

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

In the Matter of the Application of)
Ohio Power Company for Approval of) Case No. 14-1694-EL-AAM
Certain Accounting Authority.)

ENTRY

The attorney examiner finds:

- (1) Ohio Power Company d/b/a AEP Ohio (AEP Ohio or the Company) is an electric distribution utility as defined in R.C. 4298.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is 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) In Case No. 13-2385-EL-SSO, et al., the Commission modified and approved AEP Ohio's application for an ESP for the period beginning June 1, 2015, through May 31, 2018, pursuant to R.C. 4928.143. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al. (ESP 3 Case), Opinion and Order (Feb. 25, 2015). Among other matters, the Commission concluded that AEP Ohio's proposed power purchase agreement (PPA) rider, which would flow through to customers the net impact of the Company's contractual entitlement associated

with the Ohio Valley Electric Corporation (OVEC), satisfies the requirements of R.C. 4928.143(B)(2)(d) and, therefore, is a permissible provision of an ESP. The Commission stated, however, that it was not persuaded, based on the evidence of record, that AEP Ohio's PPA rider proposal would provide customers with sufficient benefit from the rider's hedging mechanism or any other benefit that is commensurate with the rider's potential cost. Noting that a properly conceived PPA rider proposal may provide significant customer benefits, the Commission authorized AEP Ohio to establish a placeholder PPA rider, at an initial rate of zero, for the term of the ESP, with the Company being required to justify any future request for cost recovery. Finally, the Commission determined that all of the implementation details with respect to the placeholder PPA rider would be determined in a future proceeding, following the filing of a proposal by AEP Ohio that addresses a number of specific factors, which the Commission will consider, but not be bound by, in its evaluation of the Company's filing. In addition, the Commission indicated that AEP Ohio's PPA rider proposal must address several other issues specified by the Commission. *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 20-22, 25-26.

- (4) On October 3, 2014, in the above-captioned proceedings, AEP Ohio filed an application seeking approval of a proposal to enter into a new affiliate PPA with AEP Generation Resources, Inc. (AEPGR).
- (5) Following the issuance of the Commission's Opinion and Order in the *ESP 3 Case*, AEP Ohio filed, on May 15, 2015, an amended application and supporting testimony, again seeking approval of a new affiliate PPA with AEPGR and also requesting authority to include the net impacts of both the affiliate PPA and the Company's OVEC contractual entitlement in the placeholder PPA rider approved in the *ESP 3 Case*. AEP Ohio explained that the amended application was to completely supersede and replace the original application filed on October 3, 2014. AEP Ohio further explained that the amended application intended to address the factors and requirements set forth by the

Commission in the *ESP 3 Case* and update the Company's supporting testimony to reflect a more current analysis of the amended proposal.

- (6) By Entry issued August 7, 2015, the attorney examiner established August 21, 2015, as the deadline by which interested persons were required to file motions to intervene in these proceedings, and September 28, 2015, as the date for the evidentiary hearing to commence.
- (7) An evidentiary hearing in these proceedings began on September 28, 2015, as scheduled by the August 7, 2015 Entry, and concluded on November 3, 2015.
- (8) On December 14, 2015, AEP Ohio filed a joint stipulation and recommendation (Stipulation) for the Commission's consideration.
- (9) By Entry issued December 15, 2015, the attorney examiner set forth a procedural schedule, which set an additional evidentiary hearing to review the Stipulation to commence on January 4, 2016.
- (10) On December 28, 2015, PJM Interconnection, LLC (PJM) filed a motion for limited intervention, noting the need for clarification regarding Section III.A.5.a of the Stipulation. This section of the Stipulation discusses annual compliance reviews before the Commission to ensure that actions taken by AEP Ohio when selling the output from generation units included in the PPA rider into the PJM market were not unreasonable. PJM argues that clarification is needed in order to ensure that AEP Ohio's actions in bidding the affected units into the PJM market are 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 the compliance review process was not proposed prior to the filing of the Stipulation and should be treated as a new issue in the proceedings. PJM also argues that, because it

administers the wholesale market and AEP Ohio'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 these proceedings established to date.

- (11) On December 29, 2015, as amended on December 30, 2015, AEP Ohio filed a memorandum contra PJM's motion for limited intervention. In its memorandum contra, AEP Ohio argues that PJM fails to explain how these proceedings would adversely affect PJM's ability to administer wholesale markets or why intervention is necessary to perform its functions under federal law. AEP Ohio also maintains that PJM has misapprehended the purpose and meaning of Section III.A.5.a of the Stipulation. AEP Ohio suggests that, if the Commission is interested in PJM's perspective, an appropriate alternative would be to deny intervention and simply grant PJM leave to file an amicus brief.
- (12) On January 4, 2016, the Ohio Consumers' Counsel (OCC) filed a memorandum contra PJM's motion for limited intervention. OCC argues that allowing PJM to intervene in these proceedings would be unfair to OCC and residential consumers. OCC also notes that PJM's motion, filed over four 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 these proceedings.
- (13) On December 31, 2015, PJM filed a reply to AEP Ohio's memorandum contra PJM's motion to intervene, arguing that the Company premised its memorandum on the merits of PJM's proposal, rather than the requirements for intervention. PJM also notes that filing an amicus brief would limit its comments to addressing proposals included in others' testimony, contending that the parties should have the opportunity to cross-examine PJM's witness to fully vet PJM's proposal. PJM also asserts that, as the only entity that administers tariffs under which AEP Ohio and other market participants bid into the PJM market, it holds a real and substantial interest in these proceedings, specifically

referring to the express relationship between the bidding practices of units covered by the PPA and the Commission's review of those practices, as proposed in Section III.A.5.a.

- (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 person 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 AEP Ohio, 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 the Commission has frequently denied untimely motions to intervene where no extraordinary circumstances were present. *See, e.g., In re AEP Ohio*, Case No. 10-2376-EL-UNC, 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 the present cases, PJM filed its motion to intervene on December 28, 2015, 129 days after the August 21, 2015 intervention deadline and after 17 days of widely publicized hearing in these matters. It is clear that PJM had ample notice of the proceedings and the issues raised therein.

However, PJM has set forth no extraordinary circumstances to warrant its late intervention. PJM cannot claim that it lacked notice that Commission oversight of AEP Ohio's bidding process would be at issue in these proceedings. In the Commission's Opinion and Order approving the creation of the PPA rider in AEP Ohio's current ESP, the Commission directed the Company to include provisions for rigorous Commission oversight of any proposed PPA including periodic substantive review and audit. *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 25. Further, AEP Ohio witness Vegas squarely addressed this issue in his initial testimony filed on May 15, 2015, in these proceedings (Co. Ex. 1 at 5).

PJM attempts to justify its untimely intervention motion by claiming that the filing of the Stipulation presented for the first time the specific provisions for Commission review of the PPA rider. 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 Co.*, Case No. 02-2779-EL-ATA (*DP&L Case*), Opinion and Order (Sept. 2, 2003) at 8-9; *In re AEP Ohio*, *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 an entity 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 these proceedings 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 AEP Ohio's actions in bidding into the PJM market, as proposed in the Company's amended application and as supported by the Company in its testimony. Further, even if the Stipulation in these cases could be considered to have expanded the issues in these proceedings, 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 these proceedings 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 September 15, 2015, 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 that it should be granted intervention for the same purpose for which the Market Monitor was already granted intervention in these proceedings. 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 invited the filing of amicus briefs in situations where intervention in the proceeding was not warranted. *See In re Ohio Edison Co.*, Case No. 03-1966-EL-ATA (*Ohio Edison Case*), Finding and Order (Feb. 4, 2004) at 2; *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR (*Duke Case*), Opinion and Order (Nov. 13, 2013) 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 invited 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 Section III.A.5.a of the Stipulation, and that it is not taking an overall position on the Stipulation outside of the requested clarification. The attorney examiner finds that permitting PJM to file an amicus brief, as a non-party, solely to provide the Commission with information on its operations and clarification of Section III.A.5.a of the Stipulation, without taking an overall position, comports with prior Commission precedent and would not prejudice any party. The amicus brief may be filed concurrently with the filing of post-hearing briefs in these proceedings and the parties may address in their reply briefs any issue raised by PJM in its amicus brief.

It is, therefore,

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

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

By: Sarah J. Parrot
Attorney Examiner

JRJ/sc

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Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM

Summary: Attorney Examiner Entry denying PJM Interconnection, LLC's motion for limited intervention and granting PJM Interconnection, LLC 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 Sarah Parrot, Attorney Examiner, Public Utilities Commission of Ohio