UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	)	Docket Nos. ER18-459-000
and	)	and ER18-460-000
Ohio Valley Electric Corporation	)	

ANSWER AND PROTEST BY AMERICAN MUNICIPAL POWER, INC. IN OPPOSITION TO MOTION FOR EXTENDED TARIFF EFFECTIVE DATE

On April 17, 2018, Ohio Valley Electric Corporation ("OVEC") and PJM Interconnection, L.L.C. ("PJM") submitted, in the form of a letter of counsel, a motion to extend the effective date of the changes to the PJM Open Access Transmission Tariff ("Tariff") necessary to implement OVEC's full integration into PJM. The April 17 motion recites that the Commission's February 13, 2018 order accepting the proposed Tariff revisions for filing[1] granted the requested effective date of March 1, 2018 for the revisions, but that, on February 26, 2018, OVEC and PJM submitted a motion requesting that the effective date for the Tariff revisions be delayed to June 1, 2018 because the date for OVEC's planned integration into PJM had been postponed. The April 17 motion now requests that the effective date for the proposed Tariff revisions be modified again, and that the changes be given a proposed effective date of "12/31/9998" to reflect that the effective date has not yet been decided.[2]

In accordance with the Commission's notice of the April 17 submittal,[3] American Municipal Power, Inc. ("AMP") hereby protests and responds in opposition to the OVEC/PJM

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[1] *PJM Interconnection, L.L.C. and Ohio Valley Electric Corp*., 162 FERC ¶ 61,098 (2018) ("February 13 Order").

[2] April 17 motion at 2.

[3] Combined Notice of Filings #1 (Apr. 18, 2018).

request for a further—and, this time, indefinite—deferral of the effective date for the Tariff changes that would implement OVEC's integration into PJM. Due to recent events not discussed in the April 17 submittal—especially the bankruptcy of FirstEnergy Services Corp. ("FES") and its efforts to reject the Intercompany Power Purchase Agreement ("ICPA") with OVEC—the prospects for OVEC's integration into PJM are now highly uncertain. Moreover, one of the premises on which the Commission relied in the February 13 Order—the continued effectiveness of the ICPA—is now in doubt. Under these circumstances, the proposed Tariff changes should be rejected without prejudice to a later re-filing when the prospects for OVEC's integration into PJM are more definite. The grounds for AMP's opposition to and protest of the April 17 request are set forth in more detail below.

I. THE FES BANKRUPTCY CASTS DOUBT ON THE LIKELIHOOD OF OVEC'S INTEGRATION INTO PJM.

In the April 17 motion, OVEC and PJM state (at 1-2) that, subsequent to their first request for an extension of the effective date on February 26, "OVEC requested and PJM agreed that additional time is appropriate to ensure a smooth transition of OVEC's operations into PJM, but have not yet determined how much more time will be required." Although OVEC and PJM fail to specify the factors that caused them to conclude that additional time is "appropriate," it is easy to guess at the reason. There have been a number of important developments in recent weeks, chief among them the bankruptcy filing by FES and FES's efforts to reject certain of its power purchase obligations, including the ICPA. These developments have a direct bearing on the likelihood that the OVEC integration will occur as planned (or at all).

In more detail, on March 31, 2018, FES and a number of its affiliates filed voluntary petitions under Chapter 11 of the Federal Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Ohio.[4] Among the "first day motions" submitted in conjunction with the bankruptcy petitions was a motion ("Rejection Motion") for an order authorizing FES and FirstEnergy Generation, LLC ("FG") to reject the ICPA with OVEC as of the petition date. The Rejection Motion recites that FG is a party to the OVEC ICPA pursuant to which FES and other companies "sponsor" and purchase power generated by OVEC, and that the ICPA obligates FG to purchase 4.85% of the power that OVEC's generating plants produce until either the year 2040 or until OVEC ceases to operate. The Rejection Motion asserts that the ICPA is "extraordinarily burdensome" to FES and FG because they "are losing approximately $12 million per year, and are expected to lose $268 million over the remaining 22 years left on the OVEC ICPA."[5] FES and FG state that they have "concluded that without rejection of the OVEC ICPA the Debtors' ability to reorganize would be jeopardized and their estates would be irreparably damaged."[6]

The effort by FES and FG to reject the OVEC ICPA is vigorously contested by OVEC and the OVEC-sponsoring companies other than FES on at least two fronts. At the Commission, OVEC filed a complaint or, in the alternative, request for declaratory order on March 26, 2018 in anticipation of the FES bankruptcy filing. OVEC there asked the Commission to exercise its

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[4] *In Re: FirstEnergy Solutions Corp., et al*., Bankr. N.D.Oh. No. 18-50757.

[5] "Motion for Entry of an Order Authorizing FirstEnergy Solutions Corp. and FirstEnergy Generation, LLC to Reject a Certain Multi-Party Intercompany Power Purchase Agreement with the Ohio Valley Electric Corporation as of the Petition Date," *In Re: FirstEnergy Solutions Corp., et al*., Bankr. N.D.Oh. No. 18-50757 (Apr. 1, 2018), at 2.

[6] *Id*. at 10. In conjunction with the bankruptcy petitions, FES and FG also initiated an adversary proceeding against the Commission, seeking a declaration from the bankruptcy court that it has exclusive jurisdiction to adjudicate the request for authorization to reject the ICPA and enjoining FERC from commencing proceedings that could result in issuance of an order requiring FES/FG to continue performance under the ICPA.

exclusive jurisdiction over the ICPA and to find "that FirstEnergy's anticipated breach of the ICPA would amount to a termination of FirstEnergy's purchase obligation in violation of the filed rate doctrine and the ICPA."[7] FES answered OVEC's complaint on April 30, 2018, arguing *inter alia* that OVEC's complaint is an attempt to frustrate FES's rights under the Bankruptcy Code to secure relief from obligations that would impede FES's successful reorganization.[8] The Commission has not yet acted on OVEC's complaint.

Before the bankruptcy court, OVEC filed a "motion to withdraw reference" of the FES/FG Rejection Motion on April 2, 2018. OVEC there argues that reference of the Rejection Motion to the bankruptcy court must be withdrawn to the U.S. District Court because its resolution requires consideration of laws other than the Bankruptcy Code (specifically, the Federal Power Act). OVEC notes that the two issues raised by the Rejection Motion—whether debtors can reject executory wholesale power contracts, and the standard of review for doing so—are issues of first impression in the circuit where the bankruptcy court presented with the motion resides.[9] Those issues remain pending, with the bankruptcy court having issued on April 17, 2018 an order adjourning deadlines for responses to the Rejection Motion and stating that a new deadline will be established at a May 14, 2018 scheduling conference.

The upshot of these developments is that the FES bankruptcy proceeding and the possible rejection of the ICPA are fundamental changes in circumstances that could affect whether (and,

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[7] "Complaint or, in the Alternative, Request for Declaratory Order," *Ohio Valley Elec. Corp. v. FirstEnergy Solutions Corp*., Docket No. EL18-135-000 (Mar. 26, 2018) at 1-2.

[8] "Answer of FirstEnergy Solutions Corp.," *Ohio Valley Elec. Corp. v. FirstEnergy Solutions Corp*., Docket No. EL18-135-000 (Apr. 30, 2018) at 2.

[9] "Ohio Valley Electric Corporation's Motion to Withdraw Reference of the Motion for Entry of an Order Authorizing FirstEnergy Solutions Corp. and FirstEnergy Generation, LLC to Reject a Certain Multi-Party Intercompany Power Purchase Agreement with the Ohio Valley Electric Corporation as of the Petition Date," *In Re: FirstEnergy Solutions Corp., et al*., Bankr. N.D.Oh. No. 18-50757 (Apr. 2, 2018).

if so, when) OVEC will proceed with its plans to integrate into PJM. Among other reasons the outcome may affect OVEC's integration plans is that rejection of the ICPA could have adverse cost impacts that would render OVEC's integration no longer beneficial to PJM or its members.[10] It is questionable whether, in those circumstances, the Commission would find it just and reasonable for the integration to proceed. Therefore, until the ultimate fate of the ICPA is determined, it is uncertain that the OVEC integration into PJM actually will occur. Accordingly, the Tariff changes that would implement OVEC's integration should not be accepted until the likelihood of integration is clarified.

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[10] OVEC discussed in its March 26, 2018 complaint the manner in which rejection of the ICPA could be detrimental to PJM by causing upward pressure on market prices in PJM, as follows:

> [T]he ICPA … requires the Sponsoring Companies to pay all of OVEC's borrowing costs. As result of OVEC's construction of significant emissions' control equipment at both of its plants, as of December 31, 2017, OVEC's outstanding debt obligations were approximately $1.4 billion. FirstEnergy's 4.85% pro rata responsibility for this debt amounts to $67.9 million. However, if FirstEnergy is allowed to reject its obligations under the ICPA, OVEC and the remaining Sponsoring Companies would need to come up with some way to close the gap in OVEC's recovery of its costs, which would likely result in further increased debt and borrowing costs for OVEC's remaining Sponsoring Companies, with a disproportionately adverse effect on the costs of OVEC's power and energy to them and their customers. OVEC would be faced with a number of options, including potentially borrowing additional funds (including to refinance FirstEnergy's portion of maturities as they come due at ever-increasing borrowing costs), attempting to locate a new Sponsoring Company to replace FirstEnergy's ownership interest a discount, and/or a renegotiation of the ICPA with all Sponsoring Companies to reallocate the revenue shortfall associated with FirstEnergy's rejection of the contract. All of these options would raise and reallocate the costs of power and energy generated by the OVEC facilities. Furthermore, OVEC understands that many of OVEC's Sponsoring Companies bid their entitlement to OVEC's power and energy into nearby markets (principally, PJM). While power and energy from OVEC is currently economic to dispatch, there is no guaranty that if OVEC's costs continue to increase, this proposition will continue to remain true, may result in upward pressure on market prices in the PJM market.

"Complaint or, in the Alternative, Request for Declaratory Order," *Ohio Valley Elec. Corp. v. FirstEnergy Solutions Corp*., *supra* note 7, at 14-15.

II. BECAUSE CONTINUATION OF THE ICPA WAS A FUNDAMENTAL PREMISE OF THE COMMISSION'S ORDER APPROVING THE OVEC INTEGRATION, THE FAILURE OF THAT PREMISE WOULD RENDER THE COMMISSION'S ORDER INVALID.

The continuation in effect of the ICPA was one of the basic premises on which the Commission relied in finding the terms of the OVEC integration to be just and reasonable. This is evident from a number of specific findings made in the February 13 Order. For example, in response to protestors' concerns regarding allocation of the costs of possible future transmission upgrades to maintain reliability on OVEC's system, the Commission specifically cited the treatment of upgrade costs under the ICPA as a basis for finding the proposed terms of OVEC's integration to be just and reasonable:

> Following the integration of the OVEC transmission system into PJM, any transmission projects that are deemed necessary in the OVEC zone will be evaluated in accordance with the PJM Tariff and Operating Agreement, and the costs of any such transmission projects will be allocated pursuant to Schedule 12 of the PJM Tariff, which sets forth PJM's Commission-approved cost allocation methods. If the OVEC zone is assigned costs under Schedule 12 of the PJM Tariff, those costs will, pursuant to the OVEC Inter-Company Power Agreement, continue to be borne by the OVEC Sponsoring Companies based on their percentage ownership share of OVEC. We find that this approach is just, reasonable, and not unduly discriminatory.

February 13 Order at P 39 (footnote omitted).

Even more fundamentally, the Commission found that OVEC and PJM had satisfied the criteria set forth in the PJM Operating Agreement (§ 11.6) and the Consolidated Transmission Owners Agreement (§ 3.1), which govern the integration of transmission facilities into the PJM Region. The Commission observed that PJM's deliverability studies of the integration determined that, with the exception of a single violation that OVEC had agreed to remedy,

existing facilities are adequate to implement the integration.[11] On that basis, the February 13 Order held that "because the record before us demonstrates that the Filing Parties have complied with the requirements set forth in the Operating Agreement and the Consolidated Transmission Owners Agreement, we find that the Filing Parties' proposal is just and reasonable."[12] Importantly, one of the assumptions baked into PJM's deliverability studies was the continuation in effect of the ICPA; indeed, the December 15 filing proposed (and FERC ultimately agreed) that the ICPA would be a grandfathered agreement.[13] Furthermore, there can be little question but that termination of the ICPA would have adversely affected the results of PJM's deliverability studies. In the December 15 filing, OVEC and PJM stated:

> Under the terms of the OVEC Integration Agreement with PJM, OVEC and PJM have agreed to grandfather the terms and conditions of the ICPA to maintain the relationship, cost recovery mechanisms and operational authority that exist between OVEC and its Sponsoring Companies. *This is a critical means of maintaining OVEC's operations,* as well as the allocation of costs and power entitlements to the OVEC generation.

December 15 filing at 12 (emphasis added). Clearly, termination of the ICPA would eliminate this "critical means of maintaining OVEC's operations" and thereby negate one of the underlying premises of the Commission's determination that the OVEC integration could be accomplished consistent with the safe and reliable operation of the OVEC transmission system.[14]

Because continuation of the ICPA was one of the basic premises of PJM's integration studies and a basis for the Commission's findings regarding the justness and reasonableness of

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[11] February 13 Order at P 37.

[12] *Id.*

[13] *Id.* at P 42.

[14] *Id*. at P 37.

the integration, the failure of that premise would render the Commission's findings in the February 13 Order invalid. Because FES's efforts to reject the ICPA put continuation of that agreement very much in doubt, acceptance of the integration-related Tariff changes is no longer warranted. The Commission therefore should deny the OVEC/PJM request for an indefinite extension of the effective date for the integration-related Tariff changes and reject the proposed Tariff changes without prejudice to a later re-filing when the prospects for the OVEC integration are more definite. [15]

III. CONCLUSION

WHEREFORE, for the reasons stated herein, the Commission should deny the request by OVEC and PJM to designate an effective date of 12/31/9998 for the OVEC integration-related Tariff changes filed on December 15, 2017, and should modify its February 13 Order by rejecting the proposed Tariff changes without prejudice to a later re-filing of those changes.

Respectfully submitted,

AMERICAN MUNICIPAL POWER, INC.

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[15] Although the Commission's February 13 Order accepted the integration-related Tariff changes for filing, the Commission has the authority to modify its orders and take action on a filing at any time prior to the effective date of proposed rates. *See, e.g., PJM Interconnection, L.L.C.,* 111 FERC ¶ 61,134 at n.20 (2005) and cases cited therein.

CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission's Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated this the 8th day of May, 2018 at Washington, D.C.

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