

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into an Affiliate Power)	Case No. 14-1693-EL-RDR
Purchase Agreement for Inclusion in the)	
Power Purchase Agreement Rider)	

In the Matter of the Application of Ohio)	
Power Company for Approval of Certain)	Case No. 14-1694-EL-AAM
Accounting Authority)	

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE SECOND
APPLICATION FOR REHEARING OF THE ENVIRONMENTAL LAW AND POLICY
CENTER**

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I. INTRODUCTION

In its second application for rehearing in this case, the Environmental Law and Policy Center ("ELPC") seeks a Commission order barring customers of the Ohio Power Company ("AEP-Ohio") that take interruptible service from exercising an election to opt out of the opportunity and ability to obtain direct benefits of AEP-Ohio's energy efficiency and peak demand reduction portfolio plan ("EE/PDR Plan"). Second Application for Rehearing by the Environmental Law and Policy Center (Dec. 5, 2016) ("ELPC Second Application for Rehearing"). Because the bar that ELPC is seeking is not properly presented or supported by Ohio law, Commission precedent, or sound policy, the Commission should deny ELPC's application for rehearing.

II. BACKGROUND

Under its current and prior electric security plans (“ESP”), AEP-Ohio has provided an interruptible rate program, the IRP-D or IRP Program.¹ The Stipulation filed by AEP-Ohio and several parties in this case proposes modifications to permit shopping customers to participate in the IRP Program and an expansion for the load that customers may elect to take service under the IRP Program. Joint Stipulation and Recommendation at 10-11 (Dec. 14, 2015). It further provides that “IRP customers may opt out of the opportunity and ability to obtain direct benefits from AEP Ohio’s EE/PDR Plan as provided in S.B. 310. No account properly identified in the customer’s verified notice under R.C. 4928.6612 shall be subject to any cost recovery mechanism under R.C. 4928.66 or eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans approved by the Commission.” *Id.* at 11-12.

In its initial briefs addressing the Joint Stipulation and Recommendation, ELPC argued that this provision addressing the opportunity of IRP customers to opt out of the EE/PDR Program violated R.C. 4928.6613. Initial Post-Hearing Brief of the Environmental Law and Policy Center, Environmental Defense Fund, and Ohio Environmental Council at 57 (Feb. 1, 2016). In reply memoranda, both AEP-Ohio and IEU-Ohio argued that there would be no violation of the requirements of SB 310 because the IRP Program predated the EE/PDR Plan and the proposed recovery mechanism

¹ AEP-Ohio’s interruptible service offering existed prior to the first approved electric security plan and was continued in the first, second, and third plans. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 46 (Mar. 18, 2009); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power 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 Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 26 (Aug. 8, 2012); *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.*, Opinion and Order at 39-40 (Feb. 25, 2015) (“ESP III”).

included recovery through the Economic Development Rider. Reply Brief in Support of the Joint Stipulation and Recommendation on Behalf of Ohio Power Company at 114 (Feb. 8, 2016); Reply Brief of Industrial Energy Users-Ohio at 4-6 (Feb. 8, 2016). Further, IEU-Ohio argued ELPC's argument was not ripe for consideration because the provision ELPC claimed was illegal was not in effect and would be addressed when the Commission considers the ESP extension application. Reply Brief of Industrial Energy Users-Ohio at 3-4 (Feb. 8, 2016) In its Opinion and Order, the Commission agreed that ELPC's argument was premature and indicated that interested parties will be able to raise this issue in a future proceeding. Opinion and Order at 98 (Mar. 31, 2016).

ELPC then sought rehearing of the Commission's determination that review of this provision was premature. Arguing that the provision allowing customers to opt out was effective immediately, EPLC sought a ruling that the provision was unlawful or that customers currently taking service under the IRP Program cannot elect to opt out. Application for Rehearing by the Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund, Memorandum in Support at 15 (May 2, 2016). The Commission clarified that this provision of the Stipulation has not been approved for immediate implementation upon either the issuance of the PPA Order or the Second Entry on Rehearing and denied ELPC's request for rehearing. Second Entry on Rehearing at 107 (Nov. 3, 2016).

ELPC then filed a second application for rehearing. In its second application for rehearing, ELPC states that "the [Second Entry on Rehearing] is unlawful and unreasonable to the extent it fails to prevent AEP Ohio from allowing opt-out customers to participate in the interruptible demand program prior to a decision in that ESP

amendment proceeding.” ELPC Second Application for Rehearing at 1. In its Memorandum in Support, ELPC explains that it is seeking rehearing “only to the extent [the Second Entry on Rehearing] failed to state whether AEP Ohio is in fact *barred* from allowing customers who opted out of the Company’s energy efficiency and peak demand reduction programs from participating in the IRP tariff.” ELPC Second Application for Rehearing, Memorandum in Support at 2 (emphasis in the original). For relief, it is requesting that “the Commission specifically hold that no customer that has opted out of the plan under R.C. 4928.6611 may simultaneously participate in the IRP tariff unless and until the Commission endorses that procedure as consistent with R.C. 4928.6613 in the ESP amendment case.” *Id.*

III. THE COMMISSION SHOULD DENY ELPC’S APPLICATION FOR REHEARING BECAUSE THE LAWFULNESS OF CUSTOMER ELECTIONS TO OPT OUT OF THE CURRENT IRP-D TARIFF IS NOT A MATTER AT ISSUE IN THIS PROCEEDING

In the Opinion and Order and the Second Entry on Rehearing, the Commission is addressing the implementation of the Stipulation. The Stipulation addresses several issues, some of which are of current effect and others that will be effective only after the Commission considers the pending application to extend the current ESP with certain proposed modifications. As the Commission has now stated twice, the provision regarding a customer’s election to opt out is a matter in the latter category. Simply put, the Commission has determined that this issue, to the extent it is an issue, will be addressed in the pending extension case.

ELPC, however, seeks to make this proceeding a vehicle for it to seek limits on existing IRP-D customers’ right to opt out. Regardless of the legal merits of its claim that existing customers should not be permitted to opt out, this proceeding is not the venue

for that argument. Rehearing is proper as to only those issues that are determined in the proceeding. R.C. 4903.10. ELPC cannot use this proceeding to inject an issue it could have raised in the ESP case that addressed the current IRP-D² or used whatever other legal venue to address the current IRP tariff it may have. Accordingly, the Commission should deny ELPC's Application for Rehearing.

IV. THE COMMISSION SHOULD DENY ELPC'S APPLICATION FOR REHEARING BECAUSE IT PRESENTS NO NEW ARGUMENT THAT HAS NOT ALREADY BEEN ADDRESSED BY THE COMMISSION

In addition to seeking relief in the wrong proceeding, ELPC's Application for Rehearing presents no new issue that the Commission has not already addressed. For the second time, ELPC asks the Commission to deny current customers the opportunity to opt out under R.C. 4928.6611. It has not provided any new reasoning or argument that the Commission has not already rejected. Accordingly, the Commission should affirm its prior decision and reject ELPC's Application for rehearing. *ESP III*, Second Entry on Rehearing at 25-26 (May 28, 2015).

V. THE COMMISSION SHOULD DENY ELPC'S APPLICATION FOR REHEARING SEEKING TO BAR CUSTOMERS TAKING SERVICE UNDER THE IRP PROGRAM FROM ELECTING TO OPT OUT OF THE BENEFITS AND COSTS OF AEP-OHIO'S ENERGY EFFICIENCY AND PEAK DEMAND PORTFOLIO PROGRAM BECAUSE A BAR WOULD BE UNLAWFUL AND UNREASONABLE

In addition to seeking relief that is inappropriate in this proceeding, ELPC is also seeking relief that is unwarranted legally. Ohio law provides certain customers with the right to opt out, and IRP customers remain eligible to make that election while they are

² SB 310 became effective on September 12, 2014, but ELPC did not raise this issue in its Application for Rehearing of the *ESP III* Opinion and Order filed on March 27, 2015. *ESP III*, Application for Rehearing by The Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund (Mar. 27, 2015).

taking interruptible service. This outcome is supported by Ohio law, Commission precedent, and sound public policy.

R.C. 4928.6611 provides that eligible customers of AEP-Ohio may opt out of the opportunity and ability to obtain direct benefits of an EDU's energy efficiency and peak demand reduction portfolio beginning January 1, 2017. Taking service under an interruptible load program prevent a customer from electing to opt out, as the Commission has already concluded in the *FirstEnergy ESP IV Case*. In that case, the parties presented the Commission with several stipulations, one of which included a provision stating that customers electing to take service under FirstEnergy's interruptible rate program retained their right to opt out under R.C. 4928.6611. ELPC complained in that case, as it has in this one, that taking service under the FirstEnergy interruptible program prevented customers from opting out under R.C. 4928.6613. The Commission rejected this argument, holding, "[T]he Commission will clarify that customers participating in the [interruptible load] program retain their statutory right to opt out of the energy efficiency programs. The [interruptible load] programs existed long before the statutory energy efficiency and peak demand reduction mandates. Further, the Commission has long held that [the interruptible load program] has an economic development component and [the interruptible load program] 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." *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at 146 (Oct. 12, 2016).

If the Commission determines that it is necessary to address the merits of ELPC's attempt to deny customers taking service under the IRP their right to opt out, then the Commission again should find that a customer may take service under the IRP and elect to opt out of the EE/PDR plan. Authorization of the IRP Program predates the requirement that AEP-Ohio enter into an EE/PDR portfolio plan and is a provision of the AEP-Ohio tariff that is approved as part of the ESP, not as part of its portfolio plan. *ESP III*, Opinion and Order at 40. If there were no portfolio plan, there would still be an IRP. Additionally, the benefits of the IRP extend beyond AEP-Ohio's compliance with EE/PDR requirements. As the Commission has previously found, the IRP advances "numerous benefits, including the promotion of economic development and the retention of manufacturing jobs." *Id.* Because the IRP is separately approved and provides benefits that extend beyond compliance with EE/PDR requirements, a customer electing to take service under the IRP should not be deemed to be taking a benefit of the EE/PDR Plan.

Moreover, the IRP provides benefits to all AEP-Ohio customers that would be reduced or lost if the Commission adopted ELPC's view that IRP customers are barred from opting out. A potential 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 AEP-Ohio. If the customer participates in the IRP, however, that customer is subject to unlimited emergency interruptions. *Id.* AEP-Ohio is then able to use this demand response capability to address emergency circumstances that might otherwise cause involuntary interruptions of service to other non-IRP customers. Because ELPC's position would impose an additional cost on participation in the IRP, it would discourage

customers with IRP capabilities from making them available to AEP-Ohio and thereby reduce the benefits of the IRP that would otherwise benefit all customers. Thus, the Commission should reject ELPC's position because it would negatively impact the system benefits that the IRP would otherwise provide.

VI. CONCLUSION

ELPC's request is not a proper matter for the Commission to address on rehearing in this proceeding. Further, ELPC's request that the Commission bar IRP customers from electing to opt out is neither lawful nor reasonable. Accordingly, the Commission should deny EPLC's application for rehearing.

Respectfully submitted,

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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 *Industrial Energy Users-Ohio's Memorandum Contra the Second Application for Rehearing of the Environmental Law and Policy Center*, was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 15th day of December 2016, via electronic transmission.

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