

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 Edison Company for) Case No. 14-1297-EL-SSO
Authority to Provide for a Standard)
Service Offer Pursuant to R.C. 4928.143)
in the Form of an Electric Security Plan.)

ENTRY

The attorney examiner finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) are electric distribution utilities as defined in R.C. 4298.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.
- (2) R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.
- (3) On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an ESP, in accordance with R.C. 4928.143 (ESP IV).
- (4) Three stipulations have previously been filed in this proceeding by FirstEnergy and several other parties: the stipulation and recommendation filed on December 22, 2014, as modified by the Errata filed on January 21, 2015; the supplemental stipulation and recommendation filed on May 28, 2015; and the second supplemental stipulation and

recommendation filed on June 4, 2015 (collectively, Prior Stipulations).

- (5) By Entry issued August 13, 2014, the attorney examiner established October 1, 2014, as the deadline by which parties were required to file motions to intervene in this proceeding, and, by subsequent Entry issued July 2, 2015, the attorney examiner set August 31, 2015, as the date for the evidentiary hearing to commence.
- (6) An evidentiary hearing considering the application and the Prior Stipulations began on August 31, 2015, as scheduled, and concluded on October 29, 2015.
- (7) On December 1, 2015, a third supplemental stipulation and recommendation (Third Supplemental Stipulation) to resolve the issues raised in the ESP IV proceeding was filed by various parties to this proceeding, including FirstEnergy and Staff (Signatory Parties). Signatory Parties state that the Third Supplemental Stipulation, together with the Prior Stipulations (collectively, Stipulated ESP IV) is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process. Additionally, Signatory Parties state that FirstEnergy and numerous other parties have engaged in a wide range of discussions over a period of time related to the development of the Stipulated ESP IV.
- (8) On December 1, 2015, and December 2, 2015, joint motions to reopen the hearing record and to establish a procedural schedule to address the Third Supplemental Stipulation were filed by various parties to this proceeding.
- (9) By Entry issued December 9, 2015, the attorney examiner granted the requests for an additional hearing to be held to discuss the Third Supplemental Stipulation and set forth a procedural schedule, in which the evidentiary hearing was scheduled to commence on January 14, 2015.
- (10) On December 29, 2015, PJM Interconnection, Inc. (PJM) filed a motion for limited intervention, noting the need for clarification regarding Paragraph V(B)(3)(a) of the Third Supplemental Stipulation. This paragraph of the Third Supplemental Stipulation discusses the compliance reviews

of actions taken by FirstEnergy when selling output from generation into the PJM market and whether those actions would be considered unreasonable. PJM argues that clarification is needed in order to ensure that FirstEnergy's actions in bidding the affected units into the PJM market is undertaken in a manner to support a competitive wholesale market and development of new generation. PJM believes that its request for clarification falls under "extraordinary circumstances," given the need for the development of a complete record. Further, PJM contends that its request is appropriate pursuant to R.C. 4903.221 because this review process was not proposed prior to the filing of the Third Supplemental Stipulation and should be treated as a new issue in the proceedings. PJM also argues that because it administers the wholesale market and FirstEnergy's tariffs to bid into the market, no other party can adequately protect its interest. Finally, PJM maintains that no party will be prejudiced if it is granted limited intervention as it is willing to accept the record of this proceeding established to date.

- (11) On January 4, 2016, FirstEnergy filed a memorandum contra PJM's motion for limited intervention. In its memorandum contra, FirstEnergy argues that PJM is attempting to unnecessarily join this proceeding to advance testimony that is beyond the scope of the Third Supplemental Stipulation and may also be beyond the jurisdiction of the Commission. FirstEnergy also argues that PJM's motion was filed fourteen months after the specified deadline for intervention in this proceeding, noting that PJM provides no valid reason for this delay. Additionally, FirstEnergy contends PJM has no real and substantial interest in this proceeding, and that, even in the event PJM had such an interest, it is adequately represented and has already been addressed by several parties. FirstEnergy requests that PJM's motion for limited intervention be denied in order to avoid unduly prolonging this proceeding.
- (12) On January 11, 2016, Ohio Consumers' Counsel (OCC) filed a memorandum contra PJM's motion for limited intervention, noting that the review process described in Paragraph V(B)(3)(a) has been contemplated since the early stages of this proceeding, as demonstrated by the Companies application and supporting testimony.

Companies Ex. 7 at 14-15. OCC argues that allowing PJM to intervene in this proceeding would be unfair to OCC and residential consumers. OCC also notes that PJM's motion, filed nearly a year and three months after the specified deadline, is extremely untimely and presents no extraordinary circumstances that prevented PJM from intervening in a timely manner or warrants its participation in the advanced stage of this proceeding.

- (13) On January 8, 2016, PJM filed a reply to FirstEnergy's memorandum contra PJM's motion for limited intervention. In addition to reiterating the arguments in its motion for limited intervention, PJM argues that the Companies premised their memorandum on the merits of PJM's proposal, rather than the requirements for intervention. PJM asserts that, as the only entity that administers tariffs under which FirstEnergy and other market participants bid into the PJM market, it holds a real and substantial interest in this proceeding, specifically referring to the express relationship between the bidding practices of the units covered by the affiliate power purchase agreement and the Commission's review of those practices, as proposed in Paragraph V(B)(3)(a). PJM also maintains that its involvement in this proceeding was not necessary before the filing of the Third Supplemental Stipulation, as this was the first time in which parties addressed FirstEnergy's bidding practices and the Commission's subsequent compliance reviews. Finally, PJM states that it is not requesting the Commission to contemplate matters outside of its jurisdiction; rather, PJM is merely suggesting that the Commission consider PJM's clarifications as a means to provide guidance to all parties as to the Commission's expectations in implementing its oversight authority.
- (14) It is the Commission's responsibility to ensure the expeditious and orderly conduct of its hearings. R.C. 4901.13 permits the Commission to adopt rules to govern its proceedings and to "regulate the mode and manner" of its hearings, and the Commission is empowered to determine whether the interest of a party is sufficient to warrant the grant of a petition to intervene. *Dworken v. Pub. Util. Comm.*, 133 Ohio St. 208, 12 N.E. 2d 490 (1938).

- (15) An attorney examiner may grant intervention, pursuant to Ohio Adm.Code 4901-1-11(A), only when “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.” Ohio Adm.Code 4901-1-11(B) provides that, in deciding whether to permit timely intervention, an attorney examiner may consider: the nature and extent of the prospective intervenor's interest; the legal position advanced by the prospective intervenor and its probable relation to the merits of the case; whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues; and the extent to which the person's interest is represented by existing parties. Ohio Adm.Code 4901-1-11(D) also states that an attorney examiner may grant limited intervention for the purpose of participating with respect to one or more specific issues.
- (16) However, as noted by both PJM and FirstEnergy, R.C. 4903.221 states that the Commission may, in its discretion, grant a motion to intervene filed after a specified deadline for intervention has passed for “good cause shown.” Accordingly, Ohio Adm.Code 4901-1-11(F) provides that an untimely motion to intervene will only be granted under “extraordinary circumstances.”
- (17) The attorney examiner notes that both the Commission and the Ohio Power Siting Board have frequently denied untimely motions to intervene where no extraordinary circumstances were present. *See, e.g., In re Ohio Power Co.*, Case No. 10-2376-EL-UNC (AEP Ohio Case), Opinion and Order (Dec. 14, 2011) at 9; *In re FirstEnergy*, Case No. 11-5201-EL-RDR, Opinion and Order (Aug. 7, 2013) at 7-8; *In re Greenwich Windpark*, Case No. 13-990-EL-BGN, Opinion, Order, and Certificate (Aug. 25, 2014) at 3-4. In this case, PJM filed its motion to intervene on December 29, 2015, 454 days after the October 1, 2014 intervention deadline.

However, PJM has set forth no extraordinary circumstances to warrant its late intervention. PJM cannot claim that it lacked notice that Commission oversight of FirstEnergy's bidding process would be at issue in this proceeding. The Commission has previously directed companies to include provisions for rigorous Commission oversight for riders associated with proposed power purchase agreements, including periodic substantive review and audit. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015) at 25. In fact, as indicated by OCC, FirstEnergy witness Mikkelsen discussed this issue in her initial testimony in this proceeding (Companies Ex. 7 at 14-15).

PJM attempts to justify its untimely intervention motion by claiming that the filing of the Third Supplemental Stipulation presented for the first time the specific provisions for Commission review of the proposed PPA. The attorney examiner finds that this claim is meritless. In cases where a stipulation is filed following the deadline for motions to intervene, the Commission has established that the filing of a stipulation that may resolve issues differently than initially proposed or that expands the issues does not, alone, constitute extraordinary circumstances warranting untimely intervention. *See In re Dayton Power & Light*, Case No. 02-2779-EL-ATA, Opinion and Order (Sept. 2, 2003) (*DP&L Case*) at 8-9; *AEP Ohio Case*, *supra*. In its analysis in the *DP&L Case*, *supra*, the Commission reasoned that it should be no surprise to anyone that a case may be resolved by the proposal of a stipulation, which often encompass a variety of issues, and the mere fact that a stipulation may resolve issues differently than initially proposed does not afford a party the right to intervene beyond the deadline. In that particular case, the Commission did permit untimely intervention based upon the fact that the late intervenor did not receive notice of certain procedures required by a proposed rule relating to the end of the market development period. In making its finding, the Commission emphasized that intervention was permitted not because the issues in the proceeding were expanded by the stipulation, but because the intervenor did not receive the notice of certain procedures specific to that case. *DP&L Case* at 9.

Therefore, the situation in this case is different from the situation at issue in the *DP&L Case*. Here, it should be no surprise to PJM that a stipulation was filed that addresses Commission oversight of FirstEnergy's actions in bidding into the PJM market, as proposed in FirstEnergy's initial application and as supported by FirstEnergy in testimony. Further, even if the Third Supplemental Stipulation in this case could be considered to have expanded the issues in this proceeding, under the precedent discussed above, that alone is insufficient grounds to find extraordinary circumstances for late intervention. The attorney examiner finds that extraordinary circumstances, such as those discussed in the *DP&L Case*, are simply not present here.

- (18) Further, the attorney examiner does not believe that PJM has a unique interest in this proceeding that is not adequately represented by other parties already granted intervention. Most notably, Monitoring Analytics, LLC, operating in its capacity as the PJM Independent Market Monitor (Market Monitor), and several wholesale power provider organizations filed timely motions to intervene and were granted intervention. In fact, by Entry issued December 1, 2014, the attorney examiner granted the Market Monitor's motion to intervene due to the Market Monitor's role in performing a public interest function that includes monitoring the PJM markets for any exercise of market power as well as recommending market design changes to increase competition. PJM is arguing it should be granted intervention for the same purpose for which the Market Monitor was already granted intervention in this proceeding. Thus, even in the event that extraordinary circumstances existed, PJM's motion for limited intervention would nonetheless be denied.
- (19) Additionally, the attorney examiner notes that the Commission and Staff regularly rely upon PJM in an open, informal, and collaborative dialogue to exchange data and information regarding its reliability, transmission planning, and market operation functions. This information and data sharing has assisted the Commission in developing more effective policy outcomes. It is hoped that such collaboration continues in the future unhindered by unnecessary litigation.

- (20) Finally, the attorney examiner notes that, in the past, the Commission has permitted the filing of amicus briefs in situations where intervention in the proceeding was not warranted. See *In re Ohio Edison (Ohio Edison Case)*, Case No. 03-1966-EL-ATA, Finding and Order (Feb. 4, 2004) at 2; *In re Duke Energy Ohio*, Case No. 12-1685-GA-AIR, Opinion and Order (Nov. 13, 2013) (*Duke Case*) at 5-6; *In re Columbia Gas of Ohio, Inc.*, Case No. 94-987-GA-AIR, Entry (Aug. 4, 1994) at 5; *In re FirstEnergy*, Case No. 99-1212-EL-ETP, et al., Entry (Mar. 23, 2000) at 2-3. In the *Duke Case*, the Commission found that the determination whether to accept briefs from amici curiae must be based on the individual case at bar and the issues proposed to be addressed by the movant.
- (21) Here, the attorney examiner finds that PJM should be permitted to file an amicus brief as a non-party. The attorney examiner notes that the Commission has previously permitted the filing of an amicus brief by a regional transmission operator, Midwest Independent Transmission System Operator, Inc. (MISO), in order that MISO could provide the Commission with information on its current operations and benefits of transmission integration. See *Ohio Edison Case*, supra. The attorney examiner notes that, in its motion to intervene, PJM asserts that its sole purpose in seeking to intervene is to address the meaning of and seek clarification regarding Paragraph V(B)(3)(a) of the Third Supplemental Stipulation, and that it is not taking an overall position on the Third Supplemental Stipulation outside of the requested clarification. PJM asserts that this would provide guidance that would not be prejudicial but would be helpful to all parties and would help to ensure development of a complete record. The attorney examiner also notes that affording PJM this opportunity would be consistent with a recent ruling in a similar proceeding currently pending before the Commission. *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al., Entry (Jan. 7, 2016). The attorney examiner finds that permitting PJM to file an amicus brief solely to provide the Commission with information on its operations and clarification of Paragraph V(B)(3)(a) of the Third Supplemental Stipulation, without taking an overall position, comports with prior Commission precedent and would not prejudice any party.

It is, therefore,

ORDERED, That PJM Interconnection, Inc.'s motion for limited intervention be denied. It is, further,

ORDERED, That PJM Interconnection, Inc. be granted non-party amicus curiae status for the limited purpose of the raising the issues described in finding (10). It is, further,

ORDERED, That a copy of this Entry be served upon PJM Interconnection, Inc. and all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Megan Addison

By: Megan Addison
Attorney Examiner

JRJ/sc

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in

Case No(s). 14-1297-EL-SSO

Summary: Attorney Examiner Entry denying PJM Interconnection, Inc.'s motion for limited intervention and granting PJM Interconnection, Inc. non-party amicus curiae status for the limited purpose of raising the issues described in Finding (10). - electronically filed by Sandra Coffey on behalf of Megan Addison, Attorney Examiner, Public Utilities Commission of Ohio