

**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)

**MOTION OF OREGON CLEAN ENERGY, LLC
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
AND
REQUEST FOR EXPEDITED RULING**

Pursuant to Ohio Administrative Code (“O.A.C.”) 4901-1-12, Oregon Clean Energy, LLC (“OCE”) respectfully moves for leave to submit an *amicus curiae* brief in this matter to address the implications of the Third Supplemental Recommendation and Stipulation filed by The Toledo Edison Company, The Cleveland Electric Illuminating Company, and Ohio Edison Company (collectively “FirstEnergy”) on December 1, 2015 (“the Third Supplemental Stipulation”) on unsubsidized power plant development in Ohio. Pursuant to O.A.C. 4901-1-12(C), OCE seeks the issuance of an expedited ruling on this motion. A Memorandum in Support of this Motion is attached.

MEMORANDUM IN SUPPORT

I. Introduction

Oregon Clean Energy, LLC is currently constructing the \$800 million Oregon Clean Energy Center in Oregon, Ohio. This facility is a state-of-the-art combined-cycle natural gas facility with a capacity of 860 MW. The investment in the facility is entirely market-based, driven by market signals in Ohio and the PJM Interconnection (“PJM”).

The Oregon Clean Energy Center is the project furthest along in development of at least five new power plant projects in Ohio.¹ Combined, the new projects under development—three of which are already actively under construction—will bring more than 3,600 MWs of new, efficient, and reliable combined-cycle natural gas generation to Ohio. Moreover, in total, these new projects will bring more than \$4.1 billion of new direct investment to Ohio.

The willingness of investors to commit more than \$800 million to Ohio-based generation facilities like Oregon Clean Energy Center was predicated on their long-term confidence in PJM’s markets. OCE wishes to inform the Public Utilities Commission of Ohio (“PUCO” or “Commission”) of the implications of the Third Supplemental Stipulation regarding unsubsidized power plant development in Ohio.

Under FirstEnergy’s proposal now before the Commission, FirstEnergy will enter into an unbid and non-competitive multi-year Power Purchase Agreement with its affiliate, FirstEnergy Solutions (“Affiliate PPA”). FirstEnergy would then offer the energy, ancillary services, and

¹ In addition to the Oregon Clean Energy Center, the Ohio Power Siting Board has also approved the Carroll County Energy Generation Facility (Case No. 13-1752-EL-BGN), the Middletown Energy Center (Case No. 14-0534), and Clean Energy Future-Lordstown (Case No. 14-2322-EL-BGN). The application for the South Field Energy Electric Generating Facility (Case No. 15-1716-EL-BGN) is under review by Ohio Power Siting Board. The Oregon Clean Energy Center, the Carroll County Energy Generation Facility, and the Middletown Energy Center are all under construction, verified by public filings made to the Ohio Power Siting Board.

capacity into PJM's markets. The net costs of the assets under the Affiliate PPA, along with its share of assets owned and operated by the Ohio Valley Electric Corporation, will be charged to FirstEnergy's ratepayer via a nonbypassable rider (the "Rider RRS").

No party to this proceeding is constructing a new merchant power plant in Ohio. The submission of an amicus brief by OCE will not prejudice any party and will contribute to the full development and equitable resolution of the issue of the impact of FirstEnergy's proposal on unsubsidized power plant development in Ohio. Recent events now compel OCE to offer the Commission its unique perspective on this specific issue.

II. ARGUMENT

Public policy supports the Commission's grant of leave for OCE to file an amicus brief, as leave to file an amicus is generally granted in cases involving the public interest. See *Matthews v. Ingleside Hospital, Inc.*, 21 Ohio Misc. 116, 120 (Cuyahoga C.P. 1969). Commission precedent adheres to this public policy, as the Commission has repeatedly granted leave for interested parties to file briefs as amici curiae where actual intervention is not necessary or warranted. See *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR, et al., 2013 Ohio PUC LEXIS 259, Entry, *12 (Nov. 13, 2013); *In re Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 94-987-GA-AIR, 1994 Ohio PUC LEXIS 684, *8 (Aug. 4, 1994).

The Commission's determination "as to whether it is appropriate to permit the filing of amicus briefs in a proceeding must be made based on the individual case [at] bar and the issues proposed to be addressed by the movant." *In re Application of Duke Energy Ohio, Inc. for an Increase in Its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR, et al., 2013 Ohio

PUC LEXIS 259, Entry, *12 (Nov. 13, 2013). When making this determination, the Commission examines whether the submission of amicus briefs will prejudice any party and whether the amicus briefs will assist with the consideration of the issues present in the proceeding. *Id.*

No party to this proceeding is currently constructing a new power plant in Ohio. The Oregon Clean Energy Center is furthest along in the development of at least five new power plant projects in Ohio. Because of OCE's significant investment in developing and constructing new, efficient, and reliable combined-cycle natural gas generation, OCE has a unique perspective to share with the Commission on the impact of FirstEnergy's proposal on unsubsidized power plant development in Ohio. As a result, the submission of an amicus brief by OCE at the post-hearing stage of this proceeding will contribute to the full development of this issue.

Importantly, permitting OCE to file an amicus brief will not prejudice any party to these proceedings. OCE respectfully requests leave to submit an amicus, and an expedited ruling, at the same time that parties to the proceeding submit their initial post-hearing briefs. Other parties will have adequate time to consider OCE's unique perspective and respond to OCE in their post-hearing reply briefs. Compare with *In re Vectren Delivery of Ohio, Inc.*, Case No. 02-220-GA-GCR, Entry on Rehearing (Aug. 10, 2005) (denying a request to file an amicus in support of application for rehearing because the request came at the rehearing stage of the case, well beyond the briefing stage of the proceeding).

Whereas previous intervention by OCE was not necessary or warranted, recent events now compel OCE to share its unique perspective with the Commission. The Third Supplemental Stipulation failed to address the concerns of the Independent Market Monitor ("IMM") that FirstEnergy's proposal would constitute a subsidy which is inconsistent with competition in the

PJM wholesale power market. Further, the PUCO Staff's signature to the Third Supplemental Stipulation signifies a reversal in the PUCO Staff's long-held position in opposition to FirstEnergy's proposal. The loss of the PUCO Staff's opposition with regard to the Rider RRS creates a vacuum that concerns OCE and merits OCE's decision to now lend its voice to this proceeding on this issue. See Staff Ex. No. 12.

Moreover, PJM has now made clear that Rider RRS has the potential to impact not only the marketplace in Ohio for new investment, but also the PJM marketplace as a whole. While the Commission denied PJM's intervention in this case, its public position remains the same. This position necessarily informs the investment community about Rider RRS's impact on the market. Because OCE has actually developed such an investment in Ohio, it has a unique perspective on this issue.

The January 13, 2016 Entry denying PJM's motion to intervene but inviting PJM to submit an amicus brief signaled to OCE that intervention at this stage of the proceeding is unnecessary. Instead, the Entry instructed PJM to share its perspective on specific issues to the proceeding. OCE requests to do just that.

Finally, on January 25, 2016, the Supreme Court of the United States released its opinion in *Federal Energy Regulatory Commission v. Electric Power Supply Association*, No. 14-840, slip. op., Kagan, J., (January 25, 2016). The decision provides insight into the U.S. Supreme Court's view on the boundaries between state regulation of retail matters and federal regulation of wholesale matters, and where those boundaries begin and end. Where those boundaries begin and end has consequences for the ability of PJM and Ohio to attract new investment. This opinion was not previously available to the IMM or PJM, or any other party participating in the proceeding.

III. CONCLUSION

For these reasons, Oregon Clean Energy, LLC respectfully requests that the Commission grant its Motion for Leave to File an amicus curiae brief in this proceeding.

Respectfully submitted,
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AMICUS CURIAE BRIEF OF OREGON CLEAN ENERGY, LLC

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INTRODUCTION

Since the passage of Ohio Senate Bill 3 in 1999, this Commission has been a staunch and reliable supporter of competitive outcomes in the electric generation markets. The Commission has been willing to make hard decisions on the basis that, ultimately, those decisions would lead Ohio to full competition for generation as expeditiously as possible under the circumstances. One clear recent example of the Commission's resolve is found in its August 8, 2012 Opinion & Order in Case No. 11-346-EL-SSO, et al., where, in explaining why it was approving Ohio Power Company's ("AEP Ohio") Electric Security Plan that was less financially favorable than a comparable Market Rate Offer by \$386 million, the Commission found that:

the most significant of the non-quantifiable benefits is the fact that in just under two and a half years, AEP-Ohio will be delivering and pricing energy at market prices, which is significantly earlier than what would otherwise occur under an MRO option.

Opinion & Order, p. 76.

This finding followed the Commission's earlier discussion clarifying that PJM Interconnection's ("PJM") "[Reliability Pricing Model] prices are consistent with the state compensation mechanism" for pricing capacity. *Id.*, p. 74. This clearly-expressed belief in the benefits of competitive outcomes is one of the reasons why Ohio has been viewed by the investment community as a stable and reliable place in which to make major financial commitments.²

Ohio is beginning to see benefits of that commitment to competition in the form of billions of dollars of investment in new, efficient, and reliable combined-cycle natural gas power

² See also *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM, Opinion and Order (July 19, 2000), p. 71 (establishing approximately \$7 billion in total allowable transition costs for the Companies).

plants. FirstEnergy's proposal threatens to jeopardize this progress. Under FirstEnergy's proposal now before the Public Utilities Commission of Ohio ("PUCO" or "Commission"), FirstEnergy will enter into an unbid, non-competitive multi-year Power Purchase Agreement ("PPA") with its affiliate. FirstEnergy would then offer the energy, ancillary services, and capacity into the PJM markets. The net costs of the assets under the PPA, will be charged to FirstEnergy's ratepayer via a nonbypassable rider (the "Rider RRS").

Oregon Clean Energy, LLC ("OCE") is currently constructing a new 860 MW state-of-the-art combined-cycle natural gas facility in Lucas County, Ohio, without any subsidy. OCE's investors' willingness to commit more than \$800 million to this Ohio-based project was predicated on their long-term confidence in PJM's markets and Ohio's commitment to those markets. Approval of FirstEnergy's proposal will interfere with PJM markets and discourage new investment in Ohio.

ARGUMENT

I. The Oregon Clean Energy Center represents an investment exceeding \$800 million in new, reliable, and efficient generation in Ohio.

The Oregon Clean Energy Center is furthest along in development among at least five new power plant projects in Ohio.³ Combined, the new projects under development will bring more than 3,600 MWs of new, efficient, and reliable combined-cycle natural gas generation to Ohio. Moreover, in total, these new projects will bring more than \$4.1 billion of new direct investment to Ohio. Despite assertions by FirstEnergy to the contrary, OCE, and other new,

³ In addition to the Oregon Clean Energy Center, the Ohio Power Siting Board has also approved the Carroll County Energy Generation Facility (Case No. 13-1752-EL-BGN), the Middletown Energy Center (Case No. 14-0534), and Clean Energy Future-Lordstown (Case No. 14-2322-EL-BGN). The application for the South Field Energy Electric Generating Facility (Case No. 15-1716-EL-BGN) is under review by Ohio Power Siting Board. The Oregon Clean Energy Center, the Carroll County Energy Generation Facility, and the Middletown Energy Center are all under construction, verified by public filings made to the Ohio Power Siting Board.

efficient, and reliable combined-cycle natural gas generation facilities like it, are being successfully developed and built in Ohio.

- A. *Oregon Clean Energy Center received approval from the Ohio Power Siting Board, successfully acquired financing, and is over half way complete with construction.*

OCE submitted its application to construct and operate the Oregon Clean Energy Center to the Ohio Power Siting Board (“OPSB”) on January 17, 2013. Case No. 12-2959-EL-BGN. The project was approved by the OPSB on May 1, 2013. On October 27, 2014, the OPSB approved updates to the project’s design, and in November 2014, OCE closed financing on a total project investment exceeding \$800 million. This amount includes over \$400 million in equity contributions and an additional \$400 million in debt provided by a syndicate of ten experienced project-finance banks. The Oregon Clean Energy Center was developed and financed in direct response to the robust wholesale price signal provided by PJM’s capacity and energy markets.

Construction of the Oregon Clean Energy Center commenced in October 2014. To date, the facility is more than 60 percent complete. The project is on schedule to achieve commercial operation during the first quarter of 2017. The arguments made in this case by FirstEnergy that new capacity is not being built in Ohio (see, Company Ex. 1, p. 24; Company Ex. 11, p. 8) are flatly untrue.

- B. *Oregon Clean Energy Center is a substantial direct and indirect investment in Ohio.*

The Oregon Clean Energy Center will contribute more than \$800 million to the economy of the state of Ohio, Lucas County, and the City of Oregon from the facility’s construction and during its first 20 years of operations. Notably, this positive stimulus is occurring without the need for any capital expenditures by a government entity and without any subsidy.

The construction phase of the facility—now over 60 percent complete—alone creates a significant economic impact to Lucas County and throughout the state of Ohio. Approximately 500 on-site construction jobs and approximately 450 indirect jobs in Lucas County, as well as approximately 350 additional indirect jobs across Ohio, will be created during the construction of the facility. In total, construction of the facility will create approximately 1,300 new jobs in Ohio. Construction of the Oregon Clean Energy Center will increase the forecasted rate of job growth in Lucas County by an average of nearly 0.5 percent each year of the construction phase. The total economic impact of the facility’s construction in Lucas County alone is \$362 million, with an additional economic impact of \$50 million throughout the remainder of Ohio.⁴

After the facility is constructed, the operation of the Oregon Clean Energy Center will continue to provide significant economic benefits. Approximately 50 permanent jobs will be created by the facility’s operation, which will provide an additional \$20 million of economic impacts in Ohio.

The addition of 860 MW of a local, competitively-priced supply of electricity will also benefit Ohio’s manufacturing sector. Electricity-intensive industries are a critical part of Ohio’s economic base. OMAEG Ex. 17, p. 11. Since the restructuring of Ohio’s markets in 2001, the average industrial price of electricity dropped, making Ohio manufacturing more competitive. *Id.* at 13. FirstEnergy’s proposal undermines this progress and will destabilize the competitive structure of electricity markets in Ohio.

⁴ The economic impact figures are from a report entitled *The Economic and Fiscal Impacts of the Construction and Operation of the “Oregon Clean Energy Center.”* This report was included as Appendix E of the facility’s application to the Ohio Power Siting Board and was reviewed by Board Staff as part of the application process. Case No. 12-2959-EL-BGN.

C. *Oregon Clean Energy Center is an efficient, clean, and reliable state-of-the-art facility.*

Oregon Clean Energy Center and similar projects will provide the most efficient generation capability in the market, replacing generation from several aging coal-fired power plants in the region that are being retired. These new units employ Best Available Control Technology, significantly reducing air emissions as compared to the coal plants being phased out by the Mercury and Air Toxics Standard and the Clean Power Plan. These new energy facilities also employ the best quality technology to increase efficiency and emissions control. A competitive market invites new investments that will provide customers with cost-effective clean energy—critical to the future of Ohio.

II. Approval of FirstEnergy’s PPA proposal will interfere with PJM market operations and discourage new investment in Ohio and elsewhere in PJM.

FirstEnergy’s PPA proposal will have direct effects on the PJM marketplace and energy investment in Ohio. Concerns about these effects have been brought to the Commission’s attention by both the PJM Independent Market Monitor (“IMM”) and by PJM itself.

The IMM, through its witness Mr. Bowring, explained to the Commission that the Third Supplemental Stipulation filed in this case on December 1, 2015, does nothing to address the IMM’s basic concern that the Rider RRS is simply a subsidy that is inconsistent with competition in the PJM wholesale power market. IMM Ex. 2, p. 2. The Rider RRS operates to remove virtually all cost recovery risk from FirstEnergy, the market participant, who then has no incentive to make competitive offers in the PJM Capacity Market and is instead incentivized to make offers below the competitive level in the PJM Capacity Market. *Id.*

In addition, IMM witness Bowring testified that the Rider RRS may also interfere with PJM’s newly-designed Capacity Performance mechanism by shifting the risk associated with

performance failures on to the captive ratepayers, while keeping FirstEnergy whole at the same time. This would provide a further windfall to FirstEnergy Solutions' plants that do perform as expected. *Id.*, p. 4. The incentives provided by the Rider RRS do not apply to other energy and capacity market participants that lack access to that subsidy mechanism. Consequently, the Rider RRS mechanism is a direct interference with the operation of the federally-regulated PJM marketplace.

FirstEnergy has made it abundantly clear that these plants may not participate in the PJM markets at all if FirstEnergy does not receive the Rider RRS subsidy—in other words, the plants will close. See e.g., Company Ex. 13, p. 5. IMM witness Bowring framed the fundamental issue very succinctly when he testified that:

[t]he market paradigm includes a full set of markets, most importantly the energy market and capacity market, which together ensure that there are adequate revenues to incent new generation when it is needed and to incent retirement of units when it is appropriate. This approach will result in the long term reliability at the lowest possible cost.

IMM Ex. 2, p. 5. The Rider RRS “pays” FirstEnergy to offer uneconomic capacity into the market and to delay the retirement of uneconomic generation. Both outcomes are directly contrary to the intent of the PJM market mechanism approved by the FERC and general policy of the state of Ohio set out in Senate Bill 3.

Finally, IMM witness Bowring expresses one of the main concerns of developers of new generation. Facilities such as Oregon Clean Energy Center are under specific rules that govern their market behavior. The Minimum Offer Price Rule (“MOPR”) constrains the offers made by new gas-fired plants to be no less than the PJM-set cost of new entry (“CONE”). *Id.*, p. 6. The Rider RRS, by providing FirstEnergy the consequence-free ability to bid into the market at any price, will greatly expand any market imbalances that may already exist as a result of the MOPR.

The Rider RRS raises a further disincentive to new investment in gas-fired generation in Ohio and elsewhere in PJM.

The concerns expressed by the IMM are essentially corroborated by the publicly-expressed position of PJM itself with respect to the Rider RRS proposal.⁵ While PJM took no express position regarding Rider RRS itself, it did make clear that the Rider RRS, as proposed, has the potential to impact both the operation of the PJM marketplace as a whole as well as Ohio more specifically, as a location for new investment. PJM's solution to this risk is to restrict FirstEnergy from making below-cost offers into the PJM markets, without delving into the cost consequences to captive ratepayers arising from such a restriction. The primary point to this is not the specific impact on the market that Rider RRS may have, but rather the simple fact that PJM sees a direct threat to the functioning of its market from the Commission's approval of the Rider RRS. The Commission must consider how PJM's concerns about the Rider RRS will be received by the investment community.

PJM's concerns might have been expressed differently had its testimony been made public only one month later. On January 25, 2016, the Supreme Court of the United States released its opinion in *Federal Energy Regulatory Commission v. Electric Power Supply Association, et. al.*, No. 14-840, slip. op., Kagan, J., (January 25, 2016). While the immediate subject of this decision is the FERC's approval of PJM's rules governing the participation of demand response resources in its wholesale markets, a major focus of the decision is the boundary between state authority over retail matters and federal authority over wholesale matters. The decision by the Court makes clear that PJM's concern with the Stipulation in this case is valid. The court explains that "[t]he FPA [Federal Power Act] 'leaves no room either for

⁵ While the Commission denied PJM's late intervention in this case, the fact remains that PJM has taken this public position. This position necessarily informs the investment community about the Rider RRS's impact on the market as well as the investment climate in Ohio.

direct state regulation of the prices of interstate wholesales’ or for regulation that ‘would indirectly achieve the same result.’” Slip. op., p. 26, [citing *Northern Natural Gas Co. v. State Corporation Comm’n of Kan.*, 372 U.S. 84, 91 (1963)]. “A State could not oversee offers, made in a wholesale market operator’s auction, that help set wholesale prices. Any effort of that kind would be preempted.” *Id.* This is precisely the concern of PJM with the Stipulation supporting the Rider RRS. The U.S. Supreme Court’s opinion alleviates PJM’s concern by cutting directly to the chase—the Stipulation in this case at Paragraph III.A(5)(a) cannot provide the Commission the authority it purports to provide. The FPA prohibits the Commission from overseeing FirstEnergy’s activities in the federally-regulated PJM marketplace or otherwise interfering in the operation of that marketplace.

Whether the Rider RRS is unlawful or not, the investment community cannot ignore the Commission’s attempt to put its thumb on the market scale in favor of generation owned by or affiliated with Ohio’s investor-owned utilities. The Rider RRS will distort the PJM markets and make meaningful financial planning for competitors in those markets even more difficult, if not impossible. Perhaps worst of all, approval of a PPA of this type shows the investment community that Ohio does not value regulatory stability and that energy investment in Ohio is at best a gamble because the rules of the game may change with little cause.

CONCLUSION

Our investors’ willingness to commit more than \$800 million to the Ohio-based Oregon Clean Energy Center was predicated on their long-term confidence in PJM’s markets. Future investment will only occur if this confidence is maintained. Approval of FirstEnergy’s proposal will interfere with PJM’s markets and discourage new investment in Ohio.

The chilling effect of FirstEnergy's proposal on future generation is not merely theoretical. Oregon Clean Energy, LLC has the potential to develop an additional 860 MW facility in Ohio. However, potential investment in Ohio in other generation facilities like the Oregon Clean Energy Center can only go forward if investors have confidence in PJM's markets and in Ohio's commitment to those markets.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties of record listed below this 16th day of February 2016 *via* electronic mail.



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