

FILE

13

RECEIVED-DOCKETING DIV
2007 SEP -6 AM 11:19

PUCO

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and Toledo Edison.)
Company for Approval of a Competitive)
Bidding Process for Standard Service Offer)
Electric Generation Supply, Accounting)
Modifications Associated with Reconciliation)
Mechanisms and Phase In, and Tariffs for)
Generation Service.)

Case No. 07-796-EL-ATA
Case No. 07-797-EL-AAM

**COMMENTS
OF OHIO PARTNERS FOR AFFORDABLE ENERGY**

I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned dockets, respectfully submits these comments in accordance with the Entry issued by the Public Utilities Commission of Ohio ("Commission") on August 16, 2007. These dockets concern applications filed by Ohio Edison Company, The Cleveland Electric Illuminating Company and Toledo Edison Company ("Companies") for approval of a competitive bidding process designed to procure generation supply beginning January 1, 2009, for the provision of standard service offer electric generation to the Companies' retail customers who do not purchase electric generation service from a competitive supplier. The Commission's Entry invited interested persons to file comments and propose alternative methodologies to the competitive bidding process described in the applications.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
Technician _____ Date Processed 9-6-07

II. Competitive markets for electric generation have not developed; therefore, there is no real-world basis for the assumption that a competitive bid process will produce a just and reasonable market-based standard service offer to satisfy the requirements of R.C. §4928.14(A).

The Companies' application quotes R.C. §4928.14(B), which states that at the election of the electric distribution utility, and approval of the Commission, the competitive bidding option may be used as the market-based standard service offer required by R.C. §4928.14(A). The application states that the Companies elect to use the competitive bid option as their market-based standard service offer under R.C. §4928.14(A). Application at 7.

The Commission should not approve the Companies' election. The Commission has the duty to determine whether the competitive bid option meets the requirements of R.C. §4928.14(A) for the standard service offer. The Commission is under no obligation to approve the competitive bid to serve as the standard service offer under R.C. §4928.14(A). A distribution utility can elect to propose what it wants. The Commission is responsible for determining if the proposal meets statutory requirements resulting in just and reasonable rates.

There is good reason why the Commission should reject the Companies' election. Wholesale and retail markets for electric generation have not developed in the manner assumed by Ohio's electric restructuring legislation, which includes R.C. §4928.14(A) and (B). The rate stabilization plans approved by the Commission for each electric utility are proof that the markets have simply not developed. Current electric markets, both wholesale and retail, are highly concentrated or dysfunctional. An auction for generation supply that occurs in a highly concentrated or dysfunctional market will

not establish a just and reasonable market-based standard service offer. (See Attachment.) R.C. §4928.14(A) requires a standard service offer filed under R.C. §4909.18, which, in turn, requires just and reasonable rates. The most likely result of any auction in a dysfunctional wholesale market is a price far higher than one would expect if the market were functioning properly. Therefore, the auction will most likely result in rates that are not just and reasonable.

The Companies contend that customers will be provided with rate options such as time-of-day and seasonal rates, that will send proper price signals, encourage conservation and further public policy. The Companies fail to provide any evidence that these measures will result in any meaningful mitigation of the inevitable excessive price resulting from the lack of a functional market. The Companies have not demonstrated that the combinations of auctions and rate options will provide just and reasonable rates, an existing statutory requirement. R.C. §§4909.18 and 4928.14(A).

This is obvious from the fact that the Companies also propose a phase-in of rates for residential customers in 2009. The applications provide that, in the event that the rate increase from the bidding process would increase average residential rates by more than 15%, the Companies would defer purchased power expense to reduce the rate increase to 15% with a maximum deferral of \$150 million and recovery through a non-bypassable rider paid by all distribution customers. Application at 32. In fact, there is no cost-based justification for rates to rise at all when the impact of transition costs is imputed to the generation assets. The projected increase in rates will be pure profit for the parent holding company. That is a clear demonstration that no functional markets exist.

It is also not clear that the Companies' proposal for the recovery of these deferrals is lawful, given the Supreme Court's decision in *Elyria Foundry v. Pub. Util. Comm.*, 2007-Ohio-4164 (August 29, 2007). In that case, the Court found that the Commission violated R.C. §4928.02(G) when it gave the Companies authority to collect deferred increased fuel costs through future distribution rate cases. Although this proposal involves a rider rather than a distribution rate case, the Court based its decision on the simple fact that generation charges may not be applied to distribution rates. The Court's reasoning would apply to any non-bypassable rider recovering generation charges from all distribution customers. Therefore, there is little chance of success for the Companies' efforts to mitigate the probable severe consequences of the use of the competitive bid to serve as the standard service offer.

The Companies also contend that the competitive bid process is designed to encourage a large number of bidders. Likewise, the Companies contend that the distribution utility is neutral as it neither makes nor loses money on the provision of the generation service. The application states that affiliates of the Companies may participate as bidders in the solicitations and win the right to provide standard service offer supply as part of the competitive bidding process. Application at 13. Affiliates may bid to supply up to 75% of volume.

The Companies' affiliates are clearly destined to be the principal bidders at the auction and the probable winners of 75% of the volume. One reason for this obvious outcome is that competitive markets have failed to develop for wholesale generation supply. Moreover, transmission constraints continue to hinder the development of competitive markets.

The Commission has the authority to oversee regional transmission organization ("RTO") selections by Ohio utilities, but has left it to individual utilities to select their RTO membership. The RTO selections made by Ohio's utilities merely divide Ohio and do not favor price and service quality. While the Companies emphasize features, such as the multiple solicitations, designed to mitigate wholesale market volatility and encourage bidders, in reality, given the transmission constraints and RTO selections, the Companies' affiliates have overwhelming market power in the provision of generation service in the Companies' certified distribution services areas.

Clearly, the Companies' own affiliates will bid to supply generation service, perhaps up to the 75% limit. In this way, the auction is nothing more than a method by which the Companies' affiliates will maximize profits at customers' expense. If the Companies' affiliates see an increase in profits of more than 15%, will the overage be deferred for a future credit with interest to ratepayers? In spite of their contention, it is unlikely that the Companies are neutral to the profits earned by their affiliates.

Given the failure of competitive markets to develop, the General Assembly may eventually eliminate the use of market-based pricing to establish prices for generation standard service. In the real world today, generation service is not competitive; the statute declaring otherwise is mistaken. Competitive markets may be the ultimate economic goal, but public policy dictates that those markets actually function. Nothing in Ohio's electric restructuring laws requires the purchase of generation in a dysfunctional market. Based on all available evidence, generation service should be classified as a non-competitive service so that market-based pricing does not apply. R.C. §4928.14, which calls for a market-based standard service offer, should be

repealed; and, the standard service offer for generation should be established in an R.C. §§4909.18 and 4909.19 proceeding.

Any new legislation addressing the failure of markets to develop should also forbid participation in RTOs unless the Commission finds the participation in the best interests of customers. Utilities should be required to demonstrate that the benefits derived by consumers exceed the costs associated with their RTO selections.

While Ohio awaits new legislation to recognize the obvious failure of electric generation markets to develop and the need for a return to price regulation of all aspects of the provision of electric service, the Commission has statutory authority to address the current market failure. The standard service offer under R.C. §4928.14(A) must be approved by the Commission and must be just and reasonable pursuant to R.C. §4909.18.

Given the Commission's responsibility to assure that the R.C. §4928.14(A) standard service offer is just and reasonable pursuant to R.C. §4909.18, it is unlawful for the Commission to approve a process whereby the results of the bid process will be approved merely on the basis that the bidding process was consistent with the Commission-approved process. The application proposes that within one business day after the conclusion of each solicitation, the auction manager will submit a report to the Commission which will provide information necessary to enable the Commission to determine whether the results were consistent with the Commission-approved bidding process. Application at 12. The Commission would then have two business days following the close of bidding for each solicitation to accept the solicitation results for all products as being consistent with the Commission-approved process. Id.

Ohio law requires more of the Commission than merely approving the auction process. The Commission must recognize its authority to require just and reasonable rates for the R.C. §4928.14(A) standard service offer pursuant to R.C. §4909.18. The Commission cannot allow for a process that accepts the auction results as the standard service offer under R.C. §4928.14(A) merely on the basis that the auction process was consistent with the Commission's bid process orders. The results of the auction must also be just and reasonable pursuant to R.C. §4909.18; otherwise, the Commission cannot approve the auction results as the standard service offer pursuant to R.C. §4928.14(A).

Given the failure of competitive markets to develop, it is unlikely that the competitive bid process will result in a just and reasonable generation standard service offer pursuant to R.C. §4928.14(A). While the competitive bid process will continue to serve as one alternative available to customers, it is not appropriate or lawful at this stage in the development of markets to allow the competitive bid to serve as the standard service offer under R.C. §4928.14(A).

III. The competitive bid process should be designed to produce the best results possible for residential and small commercial customers.

The Companies' application presents various alternatives for the competitive bidding process. Even with the failure of the competitive market for generation to develop, the competitive bid process should result in one alternative available to customers for generation supply. Therefore, the competitive bid process should be

designed to produce the best results possible for residential and small commercial customers.

The Companies seek a Commission order by November 1, 2007 approving one of two alternatives for the solicitation. Under the first alternative, suppliers will bid for each load class, residential, small general service and large general service, separately. The second alternative uses a "slice of system" approach under which bidders will bid on tranches of total customer load. Application at 3.

It is likely that bids by customer class would be favorable. Given the differences in usage and in rate design among the various classes, bidding by customer class might attract more and better offers. It would also insure that residential customers no longer subsidize large customers.

The Companies also propose rate designs and tariffs based solely on kWh charges with no demand charges and no declining block rates. According to the application, this rate design is to align the way the Companies acquire power with how retail customers are charged for it. Application at 4. The Companies state that their power supply expenses will be incurred on a per megawatt hour basis. The application also claims that the elimination of declining block rates is consistent with public policy. Application at 9.

The proposal here is for a radical change in rate design for all customer classes. Such changes should be viewed in context of the improbability of a suitable overall result from the auction process. In addition, the auction process is not the forum in which to analyze such radical rate design issues. The Companies stated at the technical conference held on August 16, 2007 at the Commission that the rate design

proposals were meant to track similar proposals made in the Companies' pending distribution rate increase cases. The timeline for the distribution rate cases is not now advanced, and it cannot be determined when the Commission's decision on these issues will be made. Therefore, the winning bids should be made to accommodate the existing tariff structures until a Commission decision on the merits of the new rate design proposals is made.

With respect to Cleveland Electric Illuminating Company's ("CEI") special contract customers remaining after January 1, 2009, the Companies propose to recover 50% of the difference between the standard service offer generation charge and the generation portion of the special contract rate through a non-bypassable charge paid by all other CEI customers via a separate rider.

This proposal is unlawful pursuant to the Supreme Court's decision in *Elyria Foundry v. Pub. Util. Comm.*, 2007-Ohio-4164 (August 29, 2007), in which the Court stated that the Commission violated R.C. §4928.02(G) when it gave the Companies authority to collect deferred increased fuel costs through future distribution rate cases. Although this proposal involves a rider rather than a distribution rate case, the Court based its decision on the simple fact that generation charges may not be applied to distribution rates. The Court's reasoning would apply to any non-bypassable rider recovering generation charges applied to all distribution customers. Moreover, the proposed recovery of this shortfall from all other CEI customers through a non-bypassable rider demonstrates the extent to which the Companies as distribution utilities are not actually neutral with regard to the provision of generation service by their affiliates. The distribution utilities are using their monopoly status to recover costs that

should be borne exclusively by generation providers, specifically, of course, their affiliates. The Companies are, in effect, proposing to use their monopoly power to tax customers in order to provide benefits for those with special contracts.

Wherefore, OPAE respectfully requests that the Commission defer consideration of these applications pending legislative action to address the failure of wholesale and retail markets for electric generation to develop in the manner assumed by Ohio's current electric restructuring law. In the alternative, OPAE respectfully requests the Commission to recognize its statutory responsibility pursuant to R.C. §4909.18 to assure just and reasonable standard service generation under R.C. §4928.14(A). Given the Commission's statutory responsibility to approve only just and reasonable standard service offer rates pursuant to R.C. §4928.14(A), the Commission cannot reasonably approve the proposal whereby the competitive bid option will serve as the standard service offer pursuant to R.C. §4928.14(A). While the competitive bid process may be used to provide one alternative available to customers for their generation supply, the Commission must find that markets have not developed sufficiently to allow the competitive bid option to serve as the standard service offer under R.C. §4928.14(A).

Respectfully submitted,



Colleen L. Mooney
David C. Rinebolt
Ohio Partners for Affordable Energy
1431 Mulford Road
Columbus, OH 43212
Telephone: (614) 488-5739
FAX: (419) 425-8862
e-mail: cmooney2@columbus.rr.com
drinebolt@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served by U.S. Mail upon the persons identified below on this 5th day of September, 2007.


David C. Rinebolt, Esq.

Ann M. Hotz
Office of the Ohio Consumers'
Counsel
10 West Broad St., Suite 1800
Columbus, Ohio 43215

Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour & Pease
52 East Gay Street
Columbus, Ohio 43215

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 E. Seventh Street, Se. 1510
Cincinnati, Ohio 45202

Rick C. Giannantonio
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291

Trent A. Dougherty
Ohio Environmental Counsel
1207 Grandview Avenue, Se. 201
Columbus, Ohio 43212

Duane W. Luckey
Chief, Public Utilities Section
Office of Attorney General
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793

James W. Burk
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308

Samuel C. Randazzo
Lisa G. McAlister
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215

Carl Word
Utility Workers Union of America
10103 Live Oak Avenue
Cherry Valley, CA 02223

Glenn Krassen
Brickler & Eckler LLP
1375 East Ninth Street, Se. 1500
Cleveland, Ohio 44115

Sheilah H. McAdams
Counsel for City of Maumee
Marsh & McAdams
204 West Wayne Street
Maumee, Ohio 43537

Richard L. Sites
Ohio Hospital Association
155 East Broad St. 15th Floor
Columbus, Ohio 43215-3620

Robert N. Fronck
Local 270, UWUA, AFL-CIO
4205 Chester Avenue
Cleveland, Ohio 44103

Joseph M. Clark
Samuel C. Randazzo
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215

Marvin I. Resnik
American Electric Power Service
Corp.
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215

William M. Ondrey Gruber
2714 Leighton Road
Shaker Heights, Ohio 44120

Brian J. Ballenger
Counsel for Village of Northwood
Ballenger & Moore
3401 Woodville Road, Suite C
Northwood, Ohio 43618

Dance M. Keiffer
Counsel for Lucas County
Commissioners
11 Adams Street, 2nd Floor
Toledo, OH 43624-1680

James E. Moan
Counsel for City of Sylvania
1930 Holland-Sylvania Road
Sylvania, Ohio 43560

Joseph P. Meissner
Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, Ohio 44113

Brian S. Goldberg
Counsel for Village of Oregon
6800 West Central Avenue
Toledo, Ohio 43617-1135

Paul Skaff
Counsel for Village of Holland
Leatherman, Witzler, Dombey
353 Elm Street
Perrysburg, Ohio 43551

Peter D. Gwyn
Counsel for Village of Perrysburg
110 West Second Street
Perrysburg, Ohio 43551

Stephen L. Huntoon
FPL Energy Power Marketing, Inc.
801 Pennsylvania Ave, N.W
Suite 220
Washington, D.C. 20004

Attachment A

- 2006 State of the Market Report, prepared by the PJM Market Monitoring Unit (March 8, 2007) -- available at <http://www.pjm.org>;
- 2006 Assessment of the Electricity Markets in New England, prepared by ISO-New England's Independent Market Monitoring Unit (June 2007) – available at <http://www.ISO-NE.com>;
- 2006 State of the Market Report, Midwest ISO, presentation prepared by the MISO Independent Market Monitor (May, 2007) -- available at <http://www.midwestiso.org>;
- Monthly Metrics Report for SPP Energy Imbalance Services (EIS) Market, April 2007, prepared by the SPP Market Monitoring Unit (May 18, 2007) -- available at <http://www.spp.org>;