

**BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA**

**IN THE MATTER OF A RULEMAKING)
OF THE OKLAHOMA CORPORATION) CAUSE NO. RM 200900002
COMMISSION, AMENDING OAC 165:35,)
ELECTRIC UTILITY RULES)**

**COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION,
ATTORNEY GENERAL, OIEC, AARP, AND THE OKLAHOMA
SUSTAINABILITY NETWORK**

The Electric Power Supply Association (“EPSA”),¹ Oklahoma Industrial Energy Consumers (“OIEC”), the Oklahoma Office of the Attorney General,, American Association of Retired Persons (“AARP”), and the Oklahoma Sustainability Network,, together “Joint Commenters,” appreciate the opportunity to comment on the Oklahoma Corporation Commission’s (“Commission”) Notice of Proposed Rulemaking (NOPR) to amend its Competitive Procurement Rules, Oklahoma Administrative Code 165:35, issued on January 12, 2009. This proposed rulemaking eliminates the Commission’s competitive procurement rules for electric utility resource needs adopted by the Commission only three years ago. For the following reasons, the Joint Commenters strongly urge the Commission to maintain its competitive procurement rules to ensure that consumers receive the most efficient, lowest risk and lowest cost electricity available.

I. INTRODUCTION

¹ EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. 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.

On January 12, 2006, the Commission adopted competitive procurement rules for electric utilities in Cause NO. RM 200500011. These rules were the result of a lengthy proceeding including three technical conferences and substantial comments filed by a variety of stakeholders. The Joint Commenters actively participated in the proceeding at the technical conferences and by submitted comments in the docket. Three years to the day that the original rules were adopted by the Commission, a NOPR was issued to fully roll-back this competitive procurement requirement on an expedited schedule. This at a time when it is expected that utilities will be adding more capacity to meet customer demand in the next few years and when the most challenging economic situation in recent memory makes it ever more necessary to ensure that ratepayers' dollars are spent as wisely as possible, and only when necessary. It should be noted that not a single RFP process has been fully completed under the Commission's rules.

The Joint Commenters strongly urge the Commission to maintain the strong competitive procurement regulations that it was rightfully proud of just three years ago. We further encourage the Commission to open a docket to examine the implementation of the rules by utilities and whether modifications are necessary to increase competition in future requests for proposals (RFPs).

II. COMMENTS

A. Benefits of Competitive Procurement

Competitive procurement of electricity supplies provides consumers a mechanism to test utility resource decisions against all reasonable alternatives. This competitive mechanism is one that is used in every industry across our economy to protect consumers and should be used as the means for the Commission to meet its statutory duty under 17 O.S. § 286. At a time when uncertainty abounds regarding future electricity demand levels, construction commodity costs and challenges in financing capital-intensive power plants, among many others, it is critical to have a vibrant competitive market to assume many of the construction and supply risks that would otherwise be passed on to ratepayers.

Competitive procurement is the best means of testing the reasonableness of utility proposals to add new generation facilities. Further, the Joint Commenters believe that the existing competitive procurement process serves the public interest by providing greater transparency for the economic, environmental, and social impacts to be fully considered by the Commission.

Four years ago, the Oklahoma Legislature adopted statutory changes that permit an electric utility to seek pre-approval of its planned generation additions. 17 O.S. § 286(c). That statute requires the Commission to consider all reasonable alternatives as it evaluates whether to grant a utility's request for pre-approval. The Joint Commenters believe that an open, transparent competitive procurement process conducted under the oversight of the Commission is the best means of fulfilling this statutory obligation. Historically, utility decisions to add generation were subject to Commission review of the prudence of such

decision when the asset was proposed to be placed in rate base by the utility. Now, under the requirements of Oklahoma's pre-approval statute, that prudence review is conducted at the time the utility seeks pre-approval.²

B. Recent Events Across the Country on Competitive Procurement

In recognition of the challenges facing consumers for new supply, a joint Federal Energy Regulatory Commission (FERC) and National Association of Regulatory Utility Commissioners (NARUC) collaborative was formed to focus on competitive procurement. It recently issued a report that is an excellent distillation of best practices to ensure a fair and objective system of encouraging robust competition for the benefit of consumers.³ As is stated in the report, "...because the large capital investments necessary for development of these types of resources pose potentially valuable opportunities for utilities to enter new resources into rate base, commissions should be aware that utilities may attempt to shield such projects from competition even in situations where market processes are applicable. Despite these challenges, the potential economic gains from imposing the market discipline of competitive procurements on development of capital-intensive and advanced technologies may be great." (p. 19)

When using a competitive procurement process, the report notes that "Because the utility's (and/or its parent's) financial interests may not be aligned

² Section 286(c) provides that "If, and to the extent that, the Commission determines there is a need for construction or purchase of the electric generating facility or long-term purchase power contract, the generating facility or contract **shall be considered used and useful** and its costs shall be subject to cost recovery rules promulgated by the Commission." (emphasis added).

³ "Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices" Released by FERC and NARUC, Conducted by the Analysis Group, July 2008. The full report may be viewed at <http://www.naruc.org/Publications/NARUC%20Competitive%20Procurement%20Final.pdf>

with those of its customers when the utility selects from among the options, extra care is needed to prevent improper self-dealing by the utility. Best practices under these circumstances require a higher degree of regulatory supervision and scrutiny, such as the use of an independent monitor tasked to be the eyes and ears of the regulator and to help bolster the procurement's fundamental fairness and objectivity." (p. 12) The Joint Commenters highly recommend that the Commission review this report from a unique Federal/State collaborative. Many of the best practices noted in the FERC/NARUC report are in Oklahoma's rules. The question then becomes, why repeal this requirement at such a critical time?

FERC recently relied on state competitive bidding requirements, including the Commission's competitive procurement rules, to support termination of PURPA's mandatory purchase obligations for Oklahoma Gas & Electric Company ("OG&E") and Public Service Company of Oklahoma ("PSO"). *Xcel Energy Services, Inc., et al.* Docket Nos. QM07-5-000, QM07-5-001, *Order Granting in Part and Denying in Part Application*, 122 FERC ¶ 61,048. Amendments to PURPA by the Energy Policy Act of 2005 allow FERC to terminate an electric utility's obligation to purchase energy and capacity from qualifying facilities if FERC finds that QFs have non-discriminatory access to "competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected." 16 U.S.C. § 210(m).

The Applicants in the FERC proceeding argued that the number of RFPs conducted by electric utilities in the SPP market supported a finding that QFs had a meaningful opportunity to sell energy and capacity in the SPP market. OG&E actually filed the Commission's competitive procurement rules in the FERC proceeding, quoting the Commission's express purpose for the rules and the Commission's language requiring all electric utilities to use a competitive bidding process when purchasing long-term generation. Application of Xcel Energy Services, Inc., et al., Attachment C.

Based in part on State requirements to conduct RFPs, including the Commission's competitive procurement rules, FERC granted OG&E and PSO's request to terminate their purchase obligation under PURPA. In short, the Commission should not now repeal the rules that FERC believed would create the competitive market to justify termination of PURPA's QF purchase obligation.

C. Suggestions for a More Efficient Process

The Joint Commenters believe that the competitive bidding rules in their current form have provided a framework upon which a viable RFP process can be based. However, the Joint Commenters acknowledge complaints regarding the length of time the PSO Baseload RFP and OG&E Wind RFP process has taken and the cost to consumers to hire an IE in those cases. The Joint Commenters are willing to work with the utilities and the Commission Staff to determine if specific provisions of the

current rules are creating actual problems that apply to the RFP process generally and to devise language to address those concerns. To that end, the Joint Commenters offer the following as an initial observation and a prelude to further talks concerning the rules:

1) The process used in the PSO baseload RFP is not one which is found in the competitive procurement rules. It was a hybrid process that was accepted by the parties in hope that, with the help of an IE, answers could be found to the several, thorny issues that grew out of the Red Rock case, such as credit worthiness, debt equivalency, evaluation criteria for cost of service bids, etc.

2) It should be noted that at this time, not one of the three RFPs initiated pursuant to the competitive procurement rules have been fully completed. The Joint Commenters believe that it would be prudent to examine the results of those RFPs to see if the process was beneficial to consumers, to identify any problems attributable to the rules, and to determine if modification to the rules could address any problems identified prior to taking a drastic action such as elimination of the competitive procurement rules. It would also be helpful for the IEs involved in those RFPs to provide comments to this Commission regarding the strengths and weaknesses they believed inherent in the rules.

CONCLUSION

The Competitive Procurement Rules were a result of the joint efforts of the utilities, Commission Staff, the AG's Office, and numerous intervenors representing varied interests. While those rules are arguably imperfect to some extent, as are all rules of this nature, they have provided a framework upon which three RFPs have been conducted. This Commission should at the very least obtain the results of the RFPs that have been conducted and determine if the rules require modification to provide benefits to consumers based on the experience gained from these three RFPs. The Joint Commenters strongly urge this Commission to direct the parties to open a Notice of Inquiry and that Staff and the parties work together in good faith to identify weaknesses within the competitive procurement rules and to work to address those weaknesses where possible.