

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan)	
)	
)	Case No. 16-481-EL-UNC
)	
)	
In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan)	
)	
)	Case No. 17-2436-EL-UNC
)	
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)	
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017)	
)	
)	Case No. 18-1604-EL-UNC
)	
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)	
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change)	
)	
)	Case No. 18-1656-EL-ATA

**APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY
CENTER, THE NATURAL RESOURCES DEFENSE COUNCIL AND THE OHIO
ENVIRONMENTAL COUNCIL**

Pursuant to Ohio Revised Code (“R.C.”) 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center, the Natural Resources Defense Council, and the Ohio Environmental Council (collectively, “Environmental Advocates”) hereby file this Application for Rehearing of the July 17th 2019, Opinion and Order (“Order”) of the Public Utilities

Commission of Ohio (“Commission”) in this case. The Order approves the Stipulation with modifications.

The purpose of this Application for Rehearing is to seek change that would adopt the smart thermostat program proposed by Environmental Advocates and to change the finding regarding confidentiality of negotiations.

Dated: August 16, 2019

Respectfully submitted,

/s/ Robert Kelter

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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING

INTRODUCTION

On July 17th, 2019, the Public Utilities Commission of Ohio (“PUCO” or “the Commission”) entered an Opinion and Order approving the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s (collectively “FirstEnergy” or “Companies”) grid modernization proposal. The Environmental Law & Policy

Center, Natural Resources Defense Council, and Ohio Environmental Council (collectively, “Environmental Advocates”) ask the Commission for rehearing on two issues. First, the Commission should reconsider its findings regarding the smart thermostat issue given the recent passage of HB 6. 2019 Am.Sub.H.B. No. 6. Further, the Environmental Advocates ask that the Commission revisit its approach to the confidentiality of negotiations, given the need for additional disclosure in order to determine whether the negotiations meet the “serious bargaining” standard.

ARGUMENT

I. Smart Thermostats Play an Essential Role in Customer Savings from Time Varying Rates

Fundamentally speaking, Environmental Advocates believe the Commission took the wrong approach regarding smart thermostats. Grid Modernization (“Grid Mod”) will cost Ohio customers more than \$1 billion dollars, including \$516 million (net nominal cost \$825 million) FirstEnergy will receive from this proceeding, more than \$390 million dollars to support grid modernization in northern Ohio through a Distribution Modernization Rider authorized by the Public Utilities Commission of Ohio in 2016, plus potentially FirstEnergy’s request for a two-year, \$260 million extension of that rider. Given the cost of Grid Mod to FirstEnergy customers, Environmental Advocates urge the Commission to ensure that the customers get the direct benefits on their bills that a smart thermostat program would provide.

The Stipulation itself makes the connection between the time varying rates FirstEnergy commits to offering and the smart thermostats:

Within six months of an Opinion & Order in the current case, and after consultation with the Grid Mod collaborative group, the Companies will propose a time varying rate offering for non-shopping customers, which will be designed to achieve the energy and capacity savings detailed in the cost-benefit analysis and should leverage enabling devices, e.g. smart thermostats...

Stipulation at 17. Time of use rates only have value if customers actually cut back their usage at times when rates are highest, and smart thermostats constitute “enabling devices.” They automatically reduce usage when customers homes are vacant, and they allow customers to give utilities control over their thermostats to make minor adjustments at peak that save customers money. Moreover, the customers with smart thermostats reduce the need for utilities purchasing expensive power at peak times, which lowers all customers’ rates.

The Stipulation language reflects FirstEnergy’s own Grid Mod pilot, which combined smart meters with programmable thermostats.¹ According to FirstEnergy’s own analysis, these time-varying rate and customer energy management savings depend on the deployment of enabling technologies along with smart meters. In projecting customer energy and capacity savings for the time-varying rate and customer energy management categories, FirstEnergy relied in large part on a 2015 report on a consumer behavior study conducted in Cleveland Electric Illuminating Company territory during FirstEnergy’s initial pilot AMI deployment (“CEI Pilot Study”), including for projected per customer energy and capacity savings. *See* ELPC Ex. 23c, “AMI Benefits” tab; Tr. I at 45:848:3. FirstEnergy drew its time-varying rate savings assumptions specifically from the results for customers in the pilot who were on a “peak time rebate” rate (where they would receive payments for reducing usage at peak times) and who also received a programmable controllable thermostat (“PCT”) – a precursor to the present-day smart thermostat. *See* ELPC Ex. 16; ELPC Ex. 31c (workpaper calculations for Cost-Benefit Analysis drawing on CEI Pilot Report data); CEI Pilot Report at vii, 2-1 to 2-8. Thus, the time-varying

¹ Programmable thermostats were the precursor to smart thermostats, which required actual programming by the customers. In contrast, smart thermostats detect when customers are not home and adjust the temperature without customer action. Smart thermostats can also be adjusted directly by the utility as part of a peak demand reduction program.

rate savings in FirstEnergy's Cost Benefit Analysis are explicitly tied to parallel deployment of advanced thermostats.

Along the lines of the pilot, in the course of the proceeding, both Environmental Advocates and the Smart Thermostat Coalition ("STC") submitted substantial evidence that smart thermostats would significantly enhance customer savings when combined with the new smart meters. Environmental Advocates argued that this is consistent with FirstEnergy's own findings, as shown on its "Energy Save Ohio" website for customers:

Households with a smart thermostat see significant savings on their heating and cooling costs. For the average household, half of the energy costs are due to heating and cooling – more than \$900 per year. Based on typical energy costs, a smart thermostat can provide savings of \$131 to \$145 per year.

STC Ex. 1 at 1. These savings estimates do not include the additional savings from time varying rates that FirstEnergy will implement.

Despite considerable evidence of savings from the smart thermostats, the Commission rejects Environmental Advocates request that the Commission order a small \$30 million increase in the price for Grid Mod in order to fund this important component. The Commission decision rests in significant part on the assumption that smart thermostats will be addressed in the Company's next energy efficiency case.

Further, substantial evidence was given in support of the fact that smart thermostat programs are currently, and more appropriately, included in the Companies' EE/PDR benefits on a stand alone basis, without AMI and time varying rates (Tr. Vol. II at 247, 285).

Order at 60. However, the Commission reached this conclusion before the legislature passed HB 6, which eliminates the requirement that utilities do future efficiency programs once they meet the old standards with inflated measurements. 2019 Am.Sub.H.B. No. 6, R.C. 4928.66 (F) and (G). Moreover, it automatically extends FirstEnergy's existing programs which contain only a very small smart thermostat component. 4928.66(F). Consistent with the new law, on August

12th, 2019, FirstEnergy filed a motion asking to waive any requirements for filing a new plan. “An indefinite waiver is reasonable and appropriate given that HB 6, once it becomes effective, will dispense with the need for filing updated portfolio plans.” FirstEnergy’s Motion for Waiver, August 12, 2019. Given the changes in the law from HB6, it is highly uncertain if not unlikely, that FirstEnergy will provide customers access to smart thermostats through its efficiency programs.

II. The Commission Needs More Information Regarding Actual Negotiations in Order to Determine Whether Serious Bargaining Took Place

Environmental Advocates also ask that the Commission reconsider its ruling regarding the confidentiality of negotiations as it pertains to the cross-examination of FirstEnergy Witness Fanelli. In their Initial Briefs, both Environmental Advocates and Kroger raised issues regarding the confidentiality of negotiations given the circumstances in this proceeding. Kroger raised issues regarding the timing of settlement discussions between FirstEnergy and Staff, in order to demonstrate that FirstEnergy and Staff’s actions resulted in a lack of serious bargaining. Order at 8. Environmental advocates similarly argued that Ohio Rule of Evidence 408 does not protect all settlement discussions for all purposes. *Id.* Ohio Rule of Evidence 408 allows the Commission to consider information regarding settlement discussion, excluding elements of negotiations from the record only if they relate to validity of a claim or the amount of a claim. The rule “does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” Ohio Rule of Evidence 408. Interpreting Rule 408, the Ohio Supreme Court has noted that, “Indeed, Evid.R. 408 provides that evidence of settlement may be used for several purposes at trial, making it clear that discovery of settlement terms and agreements is not always impermissible.” *Ohio Consumers’ Counsel v. Pub. Utilities Comm’n of*

Ohio, 111 Ohio St. 3d 300, 322 (2006). Not always impermissible means that sometimes it is permissible to disclose what took place and not violate the rule.

In cases involving Stipulations, the Commission has applied a three-prong test, and the first prong of the three-prong test is, “Is the settlement a product of serious bargaining among capable, knowledgeable parties?” *Id. at 21*. This is essentially a two-part test. The easy part being whether the parties are capable and knowledgeable. The key part of the test is, did serious bargaining take place? The Ohio Supreme Court has held that in order to determine whether “serious bargaining” occurred, the Commission must investigate the context and circumstances of the settlement discussions to ensure the “integrity and openness of the negotiation process.” *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*, 111 Ohio St. 3d 300, 320 (2006). Using details from negotiations to determine whether parties actually had an opportunity to influence the negotiations fits the exceptions outlined in Rule 408 and by the Ohio Supreme Court.

If the Commission protects all facets and elements of the negotiations, it is difficult to reach any conclusion that the negotiations constitute “serious bargaining.” For example, if a utility reaches an agreement exclusively with one party and then takes that deal to all of the other parties and says, “take it or leave it” does that constitute serious negotiations? If the Commission does not allow some elements of the negotiations to come out in the hearing process, in the instance parties deem it necessary to explore the legitimacy of the negotiation process, then the Commission has no factual basis for any finding regarding the seriousness of the bargaining. The first prong becomes meaningless.

If parties want to reach a stipulation, they should understand that in order to demonstrate serious bargaining took place, some of the details of the negotiations will get exposed. This does

not have to mean that all details will become public or that the Commission will allow parties to expose details of the negotiations for superfluous reasons, but that some details will be necessary for the Commission to determine whether serious bargaining occurred.

CONCLUSION

FirstEnergy's Grid Mod case will ultimately cost customers over \$1 billion dollars. The Commission should require FirstEnergy to offer customers smart thermostats consistent with the programs outlined in Environmental Advocates' Initial Brief in order to ensure that customers receive the maximum benefit from this investment. Additionally, the Commission should address the negotiations issue in order to improve the flow of information it needs to determine whether serious bargaining took place.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Rehearing submitted on behalf of the Environmental Law & Policy Center, Natural Resources Defense Council, and Ohio Environmental Council, collectively “Environmental Advocates,” was served by electronic mail upon all Parties of Record on August 16, 2019.

/s/ Robert Kelter
Robert Kelter

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Case No(s). 16-0481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC, 18-1656-EL-ATA

Summary: App for Rehearing by the Environmental Law & Policy Center, the Natural Resources Defense Council, and the Ohio Environmental Council electronically filed by Mr. Robert Kelter on behalf of Natural Resources Defense Council and Environmental Law & Policy Center and Ohio Environmental Council