

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 OF AN
APPLICATION FOR APPROVAL OF A
DISTRIBUTION PLATFORM
MODERNIZATION PLAN

CASE NO. 17-2436-EL-UNC

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

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

ENTRY ON REHEARING

Entered in the Journal on September 11, 2019

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Environmental Law and Policy Center, Natural Resources Defense Council, and Ohio Environmental Council on August 16, 2019.

II. DISCUSSION

A. *Procedural Background*

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities, as defined in R.C. 4928.01(A)(6), and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved FirstEnergy's application for its fourth ESP (ESP IV). *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 14-1297-EL-SSO (*ESP IV Case*), Opinion and Order (Mar. 31, 2016). Moreover, on October 12, 2016, the Commission issued the Fifth Entry on Rehearing in the *ESP IV Case*, further modifying *ESP IV*.

{¶ 5} Among other terms, *ESP IV* required the Companies to undertake grid modernization initiatives that promote customer choice in Ohio and to file a grid modernization business plan. *ESP IV Case*, Opinion and Order at 22, 95-96. Accordingly, on February 29, 2016, the Companies filed a grid modernization plan with the Commission in Case No. 16-481-EL-UNC (*Grid Mod Case*).¹ Specifically, the Companies' plan provided

¹ The attorney examiner took administrative notice of the plan filed in the *Grid Mod Case* during the evidentiary hearing (Tr. Vol. 1 at 28).

scenarios for the Companies to achieve smart meter installation, as well as other grid modernization investments like distribution automation (DA) and integrated volt-VAR control (Co. Ex. 2 at 5; Co. Ex. 1 at 5-6; business plan application at 13).

{¶ 6} Subsequently, in the Fifth Entry on Rehearing in the *ESP IV Case*, the Commission noted that we intended to undertake a detailed policy review of grid modernization and that FirstEnergy's grid modernization business plan would be addressed following such review. *ESP IV Case*, Fifth Entry on Rehearing at 96-97. The Commission commenced this detailed policy review in 2017, and, on August 29, 2018, the Commission released *PowerForward: A Roadmap to Ohio's Electricity Future*. In the interim, on December 4, 2017, the Companies filed an application for approval of a distribution platform modernization plan (DPM Plan) in Case No. 17-2436-EL-UNC (*DPM Plan Case*) as a complement to the initiative (Co. Ex. 1 at 3; Co. Ex. 2 at 5).² According to FirstEnergy, the DPM Plan was designed to be completed over a three-year period to provide enhanced reliability and timelier outage restoration (DPM Plan at 1).

{¶ 7} On January 10, 2018, the Commission opened an investigation into the financial impacts of Tax Cuts and Jobs Act of 2017 (TCJA) on regulated utilities in this state. See *In re the Commission's Investigation of the Financial Impact of the TCJA on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Entry (Jan. 10, 2018). On October 24, 2018, following an extensive comment period and hearing, the Commission directed public utilities to file applications not for an increase in rates, pursuant to R.C. 4909.18, by January 1, 2019, in order to return to consumers the tax impacts resulting from the TCJA. On October 30, 2018, the Companies filed an application to establish a process to resolve TCJA-related issues in Case No. 18-1604-EL-UNC.

{¶ 8} On November 9, 2018, a stipulation and recommendation was filed, recommending a resolution for the above-captioned cases. On January 25, 2019, a

² The attorney examiner took administrative notice of the plan filed in the *DPM Plan Case* during the evidentiary hearing (Tr. Vol. 1 at 28).

supplemental stipulation and recommendation was filed, which modified the original stipulation. For purposes of this Entry on Rehearing, both stipulations will collectively be referred to as the Stipulation,³ and all parties that have signed either the original or supplemental stipulation will collectively be referred to as the Signatory Parties.

{¶ 9} By Entry issued November 15, 2018, the attorney examiner consolidated the above-captioned cases and set a procedural schedule, including scheduling an evidentiary hearing, which commenced on February 5, 2019. The hearing concluded on February 6, 2019. Timely briefs were filed by several parties, including the Environmental Law & Policy Center (ELPC), the Ohio Environmental Council, and the Natural Resources Defense Council (collectively, the Environmental Advocates).

{¶ 10} The Commission issued its Opinion and Order on July 17, 2019, approving the Stipulation, subject to the Commission's adjustments to the calculation of the total estimated net benefits proposed for Grid Mod I. Opinion and Order at ¶¶ 115-116.

{¶ 11} Pursuant to R.C. 4903.10, any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the Commission's order is journalized.

{¶ 12} Environmental Advocates filed an application for rehearing on August 16, 2019, seeking the Commission's reconsideration of our decision to reject Environmental Advocates' proposal to incorporate a \$30 million smart thermostat program in Grid Mod I and our findings regarding the confidentiality of settlement negotiations.

{¶ 13} The Companies and Industrial Energy Users-Ohio (IEU-Ohio) filed memoranda contra on August 26, 2019.

³ The Commission recognizes that the supplemental stipulation modified certain portions of the original stipulation in this case. As the Signatory Parties have indicated that the provisions of the original stipulation are still applicable unless explicitly modified by the supplemental stipulation, the Commission will review the agreement with that same understanding.

B. Summary of the Application for Rehearing and Memorandum Contra

{¶ 14} As an initial matter, IEU-Ohio claims that the application for rehearing fails to specifically set forth the ground or grounds on which Environmental Advocates considers the Opinion and Order to be unreasonable or unlawful, as required by R.C. 4903.10. In fact, IEU-Ohio argues that “an application for rehearing must set forth, in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful,” pursuant to Ohio Adm.Code 4901-1-35(A). Further, IEU-Ohio points to Supreme Court of Ohio precedent, noting that the Court has held that an application for rehearing must include an allegation of the legal error the Commission may have made or an allegation of the Commission’s incorrect factual finding in order to satisfy the statutory requirements. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 375, 2007-Ohio-53, 859 N.E.2d 957. At the very least, IEU-Ohio argues that the Commission’s rules require some basic compliance in order to focus attention on what the applicant is seeking to have reviewed. *Discount Cellular* at 374-375. However, IEU-Ohio claims that Environmental Advocates fail to satisfy these statutory or administrative requirements. First, IEU-Ohio claims Environmental Advocates have failed to offer any ground for the Commission to grant rehearing; rather, they generally request that the Commission reconsider its ruling in regard to the smart thermostat program. Moreover, IEU-Ohio claims that the Commission is required to examine and search the supporting memorandum to identify the real purposes for which Environmental Advocates are seeking rehearing, which fails to comply with the rehearing statute. *Agin v. Pub. Util. Comm.*, 12 Ohio St.2d 406, 233 N.E.2d 116 (1967). As such, IEU-Ohio requests that the Commission deny the application for rehearing for failure to comply with the specificity requirements set forth in R.C. 4903.10 and the Commission’s administrative rules.

1. ENVIRONMENTAL ADVOCATES’ ARGUMENT REGARDING THE SMART THERMOSTAT PROGRAM

{¶ 15} Environmental Advocates initially argue that the Commission “took the wrong approach” when rejecting Environmental Advocates’ request to include a \$30 million

increase in the overall cost of Grid Mod I in order to fund a smart thermostat program. Environmental Advocates urge the Commission to ensure that customers are receiving the direct benefits of Grid Mod I, which will only be realized with the use of a smart thermostat in conjunction with the advanced metering infrastructure (AMI) deployment. Environmental Advocates specifically acknowledge that time-of-use rates only have value if customers actually reduce their usage at peak times and smart thermostats would provide them the opportunity to do so. Moreover, Environmental Advocates maintain that the success of FirstEnergy's own pilot program, upon which the Commission vested significant probative value in this case, relied heavily on combining smart meters with programmable thermostats, the predecessor technology of present-day smart thermostats (ELPC Ex. 16; ELPC Ex. 31-C). Environmental Advocates claim that they and the Smart Thermostat Coalition submitted substantial evidence that smart thermostats would undoubtedly enhance customer savings when combined with the deployment of the new smart meters (STC Ex. 1 at 1).

{¶ 16} Despite this evidence, Environmental Advocates state that the Commission rejected its request to order a \$30 million increase in the total cost for Grid Mod I, largely relying on the fact that this issue would be resolved in the Companies' next energy efficiency case. Opinion and Order at 60. However, Environmental Advocates note that the General Assembly recently passed legislation eliminating the requirement that utilities do future efficiency programs once they meet the old energy efficiency standards with inflated measurements. 2019 Am.Sub.H.B. No. 6 (HB 6). Moreover, Environmental Advocates state that HB 6 automatically extends FirstEnergy's existing programs which contain only a very small smart thermostat component. R.C. 4928.66. Thus, Environmental Advocates suggest it is very unlikely that FirstEnergy will provide customers access to smart thermostats through its efficiency programs.

{¶ 17} In response, IEU-Ohio and FirstEnergy note that most of Environmental Advocates' arguments regarding the proposed smart thermostat program were thoroughly

addressed in the Commission's Opinion and Order, specifically in regard to their claims that smart thermostats are necessary to provide customers with savings from AML, and do not provide an adequate basis to grant rehearing. Opinion and Order at ¶¶ 79-85, 109.

{¶ 18} Similarly, IEU-Ohio suggests that Environmental Advocates' additional claim regarding the availability of energy efficiency programs to advance the use of smart thermostats following the passage of HB 6 should also be dismissed. IEU-Ohio acknowledges that the Commission stated that there were smart thermostat programs currently housed in the Companies' portfolio plans; however, IEU-Ohio states that the Commission's decision to reject the smart thermostat program was primarily driven by the fact that the Commission was expecting competitive markets to foster behind-the-meter solutions to take full advantage of advanced metering capabilities. Opinion and Order at ¶ 109.

{¶ 19} The Companies add that Environmental Advocates' claim that the Commission rejected the proposed program because smart thermostats would be addressed in the next energy efficiency case is also flawed because smart thermostats are currently included in the Companies' existing energy efficiency portfolio plans (Tr. Vol. I at 211). As HB 6 extends the existing portfolio plans, including the smart thermostat programs, FirstEnergy contends this argument lacks any merit. Moreover, FirstEnergy agrees with IEU-Ohio that the Commission rejected the proposed smart thermostat program for a variety of reasons, including, but not limited to, determining that a smart thermostat program is not necessary for customers to realize the projected benefits associated with Grid Mod I and finding that Grid Mod I, as proposed in the Stipulation, facilitates and stimulates market participation consistent with state policy, Commission initiatives, and the *ESP IV Case* Opinion and Order. Accordingly, as they argue that the Commission correctly found that it would have been improper to modify the Stipulation to incorporate a \$30 million smart thermostat program, IEU-Ohio and FirstEnergy request that the application for rehearing be denied in respect to these arguments.

2. ENVIRONMENTAL ADVOCATES' ARGUMENT REGARDING CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

{¶ 20} Next, Environmental Advocates request the Commission to reconsider its findings regarding the confidentiality of negotiations in regard to the cross-examination of FirstEnergy witness Fanelli. In support of their request, Environmental Advocates offer many of the same arguments advanced in their post-hearing briefs, including that Ohio Rule of Evidence 408 allows the Commission to consider information regarding settlement discussions when the evidence is offered for a purpose other than demonstrating the validity or value of a particular claim. *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213. Environmental Advocates argue that questions regarding FirstEnergy's and Staff's negotiations prior to all-party negotiations beginning on November 1, 2018, and whether any proposed changes from intervening parties were considered, is vital to address in this case, especially when discussing the first prong of the Commission's three-prong test for the consideration of stipulations.

{¶ 21} In response, FirstEnergy initially notes that Environmental Advocates fail to cite to any legal authority supporting their argument that Ohio Rule of Evidence 408 permits the disclosure of confidential settlement discussions, adding that the rule provides a much broader protection of these negotiations than Environmental Advocates suggest. Moreover, given that the Commission is not strictly bound by the Ohio Rules of Evidence, FirstEnergy claims that the Commission reasonably exercised its discretion to prohibit cross-examination questions probing into the content of settlement discussions, consistent with prior Commission and Supreme Court of Ohio precedent. The Companies also state that parties were permitted to inquire into the logistical aspects of settlement negotiations, including the timing of meetings, the participants involved, and the Companies' efforts to contact all parties unable to attend scheduled meetings. Most importantly, FirstEnergy argues that the Commission has already addressed, and summarily rejected, these arguments. Opinion and Order at ¶¶ 16-19.

C. Commission Conclusion

{¶ 22} We will first address IEU-Ohio's arguments that the application for rehearing fails to satisfy the statutory and administrative requirements for such filings. R.C. 4903.10 states that applications for rehearing "shall set forth the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." No specific assignments of error are set forth in Environmental Advocates' application for rehearing.⁴ See *Thompson v. Columbia Gas of Ohio, Inc.*, Case No. 04-22-GA-CSS, Entry on Rehearing (July 19, 2005). The Supreme Court of Ohio has previously refused to consider matters which were not set forth with adequate specificity. *Discount Cellular* at 374-375; *The Conneaut Telephone Co. v. Pub. Util. Comm.*, 10 Ohio St.2d 269, 227 N.E.2d 409 (1967); *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 1994-Ohio-469, 638 N.E.2d 550; *City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 376-378, 86 N.E.2d 10 (1949) (where the Court stated "[i]t may fairly be said that, by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question.") Thus, we agree that the application for rehearing fails to set forth specific grounds for why the Opinion and Order is unreasonable or unlawful, is improper and should be denied.

{¶ 23} However, even if the Environmental Advocates' application for rehearing met the requirements of R.C. 4903.10, which it does not, we would deny rehearing. As to their request for reconsideration for the inclusion of a smart thermostat program in Grid Mod I, we agree with IEU-Ohio and FirstEnergy that a majority of these arguments, including whether a smart thermostat program was necessary for customers to realize the projected benefits associated with Grid Mod I, were thoroughly addressed in the Opinion and Order. Opinion and Order at ¶¶ 109-110. As both IEU-Ohio and FirstEnergy note, we included ample reasoning as to why the provision and availability of smart thermostats, as

⁴ As no assignments of error have been specifically identified, we can easily conclude that Environmental Advocates also failed to identify their assignments of error in numbered or lettered paragraphs, as required by Ohio Adm.Code 4901-1-35.

well as other behind-the-meter innovations, were issues better suited for the competitive marketplace. We continue to agree with the position of the Signatory Parties, that Grid Mod I strikes a reasonable balance of efficient regulatory initiatives and market forces to benefit customers and achieve the Commission's objectives in its grid modernization initiative and the *ESP IV Case*. Further, in response to Environmental Advocates' remaining argument regarding HB 6, we specifically stated that "substantial evidence was given in support of the fact that *smart thermostat programs are currently, and more appropriately, included in the Companies' EE/PDR Portfolio Plan*, given the fact that they offer EE/PDR benefits on a stand-alone basis, without AMI and time-varying rates." Opinion and Order at ¶ 109 (emphasis added). As such, we agree with FirstEnergy and IEU-Ohio that this additional argument lacks any merit. Thus, these arguments do not warrant rehearing.

{¶ 24} Moving on to Environmental Advocates' disagreement with the Commission's findings regarding the confidentiality of settlement negotiations, we also find that these arguments were thoroughly considered, and rejected, in our Opinion and Order. Opinion and Order at ¶¶ 14-19, 52-62.⁵ We will refrain from restating our conclusions, but quickly note that the Commission will continue to allow parties to decide the form and manner of settlement negotiations, provided parties are able to demonstrate no entire class of customers is excluded from such negotiations, as was sufficiently demonstrated in these proceedings.

{¶ 25} Accordingly, for the reasons stated above, the Commission finds that Environmental Advocates' application for rehearing should be denied.

⁵ While it is unclear from the procedurally deficient application for rehearing if Environmental Advocates are simply questioning our findings in respect to the cross-examination of FirstEnergy witness Fanelli, or additionally objecting to our determinations that the three-prong test did not require modification and that the Stipulation was the product of serious bargaining among capable, knowledgeable parties, we note our conclusion remains the same as the Commission thoroughly addressed all of these arguments and the citation references all of the relevant conclusions.

III. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That the application for rehearing filed by Environmental Advocates on August 16, 2019, be denied. It is, therefore,

{¶ 28} ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

MJA/mef

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

Summary: Entry on Rehearing that the Commission denies the application for rehearing filed by the Environmental Law and Policy Center, Natural Resources Defense Council, and Ohio Environmental Council on August 16, 2019. electronically filed by Docketing Staff on behalf of Docketing