BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 16-776-EL-UNC**

CONSTELLATION ENERGY GENERATION, LLC'S
MEMORANDUM CONTRA TO
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION TO POSTPONE
THE FIRSTENERGY UTILITIES' JANUARY 10, 2023
STANDARD SERVICE OFFER AUCTION

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") wants to indefinitely postpone the January 10, 2023 standard service offer ("SSO") auction of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy Utilities"). OCC filed its request on December 29, 2022 – only a few business days before the auction will take place and just prior to the New Year's holiday. OCC asked for an expedited ruling. Constellation Energy Generation, LLC ("Constellation") opposes OCC's motion and files this memorandum contra in accordance with the Attorney Examiner's December 30, 2022 Entry.

OCC's motion should be rejected because good cause has not been shown and because the motion is ill-advised. First, OCC has not demonstrated that, with an indefinite delay, there will be less regulatory uncertainty later on or that, when held, the auction will result in lower SSO prices in the FirstEnergy Utilities' service territory. The instances cited by OCC of past auction postponements involved vastly different, broader market circumstances affecting the ability of SSO bidders to even participate in an auction (i.e., base residual auction delays and unknown capacity prices) and were not based on one entity's vying for a certain regulatory outcome in

Commission proceedings. Second, the pending Commission cases that OCC relies upon to claim that there is regulatory uncertainty may not be resolved any time soon. An indefinite delay based on those proceedings, therefore, may be for naught. There always has been, and will continue to be, pending regulatory matters before the Commission during SSO auctions. Other cases will arise as well. Third, a postponement is unnecessary because the established auction process includes steps that will ensure the auction process is successful and compliant with the bidding rules and protocols, and that process is further subject to Commission review and approval. Fourth, OCC ignores that a last-minute indefinite postponement would cause *more uncertainty* and greater harm to the competitive SSO process.

Relative to the SSO auctions, OCC has repeatedly filed pleadings for the past several months, challenging the results of various SSO auctions and asking the Commission to modify the customers who would be served by the winning SSO suppliers so that certain customers' electric generation rates would change.[1] Also, OCC's motion in this proceeding advocates its position in the NOPEC case, which reflects another attempt to sway the Commission to side with OCC. The Commission should find that there is no good cause to indefinitely postpone the January 10, 2023 SSO auction and reject OCC's motion.

II. ARGUMENT

A. OCC's motion should be rejected because OCC has not shown that postponement would result in less regulatory uncertainty or lower SSO prices.

OCC contends that an indefinite postponement should be granted until the Commission has resolved issues pending in other Commission cases, in order to avoid current uncertainty and avoid auction results that might reflect a risk premium resulting in higher electricity prices for customers.

---

[1] For example, OCC sought, in an Application for Rehearing filed on November 4, 2022 in this proceeding, to have the percentage of income payment plan customers be charged the SSO rate. One and one-half months later, OCC is claiming that the next SSO auction will result in higher electricity prices for customers.

OCC Motion at 1. OCC claims that uncertainty is due to the suspension of the automatic approval process of the electric certificate renewal application of Northeast Ohio Public Energy Council ("NOPEC")[2] and the tariff proceedings in which minimum stay language is proposed.[3] OCC advocates postponing the January 2023 auction until some unknown time after these matters are resolved. OCC Memorandum in Support at 2.

OCC's motion is based on speculation. This conjecture is evident from OCC's motion:

- These events "**could reflect** a risk premium";[4]
- "The **potential** for this risk premium **could be mitigated** by postponing";[5]
- "[The minimum stay tariffs] **could reduce** risk for auction bidders";[6] and
- "[T]he minimum-stay rules [sic], **if resolved** before the auction, **could moderate** both risk and higher prices."[7]

OCC presents nothing to demonstrate that there is undue or extraordinary regulatory uncertainty for the January 2023 SSO bidders, that the pending NOPEC and tariff cases actually create uncertainty for the SSO auction, that the alleged uncertainty will lessen in the near future, or that postponement will alleviate that alleged uncertainty or result in lower prices. Rather, OCC's

[2] *In the Matter of the Certification of Northeast Ohio Public Energy Council as a Governmental Aggregator*, Case No. 00-217-EL-GAG, Entry (December 9, 2022).

[3] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Tariff Amendments*, Case No. 22-1127-EL-ATA; *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of New or Amended Rate Schedules and Tariffs*, Case No. 22-1129-EL-ATA; *In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for a Tariffs Revision to Implement Minimum Stays for Government Aggregators*, Case No. 22-1138-EL-ATA and *In the Matter of the Application of Ohio Power Company for Approval of New or Amended Rate Schedules and Tariffs*, Case No. 22-1140-EL-ATA.

[4] OCC Motion at 1 (emphasis added).

[5] OCC Memorandum in Support at 2 (emphasis added).

[6] *Id*. at 4 (emphasis added).

[7] *Id*.

motion presents only repeated, unsupported claims. Those claims, however, do not establish good cause to postpone the January 2023 SSO auction.

OCC relies on other prior occasions when auctions were postponed or the auction product was changed.[8] Those situations are vastly different and, therefore, are not precedent that should justify granting OCC's motion. For example, the Commission modified the schedules of all the electric utilities in Ohio because of delays or changes in the timing of the base residual auction of PJM Interconnection, LLC, which impacts the generation used to supply the SSOs in Ohio.[9] Similarly, the Commission modified the auction products because of delays or changes in the timing of the base residual auction of PJM Interconnection, LLC, which again affected the generation used to supply the SSOs in Ohio (capacity rate was unknown for the 2023/2024 delivery year).[10] These decisions were based on broader market-related delays that would directly impact the ability of SSO bidders to participate effectively in an Ohio utility auction. Conversely, OCC's motion seeks delay simply because there are pending regulatory matters before the Commission. Previous decisions delaying auctions were also not based on one entity's concern as to how the Commission would rule on its pending regulatory matters. Those prior decisions are distinguishable and any reliance on them is misplaced.

---

[8] *Id*. at 4-5.

[9] *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 etc.*, Case Nos. 16-776-EL-UNC et al., Finding and Order ¶ 32 (July 15, 2020), Finding and Order at ¶ 12 (August 26, 2020), Second Entry on Rehearing at ¶ 22 (February 24, 2021), and Finding and Order at ¶ 24 (June 16, 2021).

[10] *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., Entry at ¶ 9 (February 9, 2022); *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Power Company*, Case No. 17-2391-EL-UNC, Finding and Order (February 9, 2022); *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC, Finding and Order (January 26, 2022) and Finding and Order (August 24, 2022); *In the Matter of the Procurement of Standard Service Offer Generation for Customers of The Dayton Power & Light Company*, Case No. 17-957-EL-UNC, Finding and Order (Feb. 23, 2022).

OCC also points to a Commission decision in a Columbia Gas of Ohio, Inc. case in which certain parties asked the Commission to address stipulated auction framework-related issues first (so that the next auction would take place as scheduled), if the Commission would not address all issues pending before a certain date.[11] The Commission issued its full ruling in the case (which involved the auction framework-related issues) and did not bifurcate its ruling. The FirstEnergy utilities' auction process is not under review/revision; rather, it was set years ago after a lengthy regulatory process and Commission approval. OCC's motion in this proceeding is not addressing that process; rather, OCC's motion is based on its contention that the current auction date should be vacated for a different – unknown – date because OCC alone has a concern that the rates will not be what OCC desires. The *Columbia* decision has no bearing on the issue presented in OCC's motion.

What is evident from OCC's motion, however, is that OCC has another purpose – to pressure the Commission to grant OCC's interlocutory appeal in the NOPEC proceeding. OCC makes this apparent on page two of its motion – claiming that the Commission can mitigate the alleged "auction-related issues" OCC identifies by making a different ruling in the NOPEC case:

> Another needed result for consumer protection would be the PUCO Commissioners' granting of OCC's December 14, 2022 Interlocutory Appeal (to overturn a PUCO Law Judge's ruling). OCC's Appeal would reinstate the automatic approval timeline for renewal of NOPEC's certificate to operate. That result could also mitigate the auction-related issues. But time has just about run out on that approach (though there are other good reasons to grant our Appeal).

[11] OCC Memorandum in Support at 5, citing *In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted Columbia Gas of Ohio, Inc. in Case No. 08-1344-GA-EXM,* Case No. 12-2637-GA-EXM, Opinion and Order (January 9, 2013). Those framework-related issues involved: auction goals, objective, timing, and calendar; auction supplier security requirements; and auction supplier payments. *Id*., Opinion and Order at 4.

OCC is using this unrelated proceeding – by filing an unsupported, speculative motion – to advocate for its position in the NOPEC proceeding and to pressure the Commission to take action in that other proceeding. The Commission should reject OCC's speculative motion because it has not shown that postponement would result in less regulatory uncertainty or lower SSO prices.

B. OCC's motion should be rejected because the matters that OCC relies upon to justify an indefinite delay may not be resolved in sufficient time.

OCC has pointed to the NOPEC proceeding and the minimum stay tariff proceedings to justify a postponement of the January 2023 SSO auction. The NOPEC show cause order that OCC relies upon was issued on September 7, 2022.[12] The requirement for the minimum stay tariff filings was also issued that same day.[13] Thus, the proceedings are not new developments.[14] In addition, the proceedings involve multiple issues, multiple parties, and different procedural schedules. A brief summary is as follows:

NOPEC Proceeding	Minimum Stay Tariff Proceedings
Show cause issues Certificate renewal application issues Discovery disputes pending Interlocutory appeal pending Motions for protective order pending Initial comments due January 13, 2023	Four sets of tariff proposals Initial comments due January 6, 2023 Reply comments due January 17, 2023

[12] *Certification of Northeast Ohio Public Energy Council*, *supra*, Entry at ¶ 12 (September 7, 2022).

[13] *Id*. at ¶ 14.

[14] OCC cites to the suspension on December 9, 2022, of the automatic approval process for NOPEC's certificate renewal application as an additional matter that causes uncertainty. OCC Memorandum in Support at 2, 3. Constellation fails to see how that ruling created any appreciable added uncertainty since the Commission had already required NOPEC to show cause "demonstrating why its CRES certificate should not be suspended pursuant to Ohio Adm.Code 44901:1-1-24-13," and invited comments from interested parties regarding NOPEC's response. *Certification of Northeast Ohio Public Energy Council*, *supra*, Entry at ¶¶ 12-13 (September 7, 2022).

Reply comments due January 20, 2023	

It is unclear when these matters will be resolved by the Commission or even that resolution of these matters will impact the outcome of the auction. In addition, it is unclear that they will be resolved in sufficient time before the start of the January 2023 auction's delivery period. This is because postponing the auction will not affect only the date of the auction. There are multiple steps involved and time is needed to complete all of them before the start of the delivery period. The January 2023 auction will procure electricity supplies for the delivery period June 2023 – May 2024. Even though OCC recognized that the delivery period will start June 1, 2023,[15] OCC ignored the other steps that are required. In fact, OCC did not present and could not present anything to affirm that the other proceedings will be fully resolved in time (a) to conduct an indefinitely postponed auction, (b) for the winning bidders to put into place the SSO agreement and other coincident obligations with the FirstEnergy Utilities, and (c) for the winning bidders to arrange for their electricity supply to start on June 1, 2023. Even if we were to assume that Commission decisions were issued in all of the proceedings in sufficient time before the start of the delivery period (an assumption that the Commission should not make), there is no reason to expect that there will be no application(s) for rehearing filed[16] – which filing(s) OCC or others could argue also creates regulatory uncertainty. Undoubtedly, other regulatory proceedings and pending Commission decisions would arise in the meantime.

In sum, the other regulatory matters that OCC relies on in its motion to postpone the January 2023 SSO auction do not justify an indefinite delay. There is no reason to conclude that

[15] OCC Motion at 2 and Memorandum in Support at 2.

[16] If any of the Commission's decisions in those proceedings did not align with OCC's positions, it is anticipated that OCC would file an application for rehearing.

those matters would be resolved in sufficient time before the start of the delivery period, not to mention there has been no showing that those matters actually impact the outcome of SSO auctions. There has always been, and will continue to be, pending regulatory matters before the Commission during SSO auctions. A postponement should be rejected.

C. OCC's motion should be rejected because the established process allows not only the independent auction manager to ensure the auction process is successful and according to the rules and protocols, but also includes Commission review and approval of that assessment.

Citing the electricity policy of the State, OCC contends that the competitive bid process must be designed to obtain reasonably priced generation service and postponement is necessary to allow the auction to satisfy "legal requirements." *Id*. at Memorandum in Support at 1-2. OCC has not cited to anything in the design of the FirstEnergy Utilities' competitive bid process that is problematic. OCC did not specify what "legal requirements" would not be met if the auction is held on January 10, 2023. OCC's motion is based solely on its speculation about the impact other pending Commission proceedings *may* have on the SSO price if the auction is held on January 10, 2023.

There is no reason to believe that the auction will not proceed in accordance with the long-standing auction rules and protocols. The FirstEnergy Utilities' auction manager will be there to ensure that the SSO auction proceeds in compliance with the rules and protocols. Their auction manager has vast experience with SSO auctions. In addition, the Commission will review the results of the auction and issue a written ruling regarding the auction. These are "built-in" steps and mechanisms to ensure a successful auction. The Commission should reject OCC's speculative motion because it has not shown that the long-standing rules and protocols will not work for the January 10, 2023 SSO auction.

D. OCC's motion should be rejected because a last-minute indefinite postponement would cause more uncertainty and greater harm to the competitive SSO process.

As an SSO bidder in previous auctions, Constellation knows that prospective bidders make decisions about auction participation, and expend resources, well in advance of the actual auctions. Prospective bidders have been counting on a January 10, 2023 auction for quite some time (it was announced in November 2022).[17] By now, prospective SSO bidders would have made decisions about participation, based on their own analysis and commitments. To the extent that they intend to participate, they would have expended time and resources, making necessary physical and financial arrangements relative to that specific date in preparation. They would have considered the announced tranche target and size, submitted Part 1 Applications, assessed the announced minimum and maximum starting prices, submitted Part 2 Applications, reviewed Bidder User Manuals, and been preparing for the mock auction to be held on January 4.[18] A last-minute delay to some unknown future date, as OCC has requested, creates actual regulatory uncertainty that OCC seeks to avoid and would further create an unclear and negative situation for the prospective SSO bidders who have been preparing for the January 2023 auction. Additionally, it would make prospective bidders question whether to rely on the established calendars for future Ohio SSO auctions. The Commission should not be convinced by OCC's speculative claim of a risk premium; it should reject OCC's motion to indefinitely postpone the January 2023 auction.

III. CONCLUSION

OCC's motion is based on speculation. OCC has not shown that a postponed SSO auction would result in less regulatory uncertainty or lower SSO prices and the cases that OCC relies on

---

[17] *See* the FirstEnergy Utilities' CBP SSO Auction news webpage at https://firstenergycbp.com/News.aspx (accessed January 2, 2023).

[18] *See* FirstEnergy Ohio Utilities CBP SSO Auctions > Calendar (firstenergycbp.com).

may not be resolved in sufficient time if the SSO auction is postponed. The existing auction rules and protocols will ensure a valid outcome and the Commission will review the results of the auction. Granting OCC's last-minute motion, however, would create real regulatory uncertainty that OCC claims it is trying to avoid, and it would interject OCC's discretion into auction schedules and "acceptable" SSO prices. OCC's motion does not present good cause to indefinitely postpone the January 2023 auction. The Commission should reject OCC's motion.

Respectfully Submitted,

/s/ Gretchen L. Petrucci

Gretchen L. Petrucci (0046608), Counsel of Record
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
614-464-5407
glpetrucci@vorys.com

Counsel for Constellation Energy Generation, LLC

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail on January 3, 2023.

Staff of the Public Utilities Commission of Ohio	thomas.lindgren@OhioAGO.gov
Office of the Ohio Consumers' Counsel	william.michael@occ.ohio.gov maureen.willis@occ.ohio.gov
Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	cwatchorn@firstenergycorp.com
Industrial Energy Users-Ohio	mpritchard@mcneeslaw.com
Energy Harbor LLC	talexander@beneschlaw.com mkeaney@beneschlaw.com khehmeyer@beneschlaw.com
The Dayton Power and Light Company	christopher.hollon@aes.com
Duke Energy Ohio, Inc.	rocco.dascenzo@duke-energy.com jeanne.kingery@duke-energy.com larisa.vaysman@duke-energy.com
Ohio Energy Group	mkurtz@bkllawfirm.com kboehm@bkllawfirm.com jkylercohn@bkllawfirm.com
Ohio Power Company	stnourse@aep.com
IGS Energy	michael.nugent@igs.com joe.oliker@igs.com
Direct Energy Business, LLC and Direct Energy Services, LLC	whitt@whitt-sturtevant.com

/s/ Gretchen L. Petrucci
Gretchen L. Petrucci