

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 EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY.**

CASE NO. 16-776-EL-UNC

**IN THE MATTER OF THE PROCUREMENT
OF STANDARD SERVICE OFFER
GENERATION FOR CUSTOMERS OF
DAYTON POWER & LIGHT COMPANY.**

CASE NO. 17-957-EL-UNC

**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 DUKE
ENERGY OHIO, INC.**

CASE NO. 18-6000-EL-UNC

SECOND ENTRY ON REHEARING

Entered in the Journal on February 24, 2021

I. SUMMARY

{¶ 1} The Commission grants, in part, and denies, in part, the application for rehearing of the July 15, 2020 Finding and Order filed by Ohio Power Company d/b/a AEP Ohio, and the Commission denies the applications for rehearing filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company; Ohio Consumers' Counsel; Duke Energy Ohio, Inc.; and Dayton Power & Light Company.

II. PROCEDURAL BACKGROUND

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy); the Dayton Power and Light Company (DP&L); Ohio Power Company d/b/a/ AEP Ohio (AEP Ohio); and Duke Energy Ohio, Inc. (Duke) each qualify as an electric utility as defined by R.C. 4928.01(A)(11) and as an electric distribution utility (EDU) as defined by R.C. 4928.01(A)(6).

{¶ 3} R.C. 4928.141 provides that electric utilities shall provide consumers a standard service offer (SSO) of all competitive retail electric services in accordance with R.C. 4928.142 or 4928.143. The SSO functions to make generation supply available to customers that are not receiving this supply from a Competitive Retail Electric Services provider and is sometimes referred to as default supply. The Commission has approved the above EDUs' electric security plans (ESP), each of which implemented a competitive auction-based SSO format, as well as a competitive bid procurement process for the EDUs' auctions, to procure generation supply for customers of each EDU for a certain period of time. *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (ESP IV), Opinion and Order (Mar. 31, 2016); *In re Dayton Power & Light Co.*, Case No. 16-395-EL-SSO (DP&L's ESP Case), Opinion and Order (Oct. 20, 2017); *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al., Proposed Revised Tariffs (Nov. 26, 2019) *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al. (AEP Ohio's ESP Case), Opinion and Order (Apr. 25, 2018); and *In re Duke Energy Ohio, Inc.*, Case. No. 17-1263-EL-SSO (Duke's ESP), et al., Opinion and Order (Dec. 19, 2018). The use of this competitive bidding process is conducive to Ohio's legal framework that is designed to ensure that all retail electric customers served by EDUs have reliable access to electric generation supply at market-based prices.

{¶ 4} On July 25, 2019, the Federal Energy Regulatory Commission (FERC) issued an order directing PJM Interconnection, LLC (PJM) to not conduct its base residual auction (BRA) regarding the 2022-2023 delivery year, previously scheduled for August 2019. *Order on Motion for Supplemental Clarification*, Case No. EL16-49-00, at ¶ 2 (July 25, 2019). This

direction prevented PJM from moving forward with a wholesale competitive bidding process the output of which informed potential bidders in each EDU retail competitive bidding process associated with the SSO development of the forward cost of the capacity obligation arising from the provision of SSO generation supply.

{¶ 5} Thereafter, on December 19, 2019, FERC ordered that PJM must submit a new schedule regarding the BRA within 90 days. *Order Establishing Just and Reasonable Rate*, Case No. EL16-49-00, at ¶ 4 (Dec. 19, 2019).

{¶ 6} By Entry issued on February 13, 2020, in *In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, et al., Entry (Feb. 13, 2020) at ¶ 8 (*Duke SSO Case Entry*), the Commission directed Staff to file a proposal for a modified product which contains capacity flow-through provisions since the uncertainty caused by FERC's order precludes the use of a more-traditional three-year auction product at a time when market fundamentals were signaling opportunities to use a forward looking competitive bidding process to lock in historically low energy prices for the benefit of Ohio retail electric customers.

{¶ 7} On March 13, 2020, Staff filed, in the four cases in which this Second Entry on Rehearing is made today, a singular proposal and recommendation, as directed by the Commission in the February 13, 2020 Entry in Case No. 17-1263-EL-SSO. By separate entries issued in each of the four cases in which today's Entry is made, on April 6, 2020, the attorney examiner for all four cases invited interested stakeholders to file public comments discussing Staff's proposal and recommendation.

{¶ 8} On April 16, 2020, written comments were filed by Duke; Interstate Gas Supply, Inc., Direct Energy Business, LLC, and Direct Energy Services, LLC (collectively, IGS/Direct); and Energy Harbor LLC (Energy Harbor). On May 8, 2020, FirstEnergy filed its comments.

{¶ 9} By Entry issued on May 15, 2020, the attorney examiner invited interested stakeholders to file reply comments and sur-reply comments in response to the comments

filed regarding Staff's proposal and recommendation and specifically requested that commenters discuss questions posed in the Entry about Energy Harbor's proposals. On May 29, 2020, written reply comments were filed by AEP Ohio, Duke, OCC, IGS/Direct, and FirstEnergy. Sur-reply comments were timely filed on June 8, 2020, by AEP Ohio, FirstEnergy, IGS/Direct, and Exelon Generation Company, LLC.

{¶ 10} On July 15, 2020, the Commission issued its Finding and Order directing each EDU to file a proposal to modify their respective SSO procurement auctions in the manner described in the order.

{¶ 11} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 12} On August 14, 2020, applications for rehearing were filed by OCC, FirstEnergy, Duke, DP&L, and AEP Ohio. On the same date, Retail Energy Supply Association (RESA) filed a motion for leave to enter appearance on rehearing. On August 17, 2020, IGS/Direct and RESA filed a joint application for rehearing and also filed a joint motion for waiver of Ohio Adm.Code 4901-1-02(D)(4) to perfect filing of the application for rehearing.

{¶ 13} On August 24, 2020, memoranda contra the applications for rehearing were filed by Industrial Energy Users-Ohio (IEU-Ohio) and Energy Harbor.

{¶ 14} By Entry on Rehearing issued September 9, 2020, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing filed by OCC, FirstEnergy, Duke, DP&L, and AEP Ohio. IGS/Direct and RESA's joint motion for waiver of Ohio Adm.Code 4901-1-02(D)(4) was denied, leaving RESA's motion for leave to enter appearance for rehearing moot.

{¶ 15} On October 8, 2020, AEP Ohio, Duke, FirstEnergy, and DP&L filed a joint motion for extension to file their dual auction plans and a request for expedited ruling. The joint movants requested a 30-day extension for filing their auction plans since they believe a substantive ruling on their applications for rehearing would greatly assist in preparing their auction plans and because an order from FERC affecting PJM's ability to schedule the next BRA is expected imminently.

{¶ 16} By Entry issued October 9, 2020, the attorney examiner granted the joint motion for extension and directed the EDUs to file their auction plans within 14 days of the Commission issuing its Second Entry on Rehearing in this matter.

III. DISCUSSION

{¶ 17} The Commission has reviewed and considered the arguments raised in the applications for rehearing and responsive memoranda contra. Any argument that was raised on rehearing that is not specifically discussed herein has been thoroughly considered by the Commission and should be denied.

A. The Commission did not violate R.C. 4903.09 in the July 15, 2020 Finding and Order.

{¶ 18} Several of the parties submitted assignments of error arguing that the Commission's decision in this case was not supported by an adequately developed case record. In its third assignment of error, OCC argues that the Commission erred because the record does not support the Commission's ruling, and the Commission did not adequately justify its modification of prior orders, thus violating R.C. 4903.09 and Supreme Court of Ohio precedent. According to OCC, R.C. 4903.09 requires the Commission to explain its decisions and identify in sufficient detail the record evidence upon which its orders are based. Furthermore, OCC asserts that the Supreme Court of Ohio has held that the Commission's power to modify its decisions is not without limits and that the modification must be substantively reasonable and lawful. *In re Application of Ohio Power Co.*, 144 Ohio

St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶¶16-17. OCC states that the SSO procurement auction processes were approved in heavily litigated cases, yet the Commission's dual auction directive was issued without the support of a majority of the commenting parties and was chosen without testimony, a hearing, or without the development of any factual record. In response to the Commission's reasoning that it aimed to quell uncertainty surrounding PJM's future capacity auctions, OCC asserts that PJM's capacity auctions are likely to be resolved in time for the Fall 2021 SSO auctions, meaning this uncertainty need only be addressed in the short-term, which the Commission sufficiently did with its order to adjust Fall 2020 and Spring 2021 auctions. OCC also argues that no support exists for the Commission's reasoning that low wholesale market energy prices have changed the circumstances under which the EDUs' ESPs were originally approved. According to OCC, the current auction processes already account for fluctuations in wholesale market prices since SSO bidders consider those prices when making an offer, plus wholesale prices were already low when the EDUs' most recent ESPs were approved in the last several years. For these reasons, OCC claims that the Commission failed to adequately explain the basis for its modifications and that the existing record fails to support a change to each EDU's current SSO auction process. (OCC Appl. at 4-8.)

{¶ 19} Similar to OCC, AEP Ohio, in its third assignment of error, claims that 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. AEP Ohio argues that the Commission's dual auction directive left significant gaps for AEP Ohio to adequately comply with the Commission's order for a plan, so, to the extent the Commission did not explain its rationale and adequately develop a record supporting its dual auction directive, the order violates R.C. 4903.09. AEP Ohio proceeds to posit numerous questions in an effort to gain clarity on how it should proceed with its auction plan. AEP Ohio asks for clarification regarding the overall intention and scope of the application regarding the dual auction structure. For example, AEP Ohio notes that if the Commission means for this structure to be a contingency depending on the ultimate

timing of the BRA for a given year, then AEP Ohio can formulate its plan accordingly. AEP Ohio also requests clarification on the conduct of the dual auction process and more guidance on how the Commission will evaluate the dual auction results. AEP Ohio believes the evaluation criteria should be understood by the parties, as is the case under the current auction process, where bidders understand how their bids will be evaluated under the descending clock auction and 2-day approval process. AEP Ohio notes that, subject to certification by Staff's consultant, the auction manager, and absent any logistical problems, the Commission has always approved the results. Finally, since the Commission is deviating from the statutory- and rule-defined ESP process, AEP Ohio requests clarification on the process the Commission anticipates substituting for the normal ESP filing and litigation process, which establishes an EDU's SSO auctions. (AEP Ohio Appl. at 11-15.)

{¶ 20} In its third assignment of error, FirstEnergy argues that the Finding and Order violates R.C. 4903.09 by failing to explain significant components of the dual auction concept. FirstEnergy argues that the Commission failed to explain its rationale or create a sufficient enough record upon which to make its determination, and, as a result of the lack of details in the dual auction directive, could harm the competitiveness of the auction process thereby increasing prices for customers. FirstEnergy notes that any change to the auction structure beyond adjusting the Fall 2020 and Spring 2021 auctions may be unnecessary, as the issue of unknown market-based capacity prices is likely to be resolved by the Fall 2021 auctions. FirstEnergy also argues that the dual auction directive lacks necessary details including the evaluation criteria for the Commission's decision regarding auction results, any effects on credit or security terms for winning bidders, possible increased risk of exceeding existing tranche caps, and the effects on overall competitiveness of the auctions. FirstEnergy asserts that these same concerns also carry over to the solicitations to procure generation supply for Percentage Income Payment Plan customers. (FirstEnergy Appl. at 6-7.)

{¶ 21} In Energy Harbor's memorandum contra, it contests OCC's claim that there is virtually no evidence that Ohio's SSO auctions need overhauled. Energy Harbor points out

that, upon their own initiative, several of the EDUs petitioned the Commission for approval to modify their auctions in response to the uncertainty created by FERC. *In re the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC, Application of DP&L (Feb. 7, 2020); *In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, et al., Duke's Notice of FERC's PJM Order and Request for Auction Adjustment (July 29, 2019, and Jan. 23, 2020). Energy Harbor states that the Commission acted appropriately and proactively, recognizing as it did in the *Duke SSO Case Entry* that "such uncertainty could have significant effects on the auction process, including limited participation and altering bidding strategies." *Duke SSO Case Entry* at ¶8. Consequently, the Commission ordered Staff to issue a recommendation, then solicited multiple rounds of comments concerning the structure of the auction and summarized these comments and decided on an auction structure in an order; yet, OCC overlooks these events when claiming virtually no evidence exists showing the auctions need overhauled. Energy Harbor notes that OCC fails to consider in its objections both of the main reasons offered by the Commission for modifying the auction structure, instead focusing on the Commission's reasoning regarding locking in low wholesale energy prices. Energy Harbor argues that the other rationale offered in the Finding and Order, addressing the uncertainty caused by FERC's order, is equally as important. Energy Harbor concludes that the Commission's concern about this uncertainty is legitimate, and the Commission's directive creates a transparent, dual auction approach that affords the Commission flexibility to select the auction result, if any, that is most favorable to Ohio customers while locking in low wholesale energy prices and insulating customers from potential market volatility. (Energy Harbor Memo Contra. at 6-8.)

{¶ 22} The Commission will address first AEP Ohio's request for clarification regarding the overall intention and scope of the proposed plans and whether they act as a contingency if PJM's BRA schedule remains uncertain. We note that there have been new developments regarding PJM's capacity auction schedule. On October 15, 2020, and November 12, 2020, FERC issued orders that enabled PJM to schedule its next capacity

auction. *Order on Compliance, Granting Waiver Request, Addressing Arguments Raised on Rehearing, and Setting Aside Prior Order, in Part*, Case No. EL16-49-003, et al., (Oct. 15, 2020); *Order on Compliance*, Case No. EL19-58-002, et al., (Nov. 12, 2020). Moreover, we will take administrative notice of the fact that PJM has reestablished its capacity auction schedule, with the next capacity auction, for delivery year 2022-2023, to open May 19, 2021, and close May 25, 2021. *PJM Interconnection, LLC, PJM Reestablishes Capacity Auction Schedule*, (Nov. 19, 2020) <https://insidelines.pjm.com/pjm-reestablishes-capacity-auction-schedule/> (accessed Dec. 11, 2020). Consequently, the Commission finds that dual auction plans requested in accordance with the July 15, 2020 Finding and Order may be unnecessary, and we will grant rehearing on AEP Ohio's assignment of error to indefinitely stay our directive in Paragraph 35(b) of the July 15, 2020 Finding and Order as we continue to monitor PJM's implementation and commencement of the BRA and other potential developments between FERC and PJM. Further, as PJM has re-established a capacity auction schedule, we direct the EDUs to file, within 60 days, new proposed auction schedules consistent with the timeframes established by PJM for future BRAs and consistent with the provisions for staggering and laddering auctions contained in the ESPs. Nonetheless, if these new developments regarding the capacity auctions are negatively impacted by ongoing litigation in the Federal Court of Appeals, the Commission may reconsider the stay and require the filing of dual auction plans. At that point, as we noted in the July 15, 2020 Finding and Order at ¶38, the EDUs and all other parties will have a full and fair opportunity to raise any issues on the EDUs' detailed plans before any plan or proposal is adopted by the Commission. The Commission further notes that if we ultimately remove this stay and require the filing of dual auction plans, we will address the remaining clarification requests at that time.

{¶ 23} With respect to the parties' assignments of error centering on the Commission's alleged failure to justify its rationale and to create a sufficient record upon which to make its determination, as required by R.C. 4903.09, the Commission finds that these arguments are misplaced and that rehearing on these assignments of error should be

denied. In the July 15, 2020 Finding and Order, the Commission merely ordered each EDU to file a plan or proposal to modify their respective auction processes and did not modify and approve or disapprove the EDUs' ESPs. As we noted in the July 15, 2020 Finding and Order at ¶38, the EDU's and all other parties would have had a full and fair opportunity to raise any issues with the Commission regarding the EDUs' detailed plans before any plan or proposal was adopted by the Commission. Moreover, it is well established that, the Commission may modify an earlier order if it provides an explanation as to why it is modifying the order and if its new course is substantially reasonable and lawful. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, quoting *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶16-17. Regarding providing an explanation for modifying a prior order, the Ohio Supreme Court has held that the explanatory burden is not very high and that just including "[a] few simple sentences" as to that reasoning may be sufficient to satisfy such burden. *In re Application of Ohio Power Co.* at ¶16, quoting *Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 21, 21-22, 475 N.E.2d 786 (1985).

{¶ 24} In fact, the Commission provided an explanation for its decision within the July 15, 2020 Finding and Order and offered its rationale for selecting the specific auction method identified, specifically uncertainty in the capacity markets and the opportunity to obtain energy at historically low prices. Finding and Order at ¶¶34, 36-38. OCC argues that no support exists for the Commission's claim that low wholesale market energy prices have changed the circumstances under which the EDUs' ESPs were originally approved, especially considering prices were low at the time each EDU's current ESP was approved. In making this argument, OCC ignored the extensive record in each of the EDU's SSO procurement auction dockets, which demonstrated a downward trend in wholesale energy prices since the SSO procurement auctions commenced under the current round of ESPs in 2016.¹ Furthermore, as documented within the SSO procurement auction and ESP dockets,

¹ See, *In re the Procurement of Standard Service Offer Generation as Part of the Fourth ESP for Customers of FirstEnergy*, Case No. 16-776-EL-UNC, Finding and Order (Apr. 14, 2016) at ¶6, Finding and Order (Apr.

support existed for the Commission's reasoning that the SSO procurement auction processes may need adjusted to help quell significant uncertainty regarding when and how PJM will conduct BRAs in the future. Duke and DP&L had petitioned the Commission to amend their SSO competitive bidding process (CBP) auctions to eliminate 36-month products since the forward capacity rates were unknown, specifically expressing concern that this uncertainty will increase the amount of inherent risk for all parties, possibly causing prices to increase for the months where capacity is unknown. *In re the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC, Application of DP&L (Feb. 7, 2020); *In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, et al., Notice of FERC's PJM Order and Request for Auction Adjustment (July 29, 2019, and Jan. 23, 2020). The July 15, 2020 Finding and Order aimed to address the very uncertainty from which these EDUs requested relief. Therefore, we affirm our determination that more than sufficient support exists in the record regarding the July 15, 2020 Finding and Order. Finally, with respect to claims that the Commission failed to adequately explain components of the dual auction concept, as we indicated in the July 15, 2020 Finding and Order at ¶38, the EDUs and their auction managers, rather than the Commission, have access to the critical information and the expertise necessary to provide the details of a dual auction process. However, in light of the stay, this argument is moot.

27, 2016) at ¶6, Finding and Order at (Oct. 5, 2016) at ¶6, Finding and Order (Feb. 1, 2017) at ¶7, Finding and Order (Oct. 11, 2017) at ¶7, Finding and Order (Jan. 31, 2018) at ¶7, Finding and Order (Oct. 24, 2018) at ¶7, Finding and Order (Jan. 30, 2019) at ¶7, Finding and Order (Oct. 9, 2019) at ¶7, Finding and Order (Jan. 29, 2020) at ¶7; *In re the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC, Finding and Order (Apr. 12, 2017) at ¶11, Finding and Order (Apr. 26, 2017) at ¶11, Finding and Order (Mar. 14, 2018) at ¶7, Finding and Order (Mar. 27, 2019) at ¶7, Finding and Order (Mar. 11, 2020) at ¶12; *In re the Procurement of Standard Service Offer Generation for Customers of Ohio Power Co.*, Case No. 17-2391-EL-UNC, Finding and Order (Nov. 29, 2017) at ¶9, Finding and Order (Mar. 8, 2018) at ¶11, Finding and Order (Nov. 7, 2018) at ¶6, Finding and Order (Mar. 6, 2019) at ¶6, Finding and Order (Nov. 6, 2019) at ¶6, Finding and Order (Mar. 25, 2020) at ¶6; *In re the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC, Finding and Order (Feb. 21, 2018) at ¶8, Finding and Order (Feb. 28, 2018) at ¶8, Finding and Order (September 26, 2018) at ¶8, Finding and Order (Feb. 27, 2019) at ¶6, Finding and Order (September 11, 2019) at ¶6, Finding and Order (Feb. 26, 2020) at ¶10.

B. *The Commission does not need an EDU's consent to modify a previously approved ESP.*

{¶ 25} FirstEnergy, AEP Ohio, and Duke submitted assignments of error arguing that the Commission lacks legal authority to modify an EDU's already approved ESP without EDU consent. In FirstEnergy's first assignment of error, it argues that the Finding and Order is unlawful because the Commission lacks legal authority to reopen a prior order, unilaterally, and modify an already approved ESP. FirstEnergy argues that the Commission must follow its governing statutes, which, under R.C. Chapter 4928, set forth a specific process regarding ESP application review. FirstEnergy notes that each EDU must provide customers an SSO and when such offer is provided by way of an ESP, the ESP must include provisions relating to the supply and provision of electric generation service. R.C. 4928.141(A); R.C. 4928.143(B)(1). Furthermore, Commission rules allow for an ESP to include a proposal for a CBP and, if the plan consists of a CBP, then the rules require certain information be provided regarding it. Ohio Adm.Code 4901:1-35-08(A); Ohio Adm.Code 4901:1-35-03(B). FirstEnergy notes that, pursuant to R.C. 4928.143(C)(2)(a), the Commission has only three options when deciding on an ESP application—approve, modify and approve, or disapprove the application. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶45. Under R.C. 4928.143(C)(2)(a), 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[.]” R.C. 4928.143(C)(2)(a). Consequently, FirstEnergy concludes that the statutory process does not permit the Commission to modify an EDU's ESP without the utility's consent, and, since FirstEnergy's *ESP IV* is still in effect, the Finding and Order is contrary to R.C. 4928.143 because it modifies FirstEnergy's approved *ESP IV* CBP process after a final Commission order was issued in the *ESP IV* case. (FirstEnergy Appl. at 4-5.)

{¶ 26} Similar to FirstEnergy, AEP Ohio, in its first assignment of error, argues that the Finding and Order is unlawful because the Commission lacks the unilateral legal authority to reopen a prior order modifying and approving an ESP. AEP Ohio follows the

same line of argument as FirstEnergy in that the Commission must not act beyond its statutory powers; therefore, it must follow the ESP review process set forth in R.C. Chapter 4928. AEP Ohio adds that, pursuant to R.C. 4928.143(C)(1), the Commission must provide a “proper, orderly, and prompt” decision approving, modifying and approving, or disapproving an ESP application within approximately nine months of the application’s filing. R.C. 4928.143(C)(1); *In re Columbus S. Power Co.* at ¶ 43, quoting *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 472, 66 N.E.2d 531 (1946). Therefore, AEP Ohio argues that R.C. Chapter 4928 does not include the authority to modify and approve an ESP, then unilaterally revisit and remodel the ESP more than two years after the initial approval. (AEP Ohio Appl at 5-8.)

{¶ 27} AEP Ohio further claims that EDUs retain the right to reject any modification to an ESP application imposed by the Commission. AEP Ohio acknowledges that, as prescribed in *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, the Commission may modify a prior order provided that the Commission gives an explanation and that the modification is lawful and reasonable; however, AEP Ohio points out that, in that case, the Court actually held that an EDU has a statutory right under R.C. 4928.143(C)(2)(a) to withdraw a modified ESP, preventing the Commission from modifying the EDU’s approved ESP after the ESP had expired since doing so would deprive AEP Ohio of its right to withdraw the modified ESP application. *In re Application of Ohio Power Co.* at ¶¶16, 24, 26. AEP Ohio argues that the Finding and Order in this case frustrates the proper working of R.C. 4928.143 to the same extent as if the Commission modified an already expired ESP since modifying AEP Ohio’s ESP more than two years after its approval, without acknowledging or incorporating a process for AEP Ohio to consent or present alternatives, has left AEP Ohio with no recourse other than to implement the Commission’s directives, violating R.C. 4928.143(C)(2)(a). (AEP Ohio Appl. at 7-8.)

{¶ 28} Part of Duke’s grounds for its first assignment of error tread a similar path to that of FirstEnergy and AEP Ohio. In Duke’s first assignment of error, it argues that the Finding and Order is unreasonable because it modifies the terms of *Duke’s ESP* without

Duke's consent. Duke claims that EDUs have an absolute right to reject an ESP modified by the Commission pursuant to R.C. 4928.143(C)(2)(a) and as held in *In re Application of Ohio Power Co.* at ¶24. Also, Duke notes that the Commission recently held the same regarding this right of withdraw, stating that "a plain reading of R.C. 4928.143(C)(2)(a) demonstrates that the only statutory precondition to the utility's right to withdraw the application is that the Commission modify and approve the application by order." *DP&L's ESP Case*, Case No. 16-395-EL-SSO, Finding and Order (Dec. 18, 2019) at ¶16. Duke also supports its assignment of error with reasoning that examines the Commission's authority to extend, unilaterally, an EDU's ESP plan beyond the already-approved ESP term; however, this argument will be addressed in a subsequent section, along with similar arguments made by other parties. (Duke Appl at 1, 7-8.)

{¶ 29} Also under its first assignment of error, Duke argues that the Commission's order to file a new auction plan materially modifies the stipulation agreed upon by various parties and ultimately approved by the Commission, possibly prompting any stipulating party to withdraw its agreement and void the settlement. Duke notes that *Duke's ESP* resolved four cases and ten total proceedings including its ESP, base distribution rate case, Price Stabilization Rider, and reliability performance metrics. Duke warns that such a result would create uncertainty for itself and its customers and upend its ESP and base distribution rate case, which resulted in a base rate decrease for customers. Further, Duke argues that, since the stipulation was opposed by several parties and was fully-litigated, reopening the ESP due to a material modification to its auctions process may likely induce re-litigation of previously resolved issues, resulting in an inefficient use of the Commission's and Duke's resources. Consequently, Duke requests rehearing be granted to consider the Finding and Order's impact on the prior settlements made in *Duke's ESP*. (Duke Appl. at 4-6.)

{¶ 30} In its memorandum contra, IEU-Ohio asserts that the Commission has the authority to modify an ESP during the term of that ESP. IEU-Ohio argues that the parties' reliance on the Supreme Court's decision *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060 is misguided. Here, unlike in *In re Application of Ohio*

Power Co., where the Commission issued an order modifying an ESP after that ESP had expired, the Finding and Order was issued during the term of each EDU's ESP; therefore, their statutory right to withdraw their ESPs has not been violated. *In re Application of Ohio Power Co.* at ¶ 24. (IEU-Ohio Memo at 2-3.)

{¶ 31} Given that the rehearing parties' arguments above hold no merit, IEU-Ohio then asserts that the Commission may modify an earlier order if it provides an explanation as to why it is modifying the order and if its new course is "substantially reasonable and lawful." *In re Application of Ohio Power Co.* at ¶¶16-17. IEU-Ohio states that the Commission provided an explanation for the modification in that the Commission asserted that it was addressing the uncertainty surrounding the future BRA process by seeking out alternative methods of securing electric supply for SSO customers. Finding and Order at ¶¶2-4. In response to parties' claims that the modification is unreasonable because of the negative affects it may have on ESPs settled by stipulation, IEU-Ohio argues that the Commission was required to act given the delay in PJM's capacity auction; therefore, it is disingenuous to argue the Commission is unilaterally disrupting provisions of bargained-for exchanges that may negatively affect the parties' settlements without parties acknowledging the potential effects of the uncertainty surrounding PJM's BRA. IEU-Ohio also argues that the parties failed to demonstrate that the new course is substantially unlawful. (IEU-Ohio Memo at 1-5.)

{¶ 32} The Commission notes that, in Paragraph 35 of the July 15, 2020 Finding and Order, we ordered the EDUs to submit plans that detail each EDU's proposed changes to the near-term auctions and that detail each EDU's dual auction structure to be implemented for Fall 2021 and subsequent auctions; however, outside of the August 26, 2020 Finding and Order regarding near-term auctions, we have not acted to modify and approve or disapprove any component of the ESP, considering the directives within the July 15, 2020 Finding and Order merely ordered the EDUs to submit proposals to change the auction process. Therefore, the parties' assignments of error regarding the Commission's authority to modify an already approved ESP are premature and should be denied. The July 15, 2020

Finding and Order was an intermediate step to the Commission's ultimate decision whether to modify and approve or disapprove the plans to be submitted, as well as those plans' individual components. For example, AEP Ohio's, Duke's, and FirstEnergy's current auctions scheduled for Fall 2020 and Spring 2021 were not officially modified and approved until the Commission issued its August 26, 2020 Finding and Order approving each EDU's plan/motion that was submitted pursuant to Paragraph 35(a) of the July 15, 2020 Finding and Order. Nonetheless, as discussed above, since FERC has now issued the orders necessary to re-initiate PJM's capacity auctions and PJM subsequently scheduled its capacity auctions, the dual auction plans requested in accordance with Paragraph 35(b) and a Commission decision regarding such plans may be unnecessary. Consequently, we have stayed our directive in Paragraph 35(b) of the July 15, 2020 Finding and Order as we continue to monitor PJM's implementation and commencement of the BRA and other potential developments between FERC and PJM. If there are negative developments regarding PJM's capacity auctions, the Commission may reconsider the stay and require the filing of dual auction plans, but, as we noted in the Finding and Order at ¶38, the EDUs and all other parties will have a full and fair opportunity to raise any issues on the EDUs' detailed plans before any plan or proposal is adopted by the Commission.

{¶ 33} Nonetheless, even if these arguments were not premature, the parties' arguments that the Commission lacks legal authority to modify an already-approved ESP without the EDU's consent are misplaced because it is well established that the Commission reserves the right to modify an ESP auction process, during the term of the ESP, in consultation with the EDU, auction managers, and the Commission's consultant. *In re Duke Energy Ohio, Inc.*, Case No. 14-841-EL-SSO, et al., Opinion and Order (Apr. 2, 2015) at 52; *In re Ohio Power Company*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015) at 31; *In re Dayton Power and Light Company*, 12-426-EL-SSO, et al. Opinion and Order (Sept. 4, 2013), at 16-17. Furthermore, the Ohio Supreme Court has affirmed the Commission's authority to modify prior orders. The Commission should "respect its own precedents in its decisions to assure the predictability which is essential in administrative law. *In re*

Application of Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶16, quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 402, 431, 330 N.E.2d 1 (1975), superseded on other grounds by statute as recognized in *Babbit v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979). Respecting precedent, however, does not mean that the Commission may never revisit a particular decision, only that if the Commission does change course, it must explain why. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶52, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶18. More specifically, the Commission may modify an earlier order if it provides an explanation as to why it is modifying the order and if its new course is “substantially reasonable and lawful.” *In re Application of Ohio Power Co.* at ¶16-17. The parties contend, however, that the Commission cannot unilaterally modify a prior order approving an ESP without EDU consent. As the foregoing decisions unequivocally demonstrate, the Commission possesses the authority to modify an existing order, including a prior order approving an ESP, when exercising such authority in the manner described above, and, no requirement exists for the EDU to consent to such modification.

{¶ 34} The parties’ arguments regarding the Commission lacking the legal authority to modify an already-approved ESP without EDU consent also mischaracterize established law and hold no merit. R.C. 4928.143(C)(1), in part, states that the Commission by order shall approve, modify and approve, or disapprove an ESP application. R.C. 4928.143(C)(1). As IEU-Ohio asserted in its memorandum contra and as we demonstrated above, the Commission possesses the authority to modify an order approving an ESP. The parties are misguided in relying on *In re Application of Ohio Power Co.* in their arguments that the Commission cannot modify an already approved ESP. In that decision, the Ohio Supreme Court held that the Commission’s order modifying and approving an already approved ESP deprived the EDU of its statutory right under R.C. 4928.143(C)(2)(a) to withdraw such ESP application because the ESP had expired at the time of the new Commission order. *In re Application of Ohio Power Co.* at ¶24. Here, however, the term of each EDU’s ESP is still

ongoing; thus, pursuant to R.C. 4928.143(C)(2)(a), an EDU may withdraw its ESP if the Commission further modifies and approves the ESP, which, pursuant to R.C. 4928.143(C)(2)(b), results in a reversion back to the terms and conditions of the EDU's previous ESP. This provision does not mandate that an EDU must consent to the modification of the ESP; the alleged requirement for "consent" to the modification of the ESP mischaracterizes existing law and obscures the fact that the EDU must withdraw its entire ESP and implement the terms and conditions of its prior ESP.

{¶ 35} Also, the Commission notes Duke's concern about the impact a modification may have on the stipulation in *Duke's ESP*. As in other cases, we note that the Commission may change or modify earlier orders adopting a stipulation when the Commission justifies the changes. See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶16. We understand that altering an ESP, especially one premised upon a stipulation, can have repercussions for all parties involved. Again, though, Duke's claims are premature since the Commission has merely ordered EDUs to submit plans to change the auction process. Nonetheless, as IEU-Ohio asserted in its memorandum contra, the Commission is not conducting this review of existing SSO procurement auctions and potentially altering orders adopting stipulations without cause. As articulated in our July 15, 2020 Finding and Order, FERC's July 25, 2019 Order directing PJM not to conduct its BRA regarding the 2022-2023 delivery year has prevented PJM from moving forward with a wholesale competitive bidding process, which would prevent potential bidders in each EDU SSO competitive bidding process from knowing the forward cost of the capacity obligation arising from the provision of SSO generation supply. *Order on Motion for Supplemental Clarification*, Case No. EL16-49-00, at ¶2 (July 25, 2019). The uniqueness of this situation, the possible significant repercussions of such uncertainty, as well as the historically low wholesale energy prices observed in recent auctions motivated the Commission to consider options for the future. However, as recognized above, such modification to existing ESPs may not be necessary considering PJM has now reestablished its BRA schedule.

C. *There is no prohibition on a provision of an ESP extending beyond the term of the ESP.*

{¶ 36} Duke, OCC, AEP Ohio, and FirstEnergy submitted assignments of error centering on the Commission's authority to extend the SSO's CBP beyond the term of each EDU's existing ESP. Most of Duke's assignments of error fall underneath this core issue. As part of Duke's first assignment of error described earlier, Duke also asserts that the Finding and Order violates R.C. 4928.143 in that it directs the EDUs to extend the competitive auction component of each ESP beyond the duration of the currently approved ESPs, pre-determining each EDU's evaluation and submission of their next ESP. Therefore, Duke requests that the Commission reverse its decision such that an EDU is only required to modify its SSO procurement strategy through the duration of its current ESP. As outlined earlier, R.C. 4928.143 limits the Commission's decision with regard to an ESP application to approving, modifying and approving, or disapproving the ESP application. By modifying each EDU's competitive auction component beyond the current term of their ESPs, Duke warns that the Commission risks EDUs withdrawing their current ESPs, creating significant uncertainty for Ohio customers. Furthermore, Duke stresses that the Finding and Order is unlawful because it violates R.C. 4928.143(B)(2)(e), permitting an EDU to include cost recovery mechanisms in an ESP, since the cost recovery mechanisms approved in *Duke's ESP* would not extend to encompass the revised auction format. Moreover, Duke argues that the Commission conflates the two SSO alternatives, the market rate offer (MRO) under R.C. 4928.142 and the ESP under R.C. 4928.143, when extending the term beyond the approved ESP term, noting it is actually the MRO that could extend perpetually. Duke asserts that SSO procurement under an ESP is statutorily limited to the ESP's duration, asserting that R.C. 4928.143(E) requires a comparison of results between an ESP and MRO in the fourth year and every fourth year after that if the ESP's term extends beyond three years. (Duke Appl. at 8-10.)

{¶ 37} In its second assignment of error, Duke argues that the Finding and Order unreasonably restricts Duke's ability to evaluate alternative procurement processes for its

next ESP, including bilateral contracts and the building of new generation. As Duke referenced in its first assignment of error, under R.C. 4928.141(A), SSO procurement may occur only through either an MRO under R.C. 4928.142 or through an ESP under R.C. 4928.143; however, Duke argues that R.C. 4928.143(B)(2)(a)-(c) allow for SSO supply procurement in an ESP through means alternative to a competitive auction, such as through bilateral contracts or constructing generation resources. Therefore, Duke claims that the Finding and Order's directive requesting a plan for dual auctions that extend beyond the current ESP term restricts Duke's ability to consider these other procurement options under R.C. 4928.143 when it submits its new ESP. Duke also asserts that this restriction undermines the intent of Ohio Adm.Code 4901:1-35-03(B)(2), which, within the required CBP plan, Duke must consider alternative methods of procurement and, "include a discussion of alternative retail rate options that were considered in the development of the CBP." Ohio Adm.Code 4901:1-35-03(B)(2)(h). Duke claims that the Commission's directive commits Duke to a single method of procurement, making Duke contractually bound to the auction winners for future periods and making other supply possibilities difficult to evaluate and impossible to obtain. By way of example, Duke states that, if market prices dramatically increase due to PJM's uncertainty surrounding its BRA, constructing new generation resources may be in the best interest of customers; however, under the current Commission directives, that strategy would be unavailable. (Duke Appl. at 10-11.)

{¶ 38} In its third assignment of error, Duke argues that the Finding and Order is unlawful in that it places risk on Duke by requiring Duke to enter into contracts with suppliers beyond the term of its current ESP, while failing to approve cost recovery. Duke asserts that such a requirement increases the financial risk for both the EDU and the auction participants, thereby increasing the credit requirements of the EDUs and likely the bid price, as well. Plus, the Commission directives will require revisions to the currently approved supply agreements. (Duke Appl. at 12.)

{¶ 39} Similarly, in OCC's first assignment of error, OCC argues that the Commission erred by approving terms for SSO auctions that extend beyond the EDUs' currently

approved ESP, violating R.C. 4928.143. OCC argues that the Supreme Court of Ohio has held that the Commission can only exercise the authority granted to it by the General Assembly, and the Commission failed to cite the statutory authority that empowers it to extend the term of an already-approved ESP in the manner it did. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶51. OCC notes that the Commission justified its decision by stating that it was attempting to manage price volatility risks for customers by locking-in historically low prices. Finding and Order at ¶¶34, 37. However, OCC argues that this decision is not authorized by any statutory authority and that the Supreme Court of Ohio has reversed Commission actions it deemed beyond the scope of the Commission's statutory authority, even if grounded in sound public policy. See, e.g., *Time Warner v. PUC*, 75 Ohio St.3d 229, 241, 661 N.E.2d 1097, 1106 (1996). OCC asserts that R.C. 4928.141(A) requires an SSO to occur only by way of a MRO or an ESP. Therefore, OCC states that approval of an SSO must be explicitly tied to a MRO or an ESP, but, by approving an SSO that extended beyond the already-approved ESP, the Commission has approved an SSO that is not part of a MRO or ESP, violating the plain language of R.C. 4928.141(A). (OCC Appl. at 2-4.)

{¶ 40} In its second assignment of error, AEP Ohio argues that the Commission's directive 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 AEP Ohio's consent. AEP Ohio claims that an ESP's term is one of its defining characteristics and that the term dictates the specific information that must be included in an ESP application and corresponding CBP plan. Ohio Adm.Code 4901:1-35-03(B)(3), (C)(1)-(2). Moreover, R.C. 4928.143(B)(1) and (E) set forth specific comparison test procedures for instances when a proposed ESP will last more than three years. R.C. 4928.143(B)(1) and (E). AEP Ohio notes that its CBP plan lasts for the same duration of the ESP, both ending in May 2024, and the agreed upon stipulation approved by the Commission in *AEP Ohio's ESP Case* does not have terms that extend beyond the ESP. AEP Ohio argues that the Commission's general authority to modify a prior order is inapplicable

here since it imposes requirements for an ESP for which AEP Ohio has yet to file an application, and nothing in R.C. 4928.143 or Ohio Adm.Code Chapter 4901:1-35 authorizes the Commission to impose requirements in such an instance. AEP Ohio notes that an EDU could propose an ESP or MRO with a CBP plan that extends beyond the ESP's term, which would function to bind the EDU to the CBP into the next ESP term, or the EDU could agree to terms for future CBPs as part of a stipulation with Staff or other parties; however, the Commission cannot unilaterally impose such a requirement on an EDU. (AEP Ohio Appl. at 10-11.)

{¶ 41} In FirstEnergy's second assignment of error, it argues that the Commission's directive 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 FirstEnergy's next ESP without its consent. Similar to the other parties' arguments, FirstEnergy notes that the Commission's decision requiring plans detailing dual auctions for the next four years imposes requirements on FirstEnergy's next ESP since *ESP IV* terminates in May 2024, and the decision does not clarify cost recovery for FirstEnergy. FirstEnergy echoes AEP Ohio's argument that the Commission has no authority to impose such a requirement on an EDU unilaterally without FirstEnergy's consent. (FirstEnergy Appl. at 5-6.)

{¶ 42} In its memorandum contra, IEU-Ohio asserts that the Commission's Finding and Order is not unlawful. IEU-Ohio specifically refers to Duke's claim that R.C. 4928.143(B)(2)(b)-(c) enables Duke to make alternative SSO procurement proposals in its next ESP. According to IEU-Ohio, Duke failed to offer any evidence showing a need for EDU-owned generation. In response to arguments that R.C. 4928.141(A) requires a choice between an MRO or ESP for SSO procurement, IEU-Ohio retorts that, if an EDU elects to propose an MRO, the CBP auction would be just as applicable in the MRO context. Finally, IEU-Ohio believes the Commission should defer any clarifications regarding the EDUs' questions posed in their applications for rehearing to each individual EDU implementation plan, and any clarifications made on rehearing should focus on providing market-based solutions to reduce the bypassable SSO. (IEU Memo at 1-5.)

{¶ 43} With regard to these assignments of error, the Commission first notes that it is not without precedent for an ESP provision's term to extend beyond the term of the ESP. The ESP under consideration in *In re Application of Ohio Power Inc.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060 consisted of a deferred fuel cost recovery rider that extended well beyond the term of the EDU's ESP, whereby the ESP ended in 2011 but the cost recovery period ended in 2018. *In re Application of Ohio Power Inc.* at ¶¶5-10. If the cost recovery provisions had no effect beyond the term of the ESP, the Court would have had no basis to overturn the Commission's decision. Accordingly, we are not persuaded by the parties that we do not possess the authority to extend components of an already approved ESP beyond the term of that ESP.

{¶ 44} Nonetheless, as already described above, these assignments of error are premature. The July 15, 2020 Finding and Order merely ordered EDUs to submit plans to change the auction process; we have yet to modify and approve or disapprove any component of the ESP. This Finding and Order functions as a stepping-stone to the Commission's ultimate decision to modify and approve or disapprove the plans to be submitted, as well as those plans' individual components. Review of issues raised by the parties, such as permission of cost recovery and consideration of alternative procurement processes, is more appropriate during the Commission's consideration of the EDU's plans. Therefore, rehearing on the assignments of error on this issue should be denied. However, since FERC has now issued the orders necessary to re-initiate PJM's capacity auctions and PJM subsequently scheduled its capacity auctions, the dual auction plans requested in accordance with Paragraph 35(b) and a Commission decision regarding such plans may be unnecessary. Consequently, we indefinitely stay our directive in Paragraph 35(b) of the Finding and Order as we continue to monitor PJM's implementation and commencement of the BRA and other potential developments between FERC and PJM. If the Commission ultimately removes this stay and requires the filing of dual auction plans, the EDUs and all other parties will have an opportunity to comment on the EDUs' detailed plans before any plan or proposal is adopted by the Commission.

D. The remaining assignments of error are moot.

{¶ 45} The last set of assignments of error assert that the Commission’s directives will result in an overly complex auction process and that such changes are most likely unnecessary considering the uncertainty surrounding PJM’s BRA may resolve itself in short order. In DP&L’s first and only assignment of error, it states that the Commission erred by requiring DP&L to amend its 2021 SSO CBP auction and to submit a plan for future CBP auctions at this time. DP&L contends that one of the core reasons articulated by the Commission for its auction modification, the uncertainty surrounding PJM’s BRA and the resulting lack of capacity price signals, will likely resolve itself prior to DP&L’s next SSO procurement auction in April 2021, obviating the need for DP&L to adjust its Spring 2021 auction and to adjust its auctions to conform to a dual auction structure. DP&L points to PJM’s compliance filing in FERC Case No. 16-49 where PJM requests an expedited final direction from FERC so that PJM may proceed with its overdue auctions. In this filing, PJM represents that it will post a specific schedule for the 2022/2023 BRA by 14 days after a decision on the compliance filings in the proceeding. *Second Compliance Filing Concerning Application of the Minimum Offer Price Rule*, Case No. EL16-49-000, et al., at 2, 42, 46 (June 1, 2020). DP&L also cites to the PJM Power Providers Group’s response to PJM’s compliance filing, which indicates that a prompt order from FERC will place PJM on the path to resume the normal cycle of capacity auctions in 2021. *Comments of the PJM Power Providers Group in Response to Second Compliance Filing Concerning Application of the Minimum Offer Price Rule*, Case No. EL16-49-000, et al., at 6 (June 22, 2020). Given these comments, DP&L believes that uncertainty surrounding PJM’s BRA will be resolved prior to its Spring 2021 auction and will very likely be resolved no later than DP&L’s Spring 2022 CBP auction. According to DP&L, it could be forced to incur additional, unnecessary costs for its Spring 2021 auction and beyond; therefore, the Commission decision is unreasonable, and DP&L notes that the Commission should review EDU bidding processes on an individual, not “one-size-fits-all,” basis. (DP&L Appl. at 3-5.)

{¶ 46} In OCC's third assignment of error, OCC argues that the Commission erred by amending the SSO auction process to add unnecessary complexity and uncertainty, threatening to increase prices for consumers who have historically benefitted from low, auction-based prices for electric generation service. First, OCC declares that the Commission's directive to use a 12-month product for the Fall 2020 and Spring 2021 auctions makes sense because PJM's most recent BRA procured capacity for 2021/2022, meaning capacity prices are known to some extent for these near-term auctions. However, OCC takes issue with the dual auction directive from the Commission, specifically regarding the second part of the dual auction structure requiring suppliers to offer energy and capacity separately. OCC notes that the first part of the structure, where a full requirements product will be featured and June 2021 capacity prices used as a proxy for capacity prices, is similar to the zero-proxy price approach suggested by OCC in its comments and by Staff. OCC acknowledges that this approach minimizes risk for consumers since it guarantees they will pay the actual known capacity prices resulting from the PJM BRAs. OCC argues that the capacity hedge product, on the other hand, introduces new risks to the bidding process since bidders must offer fixed capacity prices for four years, with bidders likely to increase their bids to account for the uncertainty caused by this approach. Furthermore, in a similar vein to that of DP&L's arguments, OCC believes the dual auction approach may be unnecessary because it is likely that the next BRA will occur at a point in time where Fall 2021 capacity prices will be known, obviating the need for a new, cumbersome ESP CBP process. OCC also contends that the Commission's approach is unreasonable because it lacks sufficient detail as to how the auctions will be implemented and the results evaluated. Finally, in OCC's opinion, the Commission should proceed with the 12-month product adjustment for the near-term auctions and plan to proceed with the Fall 2021 auctions and beyond based on the results of future BRAs. If capacity prices are not known prior to Fall 2021, OCC suggests that the Commission, at that point, should use the June 2021 capacity prices as proxy. (OCC Appl. at 8-10.)

{¶ 47} Following the same line of arguments submitted by DP&L and OCC, Duke, in its fourth assignment of error, argues that the Finding and Order is unreasonable and unlawful in that it creates additional risk by discouraging participation in the retail standard service auctions. Duke claims that it is likely that PJM will already have resumed its BRA processes by the time the dual auction structure will be implemented. Duke suggests that EDUs could conduct auctions in 2021 that include future delivery years for the years capacity is known. Duke contends that the comments in this case do not support the Commission's conclusion that extending the SSO auction beyond the term of each EDU's current ESP will lock in historically low prices and manage volatility risks. Instead, Duke argues that the uncertainty surrounding the Commission's dual auction will result in bidders including a risk-adjusted premium into any bid, especially considering the Commission's ability to reject either of the auctions' results. Duke asserts that it is questionable whether a supplier can accurately price and bid a capacity hedge product if there is a substantial likelihood of rejection. (Duke Appl. at 12-13.)

{¶ 48} In its memorandum contra, Energy Harbor responds to OCC by stating that the complained of uncertainty stemming from the dual auctions is not the product of the Commission but that of FERC's making and that the Commission has successfully made the best possible decision given the circumstances. Energy Harbor disputes OCC's assertion that the uncertainty surrounding PJM's BRA is likely to resolve itself in short manner, believing the Commission is taking the right approach in being proactive. Energy Harbor notes that OCC's zero-proxy capacity price proposal exposes Ohio customers to potential rate shock and market volatility, whereas the dual auction approach provides rate stability while also shifting risks of market volatility away from customers to suppliers. (Energy Harbor Memo Contra at 4-6.)

{¶ 49} As with the other assignments of error in this case, the issues raised by the parties in this area are premature since the Commission has merely ordered the EDUs to file a plan or proposal to change the auction process. Therefore, the above assignments of error should be denied. Nonetheless, if we remove the filing stay and request that plans be filed,

the EDUs and all other parties will have an opportunity to raise these issues with the Commission before any plan or proposal is adopted by us.

{¶ 50} Also, pursuant to R.C. 4903.10(B), filing an application for rehearing “shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.” R.C. 4903.10(B). In addition to protesting the Commission’s directive in Paragraph 35(b) of the Finding and Order, DP&L also challenges Paragraph 35(a)’s directive regarding the adjustment of auction products for Fall 2020 and Spring 2021 auctions. Despite DP&L’s assertions, DP&L has submitted its plan, and the Commission has approved the plan. Accordingly, we find that this assignment of error is moot.

IV. ORDER

{¶ 51} It is, therefore,

{¶ 52} ORDERED, That the application for rehearing filed by AEP Ohio be granted, in part, and denied, in part. It is further,

{¶ 53} ORDERED, That the applications for rehearing filed by FirstEnergy, OCC, Duke, and DP&L be denied. It is further,

{¶ 54} ORDERED, That the Commission’s directive in Paragraph 35(b) of its Finding and Order be indefinitely stayed. It is further,

{¶ 55} ORDERED, That EDUs file new proposed auction schedules consistent with the timeframes established by PJM for future BRAs. It is further,

{¶ 56} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

COMMISSIONERS:

Approving:

M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

MJS/kck

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

Summary: Entry granting, in part, and denying, in part, the application for rehearing of the July 15, 2020 Finding and Order filed by Ohio Power Company d/b/a AEP Ohio, and the Commission denies the applications for rehearing filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company; Ohio Consumers' Counsel; Duke Energy Ohio, Inc.; and Dayton Power & Light Company. electronically filed by Kelli C. King on behalf of The Public Utilities Commission of Ohio