

NC
FILE

11

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of
Praxair, Inc.,

Complainant,

v.

The Cleveland Electric Illuminating Company,

Respondent.

Case No. 09- 88 -EL-CSS

COMPLAINT

PUCO

RECEIVED-DOCKETING DIV
2009 FEB -5 AM 10:06

SERVICE COMPLAINT AND REQUEST FOR RELIEF

I. STATEMENT OF FACTS

- A. Praxair, Inc. ("Praxair") is engaged in the business of manufacturing industrial gases such as oxygen, nitrogen and argon used by large and small businesses,¹ which provide goods and services to the public. Praxair requires substantial amounts of electricity to operate its air separation facility in Ashtabula, Ohio ("Praxair Facility"). The cost of electricity is the largest single cost incurred by the Praxair Facility. The Praxair Facility obtains its electric supply from The Cleveland Electric Illuminating Company ("CEI") and has been a customer of CEI for many years.

¹ The gases produced by the Praxair Facility are used by steel manufacturers, steel processors, automotive companies, chemical producers, food processors, hospitals, energy producers and other sectors of the economy in and around Ohio.

{C27260:}

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 And Date Processed 2/5/09

- B. Because the cost of electricity is such a large percentage of the total costs of operating an air separation plant such as the Praxair Facility and because of the nature of electricity use by an air separation facility, the electricity demand of an air separation plant is often used by electric utilities, with the customer's consent, to improve the utility's system load factor, achieve power production or purchase efficiencies and maintain reliability. In the more recent age of regional transmission organizations ("RTOs"), nonfirm or interruptible customers can also make significant contributions in cost-effectively meeting resource adequacy obligations.
- C. On, before and since December 31, 2008, the Praxair Facility was both a firm and nonfirm customer of CEI.
- D. CEI is, among other things, an "electric light company", "electric distribution utility", "electric utility" and an "electric supplier" as defined by Section 4928.01(A), Revised Code, and is a public utility subject to the regulatory and supervisory jurisdiction of the Commission.
- E. The Praxair Facility's current service relationship with CEI was established pursuant to a "reasonable arrangement" approved by the Public Utilities Commission of Ohio ("PUCO or "Commission") in Case No. 96-1403-EL-AEC.² This reasonable arrangement addresses the prices and service terms and

² The Commission issued an Opinion and Order approving the reasonable arrangement on November 6, 1997. Through Section 4928.34(A)(6), Revised Code, the General Assembly established a transitional rate cap for customers with reasonable arrangements for the term of the arrangement. During the Market Development Period, the unbundled rates subject to this rate cap formed the basis for the standard service offer ("SSO"). Section 4928.35(D), Revised Code.

conditions for both the firm and nonfirm service components.³ Through a mutual and bilateral written amendment dated November 12, 2004, the term of this reasonable arrangement was extended by Praxair and CEI so that it would continue for so long as CEI collected regulatory transition charges ("RTC"). Praxair's reasonable arrangement remains in force since CEI is continuing to collect RTCs.

- F. On December 22, 2008, CEI filed a notice pursuant to Section 4928.143(C)(2)(a), Revised Code, withdrawing and terminating an application for approval of an Electric Security Plan ("ESP") filed in PUCO Case No. 08-935-EL-SSO.
- G. The Commission has issued entries and orders in Case No. 08-935-EL-SSO as a result of CEI withdrawing and terminating its proposed ESP. Among other things, the Commission has determined that upon such withdrawal and termination, the most recent SSO and rate schedules (including their provisions, terms and conditions) continue until a subsequent SSO is authorized by the Commission in accordance with Section 4928.142, Revised Code or Section 4928.143, Revised Code.⁴

³ For example, Section 6 of the reasonable arrangement specifies the conditions that permit CEI to interrupt service to Praxair.

⁴ See *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 Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Finding and Order (January 7, 2009) and Entry (January 14, 2009). Prior to the Commission issuing its January 7, 2009 Finding and Order in Case No. 08-935-EL-SSO, parties to the proceeding advised the Commission that CEI and its affiliated electric distribution utilities ("EDU") had altered and were altering existing service relationships in ways that negatively affected the price and availability of their service. These parties asked the Commission to proactively prevent CEI and its affiliates from altering pricing and service quality. In the January 7, 2009 Finding and Order in Case No. 08-935-EL-SSO, the Commission indicated that customers may file complaints for the purpose of seeking relief from unjust, unreasonable and unlawful actions taken by CEI.

- H. By letter dated December 23, 2008 and received shortly after Christmas on December 27, 2008, CEI notified the Praxair Facility that CEI would, effective January 1, 2009, unilaterally alter its economic curtailment practices and significantly increase the frequency and duration of interruptions and the Praxair Facility's cost of "replacement electricity".⁵ These changes imposed unilaterally on the Praxair Facility by CEI have subjected Praxair to full curtailment of the interruptible portion of its service arrangement with CEI for almost all hours since January 1, 2009. CEI has also advised the Praxair Facility that CEI's replacement electricity prices will range between 6.5¢ and 6.7¢ per kWh. CEI's dramatic increases in the frequency and duration of interruptions and its price for replacement electricity work in combination to substantially increase the Praxair Facility's weighted average electric price per kWh and, accordingly, the total electricity bill.
- I. CEI has neither sought nor obtained the Commission's approval to modify the Praxair Facility's reasonable arrangement referenced herein. As previously noted, that reasonable arrangement limits CEI's ability to interrupt service to Praxair based on a specified set of conditions. The Commission-approved arrangement for the Praxair Facility also imposes on CEI an affirmative obligation to "... use its best efforts to obtain the lowest cost Replacement Electricity, excluding that obtained for Firm Electric Service Customers, at the time an Interruption Condition occurs."

⁵ As discussed below, "replacement electricity" is the supply of electricity that may be available to a nonfirm customer during the period of an interruption. Each EDU has an obligation to make replacement electricity available pursuant to the performance expectations established by the Commission, applicable provisions in reasonable arrangements as well as applicable provisions in the tariff on file with the Commission.

- J. CEI's unilateral modifications to the Praxair Facility's reasonable arrangement were initiated with essentially no notice. Since January 1, 2009, CEI has confiscated the benefits of the Praxair Facility's reasonable arrangement and deprived the Praxair Facility of its rights under such arrangement.

II. STATEMENT OF LAW

- A. Section 4905.22, Revised Code, obligates every public utility to furnish necessary and adequate service and facilities and requires each public utility to furnish and provide such instrumentalities and facilities as are adequate and, in all respects, just and reasonable. It requires that all charges demanded for any service rendered be just and reasonable and not more than the charges allowed by law or by order of the Commission. It also prohibits any utility from demanding or imposing any charge that is unreasonable or unjust.
- B. Section 4905.32, Revised Code, states that "[n]o public utility shall charge, demand, extract, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." As indicated above, a determination of the rate schedule that is in effect requires application of Section 4928.143(C)(2)(a), Revised Code, in the present context.
- C. The United States Supreme Court has held, in what has become known as the Sierra-Mobile doctrine, that only those rates that are consistent with a public utility's contract are lawful. See *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 111-13, 79 S.Ct. 194, 199-200, 3 L.Ed.2d 153

(1958); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353, 76 S.Ct. 368, 371, 100 L.Ed. 388 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 343-44, 76 S.Ct. 373, 380, 100 L.Ed. 373 (1956).

- D. Section 4905.26, Revised Code, provides the Commission with the power to remedy unreasonable or unlawful rates, regulations, practices and inadequate service provided by a public utility. Section 4928.16, Revised Code, makes it clear that the scope of the Commission's jurisdiction under Section 4905.26, Revised Code, extends to issues related to compliance with Chapter 4928, Revised Code. Section 4933.83(B), Revised Code, also provides the Commission with the ability to address service that is or will be inadequate.

III. UNREASONABLE, UNJUST AND UNLAWFUL ACTIONS

- A. CEI's curtailment or interruption of the Praxair Facility since January 1, 2009 is unreasonable, unjust and unlawful. Since January 5, 2009, CEI has unilaterally subjected the Praxair Facility's nonfirm service component to interruption twenty-four hours per day. CEI's actions conflict with the plain language of the Commission-approved reasonable arrangement between CEI and the Praxair Facility. As noted above, Sections 6.1(a), (b) and (c) of the reasonable arrangement between the Praxair Facility and CEI specify the conditions when CEI may interrupt the Praxair Facility's nonfirm service. For example, if CEI's base generation capacity and planned system purchases are sufficient to meet CEI's total capacity needs, the Praxair Facility is not subject to interruption. In addition to violating the terms of the Commission-approved arrangement, CEI's actions also conflict with the requirements of Section 4928.143(C)(2)(a), Revised

Code, which maintain the most recent SSO and rate schedules (including their provisions, terms and conditions) until a subsequent SSO is authorized by the Commission in accordance with Section 4928.142, Revised Code or Section 4928.143, Revised Code. Accordingly, any attempt by CEI to bill or collect for electric service on a basis other than permitted by such reasonable arrangement is unreasonable and unlawful.

- B. Separate and apart from the unreasonableness and unlawfulness of CEI's increases in the frequency and duration of interruptions of the Praxair Facility, CEI's administration of the nonfirm service component in such arrangement has been since January 1, 2009 and continues to be unreasonable, unjust and unlawful. The Praxair Facility's Commission-approved reasonable arrangement obligates CEI to use its best efforts to procure the lowest cost replacement electricity during periods when CEI is permitted to interrupt the Praxair Facility's electricity supply. Similarly, CEI's tariff on file with the Commission (and specifically CEI's Rider No. 11) obligates CEI to use its best efforts to procure the lowest cost replacement electricity during periods when CEI is permitted to interrupt the Praxair Facility's electricity supply. Instead of complying with the requirement of the Praxair Facility's reasonable arrangement (and the very similar requirement in CEI's Rider No. 11), CEI violated its "best efforts" and "least cost" obligation to the Praxair Facility.⁶ CEI's administration of its nonfirm

⁶ While it is beyond the direct scope of this complaint, CEI's treatment of Praxair and perhaps its other interruptible customers may have also affected the prices that CEI is demanding from its firm service customers effective January 1, 2009. Rather than using the interruptible portion of its customers' requirements to, in effect, improve the purchased power load factor for its firm service requirements, CEI appears to have bundled the firm and nonfirm service requirements in its recent supply procurement efforts.

service relationships was also conducted in ways to intentionally deprive customers of the information that customers must have on a timely basis to successfully and safely operate their businesses. The totality of CEI's conduct is unconscionable and a flagrant assault on the objectives set forth in Section 4928.02, Revised Code. Accordingly, any attempt by CEI to bill and collect for interruptible service in accordance with its unconscionable administration of its nonfirm service relationship with the Praxair Facility is unreasonable, unjust and unlawful.

IV. RELIEF REQUESTED

Based on the foregoing statement of facts and law, Praxair urges the Commission to:

- A. Find that CEI's intentional disregard of its obligations pursuant to the reasonable arrangement approved by the Commission in Case No. 96-1403-EL-AEC is unreasonable, unjust and unlawful and that any attempt by CEI to charge, demand, extract, receive, or collect for electric service on a basis other than permitted by such reasonable arrangement is unreasonable, unjust and unlawful;
- B. Find that CEI's administration, since January 1, 2009, of the nonfirm component in such arrangement is unreasonable, unjust and unlawful and that any attempt by CEI to charge, demand, extract, receive, or collect for electric service based on such administration is unreasonable, unjust and unlawful;
- C. Direct CEI to immediately cease and desist from violating the Praxair Facility's reasonable arrangement, CEI's tariff and specifically Rider No. 11, Section

4928.143 (C)(2)(a), Revised Code, and the interruptible buy-through performance expectations adopted by the Commission;

- D. Direct CEI, pending the resolution of this complaint, to only charge, demand, extract, receive, or collect for electric service in accordance with the Praxair Facility's Commission-approved reasonable arrangement;
- E. Effective for service rendered on or after the billing period commencing on or about January 1, 2009 and pending the resolution of this complaint, direct CEI to bill the Praxair Facility for Replacement Electricity at times and rates consistent with the Commission-approved reasonable arrangement and the provisions, terms and conditions applicable to the Praxair Facility;
- F. Impose forfeitures on CEI in the maximum amount permitted by law;
- G. Direct CEI to compensate the Praxair Facility for all costs incurred to prepare and prosecute this complaint and find that such costs shall not be a recoverable expense for ratemaking purposes;
- H. Appoint an attorney examiner who shall be responsible for resolving quickly the issues raised by this complaint through an alternative dispute resolution process,⁷ and,

⁷ In Case No. 95-866-EL-UNC, the Commission adopted performance expectations for utilities related to interruptible buy-through ("IBT") electric service. Based on the Commission's guidelines, utilities are expected to establish a complaint procedure for issues concerning the implementation of IBT service. By letter dated January 14, 2009, the Praxair Facility notified CEI of Praxair's objections to CEI's unilateral modifications of the Praxair Facility's reasonable arrangement. CEI has not acknowledged the Praxair Facility's complaint. The Commission's IBT performance expectations also included the establishment of an alternative dispute resolution procedure to address complaints regarding implementation of IBT service. *In the Matter of Interruptible Electric Service Guidelines*, Case No. 95-866-EL-UNC, Finding and Order at 11 (December 22, 1998).

- I. Find that Praxair has stated reasonable grounds to support its complaint and establish a process by which the issues raised in such complaint shall be resolved as promptly as possible.

Respectfully submitted,

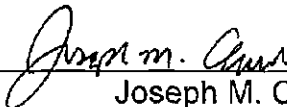
Handwritten signature of Samuel C. Randazzo in cursive script.

Samuel C. Randazzo, Esq.
McNEES, WALLACE & NURICK
Fifth Third Center
21 East State Street, Suite 1700
Columbus, OH 43215-4228
(614) 719-2840 (T)
(614) 469-4653 (Fax)
sam@mwncmh.com

Attorney for Praxair, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Service Complaint and Request for Relief* was served upon the following individuals this 5th day of February 2009, via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.



Joseph M. Clark

James W. Burk, Counsel of Record
Arthur Korkosz, Senior Attorney
Mark A. Hayden, Attorney
Ebony L. Miller, Attorney
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

The Honorable Alan Schriber
Chairman
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215