

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Proposed)
Modifications to the Electric Distribution) Case No. 23-781-EL-UNC
Utilities' Standard Service Offer)
Procurement Auctions.)

**REPLY COMMENTS FOR CONSUMER PROTECTION
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Staff of the Public Utilities Commission of Ohio (“PUCO”) has proposed that electric distribution utilities (AEP, AES, Duke, and FirstEnergy) modify their auctions that set the prices Ohioans pay for the utilities’ standard service offers. Ohioans rely on a functioning competitive market to deliver lower prices for their electricity that is generated by power plants.

Given certain unusual developments in the multi-state electricity market, the PUCO Staff proposes that the retail capacity cost component of generation (for the Ohio standard offer auctions) be priced at a proxy rate. The proxy rate would be used for the years where the PJM capacity price has not been established.¹

Under this unusual situation of lacking a PJM capacity price, the PUCO should adopt its Staff’s proposal for using a properly-designed and implemented proxy capacity rate (cost). The proposal would protect consumers by facilitating the continuity of the

¹ *In the Matter of the Proposed Modifications to the Electric Distribution Utilities’ Standard Service Offer Procurement Auctions*, Case No. 23-781-EL-UNC, July 26, 2023 Entry at 3, Attachment A at 2-3.

Ohio standard-offer auctions that many consumers rely upon for their electric generation service and as a price-to-compare when considering marketer offers.

However, the PUCO should reject its Staff’s recommendation that the proxy price be set by the electric utilities and their independent auction administrators. The PUCO should instead direct the proxy price to be set for all utilities as the average of the last two PJM base residual auctions. This approach would be consistent with the approaches taken in Pennsylvania and New Jersey, as indicated in the Staff Report.

Further, the PUCO should expand its review of the standard service offer auction procedure. The PUCO should implement a *residential-only* standard service offer auction, to protect residential consumers from higher prices resulting from the usage characteristics of non-residential customer classes.²

The PUCO should reject proposals by marketer Interstate Gas Supply, LLC (“IGS”), which proposed that the PUCO decline to adopt the proxy capacity process or, alternatively, that the PUCO provide marketers with the ability to true-up unknown capacity costs with a pass-through (true-up) provision for their “fixed” price products.

II. REPLY COMMENTS

OCC supports the goal of encouraging the efficient and effective operation of the standard offer markets. Use of a proxy price for the capacity part of the standard offer would help further that goal. Electric utilities AEP Ohio, AES Ohio, Duke, and FirstEnergy support using a proxy rate for capacity,³ as does electric marketer

² OCC Comments at 4-5 (August 25, 2023).

³ See August 25, 2023 Initial Comments of Duke Energy Ohio, Inc.; Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (“FirstEnergy”); SSO Auction Comments of Ohio Power Company (“AEP Ohio”); and Comments of AES Ohio.

Constellation.⁴ But the PUCO should not allow the electric utilities and the auction administrators to establish their own proxy rates. Instead, the PUCO should set an industry-wide proxy price such as the average of the last two PJM base residual auctions.

The Retail Energy Supply Association (“RESA”) states that it does not oppose the concept of a proxy price, but it argues that the PUCO should allow electric marketers to offer “fixed” price contracts that can be adjusted once the capacity price becomes known.⁵ IGS opposes the PUCO Staff’s recommendation to set a proxy price.⁶ The PUCO should reject RESA’s and IGS’s proposals because they would violate the “fixed-means-fixed” guidelines established by the PUCO.⁷

A. The PUCO should not allow marketers to sell products containing a future capacity adjustment as “fixed” products, because that would violate Ohio law and the PUCO’s rules to the detriment of consumers.

R.C. 4928.10 mandates that the PUCO adopt rules specifying minimum service requirements “for the protection of consumers in this state.” These requirements include “a prohibition against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of such a competitive retail electric service and in the administration of any contract for service....”⁸ Ohio law further mandates that the PUCO’s rules include consumer protections. Those mandated protections include ensuring that consumers are provided with a document containing “adequate, accurate and *understandable pricing and*

⁴ See Initial Comments of Constellation Energy Generation, LLC (August 25, 2023).

⁵ RESA Initial Comments (August 25, 2023), at 4, 6.

⁶ IGS Initial Comments (August 25, 2023).

⁷ *In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Service Market*, Case No. 14-568-EL-COI, Finding and Order (November 18, 2015).

⁸ R.C. 4928.10.

terms and conditions of service...before the consumer enters into the contract for service.”⁹

Accordingly, the PUCO developed rules. The rules prohibit marketers from engaging “in unfair, misleading, deceptive, or unconscionable acts or practices related to ... (1) [m]arketing, solicitation, or sale of a CRES. (2) [a]dministration of contracts for CRES. (3) [p]rovision of CRES including interactions with consumers.”¹⁰

RESA’s and IGS’s proposed capacity price adjustment clause on fixed price contracts would violate the PUCO’s rules. That includes violating O.A.C. 4901:1-21-05(A)(1) and 4901:1-21-05(C)(8)(c).

Under the PUCO’s rules, a marketer “that offers retail electric generation service to residential or small commercial customers shall provide, in marketing materials that include or accompany a service contract, sufficient information for customers to make intelligent cost comparisons against offers they receive from other CRES providers.”¹¹ To achieve this goal, the PUCO’s rules require that the offers include at a minimum “[f]or fixed-rate offers, the cost per kilowatt hour for generation service and, if applicable, transmission service.”¹² There are similar requirements for a marketer’s contract with residential and small commercial customers.¹³ Moreover, the rules specifically state that it is unfair, misleading,

⁹ R.C. 4928.10(A)(1) (emphasis added).

¹⁰ O.A.C. 4901:1-21-03(A).

¹¹ O.A.C. 4901:1-21-05(A).

¹² O.A.C. 4901:1-21-05(A)(1).

¹³ O.A.C. 4901:1-21-12(B)(7)(a). OCC notes that a capacity proxy “pass-through clause in “fixed rates” contracts violate this provision of the Code and, thus, violate Ohio Adm. Code 4901:1-21-03(A).

deceptive, or unconscionable for a marketer to advertise or market a fixed price “without disclosing the cost per kilowatt hour and all recurring and nonrecurring charges.”¹⁴

RESA’s and IGS’s proposals for future capacity price adjustments for “fixed-price” contracts would allow the passing on (to consumers) of not-yet-determined variable costs and allow failing to state the amount of these charges. That is in violation of the PUCO’s rules.

A future capacity price adjustment on “fixed-price” marketer contract would be unfair, misleading, deceptive and unconscionable to residential consumers. Marketers are prohibited from claiming “a specific price advantage, savings, or guarantee exists if it does not.”¹⁵ The word “fixed” is defined by the Merriam Webster Dictionary as “not subject to change or fluctuation.” And the term “guaranteed” is defined to mean “an assurance for the fulfillment of a condition.” Thus, by marketing to consumers a “fixed-rate” contract for electric generation, the marketer is “assuring” or “guaranteeing” that the customer’s rate will not change or fluctuate from the “fixed-rate” per kWh rate stated in the advertisement and contract. This would clearly be the commonly understood and accepted understanding of a residential consumer offered a “fixed-rate” contract.

To allow a marketer to then surprise the consumer – with additional charges for undetermined capacity prices – would be unfair, misleading, deceptive, and unconscionable. If a marketer is going to label a product as “fixed,” it cannot change during the term of the agreement.

¹⁴ O.A.C. 4901:1--21-05(C)(8)(c).

¹⁵ O.A.C. 4901:1-21-05(C)(8)(a).

Indeed, it would be unreasonable to expect residential consumers to understand a future capacity price adjustment clause in a so-called “fixed-price” contract.¹⁶ Likewise, residential consumers may have difficulty understanding “pass-through” provisions such as future capacity price adjustments and the cost components that can trigger additional charges. Thus, the PUCO should reject RESA’s and IGS’s proposals for future capacity price adjustments for marketers.

B. The PUCO Staff’s proposal – for the proxy rate to be set by the utilities and their auction administrators – should be rejected, as it is inconsistent with the proxy rate approach used in other PJM states and unfair to Ohio consumers.

As noted, OCC, AEP Ohio, AES Ohio, Duke, FirstEnergy, and Constellation all support the PUCO Staff’s recommendation to use a proxy price for capacity in years where the actual capacity price has not been established. That approach should protect consumers.

However, the PUCO Staff’s recommendation, for electric utilities to set their own proxy rates with their auction administrators, should be rejected. Lack of uniformity on the proxy price set for capacity would be confusing for consumers and is not consistent with other approaches adopted in other jurisdictions using a proxy capacity price.

Rather, there should be statewide consistency under PUCO control when choosing a capacity proxy rate. Specifically, the PUCO should direct the proxy price to be set as the average of the last two PJM base residual auctions.

As noted by the PUCO Staff, New Jersey and Pennsylvania have successfully used a uniform proxy price approach. The State of Maryland has also successfully

¹⁶ The Ohio Consumer Sales Practices Act provides additional meaning as to the term “unconscionable”. Under Ohio’s Consumer Sales Practices Act (“CSPA”), R.C. 1345.03(B)(1), it is an “unconscionable” act or practice for a supplier to, among other things, take advantage of the customer’s “inability to understand the language of an agreement.”

adopted a proxy price for capacity charges for years in which the capacity price has not yet been established.

In early 2020, the Maryland investor-owned utilities requested that the Staff of the Public Service Commission of Maryland convene a supplemental Procurement Improvement Process. The request was to address uncertainty in capacity prices as a result of delays created by the Federal Energy Regulatory Commission (“FERC”).¹⁷ Four options to address capacity price uncertainty were considered:

1. Do Nothing;
2. Where it is practical to do so, move the dates of SOS auctions after the PJM BRA that provides price transparency for the full term of the SOS contracts;
3. Use a “proxy price” for the time period in the SOS contracts that lack price transparency at the time of the SOS auctions. Wholesale SOS suppliers would receive (or pay) a true up to the actual price once it is known; or
4. Transfer the capacity obligation from the wholesale suppliers to the utilities during the contract periods in which price is unknown at the time of the SOS auctions, essentially obligating the utilities to purchase the capacity through some other means.¹⁸

Option 3, the “proxy price,” became the consensus choice of all of the participants.

Participants were the utilities, governmental agencies including the State of Maryland Office of People’s Counsel, wholesale suppliers, and retail market participants.¹⁹

The Maryland Staff noted that New Jersey had calculated its proxy price by having all the electric distribution companies use the average of the last two auction years multiplied by a factor of 0.9. The parties recommended that Maryland adopt a uniform

¹⁷ *Report on the 2019-2020 Supplemental Procurement Improvement Process*, Case Nos. 9064, 9065, Maryland Public Service Commission, March 3, 2020.

¹⁸ *Id.* at 4-5.

¹⁹ *Id.* at 4.

proxy price equal to the average of the Preliminary Zonal Net Load Price resulting from the last two base residual auctions, multiplied by a factor of 0.9.

The approach used by Maryland and New Jersey is very similar to that of Pennsylvania. Pennsylvania calculates its uniform proxy price by having the electric distribution companies use the average of the last two auction years but without applying the factor.

The PUCO should protect consumers by following an approach similar to PJM states New Jersey, Pennsylvania, and Maryland. In addition, the PUCO should take care to set the proxy price at an appropriate level so that consumers will not have a significant true-up to pay when the actual capacity price becomes known.

III. CONCLUSION

The standard service offer price is a critically important issue for Ohio residential consumers in their purchase of electricity. The PUCO should take action to mitigate the effects of delays in the PJM capacity auctions, on the Ohio standard-offer auctions.

To protect Ohio consumers, the PUCO should adopt OCC's recommendations set forth above and in our initial Consumer Protection Comments. The PUCO should set a proxy rate for all Ohio electric utilities as the average of the last two PJM base residual auctions.

The PUCO should reject the anti-consumer proposals by RESA and IGS to require similar adjustments to the fixed contracts that they have with Ohioans. As the PUCO determined previously for consumer protection, "fixed means fixed" for marketers' fixed-rate contracts with consumers.

The PUCO should also use this opportunity to implement a residential-only standard service offer auction. That approach is needed for consumer protection, which should mean lower prices for consumers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Reply Comments was served on the persons stated below *via* electronic transmission, this 15th day of September, 2023.

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