

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)	Case No. 16-776-EL-UNC
Edison Company, the Cleveland Electric)	
Illuminating Company, and the Toledo)	
Edison Company.)	

MEMORANDUM CONTRA TO THE OFFICE OF THE OHIO CONSUMERS'
COUNSEL'S APPLICATION FOR REHEARING
BY THE RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association (“RESA”) urges the Public Utilities Commission of Ohio (“the Commission”) to deny, again, the Office of the Ohio Consumers’ Counsel’s (“OCC”) extraordinary and meritless request for the Commission to reject the results of a Standard Service Offer (“SSO”) auction. In this instance, OCC has asked the Commission to reject the results of the January 10, 2023, SSO auction for Ohio Edison Company, the Cleveland Illuminating Company, and the Toledo Edison Company (collectively, “FirstEnergy”).

To be clear, OCC makes no allegations that the SSO auction was not conducted in a lawful and reasonable manner or that it did not produce a competitive result. Instead, OCC’s argument is based on potential issues it may have for a yet-to-be conducted procurement for generation supply for Percentage of Income Payment Plan (“PIPP”) customers. The Commission has already rejected OCC’s arguments regarding separation of the SSO and PIPP load. Further, the law is clear that the relief requested by OCC – to reject an SSO auction result – is not a lawful outcome. For these reasons,

the Commission should reject the assignments of error and deny the Application for Rehearing filed by OCC.

I. BACKGROUND

In 2016, the Ohio Department of Development (“ODOD”) filed a request with the Commission pursuant to R.C. 4928.544 to design, manage, and supervise a process to procure generation supply for PIPP customer load.¹ This *Implementation Case* would become the foundation for the current PIPP competitive procurement process. Under the process established in the *Implementation Case*, generation supply for customers would be procured in a competitive process separate and distinct from each utility’s SSO auction process. In the same month that the Commission issued its Opinion in the *Implementation Case*, the Commission issued an Opinion and Order in the FirstEnergy ESP IV case for FirstEnergy to procure SSO generation supply through a competitive bid process (“CBP”) auction.²

Consistent with the approved processes in the *Implementation Case* and ESP IV, on January 10, 2023, FirstEnergy conducted a CBP auction to secure 33 tranches of SSO generation supply for a delivery period starting June 2023 for the FirstEnergy service territory.³ This SSO auction consisted of fourteen rounds, with 6 registered bidders and

¹ *In re Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC (hereinafter *Implementation Case*), Finding and Order (Mar. 2, 2016).

² *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co. for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan (“FE ESP IV”)*, Case No. 14-1297-EL-SSO, Opinion and Order at p. 25, (Mar. 31, 2016).

³ See Finding and Order (Jan. 11, 2023).

6 winning bidders.⁴ The auction cleared at \$97.70 per Megawatt-hour ("MWh") for the delivery year beginning June 1, 2023.⁵

CRA International Inc. d/b/a Charles River Associates, Inc. ("CRA") — a consultant retained by the Commission to monitor and run the SSO auction — reported that:

- (1) there were no violations of the competitive bidding rules;
- (2) the auction was open, fair, transparent, and competitive;
- (3) bidders had sufficient time to prepare for the auction;
- (4) information was provided to bidders in accordance with a published timetable;
- (5) there were no unresolved issues or questions that created material uncertainty for bidders;
- (6) there were no procedural errors with the auction;
- (7) protocols for communications between bidders and the auction manager were followed;
- (8) there were no hardware or software issues with conducting the auction;
- (9) there were no unanticipated delays during the auction;
- (10) that there was no adverse effect to bidding caused by unanticipated delays;
- (11) appropriate back-up procedures had been planned and carried out,
- (12) there were no security breaches;
- (13) protocols for communications among FirstEnergy, the auction manager and the PUCO were followed;
- (14) protocols were followed for decisions regarding changes in auction parameters;
- (15) calculations for the auction were double-checked;
- (16) there was no evidence of confusion or misunderstanding;

⁴ See Notification of CBP Auction Results – Updated Redacted Version (Feb. 01, 2023).

⁵ *Id.*

- (17) communications between the auction manager and bidders were timely and effective;
- (18) there was no evidence of collusion or improper coordination among bidders;
- (19) there was no evidence of anti-competitive behavior in the auction; and
- (20) information was made public appropriately and confidential information was treated appropriately.⁶

Each of CRA's findings support that FirstEnergy's SSO auction was conducted in a lawful and reasonable manner that produced a competitive result. Accordingly, on January 11, 2023, the Commission approved the auction results.⁷ In its Finding and Order, the Commission denied a motion by OCC to postpone the SSO auction, finding that it had already ruled on OCC's arguments multiple times.⁸ Further, the Commission stated that postponing the auction so close to the auction date, and after bidders used significant resources to submit their applications and posted substantial pre-bid security, would have caused more uncertainty, potentially damaged the auction process, and resulted in higher prices for SSO customers.⁹

OCC then filed the instant Application for Rehearing on grounds similar to its motion to postpone the SSO auction, with the exception that it altered its requested relief to a rejection of the auction results.¹⁰ OCC does not argue that the SSO auction failed to follow the approved CBP process, the auction was not competitive, or that the results were unreasonable. Instead, OCC's single assignment of error is a restatement of the same assignment of error that it has already raised and which the Commission has

⁶ Notification of CBP Results – Updated Redacted Version at 5-6 (Feb. 1, 2023).

⁷ See Finding and Order (Jan. 11, 2023).

⁸ *Id.*

⁹ *FirstEnergy ESP IV*, January 11, 2023, Finding and Order at ¶ 14.

¹⁰ OCC Application for Rehearing.

already denied in multiple other cases. OCC argues that by excluding PIPP load from the SSO auction, the auction will potentially result in a price that is less than the price that will be achieved in the upcoming PIPP auction. OCC argues that this is unlawful, even though the Commission has rejected its argument numerous times. Further, not only have OCC's arguments already been denied, but they are also based on the theoretical outcome of a future PIPP auction.¹¹ FirstEnergy's upcoming PIPP auction is scheduled for April 3, 2023.¹² Even if the Commission did entertain OCC's arguments, no case or controversy currently exists to warrant rejection of FirstEnergy's SSO auction results.

II. ARGUMENT

A. The Commission should reject OCC's Application for Rehearing because it is improper and untimely.

Ohio law allows a party to a Commission proceeding to "apply for a rehearing [with] respect to any matters determined in the proceeding."¹³ Any application for rehearing must be filed "within thirty days after the entry of the order..."¹⁴ An application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."¹⁵ The party filing an application for rehearing must also file a memorandum in support that explains "the basis for each ground for rehearing identified in the application for rehearing..."¹⁶ When the Commission

¹¹ See *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14 ("It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect.").

¹² FirstEnergy Ohio Utilities' PIPP RFP available online at: <https://www.firstenergypipprfp.com/Calendar.aspx>.

¹³ R.C. 4903.10.

¹⁴ R.C. 4903.10; see also Ohio Adm.Code 4901- 1-35(A).

¹⁵ R.C. 4903.10; see also Ohio Adm.Code 4901- 1-35(A).

¹⁶ Ohio Adm.Code 4901-1- 35(A).

established the PIPP auction process in the *Implementation Case*, OCC did not file an Application for Rehearing at that time.¹⁷ However, two other stakeholders did file Applications for Rehearing, which the Commission denied.¹⁸ No party appealed the Commission's decision in the *Implementation Case* to the Ohio Supreme Court. Accordingly, by filing an Application for Rehearing in the present SSO auction case, OCC has filed an untimely and improper collateral attack on a non-appealable Commission order. Further, the Commission has already made this finding. In its Entry on Rehearing following Duke's September 21, 2022, SSO auction results, the Commission stated "[w]e 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."¹⁹ OCC's Application for Rehearing in this case is both untimely and improper.

Ohio law does not allow parties to re-argue issues before the Commission *in perpetuum*.²⁰ To this end, the Commission has held that "Section 4903.10, Revised Code, does not allow persons who enter appearances to have 'two bites at the apple' or to file rehearing upon rehearing of the same issue."²¹ OCC, by continuing to raise the same issues in a multitude of dockets, is acting contrary to Ohio law. OCC raised the

¹⁷ *Implementation Case*, Case No. 16-247-EL-UNC.

¹⁸ *Id.*, Entry on Rehearing (April 27, 2016).

¹⁹ *In re the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC, Entry on Rehearing (Nov. 16, 2022) at ¶ 18.

²⁰ *In re the Application of Dayton Power and Light Company to Establish a Standard Service Offer In the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, November 30, 2022, Tenth Entry on Rehearing at ¶ 30, citing R.C. 4903.10.

²¹ *Id.*; *In re the Application of Ohio Power Company for Approval of a Special Contract Arrangement with Ormet Primary Aluminum Corporation*, Case No. 96-999-EL-AEC, Second Entry on Reh'g (Sept. 13, 2006) at ¶ 10.

same issue it raises here with respect to FirstEnergy's prior SSO auction in an application for rehearing filed in this docket on November 4, 2022. The Commission did not rule on that Application for Rehearing and it was denied by operation of law.

A review of OCC's Application for Rehearing and arguments in this case are very nearly identical to the Applications for Rehearing that OCC filed in the Universal Service Fund ("USF") rider case and the SSO auction cases for Duke and AES Ohio.²² The Commission denied OCC's Applications for Rehearing in those cases and should do the same here for the very same reasons.

B. The Commission should deny OCC's Application for Rehearing because its argument is unavailing and lacks merit, which the Commission has already found.

The Commission has already denied the single assignment of error raised by OCC multiple times on both procedural grounds and the merits.²³ The Commission is required to follow its precedent and may only chart a new course when the new course is substantively reasonable and lawful and the Commission explains the basis for the new

²² See, e.g., *In re Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-0247-EL-UNC; *In re Procurement of Percentage of Income Payment Plan Program Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 16-0940-EL-UNC; *In re Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Riders*, Case No. 22-556-EL-USF; *In re the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC; *In re the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC.

²³ *In re the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC [hereinafter, "AES SSO"] September 21, 2022, Finding & Order that the Commission directs The Dayton Power and Light Company d/b/a AES Ohio to modify its standard service offer procurement auction schedules in the manner set forth in its filing at ¶ 18; *In re the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC [hereinafter "Duke SSO"], November 16, 2022, Entry on Rehearing Denying the Application for Rehearing filed by the Ohio Consumers Counsel at ¶ 19.

course.²⁴ OCC has offered no basis for a new course, and as RESA describes herein, the new direction OCC seeks is not substantively lawful and reasonable.

The Commission issued an Entry on Rehearing in Duke's SSO auction docket stating that 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. ***."²⁵ The Commission then continued 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 [CBP] separate from the SSO customers."²⁶

Just like in the Duke SSO case, the Commission addressed objections from OCC related to the PIPP aggregation process in the AES Ohio SSO case. OCC asked that the Commission combine AES Ohio's SSO auction with its PIPP auction.²⁷ The Commission found "OCC's objections to the [AES Ohio SSO auction] application unavailing" as "AES Ohio uses a Commission approved competitive-auction based format to supply SSO load to certain customers, pursuant to R.C. 4928.141 and 4928.143..."²⁸ In its entirety, the Commission determined that:

²⁴ *In re Ohio Power Co.*, 144 Ohio St. 3d 1, at ¶ 17, citing *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18.

²⁵ *In re the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC [hereinafter "*Duke SSO*"], October 5, 2022, Entry on Rehearing at ¶¶ 1, 4.

²⁶ *Id.*

²⁷ *AES Ohio SSO*, December 30, 2022, Application for Rehearing by Office of the Ohio Consumers' Counsel at p. 6; *FirstEnergy SSO*, February 10, 2023, Application for Rehearing by Office of the Ohio Consumers' Counsel at p. 6.

²⁸ *AES Ohio SSO*, Finding and Order (September 21, 2022) at ¶ 18.

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 [PIPP] 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[.] . . . In response to OCC's request to combine PIPP and SSO auctions, 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. For example, when responding to a stakeholder request to use a descending-clock PIPP auction format instead of a [RFP] auction format, we noted in [Case No. 16-247-EL-UNC] that the plain language of "R.C. 4928.54 provides that only [competitive retail electric service] providers may participate in the auction. However, more than just CRES providers participate in the SSO auctions." Therefore, OCC's proposed solution is untenable.

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, we note that we addressed the possibility of this situation in the decision to use the current format stating that, "[w]hile this may occasionally result in the PIPP load being served at a price higher than the blended SSO price, the RFP auction has been established to reduce the cost of the PIPP program to the otherwise applicable SSO over the long-term, in compliance with R.C. 4928.542(B)." Consequently, we affirm our previous determination that the existing PIPP program auction format is required under law.

The Commission gave almost identical reasoning in both the Duke SSO case²⁹ and the AES Ohio SSO case.³⁰

The Commission has considered, and in every instance denied, OCC's arguments regarding the PIPP program and SSO auctions³¹ — making it clear that ODOD lacks

²⁹ *Duke SSO*, Entry on Rehearing (October 5, 2022) at ¶ 13; see *Supra* [AES Ohio Finding and Order at ¶ 18].

³⁰ *AES Ohio SSO*, Finding and Order (September 21, 2022) at ¶ 18.

³¹ See, e.g., *In the Matter of the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-0247-EL-UNC; *In the Matter of the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 16-0940-EL-UNC; *In the Matter of the Application of the Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Riders*, Case No. 22-556-EL-USF; *In re the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC; *In re the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC.

authority to modify the Commission-approved PIPP price of electricity established by individualized PIPP auction cases and that the existing PIPP program auction format is required by Ohio law.³² OCC's argument has been thoroughly considered by the Commission. OCC does not get infinite bites at the apple and OCC has not offered the Commission any new reason to chart a new course. The Commission should again deny OCC's assignment of error.

C. The Commission should deny OCC's Application for Rehearing because relief is barred by R.C. 4928.54.

The Commission should reject OCC's assignment of error because relief is barred by the definition of a winning bid under R.C. 4928.542 and the PIPP procurement process.

Under this process, as explained by the Commission in the *Implementation Case*:

The Commission adopted an auction process in which an initial RFP auction shall take place to determine if there is a CRES provider willing to serve the PIPP load for less than the SSO price. Thereafter, if no CRES provider is willing to serve the PIPP load for less than the SSO price, then a supplemental RFP auction shall be conducted in which CRES providers may submit bids to serve the PIPP load at any price. If no CRES provider submits bids in either RFP auction, then the Commission finds that a contingency plan must exist to ensure that the electric utilities are capable of procuring supply for the PIPP load.

The Commission notes that this contingency plan of allowing the electric utilities to obtain supply for the PIPP load through bilateral transaction or from the market is necessary due to the timing of the competitive RFP auctions. Pursuant to R.C. 4928.542, the Commission must reduce the cost of the PIPP program relative to the applicable SSO. However, the SSO auctions are often conducted within 60 days of the delivery year, so as to obtain a market price as close in time to the delivery year as possible. Once the SSO auction is conducted, the electric utility can calculate the blended SSO price and provide it to CRES providers so that they know what the otherwise applicable SSO price is before bidding in the competitive RFP auctions. Accordingly, the initial and supplemental RFP auctions must be

³² AES Ohio SSO, Finding and Order (September 21, 2022) at ¶ 18.

conducted in this timeframe between the SSO auction and the delivery year.³³

In its Application for Rehearing in this case, OCC ignores Commission precedent on establishment of the PIPP auction process and the statutorily required outcome if the Commission determines that a PIPP procurement did not meet the winning bid requirements. That relief is to conduct additional steps of the PIPP procurement process to ensure that generation supply is available for PIPP customers.³⁴ Accordingly, even assuming *arguendo* that OCC's application for rehearing has merit, the Commission nonetheless lacks statutory authority to conditionally or outright reject the results of an SSO auction.

D. The Commission should reject OCC's Assignment of Error because the relief requested is unreasonable, impractical to implement, would materially disrupt SSO auctions across the state, and would likely subject FirstEnergy's SSO customers to real time market pricing.

The January 10, 2023, FirstEnergy SSO auction secured 33 tranches (*i.e.* 33% of the total SSO load) with a delivery period of June 1, 2023, through May 31, 2024. FirstEnergy has another SSO auction scheduled for March 20, 2023, in which it will secure another 33 tranches for the same delivery period. Accordingly, before the delivery year begins on June 1, FirstEnergy needs to have procured generation supply for 66% of its SSO load. Failure to procure generation supply will result in SSO customers being subject to market pricing.

³³ *Implementation Case*, Entry on Rehearing (April 27, 2016) at ¶ 10.

³⁴ R.C. 4928.541.

Separate from its SSO auctions, FirstEnergy's PIPP procurement for delivery beginning June 1, 2023, will be finalized on April 3, 2023.³⁵ As noted above in the block quote regarding the *Implementation Case*, this timing was intentional. These auctions, whether for the SSO load or PIPP load, require a significant lead time.³⁶ And, the design of the PIPP competitive procurement process is to take place after the SSO auction so that auction participants can bid below the SSO auction price, yet also before the delivery year.³⁷

OCC's Application for Rehearing asks the Commission to postpone approval of the January 10 auction until the PIPP procurement price is known on April 20, 2023. Then, if the PIPP price is greater than the SSO auction price, OCC asks the Commission to reject the SSO auction results and schedule a new SSO auction. Given the lead time to conduct an SSO auction, as well as the fact that the formal process takes more than a month and a half, completing a new SSO auction and executing the requisite supply contracts in time for delivery beginning June 1, 2023, would be extremely unlikely.

If 100 tranches (*i.e.* 100% of supply for the SSO load) are not procured through auctions prior to June 1, 2023, then the SSO supply contingency plans would need to be engaged.³⁸ These supply contingency plans require FirstEnergy to offer the unfilled

³⁵FirstEnergy Ohio Utilities' PIPP RFP *available online at*:
<https://www.firstenergypipprfp.com/Calendar.aspx>.

³⁶ *Implementation Case*, Entry on Rehearing (April 27, 2016) at ¶ 10.

³⁷ For example, initial formal activity for the March 20, 2023, SSO auction began on February 1, 2023; FirstEnergy Ohio Utilities' CBP SSO Auctions *available online at*:
<https://www.firstenergycbp.com/Calendar.aspx>.

³⁸ FirstEnergy Ohio Utilities' CBP SSO Auctions *available online at*
<https://www.firstenergycbp.com/Documents/SupplierDocuments.aspx>; Bidding Rules for FirstEnergy Ohio Utilities' CBP Auctions at 31-32, *available online at*:
https://www.firstenergycbp.com/Portals/0/SupplierDocuments/Bidding_Rules_20200701.pdf.

tranches to current SSO suppliers “at the clearing price, starting price, or reservation price, whichever is lowest, from the auction in which the tranches were not procured.”³⁹ If the current SSO suppliers do not voluntarily take on additional tranches, then the contingency plan provides that “the necessary SSO supply requirements associated with those unfilled tranches will be met through PJM-administered markets at prevailing day-ahead zonal spot prices . . .”⁴⁰ Simply put, OCC’s proposed relief sets up the very real possibility that Ohio’s electric utilities would return to providing generation supply to their customers with pricing obtained from day-ahead markets in summer months when market prices are generally higher. The relief OCC seeks is plainly unreasonable and must be rejected.

III. CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission deny OCC’s Application for Rehearing.

Respectfully submitted,

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³⁹ *Id.*

⁴⁰ *Id.* emphasis added.

CERTIFICATE OF SERVICE

In accordance with Ohio Adm. Code 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra to the Office of the Ohio Consumers' Counsel's Application for Rehearing* was sent by, or on behalf of, the undersigned counsel for RESA to the following parties of record on February 21, 2023, *via* electronic transmission.

/s/ Matthew R. Pritchard

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**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

2/21/2023 4:05:42 PM

in

Case No(s). 16-0776-EL-UNC

Summary: Memorandum Contra to the Office of the Ohio Consumers' Counsel's
Application for Rehearing electronically filed by Mr. Matthew R. Pritchard on behalf
of Retail Energy Supply Association