

**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 of) Case No. 17-957-EL-UNC
Dayton Power & Light Company.)

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

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

**MEMORANDUM CONTRA OF INDUSTRIAL ENERGY USERS-OHIO
TO APPLICATIONS FOR REHEARING**

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AUGUST 24, 2020

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Several parties seek rehearing of the Public Utilities Commission of Ohio's ("Commission") Finding and Order in this matter and incorrectly assert that the Commission cannot modify a term of an electric security plan ("ESP") without the consent of the electric distribution utility ("EDU"). The Commission's statutory authority, supported by decades of precedent, make clear that the Commission may prospectively modify the price, terms, and conditions of utility service where the Commission explains itself and the change is substantively lawful and reasonable.

A number of clarifications were also sought in the applications for rehearing. While most of the clarifications are likely best suited for the EDUs' individual implementation plans, IEU-Ohio fully supports the Commission confirming that the changes contemplated in the order related to the procurement and pricing of bypassable generation supply and that the costs of such changes shall remain bypassable.

I. INTRODUCTION

Several parties, including Ohio Power Company ("AEP Ohio"), Duke Energy Ohio, Inc. ("Duke"), Ohio Edison Company, The Cleveland Electric Illuminating Company and Toledo Edison Company (collectively, "FirstEnergy"), and jointly, the Retail Energy Supply Association, Interstate Gas Supply, Inc., and Direct Energy Business, LLC and Direct Energy Services, LLC (collectively, "Marketers"), filed Applications for Rehearing of the Commission's July 15 Finding and Order ("Order").¹

II. ARGUMENT

A. The Commission has the authority to modify an ESP during the term of that ESP.

AEP Ohio, Duke, FirstEnergy, and the Marketers each name as their first assignment of error that the Commission does not have the legal authority to unilaterally alter the terms of an ESP.² The Court has held that the Commission cannot modify the provisions of an ESP that continues beyond the term of the ESP because such prospective modification, while permissible in other contexts, deprives an EDU of its

¹ The Office of the Ohio Consumers' Counsel ("OCC") also filed an Application for Rehearing; this Memo does not address any arguments or assignments of error raised by OCC.

² AEP Ohio App. for Rehearing at 5-9; Duke App. for Rehearing at 4-6; FirstEnergy App. for Rehearing at 4-5; Marketers App. for Rehearing at 6-8.

statutory right to withdraw from the plan.³ But that does not apply here because the order was issued during the terms of the current ESPs.

Given the inapplicability of this special ESP modification rule, the more general law on Commission-ordered modifications applies. That is, the Commission has authority to modify an earlier order, if it provides an explanation as to why it is making the modification and that the course it chooses is “substantively reasonable and lawful.”⁴

Here, the Commission explained its reasoning: that lack of certainty surrounding the future of the PJM Interconnection base residual auction process prompted the Commission to seek out alternative methods of securing electric supply for Ohio’s SSO customers.⁵ The only remaining question is whether the new course is substantively lawful and reasonable.

As each of the utilities points out, the current ESPs were all settled by Stipulation and were the product of careful negotiation, and thus, they argue, to modify those orders now could open up those proceedings to withdrawal and further protracted litigation.⁶ But this modification by the Commission is not a unilateral decision born solely out of the Commission’s desire to make a change. Outside forces (the delay in PJM capacity auctions) over which the Commission has no control have caused ongoing delays and uncertainty in the SSO procurement process that was designated in each of those Stipulations and ESP Orders. This is not a case of the Commission unilaterally disrupting the provisions of a bargained-for exchange, which could negatively affect parties’ desire

³ *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 ¶¶ 24-26.

⁴ *Id.* ¶¶ 16-17.

⁵ Order ¶¶ 2-4.

⁶ See, e.g., Duke App. for Rehearing at 6.

to enter into settlements. The Commission was required to act given the delay in PJM's capacity auctions.

Furthermore, no party has demonstrated that that the new course is substantively unlawful. Parties are required to develop and explain their legal theories to support a request for rehearing; mere conjecture by the EDUs that they may have proposed different auction procurement terms and conditions for the bypassable SSO falls well short of that hurdle.⁷ For example, Duke cites to R.C. 4928.143(B)(2)(b)-(c) and indicates it could have made a proposal under this statute in its next ESP. Duke fails to offer any evidence that EDU-owned generation is "needed" and if an SSO auction successfully occurs, the very auction Duke complains of here, then it signals that there is no need for EDU generation.

Moreover, as the Commission indicated, if an EDU elects to propose an MRO instead of an ESP, the CBP auction structure the Commission directed in this proceeding would be just as applicable in the MRO context.

While the EDUs assert that the ESP change must be "consented to" by the EDUs, they severely distort the actual case law. Moreover, the implication of a consent requirement is nonsensical.⁸ The parties opposing a prospective modification are required

⁷ *In re Columbus S. Power Co.*, 129 Ohio St. 3d 271, 2011-Ohio-2638, ¶ 19 (it is generally the party's responsibility to develop its own arguments); *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 29 (citing *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 30 ("Ruling on issues without record support is an abuse of discretion and reversible error.")). *In re Fuel Adjustment Clauses for Columbus so. Power Co.* 140 Ohio St.3d 352, 2014-Ohio-3764, ¶ 36 (citing *Allnet Communications Servs., Inc. v. Pub. Utils. Comm.*, 70 Ohio St. 3d 202, 206, 1994-Ohio-460, 638 N.E.2d 516 (rejecting argument where appellant provided no "record citations to support" it); *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶ 40; *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 13, quoting *Day v. N. Indiana Pub. Serv. Corp.*, 164 F.3d 382, 384 (7th Cir.1999) ("Appellate attorneys should not expect the court to 'peruse the record without the help of pinpoint citations' to the record"))).

⁸ See, e.g., Duke App. for Rehearing at 7.

to demonstrate that the change is substantively unlawful and unreasonable. They have failed to do so.

B. If the requests for clarifications are not deferred to the individual EDU implementation plans, the clarifications should focus on providing market-based solutions to reduce the bypassable SSO.

AEP Ohio raises several points regarding the Commission's requirement of a capacity hedge product: namely, whether the product is meant to be a financial hedge or a supply product; whether the seller of the hedge product is meant to be the Load-Serving Entity ("LSE") for capacity for a particular customer; and what that means with regard to the LSE of energy for that customer.⁹ The clarifications sought, including these specially enumerated, are probably best outside the context of an application for rehearing. That is not to say that they are unimportant, but rather, the specific clarifications that are necessary may hinge on the specific implementation plan.

Nonetheless, if the Commission does offer clarifications in an Entry on Rehearing, the clarification should be focused on delivering customer benefits through market-based approaches and any clarifications or "changes" should be confirmed to be as part of the procurement of bypassable SSO supply.

III. CONCLUSION

The Commission modified the structure of the auctions used to procure bypassable generation supply for customers that do not elect to shop. The modification was necessitated given the delay in wholesale capacity auctions that were a required input into the SSO auction process. The challenges to the Commission's authority to order the modification to the bypassable SSO auction process on the basis of the Commission

⁹ AEP Ohio App. for Rehearing at 14.

needing to obtain the consent of the EDUs is without merit. The parties seeking rehearing have also failed to demonstrate that the Commission's directive for the prospective bypassable SSO auction are unlawful or unreasonable. Finally, to the extent the Commission offers further clarifications or changes, the Commission should look to bypassable market-based options designed to provide customer benefits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, 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 of Industrial Energy Users-Ohio to Applications for Rehearing* was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio, to the following parties of record on this 24th day of August 2020, via electronic transmission, hand-delivery or U.S. mail, postage prepaid.

/s/Rebekah J. Glover
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This foregoing document was electronically filed with the Public Utilities

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Case No(s). 16-0776-EL-UNC, 17-0957-EL-UNC, 17-2391-EL-UNC, 18-6000-EL-UNC

Summary: Memorandum Memorandum Contra of Industrial Energy Users-Ohio to Application for Rehearing electronically filed by Ms. Rebekah J. Glover on behalf of Industrial Energy Users-Ohio