

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo )  
Edison Company, for Authority to Establish ) Case No. 08-935-EL-SSO  
a Standard Service Offer Pursuant to Section )  
4928.143, Revised Code, in the form of an )  
Electric Security Plan )

**MOTION FOR LIMITED INTERVENTION AND  
COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION**

Now comes the Electric Power Supply Association (“EPSA”),<sup>1</sup> who, pursuant to Section 4903.221, Revised Code and Rule 4901-1-11 of the Ohio Administrative Code (“OAC”), moves for limited intervention in the above styled proceeding. EPSA will accept the record in this proceeding as it stands, and accordingly, its intervention will not delay this proceeding nor prejudice any other party.

Further, EPSA provides comments in response to the May 23, 2011 Order from an attorney examiner at the Public Utilities Commission of Ohio (“PUCO”) requesting comments on whether bids submitted in a 2009 competitive auction to serve FirstEnergy load should continue to remain confidential. EPSA agrees with the attorney examiner’s finding that the Boston Pacific report should remain under seal indefinitely.

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<sup>1</sup> EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

## **Background**

As the May 23 Order explains, the Columbus Southern Power Company and the Ohio Power Company (collectively, “AEP Ohio”) filed a public records request on May 17, which pointed to a section in the OAC as a basis for making the results of a competitive bid process public. Despite the fact that PUCO issued a protective order shielding the results from public disclosure, AEP Ohio alleges that the protective order expires as a result of OAC Rule 4901-1-24.<sup>2</sup> Thus, AEP-Ohio asks that PUCO make public the report filed by independent auction consultant Boston Pacific. AEP Ohio makes no arguments as to why the report should be made public other than citing to the pertinent code governing protective orders. However, the May 23 Order notes several reasons as to why the report should remain undisclosed. Namely,

the confidential reports contained sensitive information including the names of unsuccessful bidders; price information, including starting price methodologies and round prices/quantities for individual bidders; information contained in Part I and Part II bidder applications; and indicative pre-auction offers.<sup>3</sup>

Because AEP Ohio did not list convincing reasons to disclose the auction report and PUCO/the attorney examiner has several compelling reasons to protect such information, EPSA agrees that the protective order should be extended indefinitely.

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<sup>2</sup> The OAC rule states: Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (D) of this rule shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure.  
<http://codes.ohio.gov/oac/4901-1-24>.

<sup>3</sup> May 23 Order at P 5.

PUCO certainly has discretion to do so based on the “unless otherwise ordered” caveat of the aforementioned OAC rule.

***Comments in Support of Attorney Examiner’s Finding***

The protective order at issue here is unique and should not expire. In this case, PUCO issued two separate orders; (1) one relating to a protective order under Section 4901-1-24; and (2) one directing that the information gathered be placed under seal. That second order does not note any reliance on OAC Rule 4901-1-24.<sup>4</sup> However, it is important to note that even if the rule were to govern the order that puts the information under seal, PUCO has ultimate discretion over the expiration of protective orders.

Ohio’s protective order policy hinges upon the value of the information. PUCO has a history of allowing protective orders to expire when the protected information is stale, out of date and has lost its value.<sup>5</sup> However, the protected information contained in the Boston Pacific report remains extremely competitively sensitive, in pertinent part because it contains information from an auction to procure power conducted in 2009 for delivery in 2011. EPSA does not seek to protect information unnecessarily – instead EPSA seeks to protect confidential information about entities that are selling power into the market today. Unlike most other protective orders issued by PUCO, even those governing auctions, this protective order pertains to a three year forward auction. In making the information public, it will make bids public that promised to deliver power this year. EPSA contends that any protective order governing a forward auction should not expire

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<sup>4</sup> See May 14, 2009 Order in Docket No. 08-935-EL-SSO, p. 3.

<sup>5</sup> See, e.g., October 11, 2007 Order in Docket No. 05-376-EL-UNC.

after 18 months. EPSA would be pleased to comment on potentially changing the disclosure rules governing forward auctions permanently.

The attorney examiner has declared that the protective order should continue indefinitely. EPSA agrees. If there is a time in the future when parties would like to petition PUCO to lift the protective order, parties may do so by arguing a specific need for the public release of that information. However, the release of the data now is untenable, as that data pertains to energy being sold into the market this year due to the forward nature of the auction. While Boston Pacific, acting as the auction administrator, clearly needed sufficient information to adequately monitor the auction, any of that market data that is disclosed must not intrude on a participant's right to keep competitively sensitive information confidential. Exposure of the identity and bids of participants may have a chilling effect on future participation and damage confidence in the marketplace. Even though such data was necessarily shared with PUCO, the regulating entity, it must be protected from any collateral disclosure to other market participants. There are sufficient complaint processes and reporting mechanisms in place to serve all interested parties with sufficient market data and analysis. If AEP Ohio wants this data for any specific reason, it could make an appeal to PUCO; instead, AEP Ohio simply points to a clause in the OAC and told PUCO to notify AEP Ohio when the Boston Pacific report would be publicly available. There is no stated or apparent benefit with the public disclosure of the confidential bid information.

EPSA appreciates the attorney examiner's assessment that "the Commission did not intend for the provisions of Rule 4901-1-24(F), O.A.C., to

apply” and instead allowed the Boston Pacific report to remain under seal indefinitely. In fact, the OAC rule named by AEP Ohio states several times that PUCO has ultimate discretion over protective orders. Thus, by the very code named as a reason for disclosing the report, PUCO can order that the protective order protecting the report be extended. OAC Rule 4901-1-24(F) states that “unless otherwise ordered” protective orders expire after 18 months. PUCO has absolute discretion and the attorney examiner recommends that the report remain confidential indefinitely.

WHEREFORE, EPSA respectfully requests that PUCO grant this motion for leave to intervene and consider the comments herein.

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., June 6, 2011.

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Daniel S. M. Dolan, VP of Policy Research & Communications