances known at the time such costs were committed and market revenues were received. In addition, the calculation of Rider RRS will be based on the sale of power into PJM. (emphasis added).

PJM states that "given the fact that the terms of Paragraph V.(B)(3)(a), and the proposed PUCO prudence review process as set forth therein simply did not exist prior to its filing [on Dec. 1, 2015], good cause exists to allow this late-filed intervention."

Movant, however, misstates the facts. The prudence review process set forth in Paragraph V.(B)(3)(a) *did exist* prior to December 1. In fact the review process was proposed with the Utilities' application in 2014 and has been a persistent and prominent issue over the past year.

Over a year ago, when FirstEnergy Utilities filed their August 4, 2014 application,⁹ they identified the alleged "rigorous review" process that was written into the December 1, 2015 Stipulation. Specifically, as indicated in Paragraph V.(B)(3)(a) of the December 1, 2015 Stipulation, Company Witness Mikkelsen set out the review process to be adopted in her direct testimony, filed in support of the ESP IV application.

⁹ Application (Aug. 4, 2014).

There she described annual compliance reviews before the PUCO that allegedly would audit the reasonableness of the actual costs and market revenues contained in Rider RRS.¹⁰ She also described a review that is based on facts and circumstances known at the time the costs were committed and market revenues were received.¹¹

That review process set forth in Ms. Mikkelsen's August 4, 2014 direct testimony was included in the first stipulation filed in this case on December 22, 2014. A review of that stipulation shows that the parties to the stipulation were supporting the ESP IV as filed, which included Rider RRS and the review process Ms. Mikkelsen set out in her direct testimony.¹² Subsequent Stipulations were filed as well on May 28, 2015 and June 4, 2015. These Stipulations were also premised on the fact that there would be the alleged "rigorous review" process set forth by Ms. Mikkelsen in her August 4, 2014 testimony.¹³

And then on May 4, 2015, Ms. Mikkelsen filed "Second Supplemental Testimony" further explaining the alleged "rigorous review" process for Rider RRS. This testimony was filed to respond to the PUCO's Feb. 25, 2015 AEP Ohio Order in Case No. 13-2385. That Order required AEP to include in its PPA rider proposal a provision that included "rigorous Commission oversight of the rider."¹⁴

¹⁰ Direct Testimony of Mikkelsen at 14-15 (Aug. 4, 2014).

¹¹ Id.

¹² See Stipulation and Recommendation at 6 (Dec. 22, 2014).

¹³ See Supplemental Stipulation and Recommendation at 1 (May 28, 2015); Second Supplemental Stipulation at 1 (June 4, 2015).

¹⁴ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-ESP, Opinion and Order at 25 (Feb. 25, 2015).

The evidentiary hearing began on August 31, 2015. The alleged "rigorous review process" the Utilities proposed under its three filed Stipulations, was explained by Ms. Mikkelsen in her testimony (direct and supplemental). Extensive cross-examination on the proposed "rigorous review" occurred during the thirty-five day evidentiary hearing.¹⁵ That hearing ended on October 29, 2015.

In any event, the issue of the review process does not create extraordinary circumstances that warrant an intervention that is this late. Nor does it provide good cause for the untimely intervention.

As mentioned, the PUCO just days ago denied PJM's intervention in a similar case involving AEP's consumers.¹⁶ The PUCO has frequently denied late intervention by parties when similar circumstances have arisen. See, e.g., *In the Matter of the Application of Ohio Power Company*, Case No. 11-346-EL-SSO, Opinion and Order at 18-23 (Dec. 14, 2011) (affirming an earlier ruling denying late intervention to IGS); *In the Matter of SBC Communications, Inc.*, Case No. 98-1082-TP-AMT, Opinion and Order (Apr. 8, 1999)(denying late intervention to a party who sought to intervene to clarify procedures set forth in a stipulation upon which they otherwise took no position); *In the Matter of the Application of Columbus Southern Power Co.*, Case No. 08-917-EL-SSO, Opinion and Order at 8-9 (Oct. 3, 2011); *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company et al*, Case No. 11-5201-EL-FOR, Opinion and Order (Aug. 7, 2003); *In the Matter of the*

¹⁵ See, e.g., Testimony of Staff Witness Choueiki at 12, 15, 16 (Sept. 18, 2015); Tr. XXX 6233-6244 (Choueiki); Tr. I 66-89; 120-124 , 162 (Mikkelsen); Tr. II 255-257; 448-455;474; Tr. III 531-540.

¹⁶ *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, Entry (Jan. 7, 2016).

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, Entry (Jan. 7, 2016). The PUCO should, consistent with this precedent, deny Movant's untimely motion to intervene.

Moreover, PJM should have to show, as part of its extraordinary circumstances, that its last-minute intervention will not prejudice any other party. In this regard, PJM claims that its late intervention to give guidance on Paragraph V(B)(3)(a) would not be prejudicial to parties because it "accepts the record developed to date."¹⁷

But Movant is not accepting the record developed to date. Instead it seeks to change the record by adding the testimony of its witness, Mr. Bresler. The witness then seeks to opine on the review that the PUCO should be doing. Movant's testimony, if accepted, will change the record. And the record in this proceeding has already been developed.¹⁸

Ultimately, PJM cannot show that its intervention will not prejudice other parties. There is no way at this late date for a party representing Ohio consumers, namely OCC, to adequately conduct pre-hearing preparation for PJM's participation and to prepare OCC's case for the PUCO to consider in the context of Movant's evidence. It simply would be unfair, in an already compressed process, to allow for Movant's late-filed participation that would only compound the unfairness. Accordingly, the PUCO should find that PJM fails to provide extraordinary circumstances or good cause that warrants the PUCO granting its untimely intervention.

¹⁷ PJM Motion for Limited Intervention at 6.

¹⁸ See footnote 15.

Furthermore, PJM had the opportunity to intervene on a timely basis and “significantly contribute to full development and equitable resolution of the factual issues,” under the intervention standard in Ohio Rev. Code 4903.221(B)(4). In the attached letter to PJM, the P3 Group and the Electric Power Supply Association showed what such an intervention by PJM could have looked like to protect the benefits of competitive electric markets for Ohioans.¹⁹

III. CONCLUSION

PJM’s Motion to Intervene is untimely. The PUCO’s rules provide that an untimely motion to intervene will be granted only under extraordinary circumstances. PJM has not provided any extraordinary circumstances. And Movant’s last-minute intervention would be unfair to consumers and the party (the Consumers’ Counsel) that represents them. PJM’s Motion to Intervene should be denied.

¹⁹ <http://www.pjm.com/~media/about-pjm/who-we-are/public-disclosures/20160107-p3-epsa-ex-parte.ashx>.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served via electronic transmission to the persons listed below on this 11th day of January, 2016.

/s/ Maureen R. Willis
Maureen R. Willis
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January 6, 2016

The PJM Board of Managers
c/o Howard Schneider, Chairman
PJM Interconnection, L.L.C.
2750 Monroe Boulevard
Audubon, PA 19403

Dear Mr. Schneider and the Board of Managers:

As the Board is aware, the Public Utilities Commission of Ohio (PUCO) is considering two matters which have significant long term implications as to the viability of PJM's markets. Both FirstEnergy and AEP are seeking out of market support for units that by their own admission are "uneconomic." In seeking these out of market subsidies, both companies have called into question PJM's abilities to ensure reliability and promote pricing that is beneficial to consumers.

The PJM Independent Market Monitor understands the numerous problems presented by AEP's and FirstEnergy's proposals. The IMM filed testimony in both cases vigorously challenging the assumptions of both companies and advising the PUCO of the numerous adverse consequences that would result from approval of these proposals. In no uncertain terms, the IMM offered that the proposed subsidies are "not consistent" with competition in the PJM market and would lead to a "situation where only subsidized units would ever be built."¹

Unfortunately, PJM has adopted a different posture in these cases. Instead of defending the PJM markets and sending a clear message that out of market revenue streams for uneconomic units undermine the markets that PJM has worked so hard to develop, PJM chose not to oppose them, but rather to suggest a clarification.² In testimony recently submitted to the PUCO long after the cases were underway and the dangers known, PJM indicated that PJM did not take a position on these nefarious efforts to undermine PJM's markets. Rather than advising the PUCO on the devastating

¹First Supplemental Testimony of Joseph E. Bowring on Behalf of the Independent Market at page 5. See, http://www.monitoringanalytics.com/reports/Reports/2015/IMM_First_Supplemental_Testimony_of_Joseph_E_Bowring_14-1297_20151230.pdf

² See, <http://pjm.com/~media/documents/reports/20151228-stuart-bresler-testimony.ashx> and <http://www.pjm.com/~media/documents/reports/20151229-stuart-bresler-testimony-first-energy.ashx>

impacts to the market in the short and long term, PJM instead sent a message that these subsidies would somehow be acceptable if certain conditions were attached.

Further, PJM, through a statement from Vince Duane to the MRC, offered that it is not PJM's job to make policy decisions at the state level.³ P3 and EPSA agree. However, the only entity that will be making policy decisions in Ohio is the PUCO and unfortunately they will be doing so in a vacuum without the knowledge or guidance of PJM as to how the proposed state action impacts the regional market system Ohio chose to join.

While P3⁴ and EPSA⁵ understand that the respective roles of PJM, FERC and the states can be challenging to reconcile and that PJM must accommodate different retail market structures, PJM should not be afraid to say when a program being considered at the state level directly undermines the wholesale market. In this case, the PUCO has not yet rendered a decision so the advice would come before the state action. The Ohio Commission is simply considering proposals that were brought to them by two in-state utilities. One would expect that the Ohio Commission, while reserving the opportunity to disagree, would welcome the input of PJM on the full ramifications of what has been proposed especially as several parties to the case call into question the core tenants of PJM's market.

It is not too late for PJM to assume an appropriate role in the Ohio discussions and P3 and EPSA would encourage PJM to do so.⁶ To date, PJM's efforts have been underwhelming. While the IMM has zealously defended PJM's markets and respectfully criticized the AEP and FirstEnergy proposals, PJM has chosen to not take a position and offered suggestions that will not address the fundamental problem.

Moving forward, we respectfully suggest that PJM take a more aggressive role advocating for the benefits of a well-structured wholesale market at the state level, and in Ohio specifically, while putting mechanisms in place to protect the wholesale market when actions at the state/retail market undermine PJM's market.⁷ PJM should be rightfully proud of the markets that have been developed to date. Allowing uninformed policies at the state level to undermine this progress is not necessary and should not be acceptable.

PJM's markets have produced notable benefits for consumers. Reliability has been maintained and competitive prices have lowered the cost of electricity for homes and business throughout the entire footprint. These benefits will evaporate if the market is corrupted by state actions that subsidize

³ See, <http://insidelines.pjm.com/pjm-says-wholesale-market-in-ohio-enables-reliability/>

⁴ The views expressed in this letter are the views of the PJM Power Providers Group (P3) as an organization and do not necessarily represent the views of individual P3 members with respect to any issue.

⁵ The views expressed in this letter represent the position of the Electric Power Supply Association (EPSA) as an organization, but not necessarily the views of any particular members with respect to any issue.

⁶ There is precedent in Ohio allowing participation in PUCO proceedings as amicus curiae. Permission is required and can be obtained via a motion (under PUCO rule 4901-1-12 of the Ohio Administrative Code) requesting such authority.

⁷ P3 and EPSA appreciate that PJM has commissioned a paper on the "performance and value of markets that will include an analysis of the interplay between state initiatives and competitive power markets." P3 and EPSA are concerned that a spring release date will be too late for this important effort to have any meaningful impact on the Ohio discussions and encourage the publication of the paper as soon as possible.

otherwise uneconomic units. PJM should articulate this fact at the state level and take appropriate actions at the RTO-level and at FERC to limit any damage.

Sincerely,

/s/ John E. Shelk

John E. Shelk

President and CEO, EPSA

/s/ Glen Thomas

Glen Thomas

President, PJM Power Providers Group

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