

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the )  
Monongahela Power Company for Approval of ) Case No. 03-1104-EL-ATA  
a Market-Based Standard Service Offer and )  
Competitive Bidding Process. )

ENTRY ON REHEARING

The Commission finds:

- (1) On April 24, 2003, Mon Power filed an application in this case seeking approval of a market-based standard service offer (MBSSO) and a competitive bidding process (CBP) to comply with Section 4928.14, Revised Code, which governs the establishment of rates for generation service subsequent to the end of the market development period (MDP). Mon Power proposed to issue a Request for Proposal (RFP) for generation service as part of its CBP.
- (2) By entry of July 24, 2003, the Commission issued a Finding and Order in this case, finding, among other things, that only the RFP portion of the Mon Power application could proceed at that time. Mon Power's RFP was limited to its large commercial, industrial and street lighting customer classes.
- (3) On October 8, 2003, Mon Power filed a motion for approval and expedited treatment of its application in this case. Mon Power stated that the lowest and winning bid was submitted by Allegheny Energy Supply Company, LLC. Mon Power submitted that Allegheny Energy Supply Company, LLC, is an unregulated affiliate of Monongahela Power Company and primarily is in the business of generation of electric power for the wholesale market. Utilizing the winning bid, Mon Power provided the resulting retail rates for the affected customers, for the next year, as Exhibit A to its October 8, 2003 motion.
- (4) On October 22, 2003, the Commission issued a second Finding and Order (October 22, 2003 Order) in this case, finding, among other things, that Mon Power's April 24, 2003 application to modify its generation rates beginning January 1, 2004 should be denied, given that neither condition prescribed by Section 4928.40(B) (2), Revised Code, for early termination of the MDP, had been met. Accordingly, Mon Power's market development period was to remain in place until December 31, 2005, or until Mon Power can demonstrate, through a subsequent application, that it has met either of the conditions set forth in Section 4928.40(B)(2), Revised Code.

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- (5) On November 21, 2003, Mon Power timely filed an application for rehearing raising seven assignments of error. Mon Power alleges that the Commission's October 22, 2003 Order is unreasonable and unlawful for the following reasons:
- (a) The Commission erred by extending Mon Power's MDP for large commercial and industrial customers until December 31, 2005.
  - (b) The Commission erred because it did not set a MBSSO Rate as Section 4928.14, Revised Code, requires.
  - (c) The Commission erred when it denied Mon Power's motion for approval of the lowest and winning bid from the RFP process and the proposed MBSSO rates that resulted from the winning bid.
  - (d) The Commission is estopped from changing the terms of the Electric Transition Plan (ETP) stipulation.
  - (e) The Commission erred because, under the federal "filed-rate" doctrine, the Commission must permit Mon Power to recover the cost of power purchased to serve its large commercial and industrial customers.
  - (f) The Commission's Order violates the Contracts Clause of the United States Constitution.
  - (g) The extension of the rate freeze for default generation service after December 31, 2003 deprives Mon Power of its property without due process of law in violation of the United States and Ohio Constitutions.
- (6) On November 21, 2003, Industrial Energy Users-Ohio (IEU-Ohio) timely filed an application for rehearing requesting a clarification of the Commission's October 22, 2003 Order. IEU-Ohio requests that the Finding and Order clarify that Mon Power's ETP stipulation did not establish a schedule to end the MDP on December 31, 2003 but only permitted an accelerated end date after Commission approval and provided the statutory requirements were met.
- (7) On December 1, 2003, Mon Power timely filed its memorandum contra IEU-Ohio's application for rehearing and IEU-Ohio

timely filed its memorandum contra Mon Power's application for rehearing.

- (8) Section 4903.10, Revised Code, provides for the filing applications for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (9) The Commission will address Mon Power's first three assignments of error and IEU-Ohio's request for clarification as one category related to the Commission's actions under Chapter 4928, Revised Code. Mon Power asserts that the Commission erred by extending the MDP for large commercial and industrial customers to December 31, 2005; by not establishing a MBSSO as Section 4928.14, Revised Code, requires; and by not approving the lowest and winning bid from the RFP process. Mon Power argues that as part of its ETP stipulation, the Commission approved terms of the stipulation that allowed for the end of the MDP for large commercial and industrial customers at the end of 2003. Further, Mon Power asserts that the Commission should deny IEU-Ohio's request because the "clarification" sought is an unlawful attempt to rewrite the ETP stipulation which, IEU-Ohio agreed to, signed, and advocated for adoption by the Commission. Mon Power further submits that, in addition to rejecting IEU-Ohio's application on its merits, IEU-Ohio is barred by the doctrines of *res judicata* and collateral estoppel from presenting its argument on rehearing.

IEU-Ohio submitted that the stipulation specifically acknowledged the requirements of Section 4928.40(B)(2), Revised Code, and that the only reading of Mon Power's stipulation was for the Commission to treat the stipulation as an application to end the MDP on December 31, 2003, if the Commission found that one of the two statutory criteria were satisfied. IEU-Ohio asserted that the parties may not, by settlement or otherwise, confer jurisdiction on the Commission to ignore statutory obligations imposed on the Commission by the Ohio General Assembly. IEU-Ohio submitted that there is nothing in Mon Power April 24, 2003 application to even suggest that either of the two required conditions in Section 4928.40(B) (2), Revised Code, were satisfied.

- (10) Section 4928.02, Revised Code, describes the policy at the start of competitive retail electric service. Section 4928.02(A), Revised Code, states it is the policy of this state to: "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."

In keeping with this policy, Section 4928.40(B), Revised Code, states in pertinent part:

- (1) The commission may conduct a periodic review no more often than annually and, as it determines necessary, adjust the transition charges of the electric utility as initially established under division (A) of this section or subsequently adjusted under this division. Any such adjustment shall be in accordance with division (A) of this section and may reflect changes in the relevant market.
- (2) For purposes of this chapter, the market development period shall not end earlier than December 31, 2005, unless, upon application by an electric utility, the commission issues an order authorizing such earlier date for one or more customer classes as is specified in the order, upon a demonstration by the utility and a finding by the commission of either of the following:
  - (a) There is a 20 percent switching rate of the utility's load by the customer class.
  - (b) Effective competition exists in the utility's certified territory.

In its October 22, 2003 Order, the Commission made it clear that it is without authority to terminate Mon Power's MDP earlier than the end of 2005 unless one of the two conditions set forth above have been met. As we stated in our Order, from a review of the results of the RFP and the data from the market monitoring forms that has been submitted by Mon Power to date, neither condition has been met. Consequently, regardless of the Mon Power's or IEU-Ohio's interpretation of the ETP stipulation, the Commission is without authority to grant Mon Power's request to end the MPD for certain customers on December 31, 2003. Therefore, the Commission did not err in not ending the MDP and not approving the winning bidder of the RFP.

With regard to Mon Power's argument that the Commission erred in not establishing a MBSSO as Section 4928.14, Revised Code, requires, the Commission acknowledges that a MBSSO and CBP will need to be in place by the time Mon Power's MDP ends, which at this point appears to be December 31, 2005. Therefore, the Commission will modify our October 22, 2003 Order to reflect that the docket should remain open so that we can review the company's application to establish a MBSSO and

CBP. The Commission will by separate entry in the future establish a procedural schedule to review Mon Power's application. Further, considering the current state of competition in Mon Power's service territory, we encourage the company to modify its initial application to provide for a rate stabilization plan for the Commission's consideration as other electric utilities have done.

- (11) With regard to Mon Power's fifth, sixth and seventh assignments of error, we find no basis for granting rehearing. Mon Power asserts that the Commission must permit it, under the federal "filed-rate" doctrine, to recover the cost of power purchased to serve its large commercial and industrial users. Mon Power states that, beginning January 1, 2004, the rates it must pay for the wholesale power necessary to provide default retail electric generation service to non-switching large commercial and industrial customers are market-based rates established under tariffs approved by the Federal Energy Regulatory Commission (FERC). Mon Power submits that requiring it to provide default service at the current, frozen retail rates to the non-switching customers after December 31, 2003, will preclude it from recovering at retail rates the FERC-jurisdictional wholesale costs and, therefore, violates the federal "filed-rate" doctrine. Further, Mon Power argues that our October 22, 2003 Order deprived Mon Power of its property without due process of law in violation of the United States and Ohio Constitutions, and violated the Contracts Clause of the United States Constitution in that it impairs Mon Power's rights and obligations.

The Commission finds these arguments actually go to the constitutionality of provisions of Senate Bill 3 that enacted electric restructuring legislation. If Mon Power believes that Senate Bill 3's establishment of a MDP under Section 4928.40, Revised Code, and the caps placed on retail unbundled rates under Sections 4928.34 and .35, Revised Code, are unlawful or unconstitutional, these are issues beyond the Commission jurisdiction. See *The East Ohio Gas Co. v. City of Cleveland*, 137 Ohio St. 225, 28 N.E.2d 599 (1940).

- (12) In its fourth assignment of error, Mon Power states that the Commission is estopped from changing the terms of the Commission-approved ETP stipulation by extending the MDP. The Commission does not agree with Mon Power that estoppel applies in this circumstance. The Commission's denial of Mon Power's request to end the MDP in December 31, 2003, when the Commission does not have the legal authority to grant such

a request, can hardly be a circumstance where estoppel would apply.

- (13) The applications for rehearing filed by Mon Power and IEU-Ohio should be denied, except for the Commission's modification of its October 22, 2003 Order as set forth in finding (10) above.

It is, therefore,

ORDERED, That the applications for rehearing of Mon Power and IEU-Ohio are denied, except for the Commission's modification of its October 22, 2003 Order as set forth in finding (10) above. It is, further,

ORDERED, That the Commission's October 22, 2003 Order is modified to reflect that the docket remain open so that we can review the company's application to establish a MBSSO and CBP. It is, further,

ORDERED, That a copy of this entry be served upon the applicant and all interested parties of record in this proceeding.

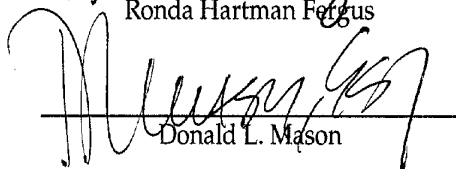
THE PUBLIC UTILITIES COMMISSION OF OHIO



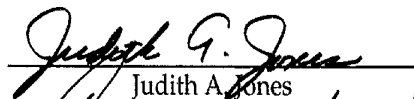
Alan R. Schriber, Chairman



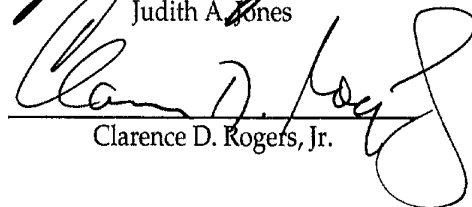
Ronda Hartman Fergus



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**DEC 17 2003**



Renee J. Jenkins  
Secretary