

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

CASE NO. 17-957-EL-UNC

ENTRY ON REHEARING

Entered in the Journal on November 16, 2022

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Ohio Consumers' Counsel.

II. PROCEDURAL BACKGROUND

{¶ 2} The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio) qualifies 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.

{¶ 4} On October 20, 2017, the Commission modified and approved an amended stipulation establishing AES Ohio's third ESP (ESP III). *In re Dayton Power & Light Co.*, Case No. 16-395-EL-SSO (*ESP III Case*), Opinion and Order (Oct. 20, 2017). ESP III included a competitive auction-based format for supply of AES Ohio's SSO load for the period between November 1, 2017, and October 31, 2023, a format that the Commission had previously accepted in AES Ohio's original ESP (ESP I).

{¶ 5} Following protracted litigation, which included several rounds of rehearing and a second evidentiary hearing compelled by an intervenor's withdrawal from the

amended stipulation establishing ESP III, the Commission issued a Supplemental Opinion and Order further modifying and approving ESP III to eliminate AES Ohio's distribution modernization rider. *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019). Consequently, on November 26, 2019, AES Ohio filed a notice of withdrawal of its application for ESP III pursuant to R.C. 4928.143(C)(2)(a) and signaled its intent to implement its most recent SSO—ESP I—pursuant to R.C. 4928.143(C)(2)(b) by filing proposed revised tariffs in Case No. 08-1094-EL-SSO. *ESP III Case*, Notice of Withdrawal (Nov. 26, 2019); *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al. (*ESP I Case*), Proposed Revised Tariffs (Nov. 26, 2019).

{¶ 6} On December 18, 2019, in addition to approving AES Ohio's withdrawal of its ESP application and terminating ESP III,¹ the Commission issued a Second Finding and Order approving, with modifications, AES Ohio's proposed revised tariffs in the *ESP I Case*. *ESP I Case*, Second Finding and Order (Dec. 18, 2019). Therein, the Commission noted that, in order to maintain the integrity of competitive wholesale and retail markets in the state, ESP I included and continued to embrace the competitive bid process (CBP) for procuring SSO generation. *ESP I Case*, Second Finding and Order (Dec. 18, 2019) at ¶ 28. The Commission further directed AES Ohio "to continue to request appropriate CBP auction schedules as necessary to continue to serve SSO customers until DP&L's next SSO is approved." *Id.*

{¶ 7} Since that time, AES Ohio's auction schedule has been modified due to delays in the timing of PJM Interconnection, LLC's (PJM) base residual auction (BRA). *In re the Procurement of Std. Serv. Offer Generation Customers of The Dayton Power and Light Co.*, Case No. 17-957-EL-UNC, Finding and Orders (Feb. 10, 2021) and (June 16, 2021).

{¶ 8} On December 22, 2021, the Federal Energy Regulatory Commission (FERC) issued an order reversing FERC's previous determination that the backward-looking energy

¹ *ESP III Case*, Finding and Order (Dec. 18, 2019).

and ancillary services offset (E&AS Offset) was just and reasonable. Given this reversal, FERC directed PJM to submit a compliance filing within 60 days to revise its Tariff and Operating Agreement and, in order to incorporate the revised E&AS Offset in the BRA for the 2023/2024 delivery year, directed PJM to submit a compliance filing within 30 days that proposes a new schedule for the BRA and subsequent BRAs. *Order on Voluntary Remand*, Case Nos. EL19-58-006; ER19-1486-003, at ¶ 2 (Dec. 22, 2021).

{¶ 9} On January 21, 2022, PJM submitted a compliance filing in response to the above order in which PJM proposed changing the BRA for the 2023/2024 delivery year from January 25, 2022, to June 8, 2022. *Compliance Filing Concerning Certain Proposed Revised Pre-Auction Deadlines*, Case Nos. EL19-58-010; ER19-1486-00, at 2 (Jan. 21, 2022).

{¶ 10} On February 7, 2022, AES Ohio filed an application to adjust its SSO procurement auctions. Due to FERC's decision to delay the BRA, AES Ohio proposed to procure 100 tranches of a 12-month product for the 2022/2023 delivery year at its March 2022 SSO auction and not to procure 50 tranches of the 24-month product. Further, to account for this loss, AES Ohio proposed to increase its tranches for its March 2023 SSO auction such that it would procure 50 tranches of a 12-month product for the 2023/2024 delivery year and 50 tranches of a 24-month product for the 2023/2025 delivery period.

{¶ 11} On February 23, 2022, the Commission approved AES Ohio's application to adjust its SSO procurement auctions in the manner described in its application.

{¶ 12} On August 12, 2022, AES Ohio filed an application to modify its CBP.

{¶ 13} On September 12, 2022, OCC filed objections to AES Ohio's application.

{¶ 14} On September 19, 2022, AES Ohio filed reply comments to OCC's objections.

{¶ 15} On September 21, 2022, the Commission granted AES Ohio's application. In rejecting OCC's objections, the Commission stated that despite OCC's reference to Ohio Adm.Code 122:5-3-06, R.C. 4928.54 specifically requires that "[t]he director of development

services *shall* aggregate percentage of income payment plan program customers for the purpose of establishing competitive procurement process for the supply of competitive retail electric service for those customers. The process shall be an auction. * * *.” [Emphasis added]. Furthermore, pursuant to R.C. 4928.544, ODOD submitted its request to the Commission to design, manage, and supervise the auction process, which was the impetus for the current design of the PIPP auction format decided in *In the Matter of the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC (*Implementation Case*), Finding and Order (Mar. 2, 2016). In response to OCC’s request to combine PIPP and SSO auctions, the Commission noted that it is clear from the plain language of the statute that the General Assembly intended that PIPP program loads be aggregated and procured from a competitive bidding process separate from the SSO customers. In regard to OCC’s claim that electricity prices resulting from the PIPP auctions have been higher than those procured under the SSO auction and that this outcome violates R.C. 4928.02(L) and 4928.542, we noted that we addressed the possibility of this situation in the decision to use the current format stating that, “[w]hile this may occasionally result in the PIPP load being served at a price higher than the blended SSO price, the RFP auction has been established to reduce the cost of the PIPP program to the otherwise applicable SSO over the long-term, in compliance with R.C. 4928.542(B).” *Implementation Case* at 5. The Commission also affirmed its previous determination that the existing PIPP program auction format is required under law.

{¶ 16} Pursuant to R.C. 4903.10, 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 Commission’s order is journalized.

{¶ 17} On October 21, 2022, OCC filed a timely application for rehearing on the Commission’s September 21, 2022 Finding and Order. In its application, OCC argues that the Commission erred and acted outside of its authority when it failed to require AES Ohio to comply with R.C. 4928.542(B) and (C) and principles of statutory construction by authorizing AES Ohio to charge at-risk PIPP consumers electricity prices higher than those

its SSO consumers pay. OCC reiterates many of the same arguments it advanced in its September 12, 2022 objections to AES Ohio's August 12, 2022 application. OCC's arguments primarily center on the PIPP program, which is administered by the Ohio Department of Development (ODOD) and the Commission for low-income electric consumers under state law. According to OCC, as currently run, the PIPP program is violating R.C. 4928.02(L) and R.C. 4928.542 to protect at-risk PIPP customers of AES Ohio by charging them prices for electricity in excess of AES Ohio's SSO for the past two auctions. OCC also asserts that the Commission's previous finding in the *Implementation Case* that cost savings need accrue only "over the long-term" violates Ohio's rules of construction under R.C. 1.42. *Implementation Case* at 5. According to OCC, R.C. 4928.542(B) requires that a winning bid shall reduce the cost of the PIPP program relative to the otherwise applicable SSO, and R.C. 4928.542(C) requires that a winning bid shall result in the best value for the persons paying the universal service rider, a rider associated with the state funding mechanism for electric bill payment assistance through PIPP. OCC argues that these statutes, when read pursuant to R.C. 1.42, are unambiguous and that R.C. 4928.542 says nothing about bids reducing rates "over the long-term" as the Commission stated in the *Implementation Case* and again affirmed in the September 21, 2022 Finding and Order in this case. *Implementation Case* at 5. If the Commission finds R.C. 4928.542 to be ambiguous, OCC contends that, when reading R.C. 4928.02(A) and (L) together with R.C. 4928.542, the latter provision should be interpreted to require that PIPP prices do not exceed the SSO at any auction.

{¶ 18} On November 1, 2022, AES Ohio filed a memorandum contra. AES Ohio asserts that OCC does not address AES Ohio's proposed auction schedules but instead focuses on the treatment of PIPP rates, which are not the subject of this proceeding. AES Ohio believes that the arguments advanced by OCC amount to a collateral attack on the *Implementation Case* and the PIPP auction result orders.

{¶ 19} We find that OCC's application for rehearing is unavailing and should be denied. We believe that OCC's assignment of error is an improper collateral attack on the Commission's final, nonappealable order in the *Implementation Case* within which the

Commission established the current design of the PIPP auction format. Before the Commission issued its decision in that case, OCC, among other stakeholders, filed comments in response to a Commission Staff review and recommendation. *Implementation Case*, OCC Comments (Feb. 29, 2016). Although OCC did not file an application for rehearing on the Commission's decision, two other stakeholders did², in response to which the Commission issued its Entry on Rehearing denying the applications for rehearing. *Implementation Case*, Entry on Rehearing (April 27, 2016). The Commission's decision was not appealed to the Ohio Supreme Court; therefore, OCC's assignment of error improperly attacks a final, nonappealable Commission order. And, as stated in the September 21, 2022 Finding and Order, R.C. 4928.54 specifically requires that "[t]he director of development services *shall* aggregate percentage of income payment plan program customers for the purpose of establishing competitive procurement process for the supply of competitive retail electric service for those customers. * * *." [Emphasis added]. In its assignment of error, OCC essentially restates its arguments advanced in its September 12, 2022 objections to AES Ohio's proposed auction modifications. For the same reasons stated within the September 21, 2022 Finding and Order, the Commission rejects OCC's arguments. Accordingly, OCC's application for rehearing in this matter should be denied.

{¶ 20} OCC also attempts to argue that R.C. 4928.542(B) and (C) are unambiguous and that these provisions do not explicitly provide the Commission with the authority to consider PIPP program costs over the long-term when comparing such costs with the blended SSO price. If, however, the Commission finds R.C. 4928.542 to be ambiguous then, when reading R.C. 4928.02(A) and (L) together with R.C. 4928.542, OCC contends that the latter provision should be interpreted to require that PIPP prices not exceed the SSO at any auction. Although these arguments are in a similar vein to those made by OCC in its objections already rejected by the Commission in this case, we find it appropriate to briefly

² Retail Energy Supply Association and Ohio Partners for Affordable Energy (OPAЕ) filed the applications for rehearing.

consider them. First, the Commission did not find that R.C. 4928.542 was ambiguous in the *Implementation Case*, nor does it change that position here; therefore, OCC's arguments as to ambiguity are irrelevant and unpersuasive. As to OCC's argument concerning R.C. 4928.542(B) and (C) being unambiguous and the Commission lacking authority to consider PIPP program costs over the long-term, again, the Commission considered the entirety of R.C. 4928.542 when it made its decision in the *Implementation Case*, so this line of argument is improper in that it is a collateral attack on the decision in the *Implementation Case*. *Implementation Case*, Finding and Order at ¶ 7. Furthermore, in the *Implementation Case*, the Commission denied OPAE's assignments of error within its application for rehearing, two of which were similar to OCC's arguments here in that OPAE believed the request for proposal (RFP) auction process selected by the Commission violated R.C. 4928.542(B) by creating the possibility for the PIPP load to be served at a cost above the otherwise applicable SSO and violated R.C. 4928.542(C) by not following a process that would result in the best value for persons paying the universal service rider. *Implementation Case*, Entry on Rehearing (April 27, 2016) at ¶¶ 5-6, 9-10. The Commission denied these assignments of error, highlighting the effectiveness of an RFP auction process and the practical necessity for a contingency plan of allowing the electric utilities to obtain supply for the PIPP load through a bilateral transaction or from the market due to the timing of the competitive auctions. Entry on Rehearing at ¶¶ 6, 10. Notably, here, OCC has not identified in practical terms what process the Commission can implement to accomplish what it seeks. Nevertheless, we reaffirm our conclusion in the Entry on Rehearing, "[t]he Commission determined that the competitive RFP auction process will ensure reliable electric service to PIPP customers, will reduce the cost of the PIPP program relative to the applicable SSO, and will achieve the best value for persons paying the universal service rider." Entry on Rehearing at ¶ 6. As already noted above, OCC's application for rehearing should be denied.

IV. ORDER

{¶ 21} It is, therefore,

{¶ 22} ORDERED, That OCC's application for rehearing be denied. It, is further,

{¶ 23} ORDERED, That a copy of this Finding and Order be served upon all parties of record to this case.

COMMISSIONERS:

Approving:

Jenifer French, Chair

Lawrence K. Friedeman

Dennis P. Deters

MJS/dmh

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11/16/2022 2:51:54 PM

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Case No(s). 17-0957-EL-UNC

Summary: Entry on Rehearing denying the application for rehearing filed by the Ohio Consumers' Counsel. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio