BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Power Company	)))	Case No. 17-2391-EL-UNC
In the Matter of the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company	))))	Case No. 17-0957-EL-UNC
In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.	)))	Case No. 18-6000-EL-UNC
In the Matter of the Procurement of Standard Service Offer Generation as Part of the Fourth Electric Security Plan for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)))))))	Case No. 16-0776-EL-UNC

APPLICATION FOR REHEARING OF THE RETAIL ENERGY SUPPLY ASSOCIATION, INTERSTATE GAS SUPPLY, INC., DIRECT ENERGY BUSINESS, LLC AND DIRECT ENERGY SERVICES, LLC

In accordance with R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the Retail Energy Supply Association (RESA), Interstate Gas Supply, Inc. (IGS), Direct Energy Business, LLC and Direct Energy Services, LLC (Direct) respectfully submit this Application for Rehearing of the July 15, 2020 Order issued in these proceedings. The Order is unreasonable and unlawful because:

A. The Commission lacks authority to modify an approved electric security plan upon its own initiative; and

B. The Commission lacks authority to approve a standard service offer that extends beyond the terms of the EDUs' existing ESPs; and

C. The auction design and schedule modifications contemplated in the Order are unnecessary and unreasonable.

Accordingly, the Commission should grant this Application and rescind the Order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The July 15 Order arises from what the Commission characterizes as "changed circumstances" in the PJM capacity market. "FERC's recent actions, and appeals from those actions, have created significant uncertainty regarding when and how PJM will conduct base residual auctions in the future [.]"[1] Seeking to "lock-in historically low prices" produced by recent auctions, "the Commission determines that it is reasonable to modify the approved SSO auction processes to mitigate the possible significant effects caused by the uncertainty surrounding PJM's BRA."[2]

The Commission's actions must be considered in a broader context. During the last round of ESP's for AEP and the FirstEnergy EDUs, the Commission authorized ratepayer recovery of hundreds of millions of dollars in above-market payments to affiliated generators. Ratepayers were assured that the above-market rates they would pay for generation provided a "hedge" that would result in tens of millions of dollars in credits once historically-low wholesale energy prices began to rise.[3] These skyrocketing prices were just around the corner, the EDUs warned.

Fast-forward to today. Wholesale energy prices have fallen even further and capacity costs have also trended downward. The Commission's desire to "hedge" generation prices succeeded only to

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[1] Order ¶ 34.
[2] *Id*.
[3] *See* Case No. 14-1297-EL-SSO (FirstEnergy ESP IV), Mar. 31, 2016 Opinion and Order at 80 ("The centerpiece of the proposed ESP IV is the Economic Stability Program, which includes Rider RRS. Rider RRS will operate as a form of rate insurance. If energy market prices stay at the current low levels, customers will pay a charge under Rider RRS; however, if energy market prices rise from the current low levels, customers will begin to receive a credit under Rider RRS, which will mitigate the increases customers see on their bills. The higher energy market prices rise, the greater the amount of credit customers will see.") (internal citations omitted); Case No. 14-1693-EL-RDR (AEP PPA Case), Mar. 31, 2016 Opinion and Order at 55 ("AEP Ohio also asserts that the PPA rider will protect customers from price volatility and supplement the benefits derived from the staggering and laddering of SSO auctions, which may mask the impact on customers of rising market prices but carmot offset the impacts in the same way as the PPA rider. In sum, AEP Ohio emphasizes that the PPA rider will benefit customers by using a diversified portfolio, sourced from 20 generation units, to provide a cost-based hedge against market prices, which provides a more balanced approach than relying solely on market-based pricing.").

prompt the very "uncertainty" the July 15 Order purports to address.[4] As noted in the FERC litigation commenced shortly after the AEP and FirstEnergy orders in March 2016:

> Out-of-market payments, whether made or directed by a state, allow the supported resources to reduce the price of their offers into capacity auctions below the price at which they otherwise would offer absent the payments, causing lower auction clearing prices. As the auction price is suppressed in this market, more generation resources lose needed revenues, increasing pressure on states to provide out of-market support to yet more generation resources that states prefer, for policy reasons, to enter the market or remain in operation. With each such subsidy, the market becomes less grounded in fundamental principles of supply and demand.[5]

Thus, the uncertainty discussed in the Order is partly of the Commission's own making. The Commission is now worried that suppliers will price this uncertainty into their bids in upcoming SSO auctions. The Commission hopes to eliminate this uncertainty by experimenting with a new auction design and extending the term of some EDUs' ESPs.

There are two fundamental problems with the Order. First, the Commission cites no authority to modify a previously-approved ESP. Any changes to a prior order must be consistent with the applicable statutory scheme and the changes proposed here are not. The Commission cannot change the term of the existing ESPs or alter the auction schedules with the stroke of a pen.

Second, even if the Commission *could* modify the ESPs, the question remains whether it *should*. The current uncertainty over the 2022-23 BRA does not prevent the SSO auctions from going forward. BRA results are the primary price-signal for future capacity prices, but they are not the only price signal. Suppliers still have the option of entering bilateral contracts. More importantly, the temporary absence of a price signal from PJM is a reality that *all* suppliers face. Insulating SSO suppliers from a risk that all suppliers face is unreasonable. Signatory parties to the stipulations adopted in the last round

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[4] *Calpine Corp., et al. v. PJM Interconnection, LLC,* FERC Docket Nos. EL16-49-00, 163 FERC ¶ 61,236, Order Rejecting Proposed Tariffs (June 29, 2018) at ¶ 111 ("Calpine asserts that the Ohio Authorizations—and the Illinois ZECs program, as addressed by the Amended Complaint—are illustrations of the threat posed by subsidized existing resources.").

[5] *Id*. at ¶ 2.

of ESPs are entitled to the benefit of their bargain. Non-signatory parties are entitled to finality. Modifying the ESPs mid-term would merely substitute one form of uncertainty for another.

A problem created by "hedging" is not easily resolved through a revised auction design that introduces yet another "hedge." The Commission should not proceed along the path outlined in the July 15 Order. It should stay the course and proceed with the SSO auctions as designed.

II. ARGUMENT

"Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section [.]"[6] The ESPs at issue were approved under R.C. 4928.143. In each case, the Commission approved a partial stipulation.[7] Each stipulation includes or references an auction schedule and the products to be bid. The deadlines for rehearing and appeal of the orders approving these stipulations expired long ago.

The July 15 Order extends the modified auction format for SSO pricing through May 2026.[8] The current ESPs for AEP and FirstEnergy expire on May 31, 2024. Duke's expires May 31, 2025. DP&L's ESP III was approved for a term ending October 31, 2023, but the company subsequently withdrew it. DP&L's SSO structure under ESP I will remain in effect until the company files a new plan.

The Order directs the EDUs to substitute a 12-month product for any longer-term products scheduled for bidding in the Fall 2020 and Spring 2021 auctions. The results of these auctions will factor in to SSO rates for the 2021-22 delivery year. For the subsequent 4-year period beginning in June 2022, the Commission has ordered "dual auctions" for two distinct products: "(i) A full requirements product with a proxy price, using the June 2021 capacity price as the proxy, subject to true-up and

[6] R.C. 4928.141(A).
[7] *See* Order ¶ 1 (listing cases).
[8] *Id*. at ¶ 35.

reconciliation; [and] (ii) An energy-only auction and a capacity-only hedge product. Suppliers will offer capacity hedge at a fixed price for all years included in the auction product, thereby guaranteeing the capacity price to be paid by consumers over the long-term."[9] The point of this exercise is to "provide stability to customers by taking action to lock-in historically low prices observed in recent auctions and thereby attempt to manage price volatility risks."[10]

A. The Commission lacks authority to modify an approved electric security plan upon its own initiative.

There is no dispute that "the Commission may modify a prior order, provided that the Commission provides an explanation and that the modification is lawful and reasonable."[11] The case cited in the Order *reversed* the Commission for modifying an ESP. The Commission could not establish its legal authority to modify an approved ESP in that case, nor has it done so here.

In AEP's *ESP II* case, the Commission authorized AEP to defer fuel costs with carrying charges at a WAAC rate of 11.15 percent. When AEP later filed an application to recover these deferrals, the Commission "deemed it necessary to modify the part of the ESP Order that established the WAAC as the carrying-charge rate," and reduced the carrying charges to a long-term debt rate of 5.34 percent.[12] The Commission claimed it had "ongoing supervision and jurisdiction" to change the ESP II Order, but the Court disagreed:

> [T]he commission does have authority to revisit and modify earlier regulatory decisions. The commission also has broad discretion under R.C. 4928.144 to authorize utilities to phase in rates. This authority, however, is not unlimited; the new regulatory course must also be permissible under the statutory scheme. Fundamentally, [t]he PUCO, as a creature of statute, has no authority to act beyond its statutory powers. So whatever

[9] Order at ¶ 35.
[10] *Id*. at ¶ 37.
[11] *Id*. at ¶ 34, citing *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶ 16
[12] *In re Application of Ohio Power Co*., 2015-Ohio-2056, ¶10, 144 Ohio St. 3d 1, 3.

> authority the commission has to modify the structure of the phase-in must be exercised in compliance with other relevant statutory provisions.[13]

The Commission's post-hoc change to the carrying charge rate deprived AEP of its right to withdraw the ESP and was therefore deemed unlawful.

The Court's decision recognizes that "traditional" ratemaking and ESP ratemaking are subject to a different "statutory scheme." Traditional rate orders are subject to modification on numerous grounds. For example, the Commission may "rescind, alter, or amend" a prior rate order; [14] it may initiate a complaint regarding previously-approved rates;[15] and it may exercise emergency ratemaking authority.[16] The statutes granting this authority do *not* apply in the ESP context. The ESP statute specifically exempts ESPs from "any other provision of Title [49] of the Revised Code,"[17] except certain enumerated provisions. The legislature's decision to *not* include R.C. 4905.26, 4909.15 or 4909.16 in the list of enumerated provisions (*i.e.,* statutes in Title 49 that remain operative for an ESP) reflects an intent to limit the Commission's authority, not expand it.[18]

The limitation on the Commission's ability to review or modify an ESP are clearly proscribed. The Commission cannot approve an ESP unless it finds the plan is "more favorable in the aggregate" than the expected results of an MRO.[19] Utilities that operate under an ESP are subject to the annual significantly excess earnings test.[20] If a plan has a term of more than three years, the Commission must test the plan in the fourth year to determine whether it remains more favorable in the aggregate than an MRO.[21] If not, "the commission may impose such conditions on the plan's termination as it considers

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[13] *Id*. at ¶¶ 31-32.
[14] R.C. 4909.15(F).
[15] R.C. 4905.26.
[16] R.C. 4909.16.
[17] R.C. 4928.143(B).
[18] "*Expressio unius est exclusio alterius* means 'the expression of one thing is the exclusion of the other.' Under this maxim, if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." *Thomas v. Freeman,* 1997-Ohio-395, 79 Ohio St. 3d 221, 224–25 (internal quotation omitted).
[19] R.C. 4928.143(C)(1).
[20] R.C. 4928.143(F)
[21] R.C. 4928.143(E).

reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative."[22] Nothing in Chapter 4928 confers authority to the Commission to revisit and modify a previously-approved ESP. The only statute that confers authority for the Commission to "design, manage, and supervise [a] competitive procurement process" pertains to the auctions for PIPP load, and even then the Commission may only get involved "upon written request by the director of development services."[23]

No statute allows the Commission to tinker with the auction design spelled out in an approved ESP, let alone extend the term of an ESP. The Commission simply lacks authority to order the modifications directed in the Order. "[T]he commission may not legislate in its own right." [24]

B. The Commission lacks authority to approve a standard service offer that extends beyond the terms of the EDUs' existing ESPs.

The Commission also lacks the ability to establish the standard service offer for a future period outside of the current ESPs. As recognized by the Commission, "the SSO procurement process outlined above extends beyond the terms of the EDUs' existing ESPs."[25] However, "***Only*** a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance [with R.C. 4928.141]."[26]

Nothing in the Order regarding the SSO was authorized in accordance with R.C. 4928.142 or 4928.143. These proceedings require an application from the EDU, a hearing, and specific findings from the Commission regarding for an ESP application. None of that has occurred here. Instead, the Commission, on its initiative, modified and extended the EDUs' SSO procurement auctions in an

[22] *Id*.
[23] R.C. 4928.544(A)
[24] *Office of Consumers' Counsel v. Public Util. Comm'n,* 67 Ohio St. 2d 153, 166 (1981).
[25] Order at ¶ 37.
[26] R.C. 4928.141 (emphasis added).

"attempt to manage price volitiatlity risks."[27] Because this scheme was not authorized under R.C. 4928.142 or R.C. 4928.143 as explicitly required under R.C. 4928.141, it cannot serve as an EDU's SSO.

Again, the Commission is a creature of statute and has no authority to act beyond its statutory powers.[28] Regarding an SSO, its authority lies with reviewing the applications submitted by an EDU.[29] Nowhere in Ohio law does it authorize the Commission to authorize an SSO through any other way except for the MRO and ESP statutes. The Commission simply lacks the authority establish a standard service offer outside of an ESP or MRO proceeding.

Additionally, the Order unlawfully interferes with the right of an EDU to establish its standard service offer under an MRO. Under Ohio law, an EDU is required to offer to a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, however, the EDU has the discretion as to whether it will fulfill this obligation through an application for an ESP and MRO.[30] By requiring the EDUs modify their SSO procurement auction processes until 2026, the Commission has precluded the EDUs from offering an MRO during that time. The results of the Commission's new SSO process cannot simply be applied to an MRO.

For example, under R.C. 4928.142(B), the EDU is required to submit an application for an MRO ***prior to*** initiating a competitive bidding process. The Commission then must determine that the EDU has met a series of requirements before it can direct the EDU to move forward with the bidding process. This limits the ability of an EDU to apply for an MRO to only those years in which the auctions have not occurred. Additionally, under an MRO, the Commission must select the least-cost bid winners of the

[27] Order at ¶ 37.
[28] *In re Application of Ohio Power Co*., 2015-Ohio-2056, ¶10, 144 Ohio St. 3d 1, 3.
[29] R.C. 4928.142 (B)(3), (C); R.C. 4928.143(C)(1).
[30] "To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections…" R.C. 4928.141.

process.[31] However, the Commission's new process does not share that requirement. Indeed, the Commission notes the "flexibility" in selecting which of the two auction results will be chosen, the purpose of which is to "attempt to manage price volatility risks," not seek the least-cost bids.[32] Thus, this will require the EDUs to apply for ESPs for future years, interfering with their statutory right to determine how to procure the SSO.

C. The auction design and schedule modifications contemplated in the Order are unnecessary and unreasonable.

The short-term benefit contemplated in the Order (lower generation prices) imposes a significant long-term cost. Past efforts to influence or circumvent market-based prices through "hedging" and other gimmicks have *never* turned out well for consumers or for the competitive market. There is no reason to believe that things will be different this time.

Under the current auction schedules and design, bidders in future SSO auctions would need to account for the lack of a 2022-23 BRA in structuring their bids. The Commission is concerned that suppliers will build a risk premium into their bids to account for this uncertainty. The Commission hopes that by eliminating uncertainty, suppliers will submit lower bids and SSO rates will be lower than they otherwise would. The Order purports to resolve this uncertainty risk by guaranteeing SSO suppliers dollar-for-dollar recovery of capacity costs. This would be an unnecessary and unlawful substantial change from the current auction requirements, which were previously authorized by the Commission through ESP process.

The modified auction design would substitute a "proxy price" for actual PJM prices. The proxy price would essentially act as a placeholder for bidding purposes. Suppliers would be compensated based on the proxy price until actual prices become known. A reconciliation would then occur and

[31] R.C. 4928.142(C).
[32] Order at ¶ 37.

suppliers would be made whole for the difference between the proxy price and actual 2022-23 BRA price.

Making SSO suppliers whole for capacity costs inserts a regulatory subsidy into the competitive procurement process. Consumers are enjoying historically low energy prices because there is a competitive market for energy and capacity. State regulatory agency intervention caused the current uncertainty in the capcity market. The cause of the problem cannot also be the solution. Further interventions will only produce more uncertainty.

The absence of a 2022-23 BRA does not prevent any EDU from adhering to the current auction schedule or design. Energy and capacity remain freely available in the wholesale market. Current market conditions have rendered future capacity prices less certain, but uncertainty is inherent in markets. Suppliers bidding in these auctions have the expertise to manage the uncertainty – just as they have done since these auctions bagan. Indeed, future energy costs represent suppliers' greatest risk because long-term energy prices are never known. Yet suppliers still enter long-term energy contracts—that is their business. Suppliers make or lose money based on how well they predict future energy prices. Current market conditions require suppliers to now evaluate and manage capacity price risk as well. All suppliers have access to the same public information. All suppliers know full well what is happening at PJM and FERC regarding the 2022-23 BRA. The timing of the capacity auction may be adjusted but it must be based on the PJM OATT, which has not changed. All suppliers and PJM are following the same process.

While the Commission is rightfully mindful of wholesale energy and capacity market conditions, the Commission is not responsible for wholesale or retail generation rates. The Commission approved ESPs that require generation procurement and pricing through competitive auctions. A revised auction design intended to "guarantee[] the capacity price to be paid by consumers over the long-

term"[33] is fundamentally inconsistent with market-based pricing. The fact that market risks constantly change over time can hardly be said to constitute a "changed circumstance."[34] Moreover, long-term prices are still available through bilateral contracts. Suppliers continue to offer long-term fixed contracts. It is entirely possible that contracted capacity prices for 2022-23 end up being *lower* than the eventual BRA results. The revised auction design would deprive consumers of the ability to do *better* than the PJM BRA.

Nor is a market in which some suppliers are singled-out for special treatment a "competitive" market. Again, every supplier is aware of what is happening in the capacity market. Allowing SSO suppliers to pass-through capacity costs would give this select group of suppliers a price advantage over suppliers who—appropriately—bear this market risk. The *possibility* of realizing temporarily-lower generation rates by subidizing capacity cost risk is not worth the cost of dysfunctional market in the long-term.

III. CONCLUSION

"When the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified."[35] The Court has specifically rejected the notion that "the commission could modify an ESP at any time after the application has been approved—even while the ESP is still in effect—and the utility would have no recourse but to implement the change. This would hardly be a 'just and reasonable result.'"[36] The Commission must rescind the July 15 Order.

[33] Order ¶ 5.
[34] *See id.* at ¶3 4.
[35] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 10 Ohio St.3d 49, 50–51 (1984).
[36] *In re Application of Ohio Power Co.,* 2015-Ohio-2056, ¶ 30, 144 Ohio St. 3d 1, 8.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served by electronic mail this 14th day of August, 2020 to the following:

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Summary: Application Application for Rehearing electronically filed by Ms. Valerie A Cahill on behalf of Retail Energy Supply Association and Direct Energy, LLC and Direct Energy Business, LLC and Interstate Gas Supply Inc