

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PJM Interconnection, L.L.C.	:	Docket No. ER20-2100-000
The Dayton Power and Light Company	:	
	:	
The Dayton Power and Light Company	:	Docket No. ER20-1068-000

**REQUEST FOR CLARIFICATION AND MOTION TO INTERVENE OUT OF TIME
OF PJM INTERCONNECTION, L.L.C.**

PJM Interconnection, L.L.C. (“PJM”)¹ requests clarification of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) August 17, 2020 Order on Transmission Incentives² and moves to intervene out of time in Docket No. ER20-1068 pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure.

By this filing, PJM seeks clarification as to the dicta in paragraph 22 of the August 17 Order concerning the Dayton Power and Light Company’s (“Dayton”) request³ for inclusion of the Regional Transmission Organization (“RTO”) Participation Adder in its transmission rates.⁴ Specifically, the Commission’s August 17 Order accepted the RTO Participation Adder portion

¹ On June 18, 2020, in Docket No. ER20-2100-000, PJM submitted on behalf of The Dayton Power and Light Company (“Dayton”) a Motion to Supplement, a Supplement, and a Motion to Consolidate Docket No. ER20-2100-000 with Docket No. ER20-1068-000 relating to Dayton’s application to establish incentive rate treatment within its formula rates. As such, PJM is a party to the proceeding in Docket No. ER20-2100. 18 C.F.R. § 385.102.

² *PJM Interconnection, L.L.C. and The Dayton Power and Light Company*, 172 FERC ¶ 61,140 (Aug. 17, 2020) (the “August 17 Order”).

³ *The Dayton Power and Light Company*, Initial Transmission Incentives Filing, Docket No. ER20-1068-000 (Feb. 25, 2020); *PJM Interconnection, L.L.C. and The Dayton Power and Light Company*, Supplement to Initial Transmission Incentives Filing, Docket No. ER20-2100-000 (June 18, 2020).

⁴ PJM takes no position on the other rate issues that were addressed in the August 17 Order.

of the Dayton filing and suspended it subject to the outcome of a paper hearing in order to:

explore whether Dayton has shown that its participation in *PJM or another RTO is voluntary, as required for it to be entitled to the adder*, or if such participation is mandated by Ohio law.⁵

The Commission should clarify that its procedural order stating an intent to “explore” the “voluntariness” of Dayton’s participation in an RTO under Ohio law should not be construed as a holding that “voluntariness” is the sole criterion by which to judge the appropriateness of Dayton’s RTO Participation Adder request. Although the “voluntariness” issue is relevant to the analysis, the Commission should clarify that an investigation of this singular issue is not dispositive of the question of the appropriateness of the RTO Participation Adder for Dayton going forward, especially absent review of a complete record. The Commission should make clear what PJM believes to be implicit in the Commission’s August 17 Order, i.e., the Commission is keeping its options open pending the receipt of a more fulsome record and is not substituting a sole criterion analysis in the place of the “case-by-case” RTO Participation Adder eligibility analysis presently required by Order No. 679.⁶ The Commission should clarify that it has not, through a procedural order, reduced the RTO Participation Adder analysis to a sole criterion determination that turns on whether RTO membership is voluntary.

I. MOTION TO INTERVENE OUT OF TIME

As noted above, PJM is already a party to the proceeding in Docket No. ER20-2100. To the extent PJM is not also deemed a party to Docket No. ER20-1068, pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, PJM moves to intervene out-of-time in that docket. PJM has good cause for failing to timely intervene in Docket No. ER20-1068 as the

⁵ August 17 Order at P 22 (emphasis added) (citing *California Public Utilities Commission v. FERC*, 879 F. 3d 966, 979 (2018) (*CPUC v. FERC*)).

⁶ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh’g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh’g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007).

legal issue raised in the August 17 Order, which is the subject of PJM’s Request for Clarification, was not anticipated prior to the entry of that order. Moreover, PJM’s participation in the ER20-1068 docket will result in no disruption to ongoing proceedings as the next submissions required by the August 17 Order are not due until October 16, 2020 and PJM’s filing does not seek to disturb that timetable. In addition, PJM’s interest as the RTO is not presently represented by any other party in Docket No. ER20-1068. Nor will any prejudice or additional burdens result from permitting PJM to intervene, particularly since PJM’s Request for Clarification addresses a narrow question – the answer to which might clarify the ongoing proceedings for all parties. Thus, the Commission should grant PJM’s motion.

II. BACKGROUND AND ARGUMENT

The August 17 Order cites the Ninth Circuit’s decision in *CPUC v. FERC* in apparent support of a proposition that eligibility for the RTO Participation Adder *requires* RTO membership to be voluntary. This reliance is misplaced and unnecessarily constrains the Commission’s ability to analyze RTO Participation Adder eligibility based on a complete record including examination of all relevant policy issues outlined in Order No. 679.

A “voluntary” requirement has never been an express requirement for RTO Participation Adder eligibility under FPA, section 219 or Order No. 679. As the Commission recently noted, “FPA section 219(c) contains no requirement that participation in an RTO/ISO must be voluntary to merit the incentive; rather, it states the Commission shall provide for incentives.”⁷ Indeed, FPA, section 219 expressly provides that the Commission must establish incentive-based rates “for the purpose of benefitting consumers by ensuring reliability and reducing the cost of

⁷ *Notice of Proposed Rulemaking: Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 85 FR 18784-01 (Apr. 2, 2020).

delivered power by reducing transmission congestion.”⁸ And, in Order No. 679, the Commission found that the RTO Participation Adder should be granted in furtherance of this purpose to those utilities that “join *and/or continue* to be a member of an ISO, RTO, or other Commission-approved Transmission Organization.”⁹

One reading of the August 17 Order could give the impression that the Commission is significantly overreading the Ninth Circuit’s decision in *CPUC v. FERC* to mean that an inquiry into “voluntariness” is the sole dispositive issue when analyzing RTO Participation Adder eligibility. But the Ninth Circuit’s decision disturbs neither FPA, section 219 nor Order No. 679. Tellingly, the Ninth Circuit’s decision is at pains to note that the legal defect in the Commission’s determination was that the Commission “definitively resolved” the issue of Pacific Gas & Electric Company’s (“PG&E”) eligibility for the RTO Participation Adder through “summary grants.”¹⁰ The court made clear that it was reversing the Commission because these “summary grants” did not leave open *the opportunity* for parties to make a case-specific record as to the reasonableness of the RTO Participation Adder requested by PG&E. The court summarized its holding as follows:

FERC’s determination that PG&E was entitled to incentive adders for remaining in the Cal-ISO was arbitrary and capricious. FERC did not reasonably interpret Order 679 as justifying *summary grants* of adders for remaining in a transmission organization. Because its interpretation was unreasonable, FERC’s grant of adders to PG&E were an unexplained departure from longstanding policy. Moreover, FERC created a generic adder in violation of the Order.¹¹

⁸ FPA, § 219(a).

⁹ Order No. 679, 116 FERC ¶ 61,057 at P 326 (emphasis added).

¹⁰ *CPUC*, 879 F.3d at 973, 979.

¹¹ *Id.* (emphasis added).

The court also noted that Order No. 679 committed FERC to a “*case-by-case review of incentive adders* even for utilities that have demonstrated ongoing membership in transmission organizations.”¹² The court criticized the Commission for having ignored its statement in Order No. 679 that the adder must be addressed on a case-by-case basis and approved “when justified.” Moreover, the court clarified that its ruling was limited in scope¹³ and did not disturb the Commission’s ability to look at other factors when deciding the appropriateness of the RTO Participation Adder, one of which relates to the voluntariness of the utility’s actions (although the court stopped short of elevating voluntariness to the position of a sole dispositive criterion). As the court noted when referring to Order No. 679, there were a number of factors that Order No. 679 indicated were relevant to the application of the RTO Participation Adder with no one factor being dispositive:

The orders did not make ongoing membership in a transmission organization the sole criterion for an incentive adder, and the orders did not preclude challenges based on the voluntariness of a utility’s membership in a transmission organization.¹⁴

In subsequent proceedings, the Commission itself has recognized the limited scope of the Ninth Circuit’s decision,¹⁵ and framed its mandate on remand as requiring it to “inquire into PG&E’s specific circumstances, i.e., whether it could unilaterally leave [CAISO] and thus whether an incentive adder could induce it to remain in [CAISO].”¹⁶ The Commission ultimately affirmed its earlier award of the RTO Participation Adder to PG&E based on a more fulsome record and case-specific analysis. Although state law issues were reached on remand,

¹² *Id.* at 974.

¹³ *Id.* at 980.

¹⁴ *Id.* at 975.

¹⁵ *PG&E*, 164 FERC ¶ 61,121, at P 24 (2018)

¹⁶ *PG&E*, 168 FERC ¶ 61,038, at P 1 (2019) (alterations in original).

the Commission's remand order stops far short of holding that there is a dispositive requirement of voluntary RTO membership for RTO Participation Adder eligibility.¹⁷

III. REQUEST FOR CLARIFICATION

It is against this backdrop that the Commission issued the August 17 Order relating to Dayton's specific request for the RTO Participation Adder. That August 17 Order requests additional briefs to "explore" issues relating to the interaction between Ohio law and Dayton's choices relative to remaining in an RTO. PJM seeks clarification that the Commission was not intending for the largely procedural August 17 Order to hold for the first time that a "voluntariness" determination is the sole criterion by which to judge the appropriateness of Dayton's request for the RTO Participation Adder. Consistent with the authority discussed above, the Commission should clarify that although the "voluntariness" of membership in PJM or another RTO under Ohio law may be *relevant* to the case-by-case analysis of whether the RTO Participation Adder should be awarded to Dayton, resolution of this narrow issue should not be dispositive of Dayton's eligibility for the RTO Participation Adder going forward, especially absent the development of a complete record. The Commission should engage in an analysis of all factors probative of the appropriateness of the RTO Participation Adder in this case.

Absent the requested clarification, the August 17 Order runs the risk of turning a routine procedural order that sets a paper hearing into a precedential ruling that "voluntariness" is the *sole criterion* for RTO Participation Adder eligibility. The Commission should clarify that the

¹⁷ *PG&E*, 168 FERC ¶ 61,038 (2019), *reh'g denied*, 170 FERC ¶ 61,194, at PP 14-15 nn. 30 & 34 (2020) (*PG&E*) ("whether a utility's membership in a transmission organization is voluntary or not is a relevant consideration when determining whether a utility is eligible for the RTO-Participation Incentive" but not holding that it is the exclusive or dispositive factor (*citing CPUC v. FERC*, 879 F.3d at 974-75)).

RTO Participation Adder is not governed by a “sole criterion” framework,¹⁸ as such an outcome would upend the long-established standard for assessing RTO Participation Adder eligibility on a case-by-case basis. Moreover, such a ruling in this docket would effectively prejudge (if not reverse) the RTO Participation Adder provisions of Order No. 679, and some might argue that it may have potential implications for the Commission’s pending transmission rate incentives rulemaking in Docket No. RM20-10. The Commission should clarify that in seeking to further “explore” the specifics of Ohio law, it intends for its review to also entail consideration of all factors that have already been and may be added to the record in this proceeding (as well as the record in Order No. 679) as to the appropriateness of the application of the RTO Participation Adder to Dayton in this proceeding.

IV. COMMUNICATIONS

Correspondence and communications with respect to this filing should be sent to, and the parties request the Secretary to include on the official service list in Docket No. ER20-1068, the following:

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¹⁸ See *Id.* at 973-975 (declining to defer to what the court construed as a “sole criterion for an incentive adder”).

V. CONCLUSION

For the reasons discussed herein, PJM respectfully requests that the Commission grant PJM's limited request for clarification prior to commencing the paper hearing procedures and its motion to intervene out of time in Docket No. ER20-1068.

Date: September 16, 2020

Respectfully submitted,

By: /s/ Mark J. Stanisz

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on those parties on the official Service List compiled by the Secretary in these proceedings.

Dated at Audubon, Pennsylvania this 16th day of September, 2020.

/s/ Mark J. Stanisz

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