

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA THE APPLICATION FOR REHEARING
OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
BY OHIO POWER COMPANY**

The Commission should deny the Office of the Ohio Consumers' Counsel's ("OCC") Application for Rehearing filed in this matter as yet another procedurally improper and legally impermissible attempt to undermine the standard service offer ("SSO"). Ohio Power Company's ("AEP Ohio" or "the Company") Commission-approved fourth Electric Security Plan ("ESP IV"), "includes a competitive auction-based SSO format, as well as a competitive bid procurement process for the Company's auctions, which procure generation supply for customers receiving service under the SSO." Finding and Order at ¶ 4 (Nov. 2, 2022). Accordingly, a competitive auction was conducted on November 1, 2022. *Id.* at ¶ 6. The Commission found that it "will not reject the results of the auction." *Id.* at ¶ 8. OCC continues to wage its endless war related to the Percentage of Income Payment Plan ("PIPP") SSO auctions and filed an application for rehearing raising a single assignment of error – that it was unlawful for the Commission to approve the SSO auction results because PIPP customers were not included as part of the tranches. (Application for Rehearing by Office of the Ohio Consumers' Counsel ("OCC AfR") at p. 2 (Dec. 2, 2022)). The Commission should deny OCC's AfR for a number of reasons: (1) OCC's request is yet another improper and untimely collateral attack on the Commission's March 4, 2016 Finding and Order issued in Case No. 16-247-EL-UNC; (2) OCC

seeks an unlawful PIPP SSO auction that has been repeatedly rejected by the Commission; and
(3) OCC's arguments are based upon flawed and unsupported factual assumptions.

A. OCC's Application for Rehearing is Another Untimely and Improper Collateral Attack on the PIPP SSO Auction Process Previously Approved by the Commission.

OCC continues its untimely collaterally attack on the PIPP SSO process when it sat on its hands in the case where it was previously approved. The process for acquiring generation to serve the PIPP SSO load was a process established over six years ago. R.C. 4928.54, which was newly enacted at the time, requires the Ohio Department of Development ("ODOD") to aggregate PIPP customers "for the purpose of establishing a competitive procurement process for the supply of competitive retail electric service for those customers." Upon written request by the director of ODOD, the Revised Code also provides that the "public utilities commission shall design, manage, and supervise the competitive procurement process required by section 4928.54 of the Revised Code." R.C. 4928.544(A). Upon receiving such request from ODOD, the Commission opened a docket to establish a process and invited two rounds of comments from all stakeholders, including OCC and the electric distribution utilities. *In Re the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC, Finding and Order at ¶¶ 3, 5 (Mar. 2, 2016) ("*16-247 Order*").

The Commission issued an Opinion and Order adopting a modified version of the Second Staff Recommendation for securing PIPP SSO load. Pursuant to that Opinion and Order, electric distribution utilities ("EDUs") are to conduct a competitive RFP process whereby every registered CRES may submit a bid to provide generation to the entire PIPP SSO load for a twelve-month period at a price lower than the SSO auction. *Id.* at ¶ 7. In the event there are no qualifying RFP bids, then the distribution utilities are directed to conduct a supplemental auction to secure generation for the PIPP SSO load at the best available price. *Id.* The Commission

acknowledge 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.” *Id.*

The appropriate mechanism for taking issue with a Commission decision would have been to file an application for rehearing “set[ting] forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” R.C. 4903.10(A). But an application for rehearing must be filed within thirty days of the entry of the respective Order. R.C. 4903.10(B). OCC did not file an application for rehearing challenging the *16-247 Order*. Thus, OCC’s arguments in this matter are nothing more than an improper collateral attack via an untimely application for rehearing on the Commission’s *16-247 Order*.

The Commission has previously dismissed untimely applications for rehearing disguised as collateral attacks on final commission entries and orders, including the very recent Universal Service Fund (“USF”) proceeding where OCC raised these very same arguments. The Commission approved the NOI Stipulation over OCC’s objections by finding that it was an “untimely and impermissible collateral attack on the PIPP RFP Case and the electric distribution utilities’ (“EDUs”) RFP PIPP auction cases which the Commission will not entertain.” *In Re the Application of the Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Rider of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 22-556-EL-USF, Opinion and Order at ¶ 44 (“*USF NOI Opinion and Order*”). OCC unapologetically continues to raise the same issue in a myriad of cases; ironically, despite failing to raise it at the only appropriate time – as an application for rehearing challenging the

Commission's *16-247 Order*. OCC continues to ignore and not address its failure to file an application for rehearing in response to the *16-247 Order*.

Alternatively, OCC's request is barred by the doctrines of res judicata and collateral estoppel. "Collateral estoppel may be applied in a civil action to bar the re-litigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings." *In Re 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. 08-1094-EL-SSO, Entry on Rehearing at ¶ 38 (June 16, 2021) (citing *In re Application of Ohio Power Co.*, 2015-Ohio-2056 at ¶ 20; *Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)). "The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Id.* (citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226). This includes whether the party actually raised the issue or could have been litigated in the prior action. *State ex rel. Armatas v. Plain Township Board of Zoning Appeals*, 130 Ohio St.3d 161, 2020-Ohio-2973 at ¶ 9.

These two doctrines have been applied to administrative proceedings. *Office of Consumers' Counsel v. Public Utilities Com'n of Ohio*, 16 Ohio St.3d at 10. Indeed, the Supreme Court of Ohio affirmed a Commission order based on collateral estoppel and res judicata, preventing OCC from "attempting to relitigate [an issue] . . . which was previously determined to be proper." *See, Id.* The Court specifically pointed to the fact that OCC "failed to appeal or request a rehearing of the previous order." *Id.* As previously mentioned, OCC participated in the 16-247-EL-UNC case that established the PIPP SSO auction process and availed itself of the

opportunity to raise concerns about the process. The Commission ruled and established the process for conducting the PIPP SSO auction, but OCC did not file an application for rehearing or appeal. OCC is now barred by the doctrines of res judicata and collateral estoppel from raising claims related to the PIPP SSO auction process and the results of those auctions.

For these reasons, the Commission should deny OCC's application for rehearing in this matter.

B. OCC's Application for Rehearing Should be Denied Because it Seeks an Unlawful Construct.

Once again arguing that R.C. 4928.542 requires the PIPP SSO auction price per kWh be lower than the SSO auction at all times, OCC reads words into R.C. 4298.542 while ironically accusing the Commission of "add[ing] words to the statute." (OCC AfR at p. 6). In doing so, OCC concedes that the Commission has already interpreted the R.C. 4928.542 requirement to "[r]educ[e] the cost of the percentage of income payment plan program relative to the otherwise applicable standard service offer" may occur "over the long term." (OCC AfR at p. 5, citing *In the Matter of the Procurement of Standards Service Offer Generation for Customers of The Dayton Power and Light Company*, Case No. 17-957-EL-UNC, Finding and Order at ¶ 18 (Sept. 21, 2022) ("*AES Ohio SSO Auction Amendment Order*"). Tellingly, OCC only cites to the AES Ohio request to change its competitive auction but fails to mention the numerous other times the Commission has issued a similar finding including Case No. 16-247-EL-UNC, and 22-556-EL-UNC. Contrary to OCC's reading, however, R.C. 4928.542 does not specify that the PIPP SSO auction must be lower than the SSO on a kWh basis each year as OCC suggests – just that the winning bid or bids must "[r]educ[e] the cost of the percentage of income payment plan program relative to the otherwise applicable standard service offer." R.C. 4928.542(B). Moreover, OCC's argument about interpretation of R.C. 4928.542 is the pinnacle of an improper and

untimely collateral attack on the *16-247 Order*, offering options for how the PIPP SSO auction process could have been designed differently. (OCC AfR at pp. 5-6); *see infra*, Section A.

OCC, like it has in numerous proceedings, also ignores the requirements of R.C. 4928.54; ironically, asserting that the Commission’s November 2, 2022, Finding and Order is unlawful while requesting an unlawful resolution from the Commission – to include the PIPP SSO customers as part of the SSO auction. (OCC AfR at p. 6). OCC’s arguments and requested solution suffers from two problems: (1) there is a requirement to hold a separate auction for PIPP SSO customers; and (2) the SSO auction includes more than just bidders certified under R.C. 4928.08.

OCC continues to rely upon Ohio Adm. Code 122:5-06, which provides that the Director of ODOD *may* aggregate PIPP consumers for competitive auctions in certain circumstances. (OCC AfR at p. 7). It is well-established, however, that administrative code provisions may not conflict with the Ohio Revised Code. *Clayton v. Ohio Board of Nursing*, 2014-Ohio-1092 at ¶ 31 (citing *State ex rel. De Boe v. Indus. Comm.*, 161 Ohio St. 67, 117 N.E.2d 925 (1954), paragraph one of the syllabus). But the Revised Code requires that:

The director of development services ***shall aggregate percentage of income payment plan program customers*** for the purpose of establishing a competitive procurement process for the supply of competitive retail electric service for those customers. The process shall be an auction. ***Only bidders certified under section 4928.08 of the Revised Code may participate in the auction.***

R.C. 4928.54 (emphasis added).

Citing to this statute, the Commission has repeatedly rejected OCC’s request to consolidate the PIPP SSO load with the SSO auction. In response to AES Ohio’s request to amend its auction schedule, the Commission found 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.” *AES Ohio SSO Auction Amendment Order* at ¶ 18 (emphasis added). Similarly, in the USF case, the Commission duly found OCC’s Ohio Adm. Code 122:-5-06 argument to be “without merit” citing to the language of R.C. 4928.54. *USF NOI Opinion and Order* at ¶ 45. The Commission further explained that “[i]t is clear from the 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.” *Id.* The Commission went on to acknowledge that, “more than just competitive retail electric service providers [certified under R.C. 4928.08] participate in the SSO auctions.” *Id.* (citing *16-247 Order* at ¶ 5). Moreover, it would be fundamentally unfair, and arguably in breach of the SSO Master Service Agreements to now require the winning SSO auction bidders to serve the PIPP SSO load.

C. OCC’s Arguments are Based Upon Baseless and/or Flawed Factual Assumptions.

Like in the NOI phase of the USF proceeding, OCC argues that the PIPP customers will have “higher bills than SSO consumers to pay.” (OCC AfR at 2). Assuming they meet the terms of their PIPP Plus membership, PIPP Plus customers will only be required to make the PIPP Plus payments. Ohio Adm. Code 122:5-3-04(A). Thus, irrespective of the amount of their monthly usage and generation rate applied to that usage, PIPP Plus customers only pay a percentage of their income and the remainder is forgiven. Ohio Adm. Code 122:5-3-04(A). Therefore, no arrearages will amass as long as PIPP customers are meeting their obligation to make timely PIPP installment payments.

OCC attempts to head this off by arguing that if PIPP customers fail to meet their obligations and arrearages amass, “it will be hard for low-income people to find the money to pay off increased debt.” (OCC AfR at p. 2). If PIPP customers do not make timely PIPP payments, however, they will not necessarily have to bear the burden of paying their arrearages

because another benefit of the PIPP program is a credit to the customer in the amount of 1/24 of a customer's arrearages with each timely PIPP payment. Ohio Adm. Code 122:5-3-04(B)(3).

This can be repeated such that any arrearages that are amassed in 2022-2023 delivery year can be the subject of future credits that will reduce the arrearages to zero over a subsequent twenty-four-month period. *See*, Ohio Adm. Code 122:5-3-04(B)(3).

OCC also bases its argument in-part upon an assumption that "AEP's next PIPP-specific auction will likely cost AEP's low-income consumers more" without any supporting evidence or basis upon which to base this statement. (OCC AfR at pp. 1, 4-5). AEP Ohio's next PIPP SSO auction will not take place until May 2023. OCC provides no projections of market prices for that auction to support their assumption that the May 2023 PIPP SSO auction clearing prices will be higher than the SSO auction prices. This is classic example of OCC putting the cart before the horse.

D. Conclusion

For the reasons stated above, the Commission should deny OCC's Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-filed with the Public Utilities Commission of Ohio on December 12, 2022. The PUCO's e-filing system will electronically service notice of the filing of this document on the following parties:

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Summary: Memorandum MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL BY OHIO POWER COMPANY electronically filed by Michael J. Schuler on behalf of Ohio Power Company