

**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 Affiliate Power Purchase Agreement)	Case No. 14-1693-EL-RDR
for Inclusion in the Power Purchase)	
Rider)	
)	
In the Matter of the Application of)	
Ohio Power Company for Approval)	Case No. 14-1694-EL-AAM
of Certain Accounting Authority)	

**BRIEF FOR AMICUS CURIAE
PJM INTERCONNECTION, L.L.C.**

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PJM Interconnection, L.L.C. (“PJM”) submits this Amicus Brief to the Public Utilities Commission of Ohio (“Commission”) both to provide information to the Commission and to urge the Commission, in its Opinion and Order in this matter, to include certain clarifications with respect to the Commission’s understanding and intentions relative to paragraph III(A)(5)(a) (“PUCO Oversight Provision”) of the Stipulation and Recommendation (“Stipulation”) filed by AEP Ohio and other parties on December 15, 2015 in this proceeding.¹ PJM submits this Amicus Brief as the regional transmission organization (“RTO”) and administrator of the wholesale power markets in Ohio. The Commission’s interpretation and clarification of the PUCO Oversight Provision in any Order approving the Stipulation is critical in order to send the right signal as to Ohio’s interest in attracting competitive generation to meet the state’s future economic development needs. Silence on this issue will only make it harder for investors in new generation to view Ohio as a place where their investment is welcome and can compete fairly

¹ PJM is not supporting or opposing the Stipulation which contains many provisions which are not germane to the wholesale electric markets that serve Ohio. PJM does believe that *how* the Commission interprets and chooses to implement paragraph III(A)(5)(a) will be central to Ohio meeting its goals of attracting new competitive generation infrastructure into the state to meet Ohio’s economic development needs. PJM seeks this clarification if the Commission is inclined to approve this Stipulation.

with existing legacy generation of the sort covered by the Stipulation. For these reasons and based on the record evidence, PJM requests that any Opinion and Order approving the Stipulation, include the clarifications recommended below.

I. INTRODUCTION

PJM is the Federal Energy Regulatory Commission (“FERC”) approved RTO that operates the bulk power system and wholesale power markets for a service territory that encompasses Ohio, in which roughly 28,300 MW of the installed capacity in the PJM Region is located. PJM’s role in administering the wholesale power market, while not encompassing Ohio retail transactions, does have significant impacts on retail prices, particularly in Ohio where the state has adopted retail competition and relies upon the competitive wholesale market in meeting the needs of its Standard Service Offer customers.

On December 15, 2015, the Stipulation was filed in the instant proceeding by AEP Ohio and other signatory parties addressing an affiliate power purchase agreement (“PPA”) between AEP Ohio and AEP Generation Resources, Inc. including, among other things, the PUCO Oversight Provision, which specifically referenced the PJM market and states, in relevant part:

AEP Ohio agree to participate in annual compliance reviews before the Commission to ensure that actions taken by the Company when selling the output from generation units included in the PPA Rider into the PJM market were not unreasonable. AEP Ohio, not its customers, would be responsible for the adjustments made to the PPA Rider 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 the PPA Rider 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 PPA Rider will be based on the sale of power into PJM.

By order of the Attorney Examiner on January 7, 2016, PJM’s request for limited intervention was denied, but PJM was invited, as a non-party, to file an amicus brief to address issues related to the clarification sought by PJM in its intervention.

II. ARGUMENT

A. THE COMMISSION SHOULD CLARIFY THE PUCO OVERSIGHT PROVISION TO ENSURE A HEALTHY COMPETITIVE GENERATION MARKET IN OHIO, IF IT ADOPTS THE STIPULATION

As stated above, given the broad nature of the Stipulation, PJM believes it is important to understand the impact the proposed language may have on attracting new investment in Ohio and on the overall competitiveness of the wholesale market in Ohio. PJM has a vested interest in such a clarification in this instance because the PUCO Oversight Provision, more than any other in the Stipulation, has the greatest potential to impact the effectiveness of the wholesale market in Ohio for stimulating new investment. Moreover, since the Commission has stated that the PJM marketplace remains the primary vehicle it intends to utilize to attract and incent new generation resources,² how the Commission implements this provision is critically important to whether those Ohio-specific goals can be achieved. Again, PJM does not take a position on the Stipulation as a whole, but does believe that the appropriate implementation of this provision is essential so that Ohio can still be seen as a state where investment in new generation is welcomed and such investment can compete fairly with legacy investment to meet the state's ongoing economic development needs.

To this end, PJM proposes the Commission make clear that the reasonableness of actions taken by "AEP Ohio when selling the output from generation units included in the PPA Rider into the PJM market," be implemented in a manner which maintains the overall competitiveness of the wholesale market. Specifically, PJM asks the Commission to make clear that a reasonable offer behavior for AEP Ohio would be to offer the units covered by the PPA into the PJM

² See, *PUCO Chair Andre Porter Sees Big Changes Coming for Power Companies*, Cleveland Plain-Dealer, August 30, 2015 ("I can tell you the existing structure has, in my view, led to very competitive results for residential, commercial and industrial customers in this state."). Article available on-line at: http://www.cleveland.com/business/index.ssf/2015/08/puco_chair_andre_porter_see_bi.html.

markets at a level no lower than their “actual costs” as that term is understood by PJM and applied consistent with its Tariff and Manuals without consideration of the offsetting revenues provided by Ohio retail customers under the Stipulation. Offering at actual costs ensures that the PPA will not artificially suppress prices in a manner which can hurt development of new generation in Ohio.³

Holding the units covered by the PPA to this clarification is important because one could argue that the Stipulation turns these incentives on their head by encouraging below cost bidding in order for a unit owner to escape possible disallowance of retail revenues pursuant to the broad language in the PUCO Oversight Provisions. This, as Dr. Bowring,⁴ Mr. Bennett⁵ and Mr. Cavicchi⁶ testified, could incentivize these particular units to bid below their costs, which, in turn, will have a suppressing effect on prices and degrade the signal upon which PJM and Ohio are relying to attract new generation resources in Ohio. AEP Ohio itself recognized this unavoidable linkage in its recent amicus brief to the United States Supreme Court in *W. Kevin Hughes v. Talen Energy Marketing, LLC, et. al* wherein it observed: “To be sure, the state commission’s willingness to permit retail-rate recovery might *affect* whether the utility decides

³ Indeed, the Ohio General Assembly has historically ensured that sales are not made below cost for the purpose of destroying competition. *See*, Section 4905.33 of the Revised Code. Moreover, Ohio Revised Code, Section 4928.02 ensures “...effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.” The Ohio General Assembly’s admonition is consistent with PJM’s own requested clarification in this case.

⁴ *First Supplemental Testimony of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM*, December 28, 2015, p. 5.

⁵ *Stipulation Direct Testimony of Stephen E. Bennett on Behalf of the Retail Energy Supply Association*, December 28, 2015, p. 4.

⁶ *Supplemental Testimony of A. Joseph Cavicchi on Behalf of the PJM Power Providers Group and the Electric Power Supply Association*, December 28, 2015, pp. 7-8.

to enter into a power purchase agreement, *or the price at which the utility decides to bid into the PJM market (emphasis added).*”⁷

The long-term impacts of that disincentive to attract efficient new investment in Ohio would far outweigh any short term gain that may be realized by AEP Ohio’s customers from “below cost” bidding and guaranteed clearing by this particular narrow subset of AEP generating units. As such, PJM urges the Commission to recognize that its interest in a healthy competitive wholesale market in Ohio, with prices that accurately reflect the going forward costs of competing units, has not changed as a result of the Stipulation. The Commission can best do this by clarifying that AEP Ohio offering below cost will *not* be considered reasonable action under the Stipulation because such offers will frustrate Ohio’s reliance on the wholesale market to meet the state’s resource adequacy needs.

Moreover, this Stipulation directs an oversight role by the Commission over AEP Ohio’s bidding practices for the subject units for purposes of retail rate recovery. Commission Staff, with AEP Ohio’s consent, has reserved for itself a role to ensure “reasonable” bidding practices of the AEP generation owners and included a very heavy hammer should the Commission deem bidding actions unreasonable.⁸ Clearly, the proponents of this Stipulation intend for it to impose additional requirements than simply following existing PJM rules since they are already bound, through PJM tariffs, to follow those rules. AEP Ohio’s strained attempt to simply read the

⁷ *W. Kevin Hughes, et al., v. Talen Energy Marketing, LLC (f/k/a PPL EnergyPlus, LLC), et al.; CPV Maryland, LLC v. Talen Energy Marketing, LLC (f/k/a PPL EnergyPlus, LLC), et al.* U.S. Supreme Court Nos. 14-614 & 14-623; Brief for American Electric Power Company, Inc., as Amicus Curiae in Support of Respondents at p. 14 (January 29, 2016).

⁸ Arguably, even in the absence of such consent on AEP’s behalf, the Commission is able to review the prudence of a utility’s decision to enter into a particular contract or provide service under an approved rate as it affects customers in Ohio regardless of FERC preemption on the matter. *See, Pike County Light & Power Co. v. Pennsylvania Public Utility Commission*, 465 A.2d 735 (1983). *See, also, Duke Energy Retail Sales, LLC*, 127 FERC 61,027 at P. 35 (April 7, 2009) (applying the Pike County principle in order granting and suspending market-based rate tariff and granting waiver of affiliate restrictions).

company's intentions with regard to the bidding of these units out of the PUCO Oversight Provision ignores the very link that AEP Ohio itself made in the specific text of the provision where it provided the Commission a right to review and disallow retail costs based on actions AEP undertakes relative to these units in the PJM wholesale markets.

Additionally, given the significant retail rate implications of the PUCO Oversight Provision, it is difficult to divorce the company's offer behavior from the retail rate implications of those actions. Given this interaction, the relevant question then is really not about what PJM's offer rules permit today, but rather, from the perspective of the Commission, how this reservation of Commission authority under the Stipulation can be exercised in a manner which harmonizes the Stipulation with Ohio's stated policy goals of relying on the PJM market to attract new generation investment to meet Ohio's future energy needs.

The Commission has, in the past, provided clarifications to provisions that are presented to it in a Stipulation. Such clarification is especially important in this matter given: (a) the mixed incentives that the Stipulation can have on continuing to ensure the development of new competitive generation in Ohio, and; (b) that the parties, including AEP, have voluntarily assigned the Commission a direct oversight role over the company's bidding into the PJM markets and its consequent impacts on the retail revenues to be collected under the Stipulation. Simply stated, if the Commission, and Ohio, believe in the value of PJM's competitive market to advance its policy goals, then it should ensure that the Stipulation does not promote the ability of select AEP units to offer below cost in the PJM market.

B. THE COMMISSION SHOULD CLARIFY WHO BEARS THE RISK OF MAKING THE SUBJECT UNITS WHOLE AS BETWEEN UNIT OWNERS AND CUSTOMERS

The Commission should also consider the issue related to the alignment of risk to unit performance when evaluating the merits of the Stipulation and take the opportunity to clarify how those risks align. Put more directly, given the Stipulation’s “make whole” provisions, the Commission should clarify who bears the risk of the units’ under or non-performance in meeting their commitment to deliver electricity whenever PJM determines they are needed to meet power system emergencies.

As part of PJM’s forward capacity market, it has introduced “pay for performance” requirements, specifying that resource owners may receive higher capacity payments in return for investment in modernizing equipment or adapting to different fuels. Unit owners that exceed performance commitments are entitled to funds collected from resources that underperform when called upon. This “capacity performance” program is essentially an insurance policy to ensure that consumers have greater protection from power interruptions and price spikes – especially during times of extreme system conditions. The better those resources perform during system emergencies, the less customers have to pay because of greater efficiencies and lower energy prices.

In this capacity performance construct, the resource owner assumes virtually all financial risks if they do not meet power supply obligations, but, at the same time, can reap the rewards in those instances where unit investment pays off and the unit over performs when called upon in system emergencies. The incentive to perform is wholly tied to financial risk. Should the Commission be inclined to approve the Stipulation, it should also clarify that risk of non-performance, or under performance, must align with the party that can mitigate the risk – in other

words, the unit owner. The FERC recently rejected AEP's request for a one year waiver of the Capacity Performance provisions by noting that any lessening of those incentives would be contrary to their goals:

...the (AEP) waiver request, if granted, would significantly weaken the incentives established by PJM's Capacity Performance construct. As the Commission found in the Capacity Performance Order, the "new and substantial penalties for non-performance . . . will help ensure the reliability of the PJM region."⁹

This Commission should ensure that the Stipulation does not provide an avenue for the company to lessen those incentives by seeking recovery of those penalty provisions from Ohio customers due to a lack of clarity in any final Order issued by this Commission on this issue.

C. ELECTRIC SYSTEM RELIABILITY IN THE PJM REGION IS ASSURED TO MEET FUTURE DEMAND REQUIREMENTS

In filed testimony, the company has argued a generalized concern relating to electric system reliability as reason to accept the Stipulation.¹⁰ Such concerns are categorically misplaced. PJM is ultimately responsible for reliability of the bulk electric system in the PJM Region which includes Ohio and each of the 14 jurisdictions where PJM operates. PJM is responsible for ensuring both resource adequacy and transmission security. PJM's day to day operations, market structure and transmission system planning functions provide a foundation at the wholesale level for reliable delivery of electricity. PJM manages the overall reserve margin through administration of a forward capacity market¹¹ to ensure future demand requirements are adequately and safely met.

⁹ *Appalachian Power Company, Kentucky Power Company, Wheeling Power Company, Indiana Michigan Power Company*, 154 FERC ¶ 61,056 at P. 23 (January 29, 2016).

¹⁰ *See, e.g., Direct Testimony of Pablo A. Vegas in Support of AEP Ohio Application*, October 3, 2014, pp. 10-15; *Direct Testimony of Kelly D. Pearce in Support of AEP Ohio's Application*, October 3, 2014 ("Vegas Testimony"), pp. 17-22.

¹¹ The PJM regional capacity market is a forward auction held three years in advance of the relevant planning year to allow new resources to compete with existing resources to service customer's capacity requirements.

In particular, company witness Vegas contends that "...the capacity markets in PJM do not provide sufficient returns in PJM's western footprint [which includes Ohio] to support new investment."¹² However, aside from obvious and visible new merchant investment under development in Ohio, the Independent Market Monitor, Mr. Haugen, and Mr. Bennett completely refute the company's statement in this regard. In fact, Witness Haugen testified that PJM's newly adopted Capacity Performance construct results in increased revenues to generators to ensure generators will have the necessary revenues to guarantee performance.¹³

The company argues that the deactivation of coal generation units (retirements) in Ohio will adversely impact system reliability. In particular, Mr. Vegas has suggested that Ohio is on a cresting wave of retirements and new generation investment will not be built in time to avoid an adverse impact on reliability.¹⁴ However, as the record evidence plainly demonstrates, due to PJM's robust forward capacity market and regional transmission planning process, those retirements have been absorbed and the generation replaced with newer resources with resource adequacy targets having been met and exceeded year after year.¹⁵ There has been significant new generation entry that, combined with demand response and imports within PJM's capacity import limit, has consistently kept PJM's reserve margins on target. Indeed, as various witnesses noted, there are several substantial new plants under construction or proposed for Ohio.¹⁶

¹² Vegas Testimony at p. 16.

¹³ *Direct Testimony of Joseph Haugen on Behalf of Interstate Gas Supply, Inc.*, September 11, 2015, pp. 4-6 ("Haugen Testimony").

¹⁴ Vegas Testimony, at pp. 10-17.

¹⁵ *Direct Testimony of James F. Wilson on Behalf of the Ohio Consumers' Counsel*, September 11, 2015, p. 20 ("Wilson Testimony").

¹⁶ Wilson Testimony at pp. 24-25. These projects include an 869 MW combined-cycle natural-gas fired generation facility, a 700 megawatt natural gas fired facility, a 1,441 MW combined cycle plant and peaking combustion turbine unit, a 800 MW combined cycle plant, and a 525 MW combined cycle unit.

Nevertheless, while the retirement of certain units has increased over the last few years, PJM's Tariff provides PJM with the ability to compensate resources that are planned to retire to allow them to continue operating past their desired retirement dates in order to ensure system reliability until such time as transmission upgrades can be built. Due to PJM's robust forward capacity market, PJM has implemented this Reliability Must Run ("RMR") ability very infrequently even in spite of the magnitude of retirements that have occurred over recent years, requiring the extended operation of only 994 MW of resources in Ohio for up to two and a half years. This is a very small quantity and a very short time compared to the approximately 6,207 MW of generation retirements that have occurred in Ohio since 2010.

While certain economic factors and regulatory policy changes have affected the future availability of existing generating units throughout the PJM Region, PJM's operation of the power grid will remain reliable because the PJM capacity market is still attracting investment in replacement resources, particularly natural gas-fired and alternative resources, which are anticipated to meet future demand requirements, with sufficient and adequate reserves. Additionally, PJM's RTEP process has identified, and continues to solicit, transmission related-projects to ensure reliability over the long-term horizon.

As such, in evaluating the merits of the Stipulation, the Commission should remain cognizant that electric system reliability is assured on a comprehensive basis and such reliability assurances do not hinge on the resources specified in the proposed Stipulation continuing in service. OCC witness Wilson succinctly dismisses the company's concerns relative to reliability in Ohio and the PJM region when he notes that:

...resource adequacy is in good shape in PJM and specifically in Ohio. Through PJM's three-year-forward Reliability Pricing Model ("RPM") capacity construct, reserve margins well above target levels have been maintained, with capacity commitments now in place through May 31, 2019. A large wave of retirements has been absorbed without a

spike in capacity prices, with the retiring capacity to be replaced by a mix of new gas-fired plants, uprates to existing units, demand response, energy efficiency, imports from adjacent areas, wind, and other types of resources.¹⁷

Indeed, the Commission and Ohio consumers can be fully assured that the system is reliable in Ohio and the PJM region. As a result, arguments that approval of the Stipulation is needed to ensure reliability in Ohio are wide of the mark and represent a proverbial ‘red herring’ that should not distract from consideration of the issues presented in the record as to the merits of the proposed Stipulation itself.

III. CONCLUSION

For the foregoing reasons, and based on the record evidence in this proceeding, PJM requests that any Opinion and Order approving the Stipulation, include the clarifications as requested.

Respectfully submitted,

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¹⁷ Wilson Testimony, p. 8.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief for Amicus Curiae Of PJM Interconnection was served this 1st day of February 2016 via electronic mail upon the individuals listed below.

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