

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Ohio)
Valley Electric Corporation for Approval of)
the Termination of a Letter Agreement for the) Case No. 15-0892-EL-AEC
Temporary Supply of Arranged Power with)
the United States of America)

**MOTION TO INTERVENE
OF OHIO POWER COMPANY**

Under Ohio Revised Code 4903.221 and Rule 4901-1-11 of the Ohio Administrative Code, Ohio Power Company (“AEP Ohio”) hereby moves to intervene in this proceeding and submits comments for the Commission’s consideration. As more fully explained in the attached Memorandum in Support and Comments, AEP Ohio requests that, if the Commission grants the Application in this docket, it should clarify that AEP Ohio will take over for the Ohio Valley Electric Corporation (“OVEC”) as the exclusive provider of electric distribution service under State law to the Department of Energy facility at issue. Based on this request, AEP Ohio has a real and substantial interest in this proceeding that is not adequately represented by existing parties, and AEP Ohio is so situated that the disposition of these proceedings may impair or impede its ability to protect that interest. Therefore, AEP Ohio respectfully requests that the Commission grant this timely request to intervene; that AEP Ohio be made a party of record to these proceedings; and that the Commission accept AEP Ohio’s comments for its consideration.

January 15, 2016

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
AND COMMENTS OF OHIO POWER COMPANY**

Since at least 1953, the Ohio Valley Electric Corporation (“OVEC”) has provided retail electric service to the U.S. Department of Energy (“DOE”) for certain DOE facilities in Southern Ohio. OVEC Application ¶ 3. Insofar as it provided such retail electric service in this State, OVEC has qualified as a “public utility” under R.C. 4905.02 and has been subject to the Commission’s jurisdiction. *Id.* ¶ 1. OVEC first provided electric service to DOE pursuant to an October 15, 1952 power supply agreement (“DOE Power Agreement”). *Id.* ¶ 3. That agreement was terminated in 2000 with effect in April 2003, and OVEC continued to provide electric service to DOE pursuant to an April 29, 2003 agreement (“Letter Agreement”), which was amended in 2005 in 2008. *Id.* ¶¶ 4-5, 9. As a public utility and provider of retail electric service subject to the Commission’s jurisdiction, OVEC sought and received express Commission approval of the DOE Power Agreement, the Letter Agreement, and the 2005 and 2008 amendments to the Letter Agreement. *Id.* ¶¶ 3, 6, 10. Last year, OVEC and DOE entered into an April 28, 2015 termination agreement (“Termination Agreement”) under which DOE was to cease providing electric service to DOE. In this docket, OVEC has submitted an Application – as well as two Amended Applications attaching extensions of the Termination Agreement – asking the Commission to approve “the Termination Agreement and resulting termination of service thereunder.” *Id.*

Ohio Power Company (“AEP Ohio”) seeks to intervene in this proceeding to ask the Commission to clarify that, if OVEC’s Application is granted, AEP Ohio will be the exclusive provider of retail electric service to DOE under State law.

I. AEP Ohio's Motion to Intervene Should Be Granted

Under applicable legal principles, AEP Ohio's motion for intervention should be granted. Section 4903.221 of the Revised Code provides that any "person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding." R.C. 4903.221. The statute also establishes four "criteria" that the Commission should consider "in ruling upon applications to intervene in its proceedings":

- (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;
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

R.C. 4903.221(B)(1)-(4). In addition, the Commission's rules establish a fifth criterion: "The extent to which the person's interest is represented by existing parties." OAC 4901-1-11(B)(5). The Ohio Supreme Court has made clear that "intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5853, ¶ 20 (2006). Each of the five criteria counsel in favor intervention by AEP Ohio in this proceeding.

First, the "nature and extent of the prospective intervenor's interest," R.C. 4903.221(B)(1), is clear: AEP Ohio seeks a Commission ruling that, if the Application is granted, AEP Ohio will be the exclusive provider of electric distribution service to DOE under State law. AEP Ohio has a strong interest in a clear definition of the scope of its certified territory and its rights and obligations as a provider of electric distribution service in this State.

Second, the “legal position advanced by” AEP Ohio will have a direct “relation to the merits of the case,” R.C. 4903.221(B)(2), because whether to grant OVEC’s Application – and release OVEC from its rights and obligations to serve DOE – necessarily raises the question of who will provide electric distribution service to DOE if the Application is granted. To approve the Application without answering that question would leave the rights and obligations of both DOE and AEP Ohio under State law unclear.

Third, granting AEP Ohio’s intervention will not “unduly prolong or delay the proceedings.” R.C. 4903.221(B)(3). Since OVEC’s application to cease providing electric distribution service to DOE necessarily raises the issue of which public utility will assume that role, AEP Ohio’s intervention will speed the resolution of that central issue. Moreover, as a frequent participant in Commission proceedings, AEP Ohio values the efficient resolution of Commission matters and will participate in this case in accordance with that important objective.

Fourth, AEP Ohio will “contribute to full development and equitable resolution of the factual issues” in this docket, R.C. 4903.221(B)(4), because AEP Ohio seeks to raise a critical issue concerning the implications of granting OVEC’s application – which public utility will provide electric distribution service to DOE under State law if the Application is granted. By requesting a Commission finding that AEP Ohio will be DOE’s exclusive distribution service provider, moreover, AEP Ohio is providing a speedy and full resolution of that issue.

Fifth, and finally, AEP Ohio’s interest is not “represented by existing parties,” OAC 4901-1-11(B)(5), because no other party represents AEP Ohio’s interest in clarifying that AEP Ohio will assume electric distribution service to DOE if the Application is granted.

II. Comments: If the Commission Grants OVEC’s Application, It Should Clarify that AEP Ohio Will Be the Exclusive Provider of Electric Distribution Service to DOE Under State Law

A. OVEC’s Electric Service to DOE Is Governed by the Certified Territory Act

Although it does not expressly it, OVEC’s Application implicates the Certified Territory Act, R.C. 4933.81-4933.90, which establishes exclusive service territories for electric distribution utilities in the State and confers on each utility both the obligation – and the exclusive right – to provide distribution service to load within its territory. *See* R.C. 4933.83 (“[E]ach electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory”). Under Senate Bill 3, customers may now shop for competitive generation service from competitive retail electric supply (“CRES”) providers, but the Certified Territory Act still gives electric distribution companies such as AEP Ohio an exclusive right to provide distribution service (sometimes inaccurately called “wires service”) to customers within their territories.

Among other provisions defining the scope of an electric distribution company’s certified territory, the Certified Territory Act essentially “grandfathered” each electric distribution company’s existing load on January 1, 1977. That is, when the Act was passed, it provided that “each electric supplier has the obligation and exclusive right to furnish electric service to electric load centers, wherever located, which it was serving on January 1, 1977, or which it had agreed to serve under lawful contracts in effect on or resulting from written bids submitted under bond prior to January 1, 1977.” R.C. 4933.83(C). As for changing load-serving rights and obligations once they are set, the Act provides that the “rights and authority granted under [the Certified Territory Act] may be assigned or transferred only with the approval of the public utilities commission and approval shall be granted if the commission finds that the assignment or transfer is not contrary to the public interest.” R.C. 4933.85. The Act also provides that “any two or

more electric suppliers may jointly petition the commission for the reallocation of their own territories.” R.C. 4933.83(E).

Here, OVEC has provided electric service to DOE since at least 1953, and thus, as OVEC acknowledges, OVEC has been operating as a “public utility” under R.C. 4905.02 and has been subject to Commission jurisdiction. *Id.* ¶ 1. Moreover, because OVEC was serving DOE under the original DOE Power Agreement on January 1, 1977, the Certified Territory Act continues to give OVEC “the obligation and exclusive right to furnish electric service to” DOE under the Certified Territory Act’s grandfathering provision. *See* R.C. 4933.83(C) (a public utility has a continuing “obligation and exclusive right” to serve electric load centers “which it had agreed to serve under lawful contracts in effect on . . . January 1, 1977”).

In its Application in this docket, OVEC has requested that the Commission approve “the Termination Agreement terminating the Letter Agreement . . . and the underlying power supply arrangement between DOE and OVEC.” Application ¶ 17. Although OVEC’s Application does not expressly address the Certified Territory Act, in order to comply with the strictures of that statute, OVEC’s Application presumably requests a finding that OVEC will no longer have the “obligation and exclusive right” to serve DOE under the Certified Territory Act’s grandfathering provision, R.C. 4933.83(C).

B. The Commission Should Clarify that DOE Will Fall Within AEP Ohio’s Service Territory

AEP Ohio in no way opposes the Termination Agreement or OVEC’s request to withdraw its provision of electric service to DOE. But AEP Ohio respectfully urges the Commission to clarify that, if OVEC’s Application is granted, the DOE load will fall within AEP Ohio’s certified territory and that AEP Ohio will have the exclusive right (and obligation) to provide distribution service to DOE. Such a finding is not only necessary to comport with the

Certified Territory Act; it is also supported by the sound regulatory policy of providing certainty to both customers and electric distribution utilities regarding service territory rights and obligations.

First, the Certified Territory Act requires that the DOE load fall within *some* utility's territory, and the DOE load is essentially an island surrounded by AEP Ohio territory. Thus, it makes the most sense in terms of contiguity of service territory for AEP Ohio to assume the role of the electric distribution utility for DOE. There is no other utility whose existing territory is adjacent to the current DOE facility.

Second, a public utility's "obligation and exclusive right" to serve a particular load under the Certified Territory Act may be extinguished, but only if that obligation and right is "assigned or transferred" and the Commission expressly approves such an assignment or transfer as "not contrary to the public interest." R.C. 4933.85.¹ That provision of the Certified Territory Act can be fulfilled by the Commission approving a transfer of the obligation and exclusive right to serve DOE from OVEC to AEP Ohio.

Finally, the Certified Territory Act as well as sound regulatory policy recognize that there should be certainty regarding which utility has the right and obligation to provide distribution service to any particular load. Such certainty protects the customer by ensuring electric service to the customer's premises. But just as importantly, the certainty afforded by the Certified Territory Act also protects the utility. Provision of distribution service requires long-term planning and considerable investment that can take years for the utility to recover in rates. Certainty in service territory boundaries allows the utility to plan its network infrastructure with

¹ AEP Ohio submits that R.C. 4933.85 governs OVEC's Application in this docket, but if the Commission were to determine that R.C. 4933.83(E) governs, that provision would be fulfilled by considering OVEC and AEP Ohio to have "jointly petition[ed]" the Commission to shift the obligation and exclusive right to serve the DOE load from OVEC to AEP Ohio. R.C. 4933.83(E).

needed long-term clarity involving the geographical locations the utility will have to serve, as well as long-term clarity regarding recovery of investments through rates.

Here, if OVEC's Application were granted without the Commission specifying whether AEP Ohio will take over as DOE's exclusive distribution provider, then both DOE and AEP Ohio (and, perhaps more importantly, OVEC) would be left with uncertainty about each party's rights and obligations. DOE potentially will be left without knowing which utility (if any) will have an obligation to maintain distribution service to its facility. AEP Ohio will be left in limbo, not knowing whether the DOE load is its responsibility or the responsibility of some other utility. AEP Ohio will have no way of knowing whether it should make investments (potentially without rate recovery) to be ready to assume distribution service in the future if DOE requests it. And OVEC will be left with uncertainty, since there will be no Commission order formally removing the DOE load from its obligations under the Certified Territory Act. Thus, Ohio law and sound regulatory policy require that the Commission eliminate this uncertainty by finding that AEP Ohio will take over as the exclusive distribution provider to DOE, if the Commission is inclined to grant OVEC's application.²

C. If the Commission Determines that DOE Will Fall Within AEP Ohio's Certified Territory, DOE Will Become an AEP Ohio Distribution Customer but Will Be Able to Shop for Competitive Services Such as Generation Supply

To avoid any future misunderstanding, AEP Ohio wishes to make clear the implications of the Commission determining that the DOE load will transfer from OVEC's responsibility to AEP Ohio's. AEP Ohio believes that this clarification is necessary because of certain ambiguous

² Insofar as OVEC's Application in this docket implicates the Miller Act, R.C. 4905.20-4905.21, the Commission should also find that OVEC's proposed withdrawal of service from DOE is "reasonable" under R.C. 4905.21. Given the fact AEP Ohio will become DOE's distribution provider once OVEC's service is withdrawn, AEP Ohio submits that the Commission should make a reasonableness determination under R.C. 4905.21 solely on the basis the written record in this docket.

language in the Termination Agreement attached to OVEC's Application and Amended Applications. Specifically, the Termination Agreement states that "[u]pon termination of the Letter Agreement, DOE shall contract with another provider to replace OVEC as the supplier of power and energy to serve the electric load of the DOE facilities pursuant to the Letter Agreement." Termination Agreement ¶ 1. That statement is only partially true. As described below, DOE may "contract with another provider to replace OVEC" insofar as DOE may shop for competitive generation supply; but once DOE falls within AEP Ohio's service territory, DOE must take noncompetitive distribution service from AEP Ohio, and DOE will be subject to all rates, tariffs, and rules applicable to AEP Ohio distribution customers.

As the Commission knows, Ohio law governs all retail electric service in the State, and the delivery of electricity to DOE for consumption on its premises is unquestionably a *retail* sale subject to Ohio law. Ohio law divides retail electric service into two components: "competitive service," including, most importantly, competitive generation supply service; and "noncompetitive service," which includes transmission service, distribution service, and all so-called "wires services." *See* R.C. 4928.03; R.C. 4928.05(A)(2). Customers may "shop" for competitive generation supply service. But customers may *not* "shop" for noncompetitive distribution service, because under the Certified Territory Act, electric distribution utilities such as AEP Ohio continue to have "the *exclusive* right" to provide noncompetitive distribution, transmission, and all other so-called "wires" services to loads within their territory. *See* R.C. 4933.83(A); *see also* R.C. 4933.81(F) ("Electric service' means retail electric service furnished to an electric load center for ultimate consumption . . . [but in the case of a for-profit supplier such as AEP Ohio] excludes a competitive retail electric service.").

Accordingly, once the Commission finds in this docket that the “exclusive right” to serve DOE under the Certified Territory Act should shift from OVEC to AEP Ohio, DOE will become an AEP Ohio distribution customer and may not contract with any other provider for noncompetitive service. The Termination Agreement states that DOE may “contract with another provider to replace OVEC as the supplier of power and energy to serve the electric load of the DOE facilities.” Termination Agreement ¶ 1. But this is true *only* for competitive generation supply. That is, DOE may “contract with another provider” other than AEP Ohio for competitive generation supply (i.e., DOE may “shop” for generation supply). But DOE may *not* “contract with another provider” other than AEP Ohio for distribution or any other noncompetitive service. To the contrary, under Ohio law, AEP Ohio will have “the *exclusive* right” to provide noncompetitive service to DOE, *see* R.C. 4933.83(A), and DOE will be subject to all rates, tariffs, and rules applicable AEP Ohio distribution customers.

D. The Commission Should Provide for an Orderly Transition by Requiring OVEC to Continue to Serve DOE Until AEP Ohio Is Able to Assume Such Service

Before taking over distribution service to DOE, AEP Ohio needs time to understand DOE’s requirements, develop a plan to meet them, and implement that plan. DOE’s load is substantial, and the majority of the existing lines and other grid infrastructure currently serving the DOE facility were neither designed nor installed by AEP Ohio. Moreover, the nature of DOE’s activities at the site in question requires that DOE have several redundant lines serving its facility. AEP Ohio has already begun the process of meeting with DOE to determine how best to assume distribution service from OVEC, but AEP Ohio has preliminarily identified potentially significant issues in taking over service to DOE. For example, as the Commission knows, AEP Ohio’s load is part of PJM. But the DOE load is not currently part of PJM, and to bring the load within PJM and satisfy all applicable PJM regulations may require overcoming several potential

issues related to metering, settlements, and infrastructure upgrades. AEP Ohio has not yet been able to develop an implementation plan for addressing these issues and will need time to research DOE's needs and existing equipment, develop a plan to address all potential issues in serving DOE, and then implement that plan. Thus, if the Commission is inclined to grant OVEC's Application and finds that the DOE load would henceforth fall within the service territory of AEP Ohio, the Commission should also provide for an orderly transition by requiring that OVEC continue to serve DOE until such time as AEP Ohio is able to assume such service.

CONCLUSION

For the foregoing reasons, AEP Ohio's motion to intervene should be granted, and if the Commission grants OVEC's application, it should clarify that AEP Ohio will be the exclusive provider of electric distribution service to DOE under State law.

January 15, 2016

Respectfully submitted,

/s/ Steven T. Nourse

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2016, a copy of the foregoing *Motion to Intervene* and *Memorandum in Support of Motion to Intervene and Comments* was served by email to counsel for OVEC. In addition, although DOE has not participated as a party in this docket, a courtesy copy of the foregoing *Motion to Intervene* and *Memorandum in Support of Motion to Intervene and Comments* was served by email to the DOE counsel and contracting officer listed below.

Ohio Valley Electric Corporation:

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Summary: Motion to Intervene with Comments of Ohio Power Company electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company