

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Procurement of)
Standard Service Offer Generation as)
Part of the Fourth Electric Security Plan)
for Customers of Ohio Edison Company,) Case No. 16-776-EL-UNC
The Cleveland Electric Illuminating)
Company, and The Toledo Edison)
Company.)**

**CONSTELLATION ENERGY GENERATION, LLC’S
MEMORANDUM CONTRA TO
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL’S
APPLICATION FOR REHEARING**

I. INTRODUCTION

Constellation Energy Generation, LLC (“Constellation”)¹ submits this memorandum contra because the Public Utilities Commission of Ohio (“Commission”) has already rejected the proposal from the Office of the Ohio Consumers’ Counsel (“OCC”) to combine the Percentage of Income Payment Plan (“PIPP”) customers with the electric Standard Service Offer (“SSO”) of FirstEnergy.² OCC repeats the same argument in its February 10, 2023 application for rehearing that was already rejected in this docket; it is erroneous and moot again. The Commission has also rejected the same argument in all other Ohio electric distribution utility auction proceedings, and the most recent rejection was only a few weeks ago. The Commission has settled this issue and OCC raises nothing new through its February 10, 2023 application for rehearing. Therefore, the Commission should follow its prior decisions again and deny this latest application for rehearing from OCC. To the extent any changes to the SSO auction results are contemplated by the Commission as a result of OCC’s February 10, 2023 application for rehearing, the changes should not affect contracts already executed by the winning SSO bidders and FirstEnergy.

¹ Constellation Energy Generation, LLC was formerly known as Exelon Generation Company, LLC.

² In this Memorandum Contra, “FirstEnergy” refers collectively to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

II. ARGUMENT

A. **The Commission should deny OCC's application for rehearing like it did previously because OCC raises the same argument that was rejected in this proceeding and in multiple other proceedings.**

OCC's sole assignment of error is premised on the fact that, based on the January 2023 SSO auction price, SSO customers will potentially be charged differently (less) than percentage of income payment plan program ("PIPP") customers based on the PIPP auction.³ OCC's February 10, 2023 application for rehearing, however, is not the first time OCC has argued that the SSO and PIPP auctions should be combined so that the PIPP customers receive the SSO price. OCC has filed multiple pleadings over the past six months, making the argument again and again. The Commission has *repeatedly* rejected OCC's argument, and it should do so again.

Specific to the FirstEnergy SSO auctions, the Commission rejected OCC's argument last fall in this case ("*FirstEnergy SSO Case*"). OCC filed an application for rehearing of the Commission's October 5, 2022 decision approving the FirstEnergy auction conducted on October 4, 2022. OCC raised the same argument then, claiming that it is an error to allow FirstEnergy to charge PIPP customers more than the SSO prices. The Commission denied OCC's application for rehearing by operation of law.

The Commission has likewise rejected OCC's similar attempts in all other Ohio electric distribution utilities' SSO auction dockets in the past six-month period:

- Argument Denied Once in AEP Ohio's SSO Auction Docket: OCC filed an application for rehearing of the Commission's November 2, 2022 decision approving the AEP Ohio auction conducted on November 1, 2022. OCC claimed that it is an error to allow AEP Ohio to charge PIPP customers more than the SSO prices. The Commission denied OCC's application for rehearing by operation of law. *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Power Company, Inc.*, Case No. 17-2391-EL-UNC ("*AEP Ohio SSO Case*").

³ OCC February 10, 2023 Application for Rehearing at 4. *See also, In the Matter of the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 16-936-EL-UNC, Finding and Order (April 6, 2022).

- Argument Denied Three Times in Duke’s SSO Auction Docket: The first occasion involved OCC objections filed in August 2022, urging the Commission to combine Duke’s SSO auction and its auction for PIPP procurement. In its August 24, 2022 Finding and Order, the Commission approved a modification to the SSO auction schedule but did not accept OCC’s objections that had been filed earlier that day. *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 18-6000-EL-UNC, Finding and Order (August 24, 2022) (“*Duke SSO Case*”). The second denial occurred after OCC filed an application for rehearing of the Commission’s September 21, 2022 decision approving Duke’s auction conducted on September 20, 2022. *Duke SSO Case, supra*, Entry on Rehearing (October 5, 2022). The third denial of OCC’s argument occurred after OCC filed a rehearing application in October 2022, again challenging the September 2022 decision. In November 2022, the Commission rejected OCC’s claims that it was an error to approve the auction results and to not combine Duke’s SSO auction and its auction for PIPP procurement. *Duke SSO Case, supra*, Entry on Rehearing ¶ 18 (November 16, 2022).
- Argument Denied Three Times in AES Ohio’s SSO Auction Docket: The first occasion involved OCC objections, urging the Commission to combine AES Ohio’s SSO auction and its auction for PIPP procurement. The Commission denied the request. *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, Finding and Order (September 21, 2022) (“*AES Ohio SSO Case*”). The second occasion was two months later in November 2022. OCC had filed an application for rehearing of the September decision, arguing that it is an error to allow AES Ohio to charge PIPP customers more than the SSO prices. On November 16, 2022, the Commission denied the application for rehearing finding it to be “unavailing.” *AES Ohio SSO Case, supra*, Entry on Rehearing at ¶ 19 (November 16, 2022). The third attempt was OCC’s December 30, 2022 application for rehearing using the same arguments and seeking to revamp the price that PIPP customers are charged for electricity. OCC argued it was an error for the Commission to have approved the November 29, 2022 auction results because the auction did not include the PIPP customers (and the PIPP customers will be charged higher rates in violation of the law). The Commission denied the rehearing request by operation of law.

All three reasons why the Commission repeatedly denied OCC’s arguments in the past apply equally to OCC’s February 10, 2023 application for rehearing. First, the Commission concluded that OCC’s “proposed solution is untenable” because “it is clear from the plain language of the statute [R.C. § 4928.54] that the General Assembly intended that PIPP program loads be aggregated and procured from a competitive bidding process separate from the SSO customers.” *AES Ohio SSO Case*,

supra, Finding and Order at ¶ 18 (September 21, 2022). See also *Duke SSO Case, supra*, Entry on Rehearing at ¶ 13 (October 5, 2022). The law has not changed in the past six months and, therefore, OCC’s proposed solution on rehearing remains untenable.

Second, the Commission upheld its existing PIPP procurement process, which was originally established in *In the Matter of the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC, Finding and Order at 5 (March 2, 2016) (“*Implementation Case*”). The Commission stated that, while electricity prices resulting from the PIPP auctions “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).” *AES Ohio SSO Case*, Finding and Order at ¶ 18, quoting the *Implementation Case, supra*, Finding and Order at 5 (March 2, 2016). The Commission’s adopted PIPP procurement process continues as binding precedent and OCC’s proposed solution on rehearing is inconsistent with it.

Third, the Commission concluded that OCC’s arguments are an improper collateral attack of the Commission’s decision in the *Implementation Case*. *Duke SSO Case, supra*, Entry on Rehearing ¶ 18 (November 16, 2022); and *AES Ohio SSO Case, supra*, Entry on Rehearing at ¶ 19 (November 16, 2022). OCC’s proposed solution on rehearing is inconsistent with the *Implementation Case* and an improper attempt – by collateral attack⁴ – to reverse that prior decision through the *FirstEnergy SSO Case*.

⁴ Res judicata (claim preclusion) and collateral estoppel (issue preclusion) prevent re-litigation of claims, facts or points that were determined in a previous action. See *Office of Consumers’ Counsel v. Public Utilities Commission*, 16 Ohio St. 3d 9, 185 Ohio LEXIS 287 (1985); and *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1192 (2007). OCC, FirstEnergy and others were involved in the *Implementation Case*, and the issue of whether the PIPP load could be served at a price above the SSO was raised and addressed when the Commission decided the PIPP auction format. *Implementation Case*, Finding and Order at ¶ 7 (March 2, 2016) and Entry on Rehearing at ¶¶ 9-12 (April 27, 2016). OCC now seeks – improperly – to change that Commission decision through the *FirstEnergy SSO Case*.

OCC's February 10, 2023 application for rehearing represents the ninth time in six months that OCC argues the Commission should ignore Ohio law, ignore Commission precedent, and instead combine the PIPP customers with the SSO auction. Over the past six months, the Commission has decided again and again in this and every Ohio electric utility SSO auction proceeding that there was no error or violation of law in not combining the PIPP customers with the SSO auction. In addition, the Commission has ruled that the PIPP auction format is proper under Ohio law and that the SSO auction results were not erroneous. Ohio law has not changed, nor has the Commission's PIPP procurement process. OCC has not raised anything new in its February 10, 2023 application for rehearing in this proceeding, and the Commission should deny it.

B. The Commission should not disturb contracts that FirstEnergy has already entered into with winning SSO suppliers under approved auctions.

If the Commission nevertheless is now convinced by OCC's arguments (although it should not be convinced since it previously rejected them), the Commission should take into account that FirstEnergy has entered into master SSO supply contracts with the successful bidders for the current delivery period (June 1, 2022 – May 31, 2023) and the upcoming delivery period (June 1, 2023 – May 31, 2024). Disturbing such contracts already executed by FirstEnergy and the successful bidders following Commission approval of the auction results would lead to unwarranted inefficiencies, a waste of resources, and confusion. *See, e.g., In re Youngstown Thermal Limited Partnership*, Case No. 93-1408-EL-CSS, Opinion and Order at 43 (August 31, 1995) (Commission did not disturb an executed contract following a competitive bid that was later found to not comply with Ohio law). Additionally, and more importantly, materially altering contract terms after (a) the auctions have concluded, (b) the winning bidders have been notified, (c) the Commission has approved the results, and (d) the contracts have been executed creates uncertainty and risk for bidders in all future Ohio auctions, which would be expected to negatively impact both auction participation and bids. Consequently, to the extent the Commission intends to change the PIPP auction outcome/process as

a result of OCC's application for rehearing in this proceeding, any such changes should not apply to SSO auctions that have been conducted for the June 1, 2022 – May 31, 2023 and the June 1, 2023 – May 31, 2024 delivery periods.

III. CONCLUSION

This proceeding concerns a procurement of SSO electric generation service. It is not related to PIPP customers, despite OCC's attempts to impose PIPP reform measures into the SSO auction proceedings (and do so on a post hoc basis). As the Commission did previously in this proceeding and all other electric SSO auction dockets, the Commission should again refrain from making any changes to the current PIPP auction results/process through this SSO auction proceeding. Additionally, because the Commission has already fully addressed and rejected OCC's arguments repeatedly, it should deny OCC's February 10, 2023 application for rehearing in this proceeding.

Respectfully Submitted,

/s/ Gretchen L. Petrucci

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail on February 21, 2023.

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Summary: Memorandum Contra to the Office of the Ohio Consumers' Counsel's
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