

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE PROCUREMENT  
OF STANDARD SERVICE OFFER  
GENERATION FOR CUSTOMERS OF DUKE  
ENERGY OHIO, INC.

CASE NO. 18-6000-EL-UNC

## ENTRY ON REHEARING

Entered in the Journal on November 16, 2022

### I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Ohio Consumers' Counsel.

### II. DISCUSSION

{¶ 2} Duke Energy Ohio, Inc. (Duke) qualifies as an electric utility as defined by R.C. 4928.01(A)(11) and as an electric distribution utility (EDU) as defined by R.C. 4928.01(A)(6).

{¶ 3} R.C. 4928.141 provides that electric utilities shall provide consumers a standard service offer (SSO) of all competitive retail electric services in accordance with R.C. 4928.142 or 4928.143. The SSO functions to make generation supply available to customers that are not receiving this supply from a competitive retail electric services provider and is sometimes referred to as default supply. The Commission approved Duke's most recent electric security plan (ESP), which implemented a competitive auction-based SSO format, as well as a competitive bid procurement process for Duke's auctions to procure generation supply for Duke's customers for a certain period of time. *In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, et al., Opinion and Order (Dec. 19, 2018).

{¶ 4} Since the approval of Duke's ESP, Duke's auction schedule has been modified due to delays in the timing of PJM Interconnection, LLC's (PJM) base residual auction (BRA). *In re the Procurement of Standard Service Offer Generation Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC, Finding and Orders (Aug. 26, 2020) and (June 16, 2021).

{¶ 5} On December 22, 2021, the Federal Energy Regulatory Commission (FERC) issued an order reversing FERC's previous determination that the backward-looking energy and ancillary services offset (E&AS Offset) was just and reasonable. Given this reversal, FERC directed PJM to submit a compliance filing within 60 days to revise its Tariff and Operating Agreement and, in order to incorporate the revised E&AS Offset in the BRA for the 2023/2024 delivery year, directed PJM to submit a compliance filing within 30 days that proposes a new schedule for the BRA and subsequent BRAs. *Order on Voluntary Remand*, Case Nos. EL19-58-006; ER19-1486-003, at ¶ 2 (Dec. 22, 2021).

{¶ 6} On January 10, 2022, Duke filed a notice advising the Commission of FERC's order cited above delaying the January 2022 BRA for the 2023/2024 delivery year and a request for guidance regarding whether an amendment to Duke's upcoming SSO auction schedule should occur. Duke also provided a modified auction schedule in case the Commission believed the SSO auction schedule should be amended.

{¶ 7} On January 26, 2022, the Commission approved Duke's proposal to modify its February 2022 SSO auction such that it procures 50 tranches of load during the 2022/2023 delivery year.

{¶ 8} On August 17, 2022, Duke filed a motion to confirm and clarify the SSO auctions for the remaining period of its ESP term, beginning with the September 2022 auction and ending with the February 2024 auction.

{¶ 9} On August 24, 2022, Ohio Consumers' Counsel (OCC) filed objections to Duke's above motion.

{¶ 10} On August 24, 2022, the Commission granted Duke's proposal to modify its SSO auction schedules.

{¶ 11} Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined

in that proceeding by filing an application within 30 days after the Commission's order is journalized.

{¶ 12} On September 23, 2022, OCC filed an application for rehearing pursuant to R.C. 4903.10 on the August 24, 2022 Finding and Order, asserting that the Commission erred by rendering a decision that was not based on record evidence presented by OCC showing Duke charging at-risk Percentage Payment Plan (PIPP) program consumers electricity prices higher than Duke's standard offer in violation of R.C. 4928.02(L), 4928.542, 4903.09.

{¶ 13} Duke filed a memorandum contra OCC's application for rehearing on October 3, 2022.

{¶ 14} On October 5, 2022, the Commission issued an Entry on Rehearing denying OCC's application for rehearing. In its Entry, the Commission stated that despite OCC's reference to Ohio Adm.Code 122:5-3-06, R.C. 4928.54 specifically requires that "[t]he director of development services *shall* aggregate percentage of income payment plan program customers for the purpose of establishing competitive procurement process for the supply of competitive retail electric service for those customers. The process shall be an auction. \* \* \*." [Emphasis added]. Furthermore, pursuant to R.C. 4928.544, the Ohio Department of Development (ODOD) submitted its request to the Commission to design, manage, and supervise the auction process, which was the impetus for the current design of the PIPP auction format decided in *In the Matter of the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC (*Implementation Case*), Finding and Order (Mar. 2, 2016). In response to OCC's request to combine PIPP and SSO auctions, the Commission noted that it is clear from the plain language of the statute that the General Assembly intended that PIPP program loads be aggregated and procured from a competitive bidding process separate from the SSO customers. In regard to OCC's claim that electricity prices resulting from the PIPP auctions have been higher than those procured under the SSO auction and that this outcome violates R.C. 4928.02(L) and 4928.542, Commission emphasized that R.C. 4928.54 requires the director of ODOD to aggregate PIPP

program customers for the purpose of establishing a competitive procurement process for the supply of competitive retail electric service for those customers. The Commission also affirmed its previous determination that the existing PIPP program auction format is required under law.

{¶ 15} On September 21, 2022, the Commission issued a Finding and Order accepting the results of Duke's September 2022 SSO procurement auction and authorizing Duke to file final tariffs implementing the rates for SSO customers.

{¶ 16} On October 21, 2022, OCC filed a timely application for rehearing on the Commission's September 21, 2022 Finding and Order. In its application, OCC asserts that the Commission erred and acted outside of its authority by approving Duke's auction results and authorizing Duke to file final tariffs that charge at-risk PIPP consumers electricity prices higher than Duke's SSO prices, in violation of R.C. 4928.542(B) and (C) and principles of statutory construction. OCC reiterates many of the same arguments it advanced in its August 24, 2022 objections and September 23, 2022 application for rehearing on the August 24, 2022, Finding and Order. OCC's arguments primarily center on the PIPP program, which is administered by ODOD) and the Commission for low-income electric consumers under state law. According to OCC, as currently run, the PIPP program is violating R.C. 4928.02(L) and R.C. 4928.542 to protect at-risk PIPP customers of Duke by charging them prices for electricity in excess of Duke's SSO for the past two auctions. OCC argues that this case provides an opportunity for the Commission to avoid this plight in the future for Duke's PIPP customers by including PIPP customers in the SSO auction. OCC asserts that combining the PIPP and SSO auctions is permissible under Ohio Adm.Code 122:5-3-06, which allows the ODOD Director to aggregate PIPP consumers for competitive auctions if substantial savings for the PIPP plus program can be realized. OCC also asserts that the Commission's previous finding in the *Implementation Case* that cost savings need accrue only "over the long-term" violates Ohio's rules of construction under R.C. 1.42. *Implementation Case* at 5. According to OCC, R.C. 4928.542(B) requires a winning bid shall reduce the cost of the PIPP program relative to the otherwise applicable SSO, and R.C.

4928.542(C) requires that a winning bid shall result in the best value for the persons paying the universal service rider, a rider associated with the state funding mechanism for electric bill payment assistance through PIPP. OCC argues that these statutes, when read pursuant to R.C. 1.42, are unambiguous and that R.C. 4928.542 says nothing about bids reducing rates “over the long-term” as the Commission stated in the *Implementation Case* and again affirmed in the October 5, 2022 Entry on Rehearing in this case. *Implementation Case* at 5.

{¶ 17} On October 31, 2022, Duke filed a memorandum contra. First, Duke believes OCC rehashes the same arguments it made in its September 23, 2022 application for rehearing and that, as a result, this application for rehearing should be disregarded as procedurally improper. Nonetheless, if the Commission considers the application for rehearing, it should again find OCC’s arguments unpersuasive for the same reasons the Commission denied the September 23, 2022 application for rehearing.

{¶ 18} We find that OCC’s application for rehearing is unavailing and should be denied. We believe that OCC’s assignment of error is an improper collateral attack on the Commission’s final, nonappealable order in the *Implementation Case* within which the Commission established the current design of the PIPP auction format. Before the Commission issued its decision in that case, OCC, among other stakeholders, filed comments in response to a Commission Staff review and recommendation. *Implementation Case*, OCC Comments (Feb. 29, 2016). Although OCC did not file an application for rehearing on the Commission’s decision, two other stakeholders did<sup>1</sup>, in response to which the Commission issued its Entry on Rehearing denying the applications for rehearing. *Implementation Case*, Entry on Rehearing (April 27, 2016). The Commission’s decision was not appealed to the Ohio Supreme Court; therefore, OCC’s assignment of error improperly attacks a final, nonappealable Commission order. And, as stated in the October 5, 2022 Entry on Rehearing, R.C. 4928.54 specifically requires that “[t]he director of development

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<sup>1</sup> Retail Energy Supply Association and Ohio Partners for Affordable Energy (OPAE) filed the applications for rehearing.

services *shall* aggregate percentage of income payment plan program customers for the purpose of establishing competitive procurement process for the supply of competitive retail electric service for those customers. The process shall be an auction. \* \* \*.” [Emphasis added]. In its assignment of error, OCC essentially restates its arguments advanced in its August 24, 2022 objections and in its September 23, 2022 Entry on Rehearing regarding the August 24, 2022 Finding and Order approving Duke proposed auction modification. OCC even proposes one of the same solutions previously offered on this issue, pointing to Ohio Adm.Code 122:5-3-06 as an avenue to combine the PIPP auction into the SSO auction. For the same reasons stated within the October 5, 2022 Entry on Rehearing, the Commission rejects OCC’s arguments. Accordingly, OCC’s application for rehearing in this matter should be denied.

{¶ 19} OCC also attempts to argue that R.C. 4928.542(B) and (C) are unambiguous and that these provisions do not explicitly provide the Commission with the authority to consider PIPP program costs over the long-term when comparing such costs with the blended SSO price. Additionally, OCC proposes that, if the PIPP auction results are accepted Duke should be required to pay the difference between the SSO auction results and the PIPP auction results. While the Commission never actually cited the “over the long-term” reasoning from the *Implementation Case* within its October 5, 2022 Entry on Rehearing or the September 21, 2022 Finding and Order at issue in this docket<sup>2</sup> and these arguments are in a similar vein to those already rejected by the Commission in this case, we find it appropriate to briefly consider them. As to OCC’s argument concerning R.C. 4928.542(B) and (C) being unambiguous and the Commission lacking authority to consider PIPP program costs over the long-term, again, the Commission considered the entirety of R.C.

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<sup>2</sup> OCC appears to be conflating separate Commission dockets. In response to objections made by OCC to the Dayton Power and Light dba AES Ohio’s August 12, 2022 application to modify its SSO procurement auction schedules, the Commission did reference its own decision in the *Implementation Case* wherein it would consider the cost of the PIPP program over the long term in comparison to the cost of the SSO blended price for the purposes of the statutory provisions OCC highlights. *In re the Procurement of Std. Service Offer Generation for Customers of the Dayton Power and Light Co.*, Case No. 17-957-EL-UNC, Finding and Order (September 21, 2022) at ¶ 18.

4928.542 when it made its decision in the *Implementation Case*, so this line of argument is improper in that it is a collateral attack on the decision in the *Implementation Case*. *Implementation Case*, Finding and Order at ¶ 7. The same holds true for OCC's suggested proposal for Duke to pay the difference between the SSO auction results and the PIPP auction results. Furthermore, in the *Implementation Case*, the Commission denied OPAE's assignments of error within its application for rehearing, two of which were similar to OCC's arguments here in that OPAE believed the request for proposal (RFP) auction process selected by the Commission violated R.C. 4928.542(B) by creating the possibility for the PIPP load to be served at a cost above the otherwise applicable SSO and violated R.C. 4928.542(C) by not following a process that would result in the best value for persons paying the universal service rider. *Implementation Case*, Entry on Rehearing (April 27, 2016) at ¶¶ 5-6, 9-10. The Commission denied these assignments of error, highlighting the effectiveness of an RFP auction process and the practical necessity for a contingency plan of allowing the electric utilities to obtain supply for the PIPP load through a bilateral transaction or from the market due to the timing of the competitive auctions. Entry on Rehearing at ¶¶ 6, 10. Consequently, we reaffirm our conclusion in the Entry on Rehearing, "[t]he Commission determined that the competitive RFP auction process will ensure reliable electric service to PIPP customers, will reduce the cost of the PIPP program relative to the applicable SSO, and will achieve the best value for persons paying the universal service rider." Entry on Rehearing at ¶ 6. As already noted above, OCC's application for rehearing should be denied.

#### IV. ORDER

{¶ 20} It is, therefore,

{¶ 21} ORDERED, That OCC's application for rehearing be denied. It is further,

{¶ 22} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

**COMMISSIONERS:**

*Approving:*

Jenifer French, Chair  
Lawrence K. Friedeman  
Dennis P. Deters

MJS/dmh

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Summary: Entry on Rehearing denying the application for rehearing filed by Ohio Consumers' Counsel. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio