

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

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA PJM INTERCONNECTION’S MOTION FOR LIMITED INTERVENTION

I. INTRODUCTION

PJM Interconnection, LLC’s (“PJM”) untimely Motion for Limited Intervention (the “Motion”) should be denied. PJM asks the Commission to grant PJM an unnecessary role in this proceeding only to advance testimony that is outside the scope of the Third Supplemental Stipulation and Recommendation (the “Third Supplemental Stipulation”). Procedurally, PJM’s Motion is untimely as it comes at the eleventh hour, far beyond the window for intervention and after the close of written discovery. PJM has presented no valid reason for its delay.

Substantively, because the issues with which PJM is concerned have either already been vetted or are improper for consideration in this proceeding, PJM has no real and substantial interest in this matter. Moreover, whatever interests PJM might have are adequately represented and have already been addressed by multiple parties. Indeed, PJM’s participation in this case will only needlessly prolong these already prolonged proceedings. For these reasons, PJM has failed to satisfy the requirements for intervention under the plain language of Rule 4901-1-11, O.A.C., and well-settled Commission authority.

II. RELEVANT FACTS

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the “Companies”) filed an application for approval of a fourth electric security plan (“ESP IV”) on August 4, 2014. Filed concurrently with the Companies’ Application, the Direct Testimony of Eileen Mikkelsen provided a detailed explanation of the Companies’ proposal for a rigorous process to review the reasonableness of the costs and revenues included in the proposed Retail Rate Stability rider (“Rider RRS”). Mikkelsen Direct at 14-15. The Companies’ proposal, as explained by Ms. Mikkelsen: (1) acknowledged the Commission’s existing jurisdiction to conduct a prudence review of the costs and revenues that would be netted through Rider RRS; and (2) identified specific procedures for that review.

On August 29, 2014, the Commission set the original procedural schedule for this proceeding. Entry at 2 (Aug. 29, 2014). Among other things, the procedural schedule placed an October 1, 2014 deadline on intervention. *Id.* at 1. Approximately fifty parties took advantage of the opportunity to intervene. Among these intervenors are Monitoring Analytics, operating in its capacity as PJM’s Independent Market Monitor (the “IMM”), the Retail Energy Supply Association (“RESA”), the Electric Power Supply Association (“EPSA”), the PJM Power Providers Group (“P3”) and Exelon Generation Company, LLC (“Exelon”).

In the sixteen months following the Companies’ Application, the Companies and interested stakeholders have vigorously litigated this case. The parties have conducted extensive discovery and depositions, participated in 35 days of evidentiary hearings, and worked to reach four stipulations. The Companies filed the Third Supplemental Stipulation on December 1, 2015. Paragraph V(B)(3)(a) of the Third Supplemental Stipulation adopts the rigorous review process set forth in Ms. Mikkelsen’s Direct Testimony as filed with the Companies’ initial application. Paragraph V(B)(3)(a) also adopts Ms. Mikkelsen’s testimony in its provision that “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."¹

On December 9, 2015, the Attorney Examiner reopened the record to hold a hearing regarding the Third Supplemental Stipulation. Entry at 4-5 (Dec. 9, 2015). In that Entry, the Attorney Examiner set a new procedural schedule establishing, among other things, December 28, 2015 as the cutoff for written discovery requests. *Id.* at 4. On December 29, 2015, after the close of discovery and fourteen months after the deadline for intervention, PJM filed the Motion, seeking to intervene for the alleged limited purpose of "providing clarifications" to Paragraph V(B)(3)(a) of the Third Supplemental Stipulation. Motion at 2.

III. STANDARD OF REVIEW

Section 4903.221 of the Ohio Revised Code permits intervention only by persons who may be "adversely affected" by Commission proceedings. Rule 4901-1-11 of the Ohio Administrative Code sets the standard for intervention in Commission proceedings. Specifically, Rule 4901-1-11(B) provides:

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;

¹ Note that, under this language, for the Companies not to recover a cost associated with PJM performance requirements, the Commission must first find that such cost was unreasonable.

- (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.” Rule 4901-1-11(A)(2), O.A.C. Furthermore, Rule 4901-1-11(F) allows the Commission to grant an untimely motion to intervene “only under extraordinary circumstances.”

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. The Limited Role Sought by PJM Is Unnecessary.

1. PJM has no real and substantial interest in this proceeding.

PJM wholly fails to articulate a real and substantial interest that would support its Motion. PJM’s purported interest is in “addressing the meaning of Paragraph V.(B)(3)(a) of the Third Supplemental Stipulation and seeking clarification as to its terms.” Motion at 5. But the aspect of the Companies’ proposal addressed by Paragraph V(B)(3)(a) – namely, the review process for Rider RRS – has not changed since August 2014, when Ms. Mikkelsen provided a detailed explanation of the review in her Direct Testimony. Mikkelsen Direct at 14-15.

During the hearing in this matter, certain parties raised the issue of responsibility for the payments to PJM relating to capacity performance requirements. *See, e.g.*, Bowring Direct at 2-3. The Companies’ witnesses expressly addressed this issue. Company witness Mikkelsen, for example, testified that the Commission and its staff would have the opportunity to review PJM “non-performance penalties” included in Rider RRS to “make a determination in their judgment whether the inclusion is reasonable or not reasonable.” Tr. Vol. III (Confidential) at 674:6-675:11 (Mikkelsen Cross). And if there is “a determination that either the underlying costs or the underlying revenues [of Rider RRS] are unreasonable, then...the financial risk of those unreasonable determinations would be transferred from the companies’ customers to the company.” Tr. Vol. I at 60:7-61:4 (Mikkelsen Cross). Company witness Ruberto similarly testified that “the revenues the companies receive through PJM are . . . subject to the PUCO’s audit process,” Tr. Vol. XIV at 3002:14-16 (Ruberto Cross), and those revenues “would be net of

any [PJM non-performance] charges that are included within PJM.” Tr. Vol. XIII 2808:25-2809:12 (Ruberto Cross).

Thus, Paragraph V(B)(3)(a) of the Third Supplemental Stipulation raises no new issues. It expressly adopts the review process set forth in Ms. Mikkelsen’s testimony and restates that “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 . . . associated with performance requirements in PJM’s markets.” Because Paragraph V(B)(3)(a) merely reiterates what is already in the record, PJM can hardly claim that Paragraph V(B)(3)(a) somehow opened the door to its intervention at this late stage.

Along with the Motion, PJM served the Companies with the Direct Testimony of F. Stuart Bresler, III (the “Bresler Testimony”). The Bresler Testimony makes clear that PJM’s objective in intervening is not to provide a mere “clarification.” Instead, PJM seeks to convince the Commission, in the context of a state proceeding concerning retail electric service, to exercise a degree of jurisdiction over federal-regulated wholesale markets. Specifically, PJM asks the Commission to include in any Order approving the Third Supplemental Stipulation a provision requiring the Companies to bid the generation units covered by Rider RRS in a specific way. Bresler Testimony at 7-8. Under PJM’s proposal, failure to bid the units in that way would constitute an unreasonable action under Paragraph V(B)(3)(a). *Id.*

PJM must be aware that its proposal is not only outside the scope of this proceeding, but it may be outside the scope of the state commission’s jurisdiction. PJM’s request to have the Commission direct the Companies’ behavior in the wholesale markets calls for precisely the type of state action that courts have held to be an improper intrusion into FERC’s exclusive jurisdiction. *See PPL Energy Plus v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014) (concluding

that Maryland’s plan to incentivize new generation “is field preempted because it functionally sets the rate that [the generation owner] receives for its sales in the PJM auction.”); *PPL Energy Plus v. Solomon*, 766 F.3d 241, 255 (3rd Cir. 2014) (“By legislating capacity prices, New Jersey has intruded into an area reserved exclusively for the federal government.”). PJM’s commentary concerning potential changes to PJM’s tariffs is a matter for PJM to explore if it wishes through a federal regulatory process – as it has in the past. The Commission can and should disregard it in this proceeding.

Although not an issue to be explored in this case, it should be noted that PJM’s selective theories about changes to the MOPR fail to address the fact that a substantial amount of resources within PJM have received and continue to receive out-of-market revenue. *See, e.g.*, Tr. Vol. XXVI at 5396:20-5397:3 (Rose, K. Cross) (admitting that renewable resources in PJM receive out-of-market revenues). In addition, and also outside the scope of this proceeding, PJM omits from its filing that a significant amount of capacity resources offer into the capacity market auctions as price takers. *See* Tr. Vol. XXIV at 5013:15-5014:17 (Bowring Cross) (admitting that, in the 2016/2017 RPM Base Residual Auction, 519 of 1,199 generation resources offered were existing resources offered as price takers, and in the 2017/2018 RPM Base Residual Auction, 637 of 1,202 generation resources offered were existing resources offered as price takers). As such, PJM is inviting the Commission to impose requirements that:

- are not applied to other similarly-situated capacity resources in the PJM markets;
- have not been shown to be consistent with PJM market design; and
- given the high number of resources that offer as price takers, have not been shown to be consistent with PJM market implementation.

In sum, PJM's proposal is not only beyond the scope of the Third Supplemental Stipulation, it also invites the Commission onto unstable and improper ground.²

2. Any interest in this case by PJM is already adequately represented by existing parties to this proceeding.

PJM's Motion should also be denied because its particular concerns are already adequately represented by several intervenors, including the IMM, EPSA, P3, RESA and Exelon. *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"). Indeed, PJM states that it accepts the record in this proceeding as it exists as of the filing of the Motion. Motion at 2. PJM's asserted interests, while neither real nor substantial in its case, are already addressed at length by the existing record, rendering PJM's presence in this proceeding unnecessary.

Through both written testimony and cross-examination at the evidentiary hearing, several witnesses have engaged in detailed discussions of the MOPR, "price taking" bidding behavior, and Commission review of the Companies' bidding practices. IMM witness Bowring's Direct Testimony, for example, addresses the impact of Rider RRS on competition in the PJM

² PJM's proposal also raises concerns with respect to competitively sensitive issues. By imposing specific rules uniquely applicable to the Companies, the Commission could well run the risk of hindering the Companies' ability to compete in the wholesale markets.

wholesale power market as well as the Companies' potential incentives to offer the units at zero. Bowring Direct at 3. At hearing, Dr. Bowring testified to, among other things: (1) the prevalence of "price taking" behavior in PJM (Tr. Vol. XXIV at 5015:25-5016:20, 5031:12-5032:1); (2) the application of the MOPR to existing resources generally and to the units covered by Rider RRS specifically (Tr. Vol. XXIV at 5032:11-5033:15); and (3) the ability of the Commission to review the Companies' bidding behavior into PJM (Tr. Vol. XXIV at 5036:25-5037:3). Moreover, Dr. Bowring's First Supplemental Testimony, filed December 30, 2015, discusses many of these same issues, and explains his belief that the MOPR should be expanded to apply to the units covered by Rider RRS. Bowring Supplemental at 4-7. In short, the IMM has represented and continues to represent PJM's alleged interests here.

Witnesses for Exelon and RESA have similarly addressed PJM's concerns. *See, e.g.*, Campbell (Exelon) Direct at 7-8 (summarizing positions with respect to the alleged impact of Rider RRS on competition in the PJM wholesale market and the Companies' bidding practices); Tr. Vol. XXVI at 5224:20-5225:7 (Campbell Cross) (discussing generators offering at zero in PJM capacity auctions and whether the MOPR applies to new generation); Scarpignato (RESA) Direct at 6-14 (discussing positions with respect to the alleged impact of Rider RRS on the PJM wholesale market and the expansion of the MOPR); Tr. Vol. XXIV at 5068:16-5069:17, 5092:12-5097:12, 5098:25-5099:3 (Scarpignato Cross) (discussing the MOPR in detail); Tr. Vol. XXIV at 5092:4-11 (Scarpignato Cross) (discussing the prevalence of price taking in PJM).

PJM brings nothing new to this proceeding. The record adequately addresses its concerns. PJM's Motion should be denied.

B. PJM’s Motion Is Untimely and There Is No Good Cause For Its Delay.

Pursuant to its August 29, 2014 scheduling order, the Commission set a deadline of October 1, 2014 for timely motions to intervene. Entry at 2 (Aug. 29, 2014). No subsequent entry altered or modified that intervention deadline. PJM filed the Motion on December 29, 2015, almost fifteen months after the deadline for intervention had passed, and after the cutoff for discovery on the Third Supplemental Stipulation. *See* Entry at 4 (Dec. 9, 2015). PJM acknowledges that its motion is untimely, but then fails to make the showing of “extraordinary circumstances” required by Rule 4901-1-11(F). For this reason alone, the Commission should deny PJM’s Motion.

PJM attempts to justify its untimely intervention by advancing the hollow argument that Paragraph V(B)(3)(a) “was not at issue in this case until the filing of the Third Supplemental Stipulation on December 1, 2015.” Motion at 3. But, as shown above, Paragraph V(B)(3)(A) merely adopts the review process set forth in Ms. Mikkelsen’s initial testimony and acknowledges the Commission’s existing prudence jurisdiction. For well over a year, the Companies’ intent to sell the output from the generation units into the PJM markets, and then include the resulting revenue from such sale in the Rider RRS netting process, has been transparent, as has the Commission’s jurisdiction to review the Companies’ actions in doing so. IMM witness Bowring recognized this fact at hearing, admitting that the bidding behavior of the Companies into the PJM market would be subject to Commission review in determining the amount to flow through Rider RRS. Tr. Vol. XXIV at 5036:25-5037:3.

PJM’s Motion comes too late because it was filed after the close of written discovery on the Third Supplemental Stipulation. Absent relief from the Commission, the Companies will be unable to serve written discovery on PJM, if its intervention is permitted. Moreover, the evidentiary hearing on the Third Supplemental Stipulation is scheduled to begin less than two

weeks from the date of this filing. PJM's intervention on the eve of trial would leave the Companies with little time to move for leave to propound discovery on PJM, to draft and serve such discovery, and to receive and review PJM's discovery responses, and no time to use discovery responses in deposing PJM's witness or to address any deficient responses.

PJM has failed to show a good reason for its tardiness, let alone extraordinary circumstances supporting its untimely intervention. The Motion comes too late, is prejudicial to the Companies, and is unjustified by any extraordinary circumstances. PJM's Motion should therefore be denied. *See 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 no "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").

C. PJM's Intervention Would Unduly Prolong This Proceeding.

PJM's Motion also should be denied because its late intervention would unduly prolong this proceeding. As demonstrated above, PJM seeks to intervene to present testimony on concerns already represented by other parties. Notwithstanding the duplicative nature of PJM's testimony, the Companies would be forced to serve discovery on PJM, depose its witness, and potentially file rebuttal testimony in response to PJM's misguided positions and misapprehensions of the Third Supplemental Stipulation. Accordingly, the Commission should deny PJM's intervention under Rule 4901-1-11(B)(2).

V. CONCLUSION

For the foregoing reasons, the Commission should deny PJM's Motion for Limited Intervention.

Date: January 4, 2016

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
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
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
jlang@calfee.com
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 4, 2016.

/s/ David A. Kutik
David A. Kutik

SERVICE LIST

Thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Steven.beeler@puc.state.oh.us
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
Jennifer.spinosi@directenergy.com
ghull@eckertseamans.com
myurick@taftlaw.com
dparram@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
mkl@bbrslaw.com
gas@smxblaw.com
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
mdortch@kravitzllc.com
rparsons@kravitzllc.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
mitch.dutton@fpl.com
DFolk@akronohio.gov
mkimbrough@keglerbrown.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
twilliams@snhslaw.com

larry.sauer@occ.ohio.gov
maureen.willis@occ.ohio.gov
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
callwein@keglerbrown.com
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
barthroyer@aol.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
tdougherty@theOEC.org
jfinnigan@edf.org
Marilyn@wflawfirm.com
todonnell@dickinsonwright.com
matt@matthewcoxlaw.com
mfleisher@elpc.org
drinebolt@ohiopartners.org
meissnerjoseph@yahoo.com
LeslieKovacik@toledo.oh.gov
trhayslaw@gmail.com
Jeffrey.mayes@monitoringanalytics.com
mhpeticoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
msoules@earthjustice.org
sfisk@earthjustice.org
evelyn.robinson@pjm.com

dwolff@crowell.com
rlehfeldt@crowell.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/4/2016 12:25:44 PM

in

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

Summary: Memorandum Contra PJM Interconnection's Motion for Limited Intervention electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company