

II. Background

2. On December 20, 2002, Applicants filed the instant application, stating that "Commission approval is sought because both CEE and RECO have codes of conduct and electric tariffs that generally prohibit wholesale sales of electric power to affiliates absent approval from the Commission under [section] 205 of the FPA."²

Accordingly, they request, to the extent necessary, waiver of the applicable provisions of Applicants' market-based rate tariffs, codes of conduct and any other applicable Commission regulations. Applicants request expedited consideration to allow them to participate in the BPU-sponsored statewide auction that will commence on February 3, 2003.

3. CEE and RECO are corporate affiliates and subsidiaries of Consolidated Edison, Inc. (Con Ed). CEE has on file a Commission-approved market-based rate tariff and code of conduct. RECO is a wholly-owned subsidiary of Orange and Rockland Utilities, Inc. (O&R) and provides retail electric service in New Jersey.

4. Applicants state that the BPU approved two statewide bidding auctions as the means for procuring Basic Generation Service (BGS)³ for electric customers in New Jersey, the first of which was concluded in February 2002.⁴ They state that in December 2002, the BPU approved an auction design for a statewide auction to commence on February 3, 2003, for the provision of all the BGS requirements for the period of August 1, 2003 to May 31, 2004 and a portion of the BGS requirements for the period of June 1, 2004 through May 31, 2006.

III. Notice of Filing and Pleadings

5. Notice of Applicants' filing was published in the **Federal Register**, 68 FR 554 (2003), with protests and motions to intervene due on or before January 10, 2003. Public Service Electric and Gas Company (PSE&G) filed a timely motion to intervene⁵ and protest. On January 17, 2003, Applicants filed an answer.

IV. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁶ PSE&G's timely, unopposed motion to intervene serves to make it a party to this proceeding. Rule 213 of the Commission's Rules of Practice generally prohibits answers to protests unless otherwise ordered by the decisional authority.⁷ We will permit Applicants' answer because it has aided us in understanding the issues.

B. Substantive Matters

7. As noted, Applicants ask the Commission to permit CEE to participate in the BPU-approved statewide auction process to the extent that CEE may bid to supply the electric load requirements of its affiliate RECO. Applicants also request, if necessary, waiver of the provisions of the applicable codes of conduct and market-based rate tariffs that, among other things, prohibit wholesale sales of electric power to affiliates absent approval from the Commission under section 205 of the FPA.⁸

8. Applicants assert that the proposed sale in this case would originate through a competitive bid process supervised by the state regulatory authority with jurisdiction over the rates of the purchasing utility and that the auction process is designed to prevent affiliate abuse. They describe the auction process as follows:

The auction process is a completely competitive one based entirely on price. The bids are submitted electronically through the internet. During the bidding process, there is no contact outside of the process between any one supplier and an [electric distribution company (EDC)] concerning the bids. Indeed, during the auction process, the EDCs do not know which suppliers are bidding to supply their BGS customer load. Only the auction manager, National Economic Research Associates, Inc. ("NERA"), an independent consultant, is privy to such information. The auction commences by an EDC setting, in consultation with the BPU and the auction manager, a starting price. Suppliers bid the percentage of the EDC's BGS customer load that they are willing to supply at that price. They do this by bidding the number of tranches, each of which is equal to a set percentage of the EDC's overall BGS customer load, that they are willing to supply

at the applicable price. Generally speaking, the auction manager then gradually lowers the price and suppliers continue to bid the volume they are willing to supply until the price is at the lowest point where one hundred percent of the EDC's BGS customer load is still covered by the suppliers' volumetric bids. Once the lowest price is determined, and the BPU approves it, the EDC and each of the winning suppliers are required to enter into the applicable BGS Supplier Master Agreement that was approved by the BPU in its decision and order issued on December 4, 2002 in Docket No. EX01110754.⁹ There is no individualized negotiation of the BGS Supplier Master Agreement between the winning suppliers and the EDC. The price described above is the price that is paid under the BGS Supplier Master Agreement for the supply of BGS.¹⁰

9. The Commission has approved affiliate sales based upon a competitive bidding process only after the Commission has evaluated the bidding process and determined that, based on the evidence, the proposal was a result of direct head-to-head competition between the affiliates and competing unaffiliated suppliers in a formal solicitation or informal negotiation process.¹¹ In *Conectiv Energy Supply, Inc.*,¹² the Commission accepted for filing, among other things, a service agreement between Conectiv Energy Supply, Inc. (CESI) and its affiliate Atlantic City Electric Company (Atlantic) pursuant to which CESI would make sales of capacity, energy and ancillary services to Atlantic under CESI's market-based rate tariff. In that case, the Commission evaluated the first BPU bid process and determined that the process "alleviates our concerns regarding affiliate abuse."

10. PSE&G states that it does not oppose CEE's proposal to bid in the BGS auction. However, PSE&G requests that Applicants' filing be rejected, arguing that the Commission lacks jurisdiction over the BGS auction. It argues that BGS is a retail service subject to the BPU's jurisdiction because the underlying BGS supply contract, the BGS Master Supply Agreement (Agreement), creates a direct supply arrangement between the BGS supplier and the end-user of electricity

⁹ There are two applicable BGS Master Supplier Master Agreements (BGS-FP for Basic Generation Service—Hourly Energy Pricing and BGS-HEP for Basic Generation Service—Fixed Pricing). Applicants attached two *pro forma* BGS Supplier Master Agreements (one for BGS-FP and one for BGS-HEP) to their filing.

¹⁰ Applicants' Transmittal Letter at 3-4.

¹¹ See *Connecticut Light & Power Company and Western Massachusetts Electric Company*, 90 FERC ¶ 61,195 at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217 at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027 at 61,059-60 (1999); *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 at 62,167-69 (1991).

¹² 91 FERC ¶ 61,076 at 61,269 (2000).

² Applicants' Transmittal Letter at 4.

³ BGS is electric generation service that is provided by a New Jersey electric distribution company to any customer who has not chosen an alternative power supplier. BGS is known in other states as provider of last resort service or default service.

⁴ See *Electric Discount and Energy Competition Act of 1999*, N.J.S.A. 48:3-49 *et seq.*, which provides the framework for the transition from a regulated to a competitive market place in New Jersey.

⁵ PSE&G states that it is the major supplier of electricity in New Jersey. It further states that it is a major distributor of electricity in New Jersey and a transmission-owning member of the PJM

Interconnection LLC regional transmission organization and a provider of wholesale transmission service to surrounding regions.

⁶ 18 CFR 385.214 (2002).

⁷ 18 CFR 385.213 (2002).

⁸ As noted above, CEE has a market-based rate tariff on file with the Commission. RECO is governed by the tariffs and code of conduct filed by O&R with the Commission on behalf of the Orange and Rockland System.