

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application</b>	)	
<b>Seeking Approval of Ohio Edison</b>	)	
<b>Company, the Cleveland Electric</b>	)	
<b>Illuminating Company and The Toledo</b>	)	<b>Case No. 14-1297-EL-SSO</b>
<b>Edison Company for Authority to</b>	)	
<b>Provide for a Standard Service Offer</b>	)	
<b>Pursuant to R.C. § 4928.143 in the Form</b>	)	
<b>of an Electric Security Plan</b>	)	

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

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**February 16, 2016**

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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 V.(B)(3)(a) (“PUCO Oversight Provision”) of the Third Supplemental Stipulation and Recommendation (“Stipulation”) filed by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the “FE Companies”) and other parties on December 1, 2015 in this proceeding.<sup>1</sup> 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 regarding 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

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<sup>1</sup> PJM is not supporting or opposing the Stipulation which contains many provisions that are not germane to the wholesale electric markets that serve Ohio. PJM does believe that *how* the Commission interprets and chooses to implement paragraph V.(B)(3)(a) will be instrumental 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.

investment is welcomed and can compete fairly 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 1, 2015, the Stipulation was filed in the instant proceeding by the FE Companies and other signatory parties addressing an affiliate power purchase agreement (“PPA”) between the FE Companies and FirstEnergy Solutions Corporation (“FE Solutions,” collectively, “FE”) including, among other things, the PUCO Oversight Provision, which specifically referenced the PJM market and states, in relevant part:

The rigorous review process set forth in the Companies’ ESP IV filing in the testimony of Company Witness Mikkelson supporting the Application shall be adopted. Specifically, the Companies agree to participate in annual compliance reviews before the Commission to ensure that actions taken by the Companies when selling the output from generation units included in Rider RRS into the PJM market were not unreasonable. 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. Any determination that the costs and revenues included in Rider RSS 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 Rider RRS will be based on the sale of power into PJM.

By order of the Attorney Examiner on January 13, 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,<sup>2</sup> 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.

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<sup>2</sup> 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](http://www.cleveland.com/business/index.ssf/2015/08/puco_chair_andre_porter_see_bi.html)

To this end, PJM proposes the Commission make clear that the reasonableness of actions taken by FE “when selling the output from generation units included in the Rider RRS into the PJM market,” be implemented in a manner that maintains the overall competitiveness of the wholesale market. Specifically, PJM asks the Commission to make clear that a reasonable offer behavior for FE would be to offer the units covered by the Rider into the PJM 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 that could constrain development of new generation in Ohio.<sup>3</sup>

Holding the units covered by the PPA to this clarification is important because one could argue that the Stipulation turns market-based 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,<sup>4</sup> Dr. Kalt<sup>5</sup> and Mr. Bennet<sup>6</sup> testified, could incentivize these particular units to bid below their costs, which, in turn,

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<sup>3</sup> 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.

<sup>4</sup> *First Supplemental Testimony of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM*, (“IMM Testimony”) December 30, 2015, p. 5.

<sup>5</sup> *Second Supplemental Testimony of Joseph P. Kalt, Ph.D on Behalf of the PJM Power Providers Group and the Electric Power Supply Association*, December 30, 2015, p. 24.

<sup>6</sup> *Stipulation Direct Testimony of Stephen E. Bennett on Behalf of the Retail Energy Supply Association*, December 30, 2015, p. 5.

would have a suppressing effect on prices and degrade the signal upon which PJM and Ohio are relying to attract new generation resources in Ohio.<sup>7</sup>

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 FE's customers from "below cost" bidding and guaranteed clearing by this particular subset of FE's 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 FE 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 establishes an oversight role for the Commission regarding FE's bidding practices for the subject units for purposes of retail rate recovery. Commission Staff, with FE's consent, has reserved for itself a role to ensure "reasonable" bidding practices of FE generation owners and included a very heavy hammer should the Commission deem bidding actions unreasonable.<sup>8</sup> Clearly, the proponents of this Stipulation intend for it to impose

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<sup>7</sup> In fact, this unavoidable linkage was recognized by another Ohio utility (AEP Ohio) in an 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 to enter into a power purchase agreement, *or the price at which the utility decides to bid into the PJM market* (emphasis added)." *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).

<sup>8</sup> Arguably, even in the absence of such consent on FE'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).

additional requirements beyond simply following existing PJM rules since they are already bound, through PJM tariffs, to follow those rules. FE's strained attempt to simply read the FE Companies' intentions with regard to the bidding of these units out of the PUCO Oversight Provision ignores the very link that FE 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 FE 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 FE Companies' offer behavior from the retail rate implications of those actions. Given this interaction, the relevant question 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 likely detrimental impact of incentives established by the Stipulation can have on the ongoing development of new competitive generation in Ohio, and; (b) that the parties, including FE, 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 FE 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 generation unit performance risks 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.

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

In filed testimony, the FE Companies have voiced a generalized concern relating to electric system reliability as reason to accept the Stipulation.<sup>9</sup> Such concerns are categorically unfounded. PJM is ultimately responsible for reliability of the bulk electric system in the PJM Region which includes Ohio and the other 13 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 market<sup>10</sup> to ensure future demand requirements are adequately and safely met.

In particular, company witness Makovich contends that “...inherent flaws and imposed environmental policies have caused market clearing prices to chronically fall short of covering the average cost of efficient power supply...”<sup>11</sup> However, aside from obvious and visible new merchant investment under development in Ohio, Dr. Bowring, Mr. Haugen, and Mr. Bennett completely refute the FE Companies’ statement in this regard. In fact, Dr. Bowring testified that

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<sup>9</sup> See, e.g., *Direct Testimony of Donald Moul on Behalf of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, August 4, 2014 (“Moul Testimony”); *Direct Testimony of Steven E. Strah on Behalf of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, August 4, 2014 (“Strah Testimony”); and *Supplemental Testimony of Dr. Lawrence Makovich on Behalf of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, May 4, 2015 (“Makovich Testimony”).

<sup>10</sup> 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.

<sup>11</sup> Makovich Testimony at p. 3.

PJM's Capacity Performance construct results in "a significant increase in capacity performance for all capacity resources in PJM and particularly for capacity resources in the western part of PJM, including Ohio."<sup>12</sup> Mr. Wilson, testifying on behalf of the Ohio Consumers' Counsel, aptly rebutted Dr. Makovich's assertions and testified that there are adequate revenues in the PJM market to attract and retain sufficient generation to satisfy resources adequacy in the PJM Region and, in particular, Ohio.<sup>13</sup>

The FE Companies argue that the deactivation of generation units (retirements) in Ohio will adversely impact system reliability. In particular, Mr. Moul has suggested that the Rider is needed to ensure that the covered units are available to serve the important goals of ensuring fuel diversity and base-load units to avoid higher costs and maintain grid reliability.<sup>14</sup> However, as the record evidence plainly demonstrates, due to PJM's robust forward capacity market and regional transmission planning process, generation retirements have been absorbed and the generation replaced with newer resources as resource adequacy targets have been met and exceeded year after year.<sup>15</sup> 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.<sup>16</sup>

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<sup>12</sup> IMM Testimony at p. 3.

<sup>13</sup> *Supplemental Testimony of James F. Wilson on Behalf of the Ohio Consumers' Counsel and Northeast Ohio Public Energy Council*, May 11, 2015, at pp. 8-9. ("Wilson Supplemental Testimony").

<sup>14</sup> Moul Testimony, pp. 5-8.

<sup>15</sup> *Direct Testimony of James F. Wilson on Behalf of the Ohio Consumers' Counsel*, November 22, 2015 at p. 42. ("Wilson Testimony").

<sup>16</sup> 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. Wilson Supplemental Testimony at p. 10.

Nevertheless, while generation retirements have increased in recent 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 needed to implement Reliability Must Run ("RMR") contracts 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 certain 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. 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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## 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 February 16, 2016.

*/s/ Evelyn R. Robinson*

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