

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Implementation of)
Section 4928.54 and 4928.544 of the) Case No. 16-247-EL-UNC
Revised Code.)

**DUKE ENERGY OHIO'S
MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF
RETAIL ENERGY SUPPLY ASSOCIATION AND OHIO PARTNERS FOR
AFFORDABLE ENERGY**

I. Introduction

On March 2, 2016, the Public Utilities Commission of Ohio (Commission) issued a Finding and Order (Order) directing each electric distribution utility (EDU) to undertake a competitive procurement process to secure supply to serve its percentage of income payment plan (PIPP) load, as required under R.C. 4928.54. Providing further direction to Ohio's EDUs, the Commission ordered the following:

- The competitive procurement process would be comprised of an auction in the format of a request for proposal (RFP).
- The RFP would be implemented to procure supply for the amount of PIPP load that would otherwise have been included in the utility's next standard service offer (SSO) auction.
- The term of the RFP would consist of twelve months, which said months would necessarily align with the PJM Interconnection, LLC, (PJM) delivery year.
- Every registered competitive retail electric service (CRES) provider in the EDU's service territory would be provided the opportunity to participate.

Significantly, the Commission imposed an accelerated schedule, given the desire to adhere to the statutory mandates of R.C. 4928.54, *et seq.*, and the then-impending SSO auctions for Duke Energy Ohio, Inc., (Duke Energy Ohio) and AEP Ohio.

On April 1, 2016, Ohio Partners for Affordable Energy (OPAE) and Retail Energy Supply Association (RESA) filed applications for rehearing of the Commission's March 2, 2016, Order. For the reasons explained below, Duke Energy Ohio submits that the Commission should deny these applications.

II. Argument

A. OPAE's Application for Rehearing

OPAE raises four general issues in its application for rehearing, all of which are separately discussed below.

1. The Commission was Correct in Adopting an RFP Auction Process.

OPAE maintains that the Commission's Order is unlawful in that it mandates an RFP, which, according to OPAE, is not an auction. This illogical statement must be rejected.

As an initial matter, Duke Energy Ohio observes that the General Assembly simply directed the use of an auction for purposes of securing supply for PIPP load. It did not further refine the auction details or dictate which auction form must be adopted. And this lack of specificity is understandable as it allows the Commission flexibility in its oversight of the procurement process on behalf of the Ohio Development Services Agency (ODSA). Further, and more importantly, an RFP is a form of an auction and the Commission's Order is thus lawful. Indeed, in its simplest sense, an auction is a process of buying goods and services by offering

them up for bid. An auction may refer to any mechanism or set of trading rules for exchange.¹ An RFP is a solicitation made through a bidding process.² It is merely one form of an auction.

2. The Commission Did Not Unlawfully Include Only a Portion of the PIPP Load in the RFP Process.

OPAE next argues that the Order is unlawful in that the Commission did not mandate a procurement process for the entire PIPP load of each EDU. Rather, as mentioned above, it ordered the separate procurements for that PIPP load not otherwise already under contract. But the law does not require the Commission to aggregate all PIPP load in respect of any one competitive procurement process. Rather, it more generally requires only that there be an aggregation of PIPP customers for purposes of establishing a competitive procurement process.³

When assessing OPAE's criticism, it is important to do so in context. The Commission is undertaking to fulfill a request from the director of the ODSA at a time when Ohio's EDUs are operating under previously approved ESPs. Importantly, these ESPs are not uniform in their termination dates. Thus, for those ESPs that will not expire at the end of the 2015/2016 delivery year, competitive procurements for a portion of the SSO supply needed in subsequent delivery years have already occurred. And those procurements necessarily included the PIPP load. Recognizing the different timelines applicable to the ESPs currently in effect in Ohio, the Commission exercised its prerogative to balance both the contractual expectations of wholesale SSO suppliers with the legislature's general directive for competitive procurements. There is nothing illegal about the course the Commission has chosen.

In an effort to create a basis for its rehearing request where one does not otherwise exist, OPAE posits that aggregation of the PIPP load is analogous to any governmental aggregation

¹See Wikipedia at <https://en.wikipedia.org/wiki/Auction>

²See Wikipedia at https://en.wikipedia.org/wiki/Request_for_proposal

³ R.C. 4928.54.

and, as such, the entire PIPP load must be bid out at once. But this statement cannot be supported in light of the controlling statutory authority that does not mandate such an outcome. Indeed, it cannot be disputed that the General Assembly understands the aggregation process, having made provision for it under Ohio law. To the extent it intended competitive procurements of supply for PIPP load to proceed pursuant to specific terms and conditions, it would have included such terms and conditions in R.C. 4928.54, *et seq.* The lack of such specificity confirms that there is nothing unlawful as to the Commission's decision here.

3. The Commission Did Not Improperly Adopt a Competitive Procurement Process in the Form of an RFP.

In its final two grounds for rehearing, OPAE maintains that the Commission's Order violates the law by allowing for supply to be procured at a price in excess of the applicable SSO price. It also criticizes the authorized contingencies of a supplemental RFP and bilateral contracts.

The contingencies are critical to the procurement process and enable an orderly but immediate transition should any supplier default. They further function to ensure that supply to non-shopping customers, including PIPP customers, will not be disrupted due to circumstances beyond the EDU's control. The Commission appropriately incorporated a contingency plan in its Order.

And the contingencies are not unlawful. Duke Energy Ohio observes that R.C. 4928.542 provides only that the competitive procurement process should function to "reduce the cost of the [PIPP] program relative to the otherwise applicable [SSO]... ." ⁴ But the law does not further define the "otherwise applicable SSO." Is it the overall SSO price for the duration of the SSO? Is it the overall SSO price for residential customers taking the SSO? With the absence of definitive

⁴ R.C. 4928.542(B).

terms, the General Assembly has deferred to that entity charged with implementing R.C. 4928.54, *et seq.*, to identify the proper benchmark against which the PIPP procurements will be compared. In properly responding to this grant of authority, the Commission found that it was the applicable blended SSO price, over the long term, against which the results of the PIPP procurements would be compared. There is nothing illegal about the Commission's determination in this regard.

B. RESA's Application for Rehearing

RESA raises five general issues in its application for rehearing. But RESA's arguments are unconvincing and further ignore the limited conditions the General Assembly did impose upon the competitive procurement process applicable to supply for PIPP load.

Generally as is concerns RESA's request for rehearing, Duke Energy Ohio submits that such filing must first be put in context. Duke Energy Ohio has, pursuant to the Commission's Order, initiated its RFP for a portion of the supply for PIPP load for the 2016/2017 delivery year. It has published an advertisement in respect of the RFP; it has scheduled an informational session.⁵ Duke Energy Ohio has established an RFP submission date. Importantly, these activities must continue as the relevant delivery year – and corresponding supply obligations – commence in less than two months. Also important is the fact that these activities are being undertaken with reference to the existing SSO supply auctions for which the Commission, its Staff, the Company, and auction participants all have substantial experience. Thus, for the upcoming RFPs, there is no immediate justification to adopt the terms and conditions advanced by RESA – there simply has been no showing of need for them.

⁵ See *Megawatt Daily*, Thursday, April 7, 2016 edition. See also, <http://www.duke-energyohiopipp-rfp.com/>

1. The Commission Did Not Err in Failing to Require an Independent RFP Auction Manager.

RESA contends that the Order is unlawful in that the Commission failed to require the retention and use of independent auction managers in connection with the RFP process. Thus, while RESA acknowledges Staff's involvement in developing the RFPs, it finds that insufficient. But RESA's concerns are misguided.

As an initial matter, R.C. 4928.54, *et seq.*, does not prescribe any particular form of auction or the identity of those who must contribute to same. This lack of a statutory mandate for competitive procurements of supply for the PIPP load is intentional. Indeed, the General Assembly has previously established elements of a competitive procurement when it thought necessary to do so.⁶ And as it made no such provision here, the legislature authorized flexibility in how the auction process would be conducted. The Commission, engaged by the ODSA to oversee the procurement process, rightfully determined that involving its Staff in the development of the RFPs was sufficient. This factor, alone, should remove any concern on RESA's part as to the deliberative effort used to form the RFP processes. But Duke Energy Ohio can remove any lingering concern by acknowledging the fact that it did retain an independent entity to assist with the development and implementation of its RFP.

2. The Commission Properly Limited Participation to CRES Providers, as Defined Under Ohio Law.

RESA next contends that the Order is unlawful in that it limits participation in the RFPs to CRES providers. It posits that the Commission should create a new process that would enable entities with no intention of engaging in the competitive retail market to participate in the RFPs. This contention must be rejected.

⁶ See, *e.g.*, R.C. 4928.142(A)(delineating factors that must be provided for under a market-rate offer).

The law is quite clear – participants in the competitive procurements applicable to PIPP load must be CRES providers. As the relevant language succinctly provides: “Only bidders certified under section 4928.08 of the Revised Code may participate in the auction.”⁷ The Commission cannot waive statutory provisions and, as such, it may quickly dispense with RESA’s second ground for rehearing.

3. The Commission Properly Refused to Force Uniformity in the RFP Process.

RESA’s third and fourth arguments address what it perceives to be a flaw in the Commission’s Order – a lack of uniformity in the RFP process. That is, RESA contends that the Commission should have dictated the same disclosure requirements for all EDUs and ordered the same deadlines for the issuance of the RFP’s that are “well in advance” of any bid due dates and for the publication of relevant SSO prices. RESA also seeks to achieve uniformity in respect of tie breaker procedures. RESA’s concerns are impractical.

To put RESA’s criticisms in perspective, it is important to first note that there is not uniformity in the SSO auctions undertaken by Ohio’s EDUs. Admittedly, there are similarities. But there are also meaningful differences, which are appropriately predicated upon the independent workings of each company. And it is the competitive bidding process used by each EDU for SSO supply that must form the basis of that EDU’s RFP here. Indeed, in its Order, the Commission first instructed the EDUs that they could modify their existing master SSO supply agreements (MSA) for purposes of the RFP process, but only in consultation with Staff. It must thus be concluded that MSAs and related bid documents that have undergone Staff and intervenor scrutiny and Commission approval will form the basis of the RFPs. Because these

⁷ R.C. 4928.54.

documents are not identical as between the EDUs, it is unreasonable to force such uniformity here, particularly when the law demands no such outcome.

4. The Commission Properly Authorized a Contingency Plan that Includes Bilateral Transactions.

RESA's final argument is that the Commission failed to provide sufficient detail in respect of the potential for the EDU to enter into bilateral transactions. RESA purports to assist the Commission by demanding a comment process and Commission review before any bilateral transaction is executed. RESA's contention is not practical in a competitive market and its request for clarification not necessary given the Commission's Order.

Bilateral transactions will only be needed in one of two circumstances: neither the initial nor the supplement RFP yields a successful, Commission-approved bid or the winning CRES provider defaults. RESA takes exception with that part of the Commission's Order that addresses the first of these two scenarios, but the Commission's directive reasonably applies to both. And the Commission instructed that, where the EDU needs to procure supply for the PIPP load from an entity other than a CRES provider participating in an RFP, it should do so via bilateral transactions, much the same way it would proceed in respect of SSO supply. In other words, the Commission's Order instructs the EDU to adopt a contingency plan here that resembles the contingency plan applicable to SSO supply.

The Commission's instruction is appropriate in that the contingencies for SSO supply have been reviewed by Staff and intervenors; they have been approved by the Commission. Insofar as Duke Energy Ohio is concerned, the contingency for filling unfilled SSO tranches prior to the commencement of a delivery year involves first offering such tranches to existing SSO suppliers, subject to credit-based limits and load caps. Thereafter, the Company would engage in the PJM-administered markets. Similarly, should an SSO supplier default, Duke

Energy Ohio's contingency plan includes both engaging in the PJM-administered markets and offering the defaulted tranches to current SSO suppliers.⁸ Both of these outcomes – assigning tranches to an SSO supplier and engaging with PJM are, by definition, bilateral transactions. Thus, as Duke Energy Ohio interprets the Commission's Order, it enables the EDU to enter into bilateral transactions with SSO suppliers or PJM in order to promptly procure supply necessary to serve PIPP load. To allay RESA's concerns in this regard, the Commission can confirm that its reference to bilateral transaction must be read in connection with the approved processes applicable to SSO supply.

RESA also contends that the extent of the Commission's approval is unclear. Specifically, RESA interprets the Order as limiting the Commission's authority to approving only the RFP or supplemental RFP results and not to approving any bilateral transactions. From here, RESA argues that such bilateral transactions must be subject to review, comment, and Commission approval. But, as discussed above, a PIPP RFP contingency plan is predicated upon an approved SSO auction contingency plan. Thus, to the extent such a contingency plan incorporates bilateral transactions, each such transaction should not be subject to separate comment. Indeed, the procedurally laden process that RESA is proposing here would jeopardize the ongoing supply to customers and unnecessarily increase costs. Further, the Commission's authority necessarily extends to these bilateral transactions via the requisite tariff approvals.

⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, *et al*, Application, at Ex. C (Bidding Rules for Duke Energy Ohio's Competitive Bidding Process Auctions) (May 29, 2014) and Opinion and Order (approving bid documents with slight modification irrelevant to the instant filing) (April 2, 2015).

III. Conclusion

Neither OPAE nor RESA has offered any arguments that would require the Commission to alter its Order. Duke Energy Ohio respectfully requests that the Commission deny both applications.

Respectfully submitted,

Duke Energy Ohio, Inc.

A handwritten signature in blue ink that reads "Amy B. Spiller" followed by a stylized flourish.

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Summary: Memorandum Duke Energy Ohio's Memorandum Contra the Application For Rehearing of Retail Energy Supply Association and Ohio Partners for Affordable Energy electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H.