

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Procurement of	)	Case No. 16-776-EL-UNC
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.	)	

In the Matter of the Procurement of	)	Case No. 17-957-EL-UNC
Standard Service Offer Generation for	)	
Customers of Dayton Power & Light	)	
Company.	)	

In the Matter of the Procurement of	)	Case No. 17-2391-EL-UNC
Standard Service Offer Generation for	)	
Customers of Ohio Power Company.	)	

In the Matter of the Procurement of	)	Case No. 18-6000-EL-UNC
Standard Service Offer Generation for	)	
Customers of Duke Energy Ohio, Inc.	)	

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**APPLICATION FOR REHEARING OF OHIO POWER COMPANY**

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Pursuant to Section 4903.10, Ohio Revised Code (R.C.), and Rule 4901-1-35, Ohio Administrative Code (O.A.C.), Ohio Power Company (AEP Ohio or the Company) respectfully files this Application for Rehearing of the Commission's July 15, 2020 Finding and Order (Finding and Order). The Commission's Finding and Order is unlawful and unreasonable in the following respects:

- A. The Commission's Finding and Order is unlawful because, under R.C. Chapters 4903 and 4928, the Commission lacks legal authority to reopen a prior order modifying and approving an electric security plan *sua sponte*.

- B. The Commission's direction to submit a plan for dual auctions for a period of four years is unlawful because the Commission lacks legal authority to impose SSO auction terms for AEP Ohio's next ESP without the Company's consent.
- C. The Finding and Order violates R.C. 4903.09 by failing to explain some significant components of the dual auction concept and, in this respect, should be cured on rehearing through clarification.

A memorandum in support of this Application for Rehearing is attached.

Respectfully submitted,

/s/ Steven T. Nourse

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## MEMORANDUM IN SUPPORT

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### I. BACKGROUND AND INTRODUCTION

On November 23, 2016, AEP Ohio filed an application to amend and extend its electric security plan (ESP) through May 2024. Among other things, AEP Ohio proposed to “continue to utilize auction-based pricing for the Company’s SSO customers through the full term of the proposed ESP.” *In re Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO *et al.* (“2016 ESP Case”), Application at 9 (Nov. 23, 2016). Company witness David Weiss filed testimony describing AEP Ohio’s SSO auction and the proposed auction schedule through May 31, 2024. *See 2016 ESP Case*, Direct Testimony of David B. Weiss at 3-6 (Nov. 23, 2016). He also described the revisions to the Company’s auction rules and documentation, including its Master Standard Service Offer Supply Agreements (MSA), that AEP Ohio proposed for the ESP’s extended term. *See id.* at 10-14.<sup>1</sup> Company witness Weiss explained that “all MSAs [would] uniformly expire [on May 31, 2024], coinciding with the beginning of a new ESP/MRO period on June 1, 2024.” *Id.* at 5. The expiration of auction products coincident with the ESP term is a common design for AEP Ohio’s past ESPs and for other electric distribution utilities (EDUs) as well.

On August 25, 2017, AEP Ohio, Staff, and numerous other parties filed a Joint Stipulation that recommended, among other things, that the Commission “modify and adopt the

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<sup>1</sup> Each winning bidder in the Company’s SSO auctions is required to execute an MSA, “which defines the rights and obligations of the winning bidders and the Company.” *Id.* at 4.

Amended Application” and adopt the Company’s revised auction bidding rules. *2016 ESP Case*, Joint Stipulation and Recommendation at 3, 35 (Aug. 25, 2017). And on April 25, 2018, the Commission modified and adopted the Joint Stipulation and authorized AEP Ohio to implement an ESP from June 1, 2018, to May 31, 2024, with “base generation rates [for] SSO customers [to] continue [being] established through a fully auction based process \* \* \*.” *2016 ESP Case*, Opinion and Order, ¶¶ 1, 267 (Apr. 25, 2018). Various parties filed applications for rehearing, which the Commission denied, and The Office of the Ohio Consumers’ Counsel appealed the Commission’s determinations to the Supreme Court of Ohio, which affirmed them earlier this year. *See In re Application of Ohio Power Co.*, Slip Opinion No. 2020-Ohio-143.

Now, more than two years into the six-year term of AEP Ohio’s ESP, the Commission has unilaterally modified AEP Ohio’s SSO auction process “to mitigate the possible significant effects caused by recent uncertainty surrounding PJM Interconnection, LLC’s base residual auction.” Finding and Order ¶ 1 (July 15, 2020). The Commission has directed AEP Ohio and the other EDUs to substitute 12-month products for the products they had planned for their Fall 2020 and Spring 2021 auctions. *Id.* ¶ 35.a. It also has directed the EDUs to submit plans by October 15, 2020, “for dual auctions for a period of four years, commencing with the June 2022 delivery year,” which must include both “[a] full requirements product with a proxy price, using the June 2021 capacity price as the proxy, subject to true-up and reconciliation;” and “[a]n energy-only auction and a capacity-only hedge product \* \* \* offer[ed] \* \* \* at a fixed price for all years included in the auction product \* \* \*.” *Id.* ¶ 35.b. The Commission explained that it believes extending the SSO auction requirements “beyond the terms of the EDUs’ existing ESPs

\* \* \* will provide stability to customers by taking action to lock-in historically low prices observed in recent auctions \* \* \*.” *Id.* ¶ 37.

On August 7, 2020, AEP Ohio complied with Paragraph 35.a. of the Finding and Order by submitting a plan to provide for only a 12-month product for the scheduled auctions for Fall 2020 and Spring 2021. However, AEP Ohio reserved its right to challenge the Commission’s Finding and Order, and is doing so now, on the three grounds discussed below. Although the Company would like to reach a position of consenting to the Commission’s policy initiative on SSO auctions, the term for the modifications would need to expire at the end of the Company’s existing ESP term and there are several important unanswered questions about the intended meaning of the Finding and Order that need to be clarified on rehearing.

## **II. ASSIGNMENTS OF ERROR**

### **A. The Commission’s Finding and Order is unlawful because, under R.C. Chapters 4903 and 4928, the Commission lacks legal authority to reopen a prior order modifying and approving an electric security plan *sua sponte*.**

Revised Code Chapter 4928 establishes a bilateral process for establishing ESPs, under which no aspect of an ESP can go into effect unless an EDU either proposes it, accepts it as part of a stipulation, or accepts it as part of a Commission modification to the utility’s application. And “provisions relating to the supply and pricing of electric generation service” are an integral component of any ESP. R.C. 4928.143(B)(1); *see also* Ohio Adm.Code 4901:1-35-02(A); *see also* R.C. 4928.141(A) (each electric distribution utility must provide its customers “a standard service offer of all competitive retail electric services necessary to maintain essential electric service \* \* \*, including a firm supply of electric generation service”).

The Commission's rules permit any electric utility proposing an ESP to "propose a plan for a CBP" (competitive bidding process). Ohio Adm.Code 4901:1-35-08(A). The rules impose numerous requirements for what a "CBP plan" must contain, including:

- "A complete description of the CBP plan and testimony explaining and supporting each aspect of the CBP plan";
- "Projected generation, transmission, and distribution rate impacts by customer class and rate schedules for the duration of the CBP plan";
- "Detailed descriptions of the customer load(s) to be served by the winning bidder(s), and any known factors that may affect such customer loads";
- "Detailed descriptions of the generation and related services that are to be provided by the winning bidder(s)"; and
- "A clear description of the proposed methodology by which all bids would be evaluated."

Ohio Adm.Code 4901:1-35-03(B).

The Commission's governing statutes then require the Commission to follow a specific process when reviewing ESP applications. Under that statutory process, the Commission should issue an order "not later than two hundred seventy-five days after the application's filing date."

R.C. 4928.143(C). And in issuing that order, the Commission has only three options:

"approve," "modify and approve," or "disapprove" the application. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 45 (quoting R.C. 4928.143(C)(2)(a)). Importantly, the statutory process does not permit the Commission to modify an electric distribution utility's ESP without the utility's consent. "If the Commission modifies and approves an [ESP] application \* \* \*, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer" application. R.C. 4928.143(C)(2)(a).

The Commission now asserts that it has an inherent authority to modify that Opinion and Order, “provided that the Commission provides an explanation and that the modification is lawful and reasonable.” (Finding and Order ¶ 34 (citing *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 16).) It is true that “[t]he commission may change or modify earlier orders as long as it justifies any changes.” *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, ¶ 14 (citing *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984)). But that does not mean the Commission may propose a modification to an ESP *sua sponte*, in a proceeding in which the subject of the Commission’s order is not otherwise before the Commission, two years after approving the ESP with modifications.

The Commission, “as a creature of statute, has no authority to act beyond its statutory powers.” *In re Ohio Edison Co.*, 158 Ohio St.3d 27, 2019-Ohio-4196, 139 N.E.3d 875, ¶ 17, quoting *Discount Cellular, Inc. v. Pub. Utils. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51. The Supreme Court of Ohio has repeatedly reaffirmed that it “decline[s] to assume that the General Assembly implicitly granted authority to the commission \* \* \* without any clear indication in the statutory language to that effect.” *Id.*, citing *Columbus S. Power Co. v. Pub. Utils. Comm.*, 67 Ohio St.3d 535, 537-541, 620 N.E.2d 835 (1993), and *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 238-241, 1996-Ohio-224, 661 N.E.2d 1097.

The statutory powers granted the Commission under R.C. Chapter 4928 do not include the authority to modify and approve an ESP, then *sua sponte* revisit and remodify the ESP more than two years later. Instead, they require a “proper, orderly, and prompt” decision on an ESP application, made within approximately nine months of the application and chosen from only

three alternatives: approve, approve with modifications, or deny. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 43 (quoting *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 472, 66 N.E.2d 531 (1946)). And they do not include the authority to require EDUs to accept any Commission modifications to their ESPs. EDUs retain the right at all times to reject any modification to an ESP application imposed by the Commission.

In *In re Ohio Power Co.*, the Supreme Court of Ohio affirmed generally that the Commission may modify its prior orders so long as it explains its decision and chooses a ““new course”” that is ““substantively reasonable and lawful.”” *In re Ohio Power Co.*, 2015-Ohio-2056, ¶ 17 (quoting *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 52). But it also held that the Commission’s governing statutes prevent it from modifying AEP Ohio’s approved ESP after the plan expired, because doing so deprived AEP Ohio from exercising its “statutory right to withdraw the modified ESP \* \* \*.” *Id.* ¶ 24. In reaching that conclusion, the Court rejected the Commission’s argument that the right of withdrawal from R.C. 4928.143(C)(2)(a) did not apply because the Commission was modifying its own prior order, rather than AEP Ohio’s ESP application. “[W]hen [the Commission] modified the ESP Order in this case,” the Court held, “it effectively modified the *application* that was approved by that order.” *Id.* ¶ 29 (emphasis in original). “And because the modification of that term occurred after the ESP had expired,” the Commission’s actions prevented AEP Ohio from withdrawing the ESP, in violation of R.C. 4928.143(C)(2)(a). *Id.*

In this case, AEP Ohio’s ESP is still in effect. But the Finding and Order frustrates the proper working of R.C. 4928.143 just as much as it would if the ESP had already expired. As the Court commented in *In re Ohio Power Co.*, allowing the Commission to “modify an ESP at



any time after the application has been approved – even while the ESP is still in effect – [when] the utility [has] no recourse but to implement the change” violates the statutory requirement that a statute must be presumed to have a “‘just and reasonable result.’” *Id.* ¶ 30 (quoting R.C. 1.47(C)). And that is what the Commission has done here: modify AEP Ohio’s approved ESP more than two years after it went into effect, without acknowledging or incorporating a process for AEP Ohio to consent or present alternatives; at this point, the Company has no recourse under the Finding and Order but to implement the Commission’s directions. For this reason, the Commission’s Finding and Order is unjust, unreasonable, and contrary to R.C. 4928.143.

**B. The Commission’s direction to submit a plan for dual auctions for a period of four years is unlawful because the Commission lacks legal authority to impose SSO auction terms for AEP Ohio’s next ESP without the Company’s consent.**

Like the CBP auction design, the term of an ESP is another one of an ESP’s defining characteristics. The proposed ESP’s term determines, in part, what the electric distribution utility’s ESP application must include. For example, the ESP application must include “[p]roforma financial projections of the effect of the ESP’s implementation upon the electric utility for the duration of the ESP \* \* \*.” Ohio Adm.Code 4901:1-35-03(C)(2). It must include “[p]rojected rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any.” Ohio Adm.Code 4901:1-35-03(C)(3). And each CBP plan must include “[p]rojected generation, transmission, and distribution rate impacts by customer class and rate schedules for the duration of the CPB plan.” Ohio Adm.Code 4901:1-35-03(B)(2). Moreover, the term of the ESP determines whether the Commission must review the ESP after it has been approved. If the ESP “has a term, exclusive of phase-ins or deferrals, that exceeds three years,” the Commission must test it “in the fourth year, and if applicable,

every fourth year thereafter” to determine whether it “continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results” under a market-rate offer. R.C. 4928.143(E). For that reason, if the ESP has a proposed term of more than three years, the electric distribution utility “may include provisions in the plan to permit the commission to test the plan \* \* \* and any transitional conditions that should be adopted \* \* \* if the commission terminates the plan \* \* \*.” R.C. 4928.143(B)(1).

The duration of the CBP plan in AEP Ohio’s approved ESP is the same as the duration of the ESP: it ends in May 2024. That is a common design for AEP Ohio’s prior ESPs and for those of the other EDUs. Yet the Commission’s Finding and Order would require AEP Ohio to plan and hold “dual auctions for a period of four years commencing with the June 2022 delivery year” (Finding and Order ¶ 35.b.) – beyond the term of the current ESP, and into the term of an ESP for which AEP Ohio has not yet even filed an application. The Commission suggests this portion of its Finding and Order falls within its authority to “modify a prior order \* \* \*.”

Finding and Order ¶ 34. But the Commission’s general authority to modify a prior order is not applicable here, to the extent the directions in ¶ 35.b. of the Finding and Order extend beyond the term of AEP Ohio’s ESP. The Commission’s prior order, like AEP Ohio’s ESP application and the Joint Stipulation and Recommendation that the Commission approved in the *2016 ESP Case*, said nothing about AEP Ohio’s SSO auctions after May 2024. Instead, the Finding and Order imposes requirements for AEP Ohio’s *next* ESP – the ESP that will go into effect after May 31, 2024, and for which AEP Ohio has not yet even filed an application.

An EDU could propose an ESP or a market rate offer under R.C. 4928.142 with a CBP plan that extends beyond the ESP’s term; this would be procedurally equivalent to binding itself

to include a CBP with the same terms in its next ESP application (or in the case of a market rate offer, it would be a permanent plan without expiration). It could also agree to terms for future CBPs as part of a stipulation with Staff or other parties, for the same reason. But the Commission has no authority to impose such a requirement on an EDU unilaterally. Nothing in R.C. 4928.143 or Ohio Adm.Code Chapter 4901:1-35 authorizes the Commission to impose requirements on an EDU's ESP before the EDU has even filed its ESP application. For this reason, Paragraph 35.b. of the Finding and Order is unreasonable and unlawful to the extent it purports to impose obligations on AEP Ohio regarding the structure and function of its future SSO auctions.

**C. The Finding and Order violates R.C. 4903.09 by failing to explain some significant components of the dual auction concept and, in this respect, should be cured on rehearing through clarification.**

The Finding and Order's directive to develop a 90-day filing also leaves the EDUs to fill in significant gaps to fulfill the Commission's intention. To the extent the Commission did not explain its rationale and record supporting the issues discussed below as part of the Paragraph 35 directive, the Finding and Order violates R.C. 4903.09. *Indus. Energy Users-Ohio v. PUC*, 117 Ohio St. 3d 486, 493 quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337; *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87, 90, 1999 Ohio 206, 706 N.E.2d 1255; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 163, 166, 1996 Ohio 296, 666 N.E.2d 1372. In order to fully understand the Finding and Order and develop its 90-day filing, AEP Ohio requests clarification through rehearing of the Commission's intent and record basis for the questions discussed in this section. The

Company's goal is to understand and support the Commission's efforts relative to modifications within the existing ESP term (*i.e.*, through May 2024).

The first important area of ambiguity relates to the overall intention and scope of application relating to the dual auction structure. Is the dual auction structure merely a contingency for unknown future circumstances involving a delay of the PJM Base Residual Auction (BRA), a contingency plan that may or may not be triggered depending on the ultimate timing of the BRA for a given delivery year? Does the Commission agree that neither a proxy price for capacity nor a capacity hedge is needed if the BRA for the delivery period has been held prior to the auction to procure supply for SSO customers? If the answer to these questions is affirmative, AEP Ohio understands the Commission's purpose and intent and can formulate its auction modifications accordingly. If the answer to these questions is not affirmative, however, AEP Ohio requests clarification of the Commission's purpose and intent as well as an explanation of the rationale for engaging in what would seem to be an unnecessary activity that could inject additional risk and premiums into SSO prices. The contingency issue is especially cogent. Should the modified plan be limited to the existing ESP term, since the BRA clearing price is expected to be known through mid-2024 prior to conducting the Fall 2021 SSO auction, employing the dual auction mechanism would be entirely redundant.

There are also important areas of ambiguity about the conduct of the auction process. Paragraph 35(b) states that the dual auctions will run "simultaneously". Does the Commission intend one auction with offers solicited for both an energy-only **product** and a capacity hedge product? In the affirmative, would suppliers be able to present offers for the energy-only product, or present offers for the capacity product, and also present offers for a combination of the two

products (if practical from an evaluation perspective)? In the negative, does the Commission intend instead for offers to be solicited for an energy-only product on the one hand and offers for a capacity hedge product on the other, but not necessarily at the same time or through a single auction process? Can the Commission confirm that the terms (*e.g.*, 48 months) of the energy-only product and the capacity hedge product should be matched and that separate price offers should be presented for each of these products? Should Paragraph 35(b) instead be interpreted to mean that the dual auctions (an auction offering a full requirements product with a capacity proxy price on the one hand and a second auction offering both an energy-only product and a capacity-only hedge product on the other hand) should be conducted on the same day? If AEP Ohio proposes a laddering structure with products of different term lengths, should the value of the capacity proxy price always be equal to the June 2021 capacity price or should the proxy price for a given delivery year be equal to the most recent available capacity price for that delivery year (which may or may not be the June 2021 capacity price)?

Another significant unanswered question relates to how the Commission will evaluate the dual auction results. In order to replace or replicate the predictability and transparency of the current SSO auction process, what pre-defined and objective criteria does the Commission intend to apply to select which auction results will be adopted among the two auctions? For example, will the Commission estimate the supplier payments for the results of each of the two auctions and select the lower cost option? If the answer to the question is affirmative, how will the Commission estimate the supplier payments and what assumption will it make regarding the unknown capacity price? From a definitional standpoint, is the energy-only product more accurately described as a full requirements obligation minus the capacity obligation? If the

answer to this question is affirmative, then under the dual auction scenario if the Commission accepts the results of an energy-only and a capacity hedge auction, do the energy-only SSO suppliers assume the load-serving entity (LSE) obligations in PJM for that load minus the obligations related to capacity? As a related matter, how can the auctions be run at the same time and evaluated contemporaneously, transparently and efficiently?

The Commission intends the capacity product to be a financial hedge. Can the Commission confirm that this means that the seller of this hedge product is ensuring that SSO customers are charged exactly the winning capacity price established through the auction for all years of the capacity contract? Can the Commission confirm that, as such, the seller of the hedge product is not an LSE in PJM supplying a capacity product to SSO customers but instead is a party that ensures a stable capacity price to SSO customers through a financial settlement?

In order to have a predictable and transparent process, the evaluation criteria should be readily understood (just as they are today). Under the current auction process, bidders know and understand precisely how their bids will be evaluated under the descending clock auction and 2-day Commission approval process. Subject to the auction manager's and Staff consultant's certification that an auction was competitive and there was no logistical problems, the Commission has always approved the results. That is a proven and transparent process that has yielded successful auctions to date in Ohio. But the Finding and Order does not address those important considerations or provide for transparent evaluation criteria or an expedient approval process using the baseline of the existing auction structure and process. To that end, the Finding and Order fails to address these important issues and the Company requests that it be clarified on rehearing.

Another area of ambiguity is the process the Commission anticipates substituting for the normal ESP filing and litigation process that establishes an EDU's SSO auctions. As referenced above, the ESP statute and the Commission's own rules envision a very specific process and set of issues to support and determine all of the details associated with an SSO auction plan. What is the process to be used to resolve the new questions under the Paragraph 35 directive and what is the process to be used to update, and receive Commission approval of, the auction rules, applicable supplier contracts, and all of the related details associated with the dual auction construct? What potential risks and price premiums are inherent in procuring up to a four year product, beyond the forward prices visible in the market? What are the corresponding changes in credit or security terms that should be incorporated in the applicable supplier contracts? If the 90-day filings are supposed to address all such topics, what is the process and timeline for resolving differences among the EDUs and/or stakeholders? Is the Commission going to adopt a uniform set of rules and details, since the Finding and Order makes the same directive to all four EDUs in Paragraph 35? That seems to cut against the language that allows EDUs to include laddering and staggering if they choose but it is not clear. All of these issues will need to be addressed in order for AEP Ohio to fully understand the Finding and Order and develop its 90-day filing.

## CONCLUSION

For the foregoing reasons, the Commission should grant rehearing and reverse or otherwise clarify its July 15, 2020 Finding and Order.

Respectfully submitted,

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**Counsel for Ohio Power Company**



## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of Ohio Power Company's Application for Rehearing was served by electronic mail upon the individuals listed below this 14<sup>th</sup> day of August, 2020.

/s/ Christen M. Blend

Christen M. Blend

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Summary: Application - Application for Rehearing of Ohio Power Company electronically filed by Ms. Christen M. Blend on behalf of Ohio Power Company