

**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) Case No. 16-776-EL-UNC
of Ohio Edison Company, The Cleveland)
Electric Illuminating Company, and The)
Toledo Edison Company.)

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

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

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

**APPLICATION FOR REHEARING
BY
DUKE ENERGY OHIO, INC.**

Pursuant to Section 4903.10, Ohio Revised Code and Rule 4901-1-35, O.A.C., Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby seeks rehearing of the Finding and Order issued in this proceeding on July 15, 2020 (Order). As demonstrated in the attached Memorandum in Support, the Order is unreasonable and unlawful on the following grounds:

1. The Order is unreasonable and unlawful in that it modifies the terms of Duke Energy Ohio's approved Electric Security Plan (ESP) without the Company's consent.
2. The Order is unreasonable and unlawful in that it precludes the Company's ability to evaluate alternative procurement processes permitted in an ESP under R.C. 4928.143, including bilateral contracts and building of new generation.

3. The Order is unreasonable and unlawful in that it places risk on the Company by requiring the Company to enter into contracts with suppliers beyond the term of its current ESP, while failing to approve cost recovery.
4. The Order is unreasonable and unlawful in that it places additional risk on the Company for participation in the retail standard service auctions.

As demonstrated in the attached Memorandum in Support, the Commission should grant Duke Energy Ohio's Application for Rehearing and modify the Order in accordance with this Application.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 13, 2020, in response to continuing delays and uncertainty regarding the capacity construct of PJM Interconnection L.L.C. (PJM), the Public Utilities Commission of Ohio (Commission) issued an entry directing Commission Staff (Staff) to propose a modified product containing capacity flow-through provisions for electric distribution utility (EDU) default service auctions. Staff filed its proposal on March 13, 2020, suggesting that the standard service offer (SSO) auction products for the various Ohio EDUs be modified such that capacity is priced at \$0/MW-day and the winning suppliers are made whole for the actual capacity costs via a pass-through charge, which charge would then be recovered from SSO customers as part of the auction cost recovery mechanism.

On April 16, 2020, interested stakeholders, including Duke Energy Ohio, filed comments regarding Staff's proposal. By Entry dated May 15, 2020, the Commission requested that interested stakeholders file reply comments, specifically addressing eight issues regarding which the Commission desired to receive additional information.¹ Among those issues, the Commission was interested in whether parallel, but separate, auctions could be held for energy and full requirements, and what issues could be created with such a strategy.² Numerous stakeholders, including Duke Energy Ohio, timely submitted comments, arguing against such a change, pointing out the risks, challenges, and difficulties inherent in such a strategy. Nonetheless, on July 15, the Commission directed each EDU to modify its current SSO procurement process as follows:³

- a. Submit a plan to change the current auction scheduled for Fall 2020 and Spring 2021 to substitute a 12-month product for the current, planned products;

¹ Entry, p. 8 (May 15, 2020).

² *Id.*

³ Order, ¶ 35.

- b. Submit a new plan, within 90 days, for dual auctions for a period of four years, commencing with the June 2022 delivery year. These auctions will run simultaneously, and the Commission will select the bid to be implemented or reject the results of both auctions. The plans for dual auctions may include a laddering or staggering structure and must include the following components:
 - i. A full requirements product with a proxy price, using the June 2021 capacity price as the proxy, subject to true-up and reconciliation; and
 - ii. An energy-only auction and a capacity-only hedge product. Suppliers will offer a capacity hedge at a fixed price for all years included in the auction product, thereby guaranteeing the capacity price to be paid by all consumers over the long-term.⁴

The Order is unreasonable and unlawful in numerous respects and, as such, should be modified on rehearing to comply with Ohio law. At a minimum, the Commission should modify the Order such that Duke Energy Ohio should not be required to submit a revised auction plan that extends beyond the term of its current ESP.

II. DISCUSSION

A. The Commission's Order results in a significant modification to the terms of Duke Energy Ohio's ESP.

1. The Order risks invalidating the Company's Stipulation resolving its ESP and base distribution rate case and should be corrected on rehearing.

The Order, among other things, requires Duke Energy Ohio to submit a revised auction plan that is in conflict with the terms of the Stipulation and Recommendation (Stipulation) that resolved the Company's most recent ESP and the Opinion and Order adopting that Stipulation. The Order modifies the ESP length and types of auction products that were previously agreed upon by the signatory parties and approved by the Commission. Specifically, Stipulation Section III. A provides that "the Term of the ESP shall be from June 1, 2018 through May 31, 2025."⁵ Section III.B (1) further provides in relevant part that "Duke Energy Ohio shall perpetuate its *existing plan* to procure

⁴ *Id.*

⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et al.*, Stipulation and Recommendation, p. 4 (April 13, 2018).

generation supply for SSO customers.”⁶ By requiring Duke Energy Ohio to file a new auction plan that modifies the products that were previously agreed upon, and for a term extending beyond the Company’s ESP, the Commission has materially modified the Company’s ESP, which may prompt any stipulating party to withdraw its agreement and potentially attempt to void the entire settlement.

The above-described Stipulation resolving the Company’s most recent ESP was approved by the Commission, nearly two years ago, on December 19, 2018, in Case No. 17-32-EL-AIR, *et al.*⁷ The Commission was presented with a comprehensive, well-conceived, and thoughtful regulatory approach to resolve complex matters raised by Duke Energy Ohio in four cases, ten total proceedings, which provides numerous benefits to customers, such as stable prices, innovation, and ESP certainty through May 31, 2025, a full year longer than what the Company had initially proposed.⁸ Parties to those proceedings negotiated over the course of nearly six months to come to the agreed-upon resolution of the Company’s ESP, base distribution rate case, Price Stabilization Rider (Rider PSR), and reliability performance metrics. Key components of this settlement included agreements regarding a reduction in the Company’s base distribution rates, establishment of reliability metrics, resolution of multiple proceedings, low-income funding commitments, and establishment of a negotiated term of an ESP with competitively procured generation through May 31, 2025.⁹

Stipulation Section IV.C confirms that the signatory parties negotiated and resolved their differences in the multiple separate proceedings in a manner that carefully balanced their interests in the multiple proceedings for an overall reasonable and recommended outcome, and that any subsequent modification of the terms might have a material impact on any individual signatory

⁶ *Id.* (emphasis added).

⁷ *Id.*, Opinion and Order (December 19, 2018).

⁸ *Id.*, Opinion and Order, p. 29 (December 19, 2018) (noting that the Company’s application had requested approval of an ESP for the period of June 1, 2018, through May 31, 2024).

⁹ *Id.*, Stipulation, p. 4, and Attachment D.

party. As such, the Stipulation provided that a signatory party could withdraw from the Stipulation, and render it null and void, whereby the withdrawing party would have the right to litigate each underlying proceeding that would have otherwise been resolved through the Stipulation. Such a result would create unanticipated uncertainty for Duke Energy Ohio's customers, not to mention the Company itself, as it would not only upend the ESP, but also the base distribution rate case that went into effect more than a year ago and resulted in a base rate decrease for customers.

The Stipulation was not unanimous and was fully litigated and opposed by several parties. After weeks of evidentiary hearings, the Commission ultimately approved the Stipulation, including the agreed-upon ESP term through May 31, 2025.¹⁰ Non-signatory parties sought rehearing and ultimately appealed the Commission's decision to the Ohio Supreme Court.¹¹ While one party voluntarily dismissed its appeal, the other two appeals were dismissed based upon jurisdictional grounds.¹² Opening the Company's previously resolved proceedings because of a substantial change in the auction process would likely result in re-litigation of issues previously resolved by the Commission and litigated all the way to the Ohio Supreme Court, which would be an inefficient use of Commission and Company resources.

While the Commission does have the right to issue subsequent decisions that modify prior decisions, the Order raises due process concerns for parties that believed the Commission had approved a plan with auction certainty through May 31, 2025. The Commission's Order raises the possibility that these signatory parties may seek to withdraw from the agreed-upon Stipulation, which, at a minimum, would result in additional litigation and uncertainty for customers. To avoid the uncertainty, the Commission should grant rehearing to consider the Commission's Order's impact on prior settlements.

¹⁰ *Id.*, Opinion and Order, pp. 33, 113.

¹¹ *Interstate Gas Supply, Inc. v. The Public Utilities Commission of Ohio, et al.*, Case No. 2019-1269.

¹² 04/22/2020 Case Announcements, p. 2, 2020-Ohio-1487.

2. The Commission’s Order results in a modification to utility ESPs implicating the potential for rejection under R.C. 4928.143(C).

a. EDUs have an absolute right to reject an ESP modified by the Commission.

The Commission’s Order significantly modifies the existing ESPs of several EDUs by requiring those EDUs to procure SSO supply through competitive auctions beyond the term of their respective current ESPs. This order, in practical application, has the effect of extending some, but not all of, the terms of the EDUs’ ESPs, without the consent of the impacted EDUs.

R.C. 4928.143(C)(1) permits the Commission to do one of three things with respect to an EDU’s ESP application: “(1) approve, (2) modify and approve, or (3) disapprove the application.”¹³ Under R.C. 4928.143(C)(2)(a), if the Commission modifies an ESP filed under R.C. 4928.143(C)(1), the EDU may withdraw the application, thereby terminating it, and file a new SSO. The EDU may then file either a market rate offer (MRO) or a new ESP. Furthermore, pursuant to R.C. 4928.143(C)(2)(b), if the utility exercises its statutory right to terminate an application for an ESP under R.C. 4928.143(C)(2)(a), the Commission is required to issue such order as is necessary to continue the provisions, terms, and conditions of the utility’s most recent SSO until a subsequent SSO is authorized.¹⁴ R.C. 4928.143 does not confer authority on the Commission to consider and pre-determine the format of an EDU’s future ESP.

Both the Ohio Supreme Court and the Commission have confirmed that, under R.C. 4928.143(C)(2)(a), the EDU has an unambiguous absolute statutory right to withdraw its ESP upon modification by the Commission and terminate it.¹⁵ As the Commission has recently held, “a plain reading of R.C. 4928.143(C)(2)(a) demonstrates that the only statutory precondition to the utility’s

¹³ *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 24.

¹⁴ R.C. 4928.143(C)(2)(b).

¹⁵ *In the Matter of the Application of the Dayton Power and Light Company To Establish A Standard Service Offer In The Form of An Electric Security Plan*, Case No. 16-395-EL-SSO, Finding and Order, p. 8 (December 18, 2019); *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009.

right to withdraw the application is that the Commission modify and approve the application by order.”¹⁶

The Commission’s Order, especially as it relates to directing EDUs to take actions beyond the duration of currently-approved ESPs, changes terms and conditions, post-implementation, in ways that detrimentally impact the EDUs’ operations and infringe upon their rights afforded under R.C. 4928.143 as it relates to subsequent ESP proposals. As the Order acknowledges, the Commission has approved the ESPs for all of the Ohio EDUs, requiring each to procure SSO supply through competitive auctions for defined periods.¹⁷ The ESPs for Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, and the Ohio Power Company are all established through the 2023/2024 PJM delivery year and the ESP for Duke Energy Ohio is established through the 2024/2025 PJM delivery year. And yet, the Order would extend the competitive auction component under each of those ESPs beyond the established terms of their respective ESPs.

The Commission’s Order violates R.C. 4929.143 in that it directs the EDUs to take actions beyond the duration of currently approved ESPs, thereby pre-determining the EDUs’ evaluation and submission of their next ESPs. R.C. 4928.143 limits the Commission’s authority to either accepting, or modifying an EDU’s proposed ESP. Here, there are no ESPs proposed beyond the terms of the EDUs’ already approved ESPs.

Moreover, even if the Commission’s Order were viewed as a modification of those previously approved ESPs, *sua sponte* extending their respective durations indefinitely, the Order nonetheless raises the possibility that each of the EDUs could, if it does not accept such a modification, withdraw

¹⁶ *Id.*

¹⁷ Order, p. 2, citing *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016); *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, *et al.*, Opinion and Order (Apr. 25, 2018); *In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, *et al.*, Opinion and Order (Dec. 19, 2018); *In re Dayton Power and Light Company*, Case No. 08-1094-EL-SSO, Finding and Order (Dec. 18, 2019).

its ESP. Such a wholesale upheaval of each of the EDUs' SSO procurement would create significant uncertainty for Ohio customers. For that reason alone, the Commission should grant rehearing of its Order.

b. The Order unreasonably modifies part of Duke Energy Ohio's ESP without its consent.

With respect to Duke Energy Ohio, the Commission approved the Company's ESP on December 19, 2018.¹⁸ While certain non-signatory parties to the Company's ESP sought rehearing, and eventually appealed to the Ohio Supreme Court, such appeals have been either withdrawn or dismissed on jurisdictional grounds.¹⁹ Thus, there has been no finding that the Company's approved ESP is unlawful necessitating a remand to the Commission. Therefore, the Company's ESP is resolved. Or was.

The Order results in a modification to the Company's current ESP, particularly with regard to the duration of some, *but not all*, components of its plan. The Order requires the Company to hold multiple types of auctions to serve the SSO load beyond the agreed upon, and Commission-approved, ESP duration. By extending some, but not all, of the ESP terms, the Commission has effectively modified the ESP, in a manner not contemplated by the terms of the Stipulation or contained in the Commission's initial Order approving the ESP. For example, the cost recovery mechanisms that allow Duke Energy Ohio to provide the SSO service to its customers remain approved only through the duration of the ESP, subject to final true-up. The Retail Energy Rider (Rider RE), Retail Capacity Rider (Rider RC), and Supplier Cost Reconciliation (Rider SCR), which pass through the SSO procurement costs for energy and capacity and reconcile the costs of conducting the auctions and allocation of differences between payments made to suppliers, as determined through the competitive

¹⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et al.*, Opinion and Order, p. 29(December 19, 2018) (noting the Company's Application requested approval of an ESP for the period of June 1, 2018, through May 31, 2024).

¹⁹ 04/22/2020 Case Announcements, p. 2, 2020-Ohio-1487; 03/13/2020 Case Announcements, p. 1, 2020-Ohio-939.

bid process, respectively, end on May 31, 2025. Yet, the Order directs the Company to continue to conduct and implement auctions beyond that term. The Order makes no mention of also continuing those mechanisms that enable the auction-based SSO, meaning Duke Energy Ohio will be required to incur the costs of such procurement and enter into agreements with suppliers, without any assurance of recovery of such costs. Such an unfunded mandate is contrary to R.C. 4928.143(B)(2)(e) that permits the utility to include cost recovery mechanisms in an ESP.²⁰

While directing a utility to procure SSO supply through auctions perpetually into the future may be a logical conclusion to reach if a utility is operating under an MRO under R.C. 4928.142, such a result is not contemplated or supportable under R.C. 4928.143. Indeed, ESPs under R.C. 4928.143 are intentionally limited in duration, requiring periodic comparison to results of an MRO.²¹ Absent an EDU providing its SSO through an MRO, SSO procurement under an ESP is statutorily limited to the duration of the ESP. The Commission's Order thus conflates the two SSO alternatives and unlawfully extends the Company's current ESP as if it were an MRO.

It is noteworthy that the Commission's Order was made contrary to the recommendations of numerous stakeholders and was not the result of some judicial finding that the previously approved ESP was unlawful. The Commission should reverse its decision such that an EDU is only required to modify its SSO procurement strategy through the duration of its current ESP, and not beyond.

3. The Commission's Order unreasonably restricts Duke Energy Ohio's ability to evaluate alternative procurement processes for its next ESP, including bilateral contracts and the building of new generation.

R.C. 4928.141 mandates that an EDU shall provide an SSO for all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation service, to all consumers within its certified territory. The SSO may be either an

²⁰ R.C. 4929.143(B)(2)(e) permits the ESP to include automatic adjustment for increases or decreases in any component of the standard service offer price.

²¹ R.C. 4929.143(E).

MRO in accordance with R.C. 4928.142 or an ESP in accordance with R.C. 4928.143. Nowhere in that statute is the utility required to procure its SSO supply through a competitive auction. In fact, the statute actually contemplates other potential methods.²² The statute gives Duke Energy Ohio and other EDUs the flexibility to consider other SSO procurement processes to meet their SSO obligations, including entering into bilateral contracts,²³ or even constructing new generation resources.²⁴ The Order restricts the EDUs' ability to consider those other procurement options contemplated under R.C. 4928.143.

By requiring EDUs to procure SSO supply through competitive auctions that extend beyond the term of the existing ESP, the Commission is restricting the EDUs' ability under R.C. 4928.143 to consider other SSO supply alternatives as part of their next ESPs. Additionally, the Commission's Order makes it impossible to comply with O.A.C. 4901:1-35-03(B)(2) and (2)(h), which require an EDU that proposes a competitive bid process (CBP) as part of an ESP or an MRO to "provide justification of its proposed CBP plan, considering alternative possible methods of procurement;"²⁵ and to "include a discussion of alternative retail rate options that were considered in the development of the CBP."²⁶

Under the Commission's Order, EDUs will be contractually bound to the auction winners for future periods, making other supply possibilities difficult to evaluate and impossible to obtain. The EDU can neither consider, nor effectively evaluate, other supply options as part of its next ESP because the Commission's Order would commit the EDU to a single method of procurement, wholly undermining the intent of O.A.C. 4901:1-35-03(B)(2). Moreover, the Commission's Order may have the unintended consequence of harming customers in future periods. If market prices dramatically

²² R.C. 4928.143(B)(2)(a)-(c).

²³ R.C. 4928.143(B)(2)(a).

²⁴ R.C. 4928.143(B)(2)(b) and (c).

²⁵ O.A.C. 4901:1-35-03(B)(2).

²⁶ O.A.C. 4901:1-35-03(B)(2)(h).

escalate as a result of the same uncertainty the Commission is seeking to address in its Order, the construction of new generation resources, as is allowed under R.C. 4928.143(B)(2)(b) and (c), may be in the best interests of customers. Again, such a strategy would be foreclosed because the Commission has required competitive auctions to occur in years beyond the current ESPs' terms. Such restrictions on the EDUs' rights under R.C. 4928.143(B)(2) and the consequent risks to customers justify rehearing. The Commission should modify its Order such that its directives to conduct multiple auctions be limited to the term of the EDUs' current ESPs.

4. The Order is unreasonable and unlawful in that it requires Duke Energy Ohio to enter into contracts with suppliers beyond the term of its current ESP, thereby placing additional risk upon the Company.

The Order is unreasonable and unlawful in that it is forcing the Company to enter into supply contracts with auction participants for periods beyond the term of approved ESPs. Such a requirement increases the financial risk for both the EDU and the auction participants, and is thereby likely to increase the bid price, or at a minimum, the credit requirements of the EDUs. Forcing the utility to enter into contracts for periods beyond the approved ESP duration will require revisions to the currently approved supply agreements. Duke Energy Ohio's current agreements were crafted and approved with its full ESP, including all terms and conditions, in mind. As previously mentioned, the Order does not extend the Company's current mechanisms to ensure the costs are fully recovered.

5. The Order is unreasonable and unlawful in that it creates additional risk by discouraging participation in the retail standard service auctions.

The Order is unreasonable in that it creates and unnecessarily complicates the EDUs' retail auction process by requiring the EDUs to conduct simultaneous and conflicting auctions for the Commission to select between. While the Company understands the Commission's desire to mitigate the uncertainty created by the delays in PJM conducting base residual auctions, the "remedy" the Order attempts to afford has little value. As it stands, the Commission has directed the EDUs to

modify their auction structures beginning with the June 2022 delivery year (which commences on June 1, 2022). Even given the delays experienced in PJM’s capacity market, it is likely that PJM will have already resumed its Base Residual Auction (BRA) processes by that time. As such, PJM BRA capacity prices for that period and likely at least three years forward, will then be known. Utilities could simply conduct auctions in 2021 that include future delivery years at that point. Capacity prices will eventually be known, even through May 31, 2025, for the duration of Duke Energy Ohio’s ESP.

The Order erroneously supposes that extending the SSO auction beyond the terms of the existing EDUs’ respective ESPs will “lock in” historically low prices and manage volatility risks.²⁷ However, there is no evidence in the record to support such a conclusion. Rather, as pointed out by several commentators, the opposite is true; bidders will likely include a risk-adjusted premium into any bid.²⁸ With the requirement to hold two separate auctions—an energy-based auction with a capacity proxy/pass through and an energy only and capacity only hedge product—suppliers will include risk adjustments in both auctions, given the fifty percent chance of Commission rejection. Moreover, it is questionable whether a supplier can even accurately price and bid a capacity hedge product if there is such a substantial likelihood of its rejection. Rather than establishing a low-priced capacity hedge, the Commission is more likely to be looking at higher prices because of the uncertainty in capacity and the possibility of the Commission rejecting the auction. For this reason, the Commission should grant rehearing of its Order.

III. CONCLUSION

For all of the reasons given above, the Commission should grant rehearing of the Order.

²⁷ Order, p. 18.

²⁸ *See, e.g.*, Comments of Ohio Power Company, p. 5 (May 29, 2020); Reply Comments of Duke Energy Ohio, p. 4 (May 29, 2020); Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, p. 3, n.1 (May 29, 2020).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the Comments of Duke Energy Ohio, Inc. was served by First-Class U.S. Mail or electronic delivery upon counsel identified below for all parties of record this 14th day of August, 2020.

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Summary: Application for Rehearing by Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Duke Energy