

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 08-936-EL-SSO
Illuminating Company and The Toledo)	
Edison Company for Approval of a)	
Market Rate Offer to Conduct a)	
Competitive Bidding Process for Standard)	
Service Offer Electric Generation Supply,)	
Accounting Modifications Associated)	
with Reconciliation Mechanism, and)	
Tariffs for Generation Service.)	

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**INITIAL POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, CITIZEN POWER,
LUCAS COUNTY, THE CITY OF TOLEDO, AND THE NORTHWEST OHIO
AGGREGATION COALITION**

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I. INTRODUCTION

On July 31, 2008, Ohio Edison Company, the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("FirstEnergy EDUs" or the "Companies") filed an application ("Application") to request approval of their proposed market-rate offer ("MRO") proposal. The MRO -- with the separate electric security plan ("ESP") that the Companies filed on the same day¹ -- are the Companies' first filings under Ohio's new energy legislation ("S.B. 221"). Any hope under the new law for the Companies' consumers to find relief from the FirstEnergy EDUs' high electricity rates would not be fulfilled by this Application, and the Public Utilities Commission of Ohio ("Commission" or "PUCO") should not approve the Companies' MRO proposal as filed.

¹ *In re FirstEnergy ESP*, Case No. 08-935-EL-SSO, Application (July 31, 2008).

The Application is not designed to provide the Companies' retail customers the lowest possible standard service offer ("SSO") rates. Unfortunately, the Companies appear to have less interest in designing an effective competitive procurement process than in designing one with deficiencies. The proposed MRO is one that the FirstEnergy EDUs do not recommend to provide generation service on January 1, 2009. Instead they favor an ESP based on a sole source arrangement with FirstEnergy Solutions, the Companies' affiliate, at high rates.

II. STATEMENT OF LAW

Ohio's recently enacted legislation regarding the regulation of electric utilities, S.B. 221, altered R.C. Chapter 4928. SB. 221 contains numerous "start up" provisions regarding the treatment of utilities' initial applications that are submitted for the PUCO's determination of the SSO that customers will pay beginning on January 1, 2009.

Pursuant to R.C. 4928.141, the utility's SSO may be established "in accordance with section 4928.142 or 4928.143 of the Revised Code."² The Companies' Application in this proceeding depends upon R.C. 4928.142 that addresses setting the SSO according to a "market-rate offer" ("MRO").³

R.C. 4928.142(B) provides that "the Commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing [R.C. 4928.142] requirements." One set of requirements are located in R.C. 4928.142(A), which sets out requirements on such matters as fairness, transparency, product clarity, a

² R.C. 4928.141(A).

³ Id.

standardized bid evaluation process, and the use of an independent third party to design and administer the bidding. R.C. 4928.142(A) also provides for compliance with Commission rules that support and reinforce Ohio policy for the electric industry.

R.C. 4928.142(B) provides a second set of requirements. These state that the “electric distribution utility or its transmission service affiliate [must] belong[] to at least one regional transmission organization [“RTO”] that has been approved by the federal energy regulatory commission,” the RTO “has a market-monitor function and the ability to take action to identify and mitigate market power,” and a “published source of information is available publicly or through subscription that identifie[s] pricing information for traded electricity on- and off-peak energy products.”

At the conclusion of a MRO proceeding, according to the provisions of S.B. 221, the Commission must determine whether an applicant-utility has satisfied the requirements stated in R.C. 4928.142. If the requirements are not met:

[T]he commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission’s satisfaction; otherwise, the electric distribution utility shall withdraw he application.

The MRO proposed by the FirstEnergy EDUs is flawed. To protect Ohio consumers, the Commission’s order in this case should direct the Companies to correct the deficiencies in their proposal.

III. ARGUMENT

A. Additional Programs Should be Introduced to Increase Load Responsiveness to Prices.

- 1. Service to the Companies' customers should encourage demand responsiveness by including demand components in large customer rates.**

The Commission should direct the Companies to adjust their MRO so that bidders will not raise their offers. Demand components are charges that take into consideration the large load for generation or heavy burden large customers place upon a generation system at a single point or points in time. As stated by OCC Witness Gonzalez:

The Companies proposal eliminates the principal, existing source of responsiveness to differences in demands that is needed going forward to reduce the bid price: demand components in generation rates for large customers.⁴

Such demand components should be re-introduced before any bidding takes place in order to more fully reflect the cost of generation in rates and to reduce the price likely to be bid in the proposed auctions.

The FirstEnergy EDUs propose to align a proposed manner of procuring power with a greatly revamped generation rate structure that is based entirely on energy charges.

FirstEnergy's proposal focuses on its generation procurement situation, but fails to recognize the important cost differences between customers whose demand profiles differ. The existing tariffs, from which FirstEnergy proposes to depart, recognize these differences by including demand charges for large customers.⁵

The FirstEnergy EDUs fail to recognize the important cost differences between customers whose demand profiles differ because of the convenience to the Companies

⁴ OCC Ex. 1 at 5 (Gonzalez).

⁵ Id.

presented by energy-only rates. The elimination of non-optional demand charges from all generation tariffs will encourage an inefficient demand for, and use of, generation resources. This weakness in the generation tariffs will be recognized by bidders, and will result in higher bids.

In future auctions, the Commission should consider directing the Companies to move towards mandatory real time pricing for large customers, rather than demand charges, as the preferred pricing mechanism. Unfortunately, the advanced metering infrastructure (“AMI”) needed to facilitate real time pricing for large customers is not yet prevalent in areas served by the FirstEnergy EDUs and would need to be in place first. The Commission should take steps towards having the FirstEnergy EDUs proceed in this direction.

2. The Commission should direct the utilities to include interruptible service.

Interruptible service is service that EDUs can discontinue providing to customers in either emergency or economic response situations. Interruptible provisions for the supply of generation services could be important for the efficient and economic provision of such services to customers. The Companies’ MRO proposal should be modified regarding interruptible service in order to reduce the procurement costs for customers served by the FirstEnergy EDUs.

A well-designed load response program could provide benefits as part of the MRO process by reducing the demand that bidders would be asked to meet. Credits for interruptible customers, once an effective interruptible service program is developed, should be paid by all the customers who are combined with the interruptible customers for bidding purposes.

An interruptible load program is promising for purposes of reducing electricity prices for all customers. The Commission should direct the Companies to address this deficiency in the MRO proposal.

B. The Commission Should Provide for Public Review and Maintain Continuing Oversight.

A compounding factor to the Companies' poor design of its MRO plan is the proposal for continuation of that poor MRO design over multiple iterations of the bidding procedure with little or no Commission oversight. Commission oversight of bidding procedures should continue, and is especially important for a new procedure for the Companies and for the State of Ohio. This serious flaw in the Companies' proposal should be rejected in favor of procedures that support continuing Commission oversight. That oversight should include opportunities for interested stakeholders to participate in the process and propose improvements to the Companies' procurement and pricing procedures.

An important deficiency in the Companies' proposal for continuing the procurement and pricing procedures over time is an insufficient plan for comment and review regarding future development of SSO rates. OCC Witness Gonzalez testified:

I agree that the bidding report should be filed immediately in the first year and required, at a minimum, within thirty days of the completion of all bids in subsequent years. The application, however, leaves out any mention of a public review and comment process for interested parties affected by the outcome of the bid.⁶

Commission supervision of EDU generation procurement and pricing procedures remains important after moving to a MRO process.

⁶ OCC Ex. 1 at 8 (Gonzalez).

OCC Witness Gonzalez recommended more specificity regarding the review process for any new procurement and pricing process:

The Commission should hold a general review of the bidding process, at a minimum, once in each of the first three years of competitive bidding. These reports should be submitted with sufficient time to make any needed changes to the process before the MISO [i.e. Midwest Independent System Operator] planning period begins. Such a process would be consistent with the requirement for a detailed CBP [i.e. Competitive Bidding Proposal] report proposed in Case No. 08-777-EL-ORD. Fifteen days, as the Companies propose, would not be sufficient time to allow for review and implementation of any needed changes.⁷

“Going to market” by means of an MRO does not mean that the EDUs responsible for procuring generation services have been deregulated. Commission oversight continues regarding procurement, rate design, and other MRO matters that are regulated under R.C. 4928.142. This sound policy is reflected in the Commission’s recently approved rules regarding a detailed CBP report (i.e. rules referred to by OCC Witness Gonzalez).

Rate design issues will remain important under the Companies’ proposal and under alternative procurement procedures. A new procurement process should especially be subject to Commission review, and stakeholders should be provided an opportunity to contribute their insights into the changes needed over time.

C. The Procedure for Conducting the Bid Should be Modified.

R.C. 4928.142(A) requires “oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that . . . criteria . . . are met.”

The FirstEnergy EDUs arranged for a witness from the Brattle Group for this proceeding

⁷ Id. (citations omitted). The testimony cited to Proposed Ohio Adm. Code 4901:1-35-11(D). On September 17, 2008, the Commission approved new rules that adopted proposed rule 4901:1-35-11(D) with an addition requirement. Pending Ohio Adm. Code 4901:1-35-11(D)(5) adds: “The annual [CBP] report shall describe the operation to date of any time-differentiated and dynamic rate designs implemented under the CBP, the approaches used to communicate price and usage information to consumers, and observed price elasticity.” The addition further supports the policy recommendation of OCC Witness Gonzalez.

regarding the Companies' MRO.⁸ That witness, FirstEnergy Witness Reitzes, stated that he started his work for the FirstEnergy EDUs around early July 2008.⁹ The proposed procurement strategy, however, is basically the same as that proposed by the FirstEnergy EDUs one year ago in Case No. 07-796-EL-ATA. In response to questioning, FirstEnergy Witness Warvell discussed the Companies' design of their MRO plan without any reference to the involvement of Mr. Reitzes or the Brattle Group.¹⁰ Mr. Reitzes does not appear to have designed the current solicitation plan.

A change in the Companies' MRO compared with their bidding proposal in 2007 is the elimination of an alternative for competitive bidding by major customer classes.¹¹ Bidding by class is preferable to the "slice of system" proposed as the only alternative in the instant MRO Application. Bidding by two classes offers the potential to tailor bidding according to the characteristics of customers. The Companies' large customers are served using meters that register demand, and their tariffs include demand charges. The loads for these demand-metered customers should be combined and bid out together.

D. The Cost of Special Discounts Should Not be Borne by Other Customers.

The Companies' propose to force customers who have not received discounts to pay subsidies for customers for whom the Companies agreed to provide discounts. The Company's proposal fails to establish a *market-based* standard service generation offer for CEI's special contract customers. The Companies' MRO proposal would instead

⁸ FirstEnergy Ex. 3 (Reitzes).

⁹ Tr. Vol. I at 27 (September 16, 2008) (Reitzes).

¹⁰ Id. at 109-111 (Warvell).

¹¹ FirstEnergy Ex. 4 at 12, ¶24 (Application); Tr. Vol. I at 119-111 (September 16, 2008) (Warvell).

require subsidies funded through an unavoidable Rider CRT that would recover “delta revenue” -- the difference in revenue between the amounts collected under the special contract price and the MRO price -- from CEI customers.¹²

The FirstEnergy EDUs, not customers, should be responsible for the delta revenues. As stated by OCC Witness Gonzalez:

The situation faced by the Companies -- discounted generation rates without ownership of generation assets -- was one of their own making when they permitted the assets to be transferred to FirstEnergy Solutions without the transfer of responsibility for the discounted rates.¹³

The Companies propose to charge residential consumers for the cost of special contract rates for large customers. The proposed charges violate the Supreme Court’s decision in *Elyria Foundry and Ohio Consumers’ Counsel*.¹⁴ In addition the special rates are preferential and discriminatory, in violation of R.C. 4905.33 and 4905.35.

The subsidy for special contracts is inconsistent with a competitive scheme to procure generation resources, and violates R.C. 4928.02(H) and 4928.07, as well as 4905.33 and 4905.35.

E. The Terms of the Master SSO Supply Agreement Should be Adjusted.

1. Assurances regarding changes in RTO requirements should reflect “net” changes.

The Companies’ MRO proposal does not recognize that RTO requirements have been changing as these organizations have developed. The proposed Master SSO Supply

¹² “CRT2,” would recover the revenue variance associated with CEI special contract customers remaining after December 31, 2008. FirstEnergy Ex. 4, Exhibit C (Application).

¹³ OCC Ex. 1 at 10 (Gonzalez).

¹⁴ *Id.*

Agreement provides that “the SSO Supplier will be solely responsible for payment of all charges due to MISO currently and as may be amended from time to time by MISO . . .

.”¹⁵ FirstEnergy Witness Warvell recognized that MISO’s requirements were changing.¹⁶

The Companies’ plan, therefore, discourages bidder involvement by not protecting against new MISO and other regulatory charges that are net additions to those charges in effect at the time of the solicitation. A change in the procedure should result in reduced costs for customers by reducing the risk premium built into bids.

The Commission should state that “net” changes in MISO and regulatory charges will be met outside the bidding. Such changes could reduce costs as well as increase costs, so the change in the Companies’ proposal could also directly protect customers. The substitution of requirements that do not change MISO or other charges should not, however, be confused with additional requirements. MISO requirements may change over the period of the Master SSO Supply Agreement, but only changes in costs on a net basis should be the subject of recognition as part of a Commission-ordered adjustment to the Master SSO Supply Agreement.

2. The master SSO supply agreement should not place all the risk of forecasting and supply on suppliers who must compete against the incumbent supplier, FirstEnergy Solutions.

The Master SSO Supply Agreement, proposed by FirstEnergy, is not fair to all potential bidders and will not encourage vigorous participation by a wide range of bidders. The agreement and the bidding process place all the risk of forecasting and supply on suppliers who are not the Companies’ affiliate supplier. The FirstEnergy

¹⁵ FirstEnergy Ex. 4, Exhibit F at 18 (MSA portion of Application).

¹⁶ Tr. Vol. I at 85 (September 16, 2008) (Warvell).

EDU's affiliate supplier has been supplying the standard service offer customers in the Companies' service territory for years and will have an unfair advantage in the bidding process.

This unfair advantage resulting from differing access to information is contrary to R.C. 4928.02(H) and 4928.17, which require that an EDU's affiliates not have unfair advantages. Therefore, the Master SSO Supply Agreement should not be approved by the Commission as proposed by the Companies. Instead, the PUCO should require the Companies to provide all bidders the same information that its affiliate supplier, FirstEnergy Solutions, has gained through its supply of generation service to the service territory.

F. Increased Oversight Should be Applied to Circumstances Under Which a Winning Bidder Fails to Provide Service.

The Commission should specify what the FirstEnergy EDUs must do to obtain replacement tranches in case of a default contingency in order to ensure that such generation is obtained at the lowest possible price. Under those default circumstances, the Companies should not have unfettered discretion to determine the means by which they will obtain the replacement tranches.

The Companies' Application contains a proposal for circumstances in which a winning bidder standard service offer supplier repudiates the Master SSO Supply Agreement before the standard service offer supply period or defaults during the standard service offer supply period.¹⁷ The FirstEnergy EDU's plan provides for contingency

¹⁷ FirstEnergy Ex. 4 at ¶68 (Application).

decisions “at the Companies’ option.”¹⁸ The Companies state that they *may* offer the generation supply “in the next solicitation for that product, offer[] to the other SSO Suppliers, bid out as quickly as commercially possible or procure[] [the supply] in MISO-administered markets.”¹⁹ The contingency plan should be supervised by the Commission, and should not be left to the Companies’ discretion.²⁰

In the best of circumstances, the Commission should require the FirstEnergy EDUs to attempt to fill the defaulted tranches through a competitive bid. If the FirstEnergy EDUs must replace power from the defaulted tranches before they can obtain supplies through a competitive bid, they should obtain such supplies on an interim basis. Initially, the FirstEnergy EDUs should ask the remaining MRO suppliers if they are willing to supply the power at the same rate as they are charging for their current tranches. If not, the Companies should determine if they are able to obtain (through affiliates or otherwise) power at less than MISO-administered markets zonal spot prices until supplies can be obtained from a competitive bid. If none of the suppliers are willing to provide supply in the interim, the FirstEnergy EDUs should obtain interim supplies through the MISO-administered markets at zonal spot prices. The Companies should either obtain approval of their plan for obtaining replacement power from the Commission before or, if that is not feasible, they should be subject to a prudence review

¹⁸ Id. at ¶70 (Application).

¹⁹ Id.

²⁰ The testimony of FirstEnergy Witness Warvell conflicts with the procedure stated in the Application. FirstEnergy Ex. 1 at 14 (Warvell). In re-direct testimony, Mr. Warvell stated that the Companies would “submit t the process of going to the winning bidders to supply those tranches first at the product supply price. Then moving forward to developing a procurement option process . . . supplying power through MISO spot marketing.” Tr. Vol. 1 at 129 (Warvell) (September 16, 2008). Mr. Warvell stated that he believed he was authorized to state the Companies’ position. Id. at 137.

afterwards. In either event, the mechanism should be determined by the Commission and not the FirstEnergy EDU's.

G. Net-Meterers Should Be Credited With The Entire Bundled Transmission and Generation Service Rate Unless FirstEnergy Is Willing To Unbundle the Charge for Net-Meterers. Moreover, Net-Meterers Contributions to the System Should Be Subject to the Proposed Reconciliation Rider.

Net-metering is a meter system that allows a generation-owning customer to meter, on a net basis, both the generation that the customer takes from the distribution system and generation the customer contributes to the distribution system. Because EDUs must allow for net-meterers on their systems and must credit net-meterers with the excess generation they contribute to the system,²¹ any bundling of non-generation charges with generation charges must be addressed in crediting net-meterers for their contributions to the system. Either the FirstEnergy EDUs must create a means whereby the transmission charges are separated out of the bids (that include transmission charges), or they must credit net-meterers with the full bundled service.

As stated above, the Companies should develop a reconciliation adjustment that makes bidders or customers whole in case unexpected charges or credits are applied to transmission services, such as new RTO charges or credits. Correspondingly, the Companies should also apply that reconciliation adjustment to the credits given net-meterers for their contributions to the distribution system. The Commission should direct the Companies to address this issue.

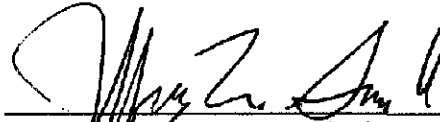
²¹ R.C. 4928.67.

IV. CONCLUSION

The Commission should find that the Companies' have failed to meet the requirements stated in R.C. 4928.142. Pursuant to R.C. 4928.142(B), the Commission should direct the FirstEnergy EDUs to improve their MRO by ordering the modifications described in this Initial Post-Hearing Brief.

Respectfully submitted,

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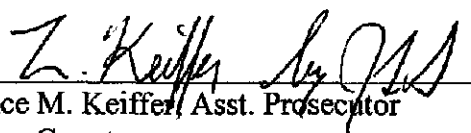


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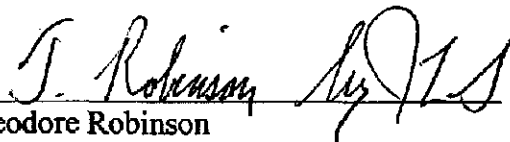
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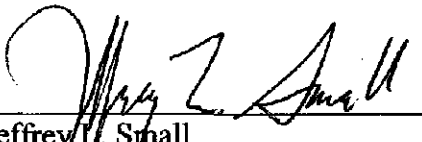
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