

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company and The Toledo)	
Edison Company for Authority to Provide)	Case No. 14-1297-EL-SSO
for a Standard Service Offer Pursuant to)	
R.C. 4928.143 in the Form of an Electric)	
Security Plan.)	

**MEMORANDUM CONTRA OF INDUSTRIAL ENERGY USERS-OHIO TO THE
APPLICATION FOR REHEARING OF THE OHIO ENVIRONMENTAL COUNCIL, THE
ENVIRONMENTAL DEFENSE FUND, AND THE ENVIRONMENTAL LAW AND POLICY
CENTER**

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

One of the stipulations that the Public Utilities Commission of Ohio (“Commission”) approved in this matter provided that customers electing to take service under the Economic Load Response Program (“ELR Program”) may opt out of the benefits and costs of the energy efficiency and peak demand reduction (“EE/PDR”) portfolio plan of the FirstEnergy electric distribution utilities (“EDU”). Cos. Ex. 2 at 8. In the Fifth Entry on Rehearing, the Commission clarified that the provision recognizing customers’ right to opt out did not violate any important regulatory principle or practice. Fifth Entry on Rehearing at 146 (Oct. 12, 2016).

In an application for rehearing, Ohio Environmental Council, the Environmental Defense Fund, and the Environmental Law and Policy Center (“OEC”) allege that the Fifth

Entry on Rehearing “contravenes R.C. 4928.66¹ by permitting utility customers to participate in one of FirstEnergy’s peak demand reduction programs under Rider ELR Program even after opting out of paying for those programs.” Application for Rehearing of the Fifth Entry on Rehearing by the Ohio Environmental Council, Environmental Defense Fund, and Environmental Law and Policy Center at 2 (Nov. 14, 2016) (“OEC Application for Rehearing”). The reasons offered by OEC in support of this assignment of error are without merit. Accordingly, the Commission should reject OEC’s assignment of error.

II. THE COMMISSION DETERMINED THAT THE PROVISION OF THE STIPULATIONS PERMITTING CUSTOMERS THAT ELECT SERVICE UNDER THE ELR PROGRAM TO OPT OUT OF THE COSTS AND BENEFITS OF THE FIRSTENERGY PORTFOLIO PLAN DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE

The Ohio Edison Company, Cleveland Electric Illuminating Company, and the Toledo Edison Company (“FirstEnergy”) filed an application for an electric security plan on August 4, 2014. FirstEnergy, the Staff of the Commission, and several parties entered into stipulations that recommended modification and approval of the application. Included in the recommended terms of the electric security plan, the parties recommended the continuation of the ELR Program with modifications. They also included a provision confirming that customers electing to take service under the ELR Program may opt out of the benefits and costs of FirstEnergy’s EE/PDR portfolio plan. Cos. Ex. 2 at 8.

In the Opinion and Order modifying and approving the electric security plan application and stipulations, the Commission addressed whether the settlement package violated any important regulatory principle or practice. In its discussion of the ELR

¹ The reference to R.C. 4928.66 appears to be a typographical error. The right to opt out is provided by R.C. 4928.6610 to R.C. 4928.6613.

Program provisions, the Commission summarized the provision permitting customers taking service under the ELR Program to opt out, but did not explicitly approve it. Opinion and Order at 106-07 (Mar. 31, 2016).

After the Commission issued its Opinion and Order, OEC filed an application for rehearing and requested that the Commission address the provision addressing a customer's right to opt out. It asserted that the provision violates R.C. 4928.6613.² Application for Rehearing by the Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund at 2 & 23 (May 2, 2016).

In response to OEC, IEU-Ohio agreed that the Commission's decision should be clarified, but argued that the provision permitting ELR Program customers to elect to opt out of the FirstEnergy portfolio plan did not violate R.C. 4928.6613. As IEU-Ohio explained, the ELR Program predates the FirstEnergy portfolio plans and the current program is an extension of the prior ones, not a part of the FirstEnergy portfolio plan. IEU-Ohio's Memorandum in Opposition to Applications for Rehearing of Retail Electric Supply Association, The Environmental Law and Policy Center, and Ohio Manufacturers' Association Energy Group by Industrial Energy Users-Ohio at 11 (May 12, 2016). Further, the benefits of the ELR Program extend beyond FirstEnergy's compliance with EE/PDR requirements by enhancing system reliability and stability, reducing the likelihood of load shedding, and assisting in job retention. *Id.* Denying customer's the right to opt out if they participated in the ELR Program would also reduce the incentive

² R.C. 4928.6613 provides as follows:

Upon a customer's election to opt out under section 4928.6611 of the Revised Code and commencing on the effective date of the election to opt out, no account properly identified in the customer's verified notice under division (C) of section 4928.6612 of the Revised Code shall be subject to any cost recovery mechanism under section 4928.66 of the Revised Code or eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans approved by the public utilities commission.

for customers to participate in the program, thereby reducing the collective benefit of a larger customer's demand response. *Id.* at 12. IEU-Ohio, therefore, urged the Commission to reject OEC's attempt to limit a customer's right to opt out. *Id.*

In its Fifth Entry on Rehearing, the Commission clarified that the provision permitting ELR Program customers to elect to opt out of the FirstEnergy portfolio plan did not violate any important regulatory principle or practice and found that customers participating in the ELR Program retain their statutory right to opt out of the portfolio plan costs and benefits. Fifth Entry on Rehearing at 146 (Oct. 12, 2016). In support of this finding, the Commission stated, "The ELR existed long before the statutory energy efficiency and peak demand reduction mandates. Further, the Commission has long held that ELR has an economic development component and ELR is funded, in part, through the economic development rider, which is paid by all customers, including those who opt out of the energy efficiency programs." *Id.*

III. THE COMMISSION SHOULD AGAIN AFFIRM THAT THE PROVISION OF THE STIPULATIONS PERMITTING CUSTOMERS THAT ELECT SERVICE UNDER THE ELR PROGRAM TO OPT OUT OF THE COSTS AND BENEFITS OF THE FIRSTENERGY PORTFOLIO PLAN DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE

In its Application for Rehearing, OEC seeks a Commission order granting rehearing and reversing the Commission's decision to approve the provision of the stipulations permitting customers that elect service under the ELR Program to opt out of the costs and benefits of the FirstEnergy portfolio plan. OEC Application for Rehearing at 2. In support of its assignment of error, OEC alleges that the Commission's reasoning fails to consider that FirstEnergy includes the ELR Program in its current portfolio plan and that its order in this case is contrary to its order in a prior Ohio Power case. *Id.* at 27-28. OEC also argues that it is irrelevant that the ELR Program predates the adoption of

R.C. 4928.66 and complains that the expansion of the ELR Program provides value to customers that are permitted to opt out in violation of R.C. 4928.6613 and basic fairness. *Id.* at 29.

There are several reasons to reject OEC's argument in support of the assignment of error.

Initially, OEC incorrectly asserts that the ELR Program is a cost or benefit of the portfolio plan. While FirstEnergy is permitted to count the peak demand response reduction associated with the ELR Program toward mandate requirements under R.C. 4928.66, the program predates the EE/PDR mandates and has supported a broad array of benefits such as economic development and job retention that extend beyond compliance with the mandates. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order at 31 (Aug. 25, 2010) (noting the benefits of continuing the ELR Program in the first electric security plan). Like its predecessors, the current ELR Program is a provision of FirstEnergy's tariffs that was not approved as part of the portfolio plans. *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order *passim* (July 18, 2012). Further, the Commission correctly noted

that the ELR Program has an economic development component and is funded in part through the economic development rider.³

Because the ELR Program predates the portfolio plan, its costs are recovered in part outside the plan, and the program provides benefits that extend beyond compliance with EE/PDR requirements, a customer electing to take service under the ELR Program should not be deemed to be taking a benefit of the FirstEnergy portfolio plan. Accordingly, the provision of the stipulations making explicit that a customer taking service under the ELR Program may elect to opt out of the portfolio plan does not violate the limitation contained in R.C. 4928.6613.

Like its statutory argument, OEC's claim that "basic fairness" requires the Commission to reverse its approval of the stipulation provision confirming a customer's right to opt out is also without merit. The opportunity to opt out is statutory: R.C. 4928.6611 grants certain customers the opportunity to opt out of the costs and benefits of the FirstEnergy portfolio plan, beginning January 1, 2017. Based on the Commission's determination that there is no violation of R.C. 4928.6613 if a customer elects to opt out, the Commission cannot then strip the customer's statutory right on the ground that "basic fairness" permits the Commissions to ignore the law. *Office of the Ohio Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 67 Ohio St.2d 153, 167-68 (1981).

Moreover, OEC's position would frustrate state energy policy that encourages customer efforts at demand-side management. R.C. 4928.02(D). Customers that have demand response capabilities have alternatives as to the manner in which they use those

³ Further demonstrating the fact that the ELR Program is not tied exclusively to the FirstEnergy portfolio plan, the Commission has directed that some of the increases in the cost of the ELR Program be recovered through a new economic development rider. Fifth Entry on Rehearing at 113.

capabilities. An opt out customer could use its demand response to reduce its capacity obligation without loss of the statutory opt out right. These customers could benefit from reducing their capacity charges and have no obligation to offer those capabilities to FirstEnergy. If the customer participates in the ELR Program, however, that customer would be subject to unlimited emergency interruptions by FirstEnergy, ATSI, and PJM. Tr. Vol. III at 494. The customer gives up its right to use emergency-related demand response as it may see fit, and FirstEnergy is then able to use this demand response capability to address emergency circumstances that might otherwise cause involuntary interruptions of service to other non-interruptible customers.

If the Commission accepted OEC's argument, however, customers with demand response capabilities would be deterred from taking service under the ELR Program since they would not be permitted to opt out of the EE/PDR costs and benefits under SB 310. If successful, therefore, OEC's argument that customers electing to take service under the ELR Program lose their opportunity to opt out would likely reduce the use of demand response by removing an incentive to participate. As a further consequence, other customers would face the increased chance of service interruptions. State policy, therefore, does not support OEC's attempt to restrict a customer's opportunity to opt out of the FirstEnergy portfolio plan.

OEC's attempt to support its position based on the Commission's decision in a prior AEP-Ohio case also does not warrant an order granting rehearing. In the decision cited by OEC, the Commission determined that costs associated with AEP-Ohio's interruptible load program should be recovered through the EE/PDR rider. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service*

Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, Case Nos. 13-2385-EL-SSO, *et al.*, Second Entry on Rehearing at 12 (May 28, 2015). The Commission did not address whether a customer that participated in the AEP-Ohio interruptible load program would be eligible to opt out of the AEP-Ohio portfolio program costs and benefits. The decision, therefore, is inapposite.⁴

IV. CONCLUSION

In the Fifth Entry on Rehearing, the Commission clarified that a provision of the stipulations providing that customers participating in the ELR Program retain their right to opt out of the FirstEnergy portfolio plan does not violate any important regulatory principle or practice. OEC's Application for Rehearing seeks an order reversing that clarification, but does not offer a reasoned basis for the Commission to grant rehearing. Accordingly, the Commission should deny OEC's request for rehearing of this portion of the Fifth Entry on Rehearing.

Respectfully submitted,

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⁴ AEP-Ohio has entered into a stipulation to resolve its attempt to implement a stability rider in which it has also agreed that customers electing to take service under its interruptible rate program may also elect to opt out of the costs and benefits of the portfolio plan. *In the Matter of the Application Seeking Approval of the Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, *et al.*, Joint Stipulation and Recommendation at 11-12 (Dec. 14, 2015).

Attorneys for Industrial Energy Users- Ohio

CERTIFICATE OF SERVICE

In Accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 23rd day of November 2016, *via* electronic transmission.

/s/ Frank P. Darr

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