

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion,)
to consider the restructuring of the electric utility)
industry.)
_____)

Case No. U-11290

At the March 14, 2000 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

The March 8, 1999 order in these proceedings directed the Commission Staff (Staff) to conduct a review of various aspects of the electric retail open access (ROA) program and to file a report within 30 days after the submission of bids for the initial block of capacity under that program. In the same order, the Staff was directed to work with the utilities and other stakeholders to try to reach consensus on a common approach towards bid forfeiture. Bids for the first round of available ROA capacity were submitted by September 20, 1999. On October 20, 1999, the Staff filed a report that summarized the results of the first bid cycle and made certain recommendations.

In its October 28, 1999 order in these proceedings, the Commission invited interested parties to file comments by November 18, 1999 on the Staff report. Comments were received from the

Association of Businesses Advocating Tariff Equity (ABATE), Attorney General Jennifer M. Granholm (Attorney General), Consumers Energy Company (Consumers), The Detroit Edison Company (Detroit Edison), DTE Edison America, Inc. (DTE-EA), Energy Michigan, and the Staff.

II.

ISSUES

Forfeiture Procedures

Upon completion of the bidding process, a successful bidder may either voluntarily relinquish the capacity associated with a successful bid or may involuntarily forfeit such capacity by failing to complete certain requirements within the time allotted.

In its comments, the Staff offered two alternatives regarding the methodology by which the capacity assigned to a successful bidder should be treated in the event that it is forfeited. One alternative awards the forfeited capacity to the highest losing bidder from the same round of bidding without further qualification. The other alternative awards the forfeited capacity to the highest losing bid from the same round of bidding “who is not affiliated with the bidder that has forfeited the capacity.” In any event, the Staff recommends that both Consumers and Detroit Edison should be required to adhere to the same approach for the awarding of forfeited capacity to another bidder.

ABATE argued that if a winning bidder has submitted multiple bids, then that bidder should be required to surrender the lowest priced winning bid first.

The Attorney General was concerned that a participant that submits multiple bids at different prices is, in effect, bidding against itself. The Attorney General suggested that a bidder with more

than one winning bid should be required to implement its bids starting with the highest price and working towards the lowest.

DTE-EA was also concerned that a winning bidder might attempt to forfeit a higher priced bid in order to make a lower priced losing bid into a winner.

Energy Michigan expressed concern that entities submitting multiple winning bids were being forced by Consumers and Detroit Edison to proceed with taking service pursuant to the highest cost bid before obtaining service pursuant to a lower cost bid. According to Energy Michigan, service should be commenced on a first-come, first-served basis, without regard to the bid price. Energy Michigan suggested that any concern that customers or marketers may try to “game” the system by commencing low cost service and forfeiting higher cost bids can be controlled through monitoring and the imposition of sanctions.

Consumers supported the Staff’s recommendation that a winning bidder with multiple bids should be required to forfeit capacity by surrendering the lowest-priced bid first. Consumers also recommended additional clarifications intended to eliminate potential abuse and subterfuge in the bid process. In so doing, it proposed that a winning bidder that forfeits one or more bids should also be required to forfeit all losing bids for that bid class in that bid cycle. Consumers also questioned whether losing bids should be disclosed to the public because such knowledge could induce a winning bidder to forfeit a higher-priced winning bid in an attempt to qualify a lower-priced losing bid.

Detroit Edison indicated it had already changed its bidding rules, prior to the second bid cycle, to clarify that a forfeiture of a winning bid would invalidate all of that capacity owner’s non-winning bids in the same bid cycle.

The Commission finds that some clarifications to the forfeiture procedures are required. The Commission agrees with the Staff that Consumers and Detroit Edison should apply the same principles to forfeiture. Therefore, the Commission adopts the Staff's second alternative, which is attached to this order as Exhibit A, with the following minor additions and clarifications that are based on the comments received from the parties and observations from the first three rounds of bidding.

The Commission agrees that forfeiture procedures should not be used as a means for gaming the bid process. It is evident from the first rounds of bidding some bidders submitted many bids at different prices. Therefore, the Commission finds that the holder of a winning bid may not forfeit a higher priced bid in order to activate a lower priced bid.¹ That principle shall apply whether or not a forfeiture is voluntary. If the holder of a winning bid forfeits its rights to any capacity under that bid, then all of its losing bids shall be disqualified. If the holder of multiple winning bids forfeits its right to any capacity under any bid, then the forfeiture shall proceed, on a megawatt-by-megawatt basis, starting with the lowest price bid until the amount of capacity being forfeited is reached.

The Commission also finds that winning bids should be associated with capacity and should not be pre-assigned to any specific customer or retailer. Therefore, the concerns raised by the Attorney General and Energy Michigan are moot. As the holder of capacity through multiple bids begins to enroll and serve customers, it shall proceed from highest to lowest priced bid. This does not mean, however, that the utility can impose this condition on multiple bids represented by a single retailer if the customer is the entity that holds the winning bid.

¹The term "holder" is used here because the capacity may be sold or assigned to parties other than the initially identified winning bidder.

Reciprocity Requirements

In its report, the Staff suggested that the open access program reciprocity requirement, which prohibits utilities and their affiliates from direct participation in the open access program if the utility does not offer comparable open access in its service territory, should be enforced by prohibiting bids from non-qualifying utilities and their affiliates from being accepted.

ABATE and Energy Michigan expressed their views about the reciprocity requirement, but did not address the specifics of Staff's proposal. ABATE maintained that reciprocity is not needed and asked the Commission to discontinue the reciprocity requirement. Energy Michigan contended that the reciprocity requirement should be dropped because it limits competition and is difficult to enforce.

The Attorney General opposed the Staff's proposal to screen for compliance with the reciprocity requirement at the time that bidding is conducted. The Attorney General believed that the Staff's approach could lead to confusion if the reciprocity requirement were to be successfully challenged in court.

Because winning bids can be sold or assigned to other entities, Consumers recommended that the reciprocity requirement not be imposed on bidders. Instead, Consumers proposed screening for reciprocity in the customer enrollment process, when retailers and power suppliers are identified.

Detroit Edison argued that the bid qualification step is not the appropriate point in the process to screen out any non-qualifying utilities and affiliates. Detroit Edison indicated that such screening could be performed later.

The Commission agrees with the Staff that the process of screening the bids for compliance with the reciprocity requirement should occur prior to the awarding of bids. By now, bidders

ought to be well aware of the reciprocity requirement and they should be qualified to participate in the program. If they are not qualified, they should not be permitted to profit by selling capacity that they were not otherwise qualified to receive in the first place. Further, the Commission is not convinced that the arguments raised by ABATE and Energy Michigan have any merit.

Minimum Bid Prices

In its report, the Staff recommended continuing the waiver of the one-half cent per kilowatt hour (0.5¢/kWh) minimum bid price requirement. According to the Staff, enforcing the minimum bid requirement could discourage adequate participation, especially by residential and small commercial customers.

Energy Michigan recommended that the Commission continue to waive the minimum bid requirement for future bid cycles. Energy Michigan noted that some bids received in the first round were higher than 0.5¢/kWh, but not enough to fill the available capacity. Energy Michigan hypothesized that bid prices may decline in future rounds because the universe of bidders desiring to participate in open access is limited.

ABATE recommended that the minimum bid waiver be made permanent.

Detroit Edison asked the Commission to reinstate the minimum bid price. According to Detroit Edison, the absence of a minimum bid requirement contributes to the underrecovery of retail access implementation costs and the company's stranded costs. Further, Detroit Edison insisted that, without an established floor price, the emerging electric market will be artificially distorted by continuing to subsidize retail access.

The Commission has now had the opportunity to observe the first three rounds of bidding. Each round of bidding has resulted in winning bids that are both higher and lower than 0.5¢/kWh.

The Commission observes that the absence of a minimum bid requirement has not had a negative effect on the bidding process. Therefore, the Commission agrees that the minimum bid requirement should be waived for both the March 20 and November 20, 2000 rounds of bidding.

Act 69 Certificate and Franchise Requirements

ABATE asked the Commission to reevaluate the requirement that competitive suppliers obtain certificates of public convenience and necessity pursuant to 1929 PA 69 (Act 69), MCL 460.501 et seq.; MSA 22.141 et seq. ABATE argued that the Commission can waive the Act 69 procedure for competitive suppliers simply by making a determination that the contract between a customer and their competitive supplier does not constitute “facilities” within the meaning of Act 69.

Energy Michigan expressed its belief that the local government franchise requirement is increasingly burdensome and recommended that the Commission implement an alternative to the franchise process.

The Commission is aware of such concerns, but they are outside of the scope of issues addressed in this review of bidding procedures.

Implementation Costs

Regarding implementation costs, Energy Michigan noted that the utilities have requested in Cases Nos. U-11955 and U-11956 (the true-up cases) that implementation costs be spread to all customers, while other participants in those same cases urge that only open access customers pay these costs. Energy Michigan proposed that the Commission reduce financial uncertainty during the bidding process by stating that implementation costs will not be collected until 2002 or, in the alternative, that any approved implementation costs will be collected from all customers until a final decision is reached in the true-up cases.

Again, the Commission notes such concerns, but finds that they are outside of the scope of issues to be addressed in this review of the bidding procedures.

Other Issues

In addition to the issues already discussed, the Attorney General requested clarification on two points. The Attorney General indicated that due to changes in the bid schedule, some confusion has resulted about whether there will be a total of four or five bid cycles.

Previous Commission orders provided for five bid cycles. Three of the bid cycles have already taken place.² The final two rounds of bidding call for bids to be received by the independent bid administrator as of March 20, 2000 and November 20, 2000, respectively. Beginning January 1, 2002, customer choice of electric generation suppliers will be extended to all customers of Consumers and Detroit Edison.

The Attorney General also expressed concern that the Staff report might lead to some misunderstanding about the relationship between bid prices, transition charges, and available customer cost savings.

The Attorney General correctly understands that the bid price is being used as a proxy for the transition charge through December 31, 2001. Beginning January 1, 2002 and running through December 31, 2007, customers will be paying uniform transition charges that will be established by the Commission through the true-up process. The Commission notes that the effects on customer cost savings of variability in the transition charge are uncertain. The level of customer cost savings will be affected by the resolution of issues in the true-up process and the unfolding of the competitive market for electricity.

In addition, some general comments about the bidding process and ROA program practices were received from DTE-EA, which characterized residential and small business interest in

²Bids in the first three cycles were filed on September 20, 1999, November 19, 1999, and January 20, 2000.

customer choice exhibited in the first cycle as “relatively low.” DTE-EA was concerned that the present program was discouraging participation by marketers and aggregators for residential and small business customers. DTE-EA recommended creating a “shopping credit,” which it claimed would serve as a benchmark that would be easily understood by residential and small business customers. DTE-EA also contended that the shopping credit is the most critical element in creating a competitive energy market.

The Commission understands that ready access to complete price and service information and price transparency are among the cornerstones of competitive markets. At the same time, the Commission is aware of the allure that simple price comparisons might hold for marketers and many customers. In the June 5, 1997 order in Case No. U-11290, the Commission identified the need for customers to have access to “sufficient and reliable information in order to be able to compare and select among products and services provided in the electricity market.” Order, supra, p. 45. In this context, the order explicitly mentioned “details regarding the prices and specific services being offered by suppliers.” Id. Moreover in the March 8, 1999 order in Cases Nos. U-11290 et al., the Commission repeated its interest in ensuring that customers are provided with information that allows them to compare prices and services on a uniform basis. However, the Commission does not intend to overhaul the ROA program at this time and cautions against such oversimplifications. Interested parties are not prevented from calculating representative costs for ROA participants and making comparisons to other price offerings. But if they choose to engage in such comparisons, then they must take care not to run afoul of established consumer protection laws and rules. Further, the desire of marketers to offer simple price comparisons should not give way to gross oversimplifications or the presentation of only partial or misleading information. In

this regard, the Commission notes that the CHOICE³ Advisory Council's "Statewide Customer Education Program Proposal" is presently being considered in Case No. U-12133. The Commission expects that the resulting education program will embody guidelines for meeting these important information needs.

DTE-EA also recommended that the Commission adopt electronic data interchange (EDI) protocols, asserting that they would be the single most effective way to reduce costs to marketers and utilities. DTE-EA stated that a recently-formed group, The Coalition for Uniform Business Rules (CUBR), which consists of representatives from natural gas and electricity marketers, utilities, meter service providers, meter data management agents, billing and collection companies, software vendors, and other mid- and back-office service providers, is in the process of developing rules intended to govern a broad array of competitive utility market practices and transactions, including EDI. DTE-EA expressed interest in discussing these issues with the Commission and the Staff.

The Commission is open to consideration of any approaches that promise to benefit competition and reduce costs for all participants. It encourages the utilities, interested parties, and the Staff to continue to work towards a consensus on such issues and welcomes establishment of industry-wide standards that promote those goals. However, these issues are beyond the scope of the Commission's review in this proceeding. The Commission finds these issues should be examined

³The acronym CHOICE stands for Customers Have Options in Choosing Electricity. The Council is a voluntary working group whose members include the Michigan Community Action Agency Association, Engage Energy US, L.P., the Michigan Electric Cooperative Association, the Small Business Association of Michigan, Indiana Michigan Power Company, the Michigan Manufacturers Association, the Michigan Retailers Association, the American Association of Retired Persons, Consumers, the Michigan Electric and Gas Association, the Michigan League for Human Services, Nordic Electric, L.L.C., Detroit Edison, The Heat and Warmth Fund, and the Staff.

in the context of the true-up cases, where utilities present information about their expenditures on information systems, data exchange, and the like, and other parties' recommendations can be fully explored.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.
- b. The ROA bidding programs for the Consumers and Detroit Edison should be modified in accordance with this order, effective immediately.

THEREFORE, IT IS ORDERED that:

A. The retail open access bidding programs of Consumers Energy Company and The Detroit Edison Company shall be modified in accordance with this order, effective immediately.

B. The procedures regarding forfeiture of retail open access bid capacity as described in this order shall apply to any forfeitures that take place after the effective date of this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand

Chairman

(S E A L)

/s/ David A. Svanda

Commissioner

/s/ Robert B. Nelson

Commissioner, concurring in a separate opinion.

By its action of March 14, 2000.

/s/ Dorothy Wideman

Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner, concurring in a separate opinion.

By its action of March 14, 2000.

Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated March 14, 2000 modifying the retail open access bidding programs for Consumers Energy Company and The Detroit Edison Company, as set forth in the order.”

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In the matter, on the Commission's)
own motion, to consider the restructuring)
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Case No. U-11290

CONCURRING OPINION OF COMMISSIONER ROBERT B. NELSON

(Submitted on March 14, 2000 concerning order issued on same date.)

I concur with the majority opinion issued today in this docket. As I indicated in my concurring opinion in Case No. U-12197 issued today, we should proceed to consider the application of Act 69 to "facilities-based" entities only. Several parties have recommended that we waive the Act 69 procedure for competitive electric suppliers that do not intend to construct facilities. As the majority opinion indicates, that issue should be addressed in another docket (U-11915). I would support swift action in that proceeding.

In response to the Staff's proposal regarding the enforcement of the reciprocity requirement, several parties to this proceeding have suggested that the requirement be discontinued. I was not a member of the Commission when the requirement was first imposed and would not have supported it had I been here. Not only is the requirement a barrier to competition and difficult to enforce, as the parties now maintain, but it will likely be struck down by the Courts as an unconstitutional obstruction of interstate commerce. I recognize, however, that the requirement was part and parcel of the program that Detroit Edison and Consumers Energy agreed to implement last Fall and that I accepted. I would therefore call upon the utilities to "voluntarily"

rescind the requirement in keeping with their apparent position on this issue in pending electric restructuring legislation.

Robert B. Nelson, Commissioner

EXHIBIT A

Prior to initiating retail open access service, a successful bidder must be declared a retailer or designate a retailer to secure their power. For the purposes of this section, self-service customers shall be designated as retailers. Within 60 days from the date the capacity was awarded to a successful bidder, the retailer must have made application to the appropriate governmental unit(s) for all approvals necessary to participate in retail open access service. Within 180 days from the date the capacity was awarded to a successful bidder, the participating customers must be enrolled for retail open access service. For either of these time periods, so long as the retailer and/or customers are acting in good faith and can demonstrate progress towards obtaining the required approvals, there will be no involuntary forfeiture. If the retailer fails to adhere to either one of these timetables, the retailer forfeits its capacity award and the bid deposit will be retained by the independent bid administrator and applied towards transition costs.

Any forfeited capacity will be awarded to the highest losing bidder from the same round of bidding who is not affiliated with the bidder that has forfeited the capacity. If the forfeited capacity was awarded as part of a set-aside for service to a specific class of customers, then it will be awarded to the highest losing bidder for that same class of customers. Once the final bid cycle has been completed, if no bidder to serve customers in the same class accepts the award, then the capacity shall be offered to the highest losing bidder for other customer classes (proceeding in order from residential only, to residential/small commercial, and then to all customer classes). If no qualified bidder from the same round of bidding accepts the capacity award, then it will be offered to the highest losing bidder from the next round of bidding. Within 10 days, the bidder that is awarded the forfeited capacity shall pay the bid deposit, equal to the amount previously submitted by the initially successful bidder. If the bid deposit is not paid within 10 days, the award shall be considered void, and the forfeited capacity shall be offered to the next eligible bidder. The bidder receiving the award or their designated retailer will be subject to the same requirements for making applications for all necessary approvals within 60 days and enrolling customers for retail open access service within 180 days from the date the capacity was awarded. Successful bidders may sell or assign awarded bid capacity to another entity as long as the capacity is assigned within the same bid class. After the final bid period, if all the capacity reserved for residential and small commercial customers has not been filled, it may be filled by bids for any class of customers. If bidders sell or assign awarded bid capacity to another entity, they must inform the utility, so the sale and the new owner of record can be recorded. In the event of any sale or assignment of capacity rights to an unaffiliated entity, the rules for forfeiture apply, with the starting date being the effective date of purchase or assignment. This additional time to make applications and enroll customers may be used only once. Additional time to make applications and enroll customers will not be extended to an entity that buys or is assigned awarded bid capacity from its own affiliate.

U-11290

U-11290