

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) Case No. 12-1230-EL-SSO
Edison Company for Authority to Provide for)
a Standard Service Offer Pursuant to R.C. §)
4928.143 in the Form of an Electric Security)
Plan)

**THE FIRSTENERGY OHIO UTILITIES’
MEMORANDUM CONTRA THE JOINT MOTION TO BIFURCATE ISSUES AND
REPLY TO MOVANTS’ MEMORANDA CONTRA THE MOTION FOR WAIVERS**

The Joint Movants’¹ Motion to Bifurcate Issues and the two Memoranda Contra Motion for Waivers² seek to relitigate previously approved provisions that were thoroughly considered by the parties and the Commission -- and which led to unquestionably successful results for customers -- while jeopardizing new provisions that the Joint Movants, too, recognize will further benefit customers. In fact, the Joint Movants “encourage the Commission to address expeditiously”³ the Signatory Parties’ new proposal that the Companies⁴ bid eligible demand response and energy efficiency resources into PJM’s fast-approaching May 7, 2012 Base Residual Auction for the 2015/2016 Planning Year (the “BRA”). However, those benefits can only be realized if the Signatory Parties’ Stipulation seeking to continue the Companies’ electric

¹ The “Joint Movants” shall refer collectively to the Environmental Law and Policy Center, the Natural Resources Defense Council, the Northeast Ohio Public Energy Council, the Northwest Ohio Aggregation Coalition, and the Office of the Ohio Consumers’ Counsel.

² The Joint Movants’ Motion to Bifurcate also included a Memorandum Contra the Motion for Waivers. A separate Memorandum Contra Motion for Waivers was filed by Direct Energy Services, LLC, Direct Energy Business, LLC, and IGS Energy, Inc. (the “CRES Movants”). The Joint Movants and the CRES Movants will be referred to collectively herein as the “Movants.”

³ Joint Motion, p. 3.

⁴ The “Companies” shall refer collectively to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

security plan (the “Stipulated ESP”) is approved as a whole. The parties and the Commission are well-positioned to review and approve the Stipulated ESP on the expedited basis necessary to allow for the Companies to bid demand response resources into the BRA because of the thorough record developed in the Companies’ previous MRO and ESP proceedings in Case Nos. 09-906-EL-SSO and 10-388-EL-SSO, respectively (collectively, the “2010 ESP”). The Companies have asked the Commission to incorporate the record associated with the 2010 ESP because the Stipulated ESP simply seeks to continue the terms and conditions of the 2010 ESP, with few new provisions. There is no good reason to jeopardize the Companies’ participation in the BRA and the benefits that process will bring to customers.

II. ARGUMENT

A. Bifurcation Is Impossible Because The Companies Need An Approved ESP To Secure The Commitments They Propose To Bid Into The BRA.

The Joint Movants’ only rationale for seeking to allow their favorite part of the Stipulated ESP to move forward, bifurcated from the rest of the Stipulated ESP, is that the Companies have “not demonstrated that the Commission’s rules require a modification to the existing ESP in order to bid [into the BRA]” -- although they would support a waiver if the Rules did.⁵ However, the Joint Movants’ misapprehend Ohio law in suggesting that the Commission could order the extension of the generation-related tariffs outside of an approved ESP. As a factual predicate, the BRA will occur in May 2012, and will cover the June 1, 2015 through May 31, 2016 time period. To bid in that auction, the Companies must have eligible generation-related resources available to them for that June 1, 2015 and May 31, 2016 time frame; yet, the Companies’ current 2010 ESP ends May 31, 2014. **The Companies do not own the generation resources and would not have the necessary interruptible load to bid into the BRA unless and until**

⁵ Joint Motion, p. 4.

the Stipulated ESP, which would provide that interruptible load through certain of its tariffs, for the 2015-2016 period is approved. Without an approved ESP, the Companies would not be in a position to secure the committed resources available to bid into the auction.

Pursuant to the regulatory framework adopted by the General Assembly in Senate Bill 221 (“S.B. 221”), a utility’s provision of generation service must be through either a Market Rate Offer (“MRO”) pursuant to R.C. § 4928.142 or an ESP pursuant to R.C. § 4928.143. No other option is available to either the utility or the Commission. Hence, Joint Movants’ argument that the tariffs that provide for the interruptible load could simply be extended, without being part of the overall ESP, is contrary to law. No provision of S.B. 221 would allow for the Companies to provide generation service outside the mandated framework of either an ESP or an MRO. In fact, in order to approve an ESP, the Commission must consider *all the terms and conditions* of the ESP.⁶ The statute is clear that the ESP must be viewed by the Commission as a package and that the Commission must reach a determination that the ESP is more favorable than a MRO. The Commission cannot disassemble the Stipulated ESP at the request of a party and carve out a single tariff for consideration separate and apart from the remainder of the plan. Doing so, as suggested by the Joint Movants, would preclude the Commission from fulfilling its statutory obligation under SB 221. As a result, the Stipulated ESP’s beneficial provisions for bidding into the BRA cannot be severed from the Commission’s approval of the Stipulated ESP. The Stipulated ESP must be considered as package, found to be more favorable than a MRO, and approved as a whole in order to allow for the Companies to bid any resources into the BRA.

As demonstrated above, the Joint Movants’ suggestion that the Commission’s rules could be waived is simply inapplicable. The Commission’s Rules do not require a waiver for the Companies to provide the benefits associated with bidding the resources in the BRA. Rather,

⁶ R.C. § 4928.143(C)(1).

Ohio law requires an approved ESP (or an MRO) in order for the Companies to offer generation related tariffs, such as those proposed in the Stipulated ESP. Such a statutory requirement cannot be waived by the Commission.

Moreover, as with any stipulation, the Stipulated ESP represents **a package of negotiated terms and compromises** between the Signatory Parties. The Joint Movants' request to approve one term and then to consider (and perhaps challenge) later the other terms would prejudice the Signatory Parties and eliminate the benefits of their bargain. In addition, such a piecemeal review is wholly inconsistent with the settlement process. Indeed, the Commission's standard of review recognizes that stipulations must be assessed "as a package."⁷ The Signatory Parties have arrived at a balanced set of terms and conditions -- the vast majority of which were approved as a package in the Companies' 2010 ESP proceeding -- that benefit customers and further the Signatory Parties' diverse interests. Without the review and consideration of the Stipulated ESP as a whole, it would fall apart and none of the benefits provided by the package of terms would be available for customers. The Joint Movants' Motion to Bifurcate Issues should be denied.⁸

⁷ See *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associated Tariff Approval*, Case No. 11-2641-EL-RDR *et al.*, Opinion and Order (May 25, 2011) at p. 9; *see also Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561 (1994); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) at p. 20.

⁸ The Joint Movants also suggest that the Stipulated ESP provides "an additional \$90 million" to the Companies in exchange for the BRA provision. See Joint Motion, p. 5. First, the Stipulated ESP says no such thing; rather, Rider DCR and the BRA provision represent two of many provisions of the Stipulated ESP Package. Further, Rider DCR would not provide the Companies with "an additional \$90 million." Instead, the Stipulated ESP would continue the current Rider DCR and the current \$15 million annual increase in the cap amount and continue to be subject to annual review and audit. See Stipulation, Section B.2.

B. There Is No Good Reason To Jeopardize The Stipulated ESP's Benefits By Denying The Companies' Request For Waivers.

The Joint Movants' and the CRES Movants' opposition to the Companies' Motion for Waivers would impose unnecessary and immaterial barriers to the expeditious review of the Stipulated ESP. The Stipulated ESP seeks to continue the successful terms and conditions of the Companies' 2010 ESP for another two years at a time when wholesale energy prices are low. The parties to the Companies' 2010 ESP (including the Joint Movants and certain of the CRES Movants) and the Commission thoroughly reviewed and considered those terms and conditions, as set forth in the extensive record evidence and testimony, before determining that the package, as a whole, benefited customers. The Companies have asked the Commission to incorporate the record from the 2010 ESP as the foundation for approving the Stipulated ESP and the Movants provide no basis on which to question the validity (or thoroughness) of that record. (Nor could they given that they participated in creating it.⁹) Not only would the Movants' request involve an unnecessary and inefficient draw on the parties' and the Commission's resources to reconsider the same terms, conditions, and policy/customer implications that were only recently approved, but the delay associated with such an unnecessary re-hashing would, as set forth above, prevent customers from realizing the new and significant benefits offered by the Signatory Parties through the BRA provision. Although the Movants vaguely assert that circumstances and markets "have changed," including reference to the merger involving the Companies' parent company (which had no impact on the structure or functioning of the Companies), they provide no argument about exactly what such circumstances and markets might be and why any changes require denying the benefits that an expedited review of the Stipulated ESP would bring. Despite

⁹ While one of the three CRES Movants, IGS Energy, Inc. ("IGS"), was not a party to the 2010 ESP proceeding, many CRES providers were and were strongly represented during the process. The CRES Movants provide no basis on which to suggest that IGS has any separate or unique interest that warrants re-litigation of all of the issues resolved through the thorough 2010 ESP proceeding, and it does not.

the Movants' suggestion otherwise, the Companies have not disclaimed the need for a hearing or other requirements, such as newspaper notice. Rather, the Companies' Motion for Waivers merely requests that those requirements be established through the record for the 2010 ESP and an expedited hearing process, so as to enable the Companies to participate in the BRA. The Companies' Motion for Waivers should be granted.

III. CONCLUSION

For the foregoing reasons, the Companies request that the Commission deny the Joint Motion to Bifurcate Issues and grant the Companies' Motion for Waiver of Rules to allow the benefits of the Stipulated ESP to be realized.

Respectfully submitted,

/s/ James W. Burk

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *The FirstEnergy Ohio Utilities' Memorandum Contra the Joint Motion to Bifurcate Issues and Reply to Movants' Memoranda Contra the Motion for Waivers* was served this 18th day of April, 2012, via e-mail upon the parties below.

/s/ Laura C. McBride

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Summary: Memorandum Contra the Joint Movants' Motion to Bifurcate & Reply to Movants' Memoranda Contra the Motion for Waivers electronically filed by Ms. Laura C. McBride on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company