

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)	
regarding the regulatory reviews, revisions,)	
determinations, and/or approvals necessary for)	Case No. U-15806
THE DETROIT EDISON COMPANY to fully)	
comply with Public Acts 286 and 295 of 2008.)	
_____)	

At the August 25, 2009 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Monica Martinez, Commissioner
Hon. Steven A. Transeth, Commissioner

ORDER

Procedural History

On March 4, 2009, The Detroit Edison Company (Detroit Edison) filed an application, with supporting testimony and exhibits, requesting approval of its renewable energy plan (REP) and energy optimization plan pursuant to the provisions of 2008 PA 295, MCL 460.1001 *et seq.* (Act 295). Administrative Law Judge Barbara A. Stump (ALJ) held a prehearing conference on March 13, 2009, at which she granted petitions to intervene filed by Attorney General Michael A. Cox (Attorney General), New Covert Generating Company, Michigan Wholesale Power Association (MWPA), LS Power Associates LP, LaFarge Midwest Inc., Michigan Environmental Council, the Environmental Law & Policy Center, the Ecology Center, Natural Resources Defense Council, Energy Michigan, RES North America LLC, Michigan Sustainable Energy Coalition, the

Michigan Community Action Agency Association, and the Association of Businesses Advocating Tariff Equity. At a motion hearing held on April 2, 2009, the ALJ granted late intervention to NextEra Energy Resources, LLC (NextEra). The Commission Staff (Staff) also participated in the proceedings.

On June 2, 2009, the Commission issued an order in which it found that Detroit Edison's description of its request for proposals (RFP) and bid evaluation procedures for its REP was so deficient that it did not comply with Act 295 or Attachment D to the December 4, 2008 order in Case No. U-15800 (Temporary Order). The Commission observed:

As pointed out by NextEra, MWPA, and others, the only detail on the bidding process that the company provided was an affirmation that proposals received in response to an RFP will comport with the Commission's guidelines for RFPs and will be handled in accordance with the company's Code of Conduct. Beyond that, there is a complete lack of information regarding how Detroit Edison proposes to conduct its RFPs or how it intends to evaluate proposals. Indeed, the company admitted that its RFP and bid evaluation processes are still under development.

Order, p. 14.

The Commission ordered Detroit Edison to consult with the Staff and file a complete description of its RFP and bidding process that complies with Section 21(2)(d) of Act 295 and Attachment D to the Temporary Order. The Commission directed:

The filing shall contain, at a minimum, a description of how Detroit Edison will implement a transparent bidding process that evaluates projects using criteria based on capacity and availability of transmission, a potential developer's required capital structure, developer experience, access to capital, and credit worthiness. In addition, the process shall provide sufficient notice (e.g. 90-120 days) to potential bidders. The filing shall also describe a clear and reasonable ranking method that Detroit Edison proposes to use in evaluating bids and the means that Detroit Edison will employ to assure that any bidders who are company affiliates are not afforded a competitive advantage over independent developers.

Order, pp. 14-15.

The Commission then set an accelerated schedule to complete this portion of the case.

On June 3, 2009, the MWPA filed a petition for clarification. On June 22 and 24, 2009, the Staff and Detroit Edison respectively filed responses in opposition to the MWPA's petition.

On July 2, 2009, the Attorney General filed a petition for rehearing. On July 23, 2009, Detroit Edison and the Staff filed responses to the Attorney General's petition.

An evidentiary hearing was held on July 7, 2009. Detroit Edison, the Staff, and the MWPA filed initial briefs on July 20, 2009. These same parties filed replies on July 31, 2009. The record in the reopened case consists of 91 pages of transcript and 3 exhibits admitted into evidence.

Positions of the parties

Charles L. Conlen, Detroit Edison's Director of Renewable Energy Business Development, testified that Detroit Edison planned to meet with the Staff early in the process of developing an RFP to review RFP goals and bid evaluation criteria. Once a bid is selected, Detroit Edison will seek Commission approval of any contracts. 7 Tr 1502-1503. Mr. Conlen stated that bid response times would depend on the complexity of the products sought as well as other factors such as whether the company engaged in a request for information (RFI) process wherein Detroit Edison solicits information from potential bidders regarding RFP design.

Mr. Conlen testified that Detroit Edison's RFPs will contain a description of products sought; a timeline for pre-bid and bid solicitations; bidding instructions concerning the organization, presentation and submission of proposals including specific information sought; a questionnaire soliciting information about the bidder's experience, financial strength, and access to credit; a confidentiality agreement between Detroit Edison and the bidder; and pro forma contracts for the products sought in the RFP. Mr. Conlen also testified that Detroit Edison does not anticipate requiring a nonrefundable bidding fee at this time. 7 Tr 1505-1506.

Mr. Conlen stated that bid evaluation criteria will be developed for each RFP and that most selections will be cost-driven. Mr. Conlen added that other factors including use of Michigan labor and equipment, quantity of capacity and energy proposed, project timing, availability of transmission, bidder experience and financial strength, and portfolio diversity will also be considered. Mr. Conlen testified that Detroit Edison will share its bid evaluation criteria and weightings with the Staff before issuance of an RFP. 7 Tr 1510-1511.

Mr. Conlen testified that Detroit Edison will issue RFPs using a secure process and will use various forms of communication, including press releases, to alert potential bidders. According to Mr. Conlen, the company does not anticipate closing the RFP to any third-party bidders. Responses to any bidder questions that relate to a specific proposal shall be kept confidential; however responses to general questions will be available to all bidders. 7 Tr 1512. Mr. Conlen noted that the company will monitor the RFP process through an electronic platform and will provide assistance to potential bidders who are having difficulties with the platform. Mr. Conlen noted that during the company's December 2008 RFP and its May 2009 RFI, activity was actively monitored throughout the bid event periods. According to Mr. Conlen, it was clear from the activity on the platform and limited technical and timeline related questions that the platform was working as expected and response timelines were reasonable.

Mr. Conlen stated that the RFP responses will be evaluated in a manner that leads to selecting the lowest lifecycle cost, viable bid in a fair and nondiscriminatory manner. Risk mitigation and portfolio diversity strategies will also be considered. Mr. Conlen testified that once a short list of bidders has been developed Detroit Edison anticipates entering into bilateral negotiations with each short-listed bidder in order to achieve the best possible price and terms. Based on these

negotiations and the resulting final price, terms, and conditions, a final bidder will be selected and the contract will be submitted to the Commission for review and approval. 7 Tr 1516-1518.

Mr. Conlen explained that Detroit Edison intends to manage all of its RFPs through a secure bidding process. Access to the bidding process and RFP responses is generally limited to the Detroit Edison Supply Chain personnel assigned to the RFP and Renewable Energy Management personnel. Other personnel may have access to this information on a need to know basis if there is a legitimate business need. Mr. Conlen testified that access to RFP results associated with purchased power agreements or contracts for unbundled attributes are specifically prohibited for employees of Detroit Edison affiliates and Renewable Energy Implementation team employees engaged in the development of self-build renewable energy systems.

Kenneth D. Johnston, a Regulatory Consultant in Regulatory Affairs for Detroit Edison, testified that the company has a policy regarding the use of confidential information. This policy pertains to employees, customers, vendors, or other subsidiaries and applies to all DTE Energy employees, including Detroit Edison employees. 7 Tr 1526. According to Mr. Johnston, although company affiliates may offer unsolicited proposals, Detroit Edison is well aware that any proposal must clearly offer opportunities that may not otherwise be available or commercially feasible. Mr. Johnson further noted that company affiliates may not participate in RFPs issued pursuant to MCL 460.1033(1)(a).

Mr. Johnston testified that Detroit Edison's Code of Conduct prohibits the company from providing its affiliates with an unfair competitive advantage and does not permit the company to share confidential or proprietary information that it does not disclose to other renewable energy system developers. Mr. Johnston confirmed that affiliates who bid against third-party developers will be evaluated using the same criteria and weighting used for non-affiliates.

Daniel Sánchez de Muniaín Dolan of the Electric Power Supply Association, a national trade association, testified for the MWPA. Mr. Dolan asserted that while Detroit Edison's proposal strikes an appropriate balance between the need for a framework and the need for flexibility, the proposal could be improved by adopting some of the "best practices" highlighted in the National Association of Regulatory Utility Commissioners (NARUC) and Federal Energy Regulatory Commission (FERC) report on procurement of electric supplies. Mr. Dolan recommended that Detroit Edison engage in a collaborative process with stakeholders as part of the RFP process. Mr. Dolan also opined that the RFP process could be significantly improved through the use of an independent monitor overseeing the bidding process and selection of bids. 7 Tr 1555-1557.

Mr. Dolan testified that the purpose of a pre-RFP collaborative is not to provide oversight over the RFP, but to build interest in the proposed project and give the utility a sense of whether there will be sufficient interest to have a successful RFP. Mr. Dolan noted that because neither the utilities nor developers in Michigan have much experience in soliciting or bidding on renewable energy projects, a pre-RFP collaborative could assist all stakeholders in more rapidly developing their skills. 7 Tr 1557-1558.

Mr. Dolan testified that the use of an independent monitor could bring credibility to Detroit Edison's RFP and bid selection process by assuring that all bidders are treated in a non-discriminatory manner. Mr. Dolan added that an independent monitor for bid selection would assure that non-monetary criteria are not inappropriately used to provide preferential treatment to certain suppliers. Mr. Dolan stated that a more transparent process overseen by an independent monitor would assure better outcomes for Detroit Edison's ratepayers by increasing the number of bidders and competition between these bidders. Finally, Mr. Dolan testified that the use of an

independent monitor would provide more assurance that confidential and proprietary information submitted by third-party developers would remain confidential.

The Staff asserted that Detroit Edison's filing complied with Act 295 and with the Commission's June 2, 2009 order in this case. The Staff recommended that the Commission approve Detroit Edison's proposal. The Staff also agreed with Mr. Dolan's recommendation to form pre-RFP collaboratives, noting that the addition of this step would be of value to all participants. The Staff recommended that the Commission address this issue, and additional issues raised by MWPA and other intervenors, when developing the final rules implementing Act 295.

NextEra argued that the weighting of bid criteria should be included in Detroit Edison's RFP documents. According to NextEra, failure to reveal RFP criteria weightings will force bidders to guess regarding the company's needs, resulting in less responsive bids. NextEra agreed with the MWPA and the Staff that collaborative proceedings involving stakeholders should be used to develop RFP documents. According to NextEra, involvement of stakeholders in development of an RFP would eliminate controversy, produce agreements which are financeable, incorporate the best technical knowledge available, and increase stakeholder confidence in the process.

NextEra argued that the Staff should be designated as an independent monitor to supervise the RFP process because the involvement of the Staff in this capacity will assure third party developers that Detroit Edison's RFP process will be handled in a fair and non-discriminatory manner. NextEra adds that Detroit Edison has not provided any legitimate reason to object to the Staff serving as an independent monitor.

Lastly, NextEra argued that Detroit Edison should expedite RFP responses. Next Era notes that Detroit Edison proposes response periods ranging from 30 days to 120 days. NextEra argues

that Detroit Edison can achieve high quality responses and participation if it expedites the bid process by using the minimum time periods proposed by the company.

Discussion

The Commission finds that Detroit Edison's filing complies with Act 295, the requirements contained in Attachment D to the Temporary Order, and the requirements of the June 2, 2009 order in this case. The proposed RFP and bidding procedures should therefore be approved. Detroit Edison has provided a framework and some detail related to features that are expected to be common to each RFP. The Commission further finds that the timelines for bid submission are reasonable and in accordance with the complexities of the products sought. In addition, nothing prohibits the company from extending these deadlines if warranted. The Commission finds that the electronic platform the company proposes to use for RFPs and bid submission will simplify the process for potential bidders and assure that all bidders have the same information. The Commission also finds that, although more detail regarding procedures may be requested in the future, Detroit Edison has provided adequate assurances regarding the protection of third-party confidential or proprietary information from Detroit Edison employees planning self-build projects, company affiliates, and other third-party developers. The Commission also agrees with the Staff that in the future, pre-RFP collaboratives would be of great assistance to Detroit Edison and other interested stakeholders and directs the Staff to address this issue in the rules to be promulgated pursuant to Act 295.

The Commission finds that Detroit Edison's proposal includes sufficient monitoring by the Staff of the RFP, bid evaluation process, and contracting that an independent monitor is not required at this time. If problems arise in the future, the Commission may revisit this issue.

MWPA's motion for clarification

The MWPA noted that Detroit Edison's Code of Conduct prevents preferential treatment only with respect to "any affiliate or other entity within its corporate structure" but that the Code of Conduct does not prohibit Detroit Edison itself from both collecting other developers' confidential information and using that information for the company's own competitive purposes. The MWPA adds that all of Detroit Edison's renewable energy efforts, including the evaluation of third-party proposals and the development of the company's own renewable projects, appear to be reported to one person in the company. The MWPA points to the Commission's order requiring Detroit Edison to assure that company affiliates are not afforded a competitive advantage over third parties, but that does not apply to Detroit Edison when it is competing against third party developers.

The MWPA recommends that the Commission clarify its order by noting that the Code of Conduct only applies to affiliates and by either requiring: 1) that Detroit Edison pursue the development of all renewables projects through a separate, at-risk affiliate, and further, that the company specify the employees involved in such activities and the manner in which they are separated from bid evaluation and that all future transfers of such employees into or out of the affiliated entity be expressly reported to the Commission; or 2) if Detroit Edison is to pursue development of its own renewable projects, that the company establish a process so that no Detroit Edison employee has access to the underlying cost data or any other confidential or proprietary information contained in proposals submitted by competing developers.

In response, the Staff noted that Mr. Johnston's testimony filed on June 16, 2009 included an explanation and description of safeguards Detroit Edison has in place to ensure that the company's Renewable Energy Implementation Team (i.e., the employees responsible for the company's self-

build proposals) does not gain access to non-public competitively sensitive information from third-party renewable energy developers.

The Commission agrees that the MWPA's motion for clarification is moot in light of the testimony filed by Detroit Edison subsequent to MWPA's motion and that this issue was addressed in the reopened proceeding. The Commission finds that the MWPA's petition should be dismissed.

Attorney General's petition for rehearing

In his petition for rehearing, the Attorney General claims that the Commission misinterpreted his argument that setting a transfer price as a floor for the life-cycle of a project will harm ratepayers because ratepayers will be required to cover any cost increases but will not receive any benefit if costs fall. The Attorney General argues, "Increases in transfer prices above the price in effect during the year that each contract is executed should be subject to decreases as well as increases in future transfer prices or should not be subject to decreases or increases in future transfer prices. DECo's proposal is not just and reasonable and should not be approved as a part of DECo's REP plan."

In response, Detroit Edison argues that the Attorney General's petition does not meet the standard for rehearing under the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403 (Rule 403) because the Attorney General simply reasserts his arguments contained in his initial brief. As such, Detroit Edison argues that the Attorney General's petition for rehearing should be denied.

Detroit Edison adds that its proposal to use the transfer price process for both third party power purchase agreements (PPAs) and Detroit Edison-owned projects does not avoid

MCL 460.1047(2)(b)(iv), which limits the “transfer price” for renewable energy sold to power supply cost recovery (PSCR) customers to the “lower of the amount established by the commission or the actual price paid.” According to Detroit Edison:

Under no foreseeable circumstance could the Company ever expect to recover a transfer price in the MCL 460.6j PSCR process which exceeds the actual contract costs. Therefore, the AG’s apparent concern that total actual costs charged to customers may be higher than the sum of the incremental cost of compliance and the projected “transfer price floor” is unwarranted. Both the renewable cost reconciliation and the PSCR reconciliation proceedings will provide ample opportunity for interested parties to validate this process.

Detroit Edison’s reply in opposition to the Attorney General’s petition, p. 5.

The Staff similarly asserts that there is no merit to the Attorney General’s argument that the Commission lacks authority to establish transfer prices as a floor. Nevertheless, the Staff notes that while the June 2, 2009 order in this case, and the December 4, 2008 order in Case No. U-15800 addressed certain aspects of the transfer price, the issue of how the transfer price is to be used in the case of a third-party PPA has not been specifically addressed. The Staff therefore urges the Commission to clarify that at the time any PPA is approved by the Commission, the schedule of transfer prices most recently approved shall become the floor price for PSCR recovery. For each contract year, if the most recently approved annual transfer price is higher than the schedule of transfer prices for a particular contract, then the most recently approved annual transfer price would be recovered via the PSCR process. However, in the event that the contract price is less than the transfer price, the contract price would be the recoverable PSCR cost. This method would be applicable to renewable engineering, procurement, and construction contracts, or contracts for renewable energy systems that have been developed by third parties for transfer of ownership to an electric provider, provider-owned projects, and third party PPAs.

Rule 403 provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant rehearing.

The Commission agrees with the Staff's clarification and adds that it appears that the Attorney General fundamentally misunderstands the concept and operation of the transfer price in renewable energy procurement. Pursuant to Section 47(2)(b) of Act 295, the Commission is required to annually set a transfer price for renewables costs that will flow through the company's PSCR. The transfer price is simply a mechanism for estimating and allocating the reasonable and prudent costs of renewable energy between the PSCR and the REP surcharge, whether these costs are associated with renewable self-build projects, projects that are built by third-parties and transferred to the utility, or PPAs. As with any other PPA for electric power, ratepayers pay the reasonable and prudent costs set forth in the contract approved by the Commission and no more. There is no reason to view a PPA for renewable energy in any different fashion than, for example, the request by Consumers Energy Company for approval of a 20-year PPA for the purchase of nuclear power. *See*, March 27, 2007, Case No. U-14992. The primary reason for setting the transfer price schedule as a floor for any project or PPA is to provide the utility with a means of planning its renewables acquisition program to meet its renewable portfolio targets without exceeding the caps on the surcharge defined in Act 295.

THEREFORE, IT IS ORDERED that:

A. The request for proposals and bid evaluation procedures proposed by The Detroit Edison Company are approved.

B. The petition for clarification filed by the Michigan Wholesale Power Association is denied because it is moot.

C. The Attorney General's petition for rehearing is granted and the operation of the transfer price is clarified as set forth in the 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, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner

Steven A. Transeth, Commissioner

By its action of August 25, 2009.

Mary Jo Kunkle, Executive Secretary