

**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 Approval of Their)	Case No. 16-743-EL-POR
Energy Efficiency and Peak Demand)	
Reduction Program Portfolio Plans for 2017)	
through 2019.)	

**JOINT MEMORANDUM CONTRA OF THE OHIO MANUFACTURERS'
ASSOCIATION ENERGY GROUP AND THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL TO THE OHIO EDISON COMPANY'S, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY'S, AND THE TOLEDO
EDISON COMPANY'S MOTION TO STRIKE PORTIONS OF INTERVENOR
WITNESSES' TESTIMONY**

I. INTRODUCTION.

Currently pending before the Public Utilities Commission of Ohio (PUCO) is FirstEnergy's¹ application for approval of its Energy Efficiency and Peak Demand Reduction Plan (EE/PDR Plan) for implementation from 2017 through 2019. Given that this proceeding will establish the parameters for the next three years on how the EE/PDR Plan is implemented, it is imperative that the PUCO have an adequate evidentiary record to review and base its decision on. Without an adequate evidentiary record, there can be no basis for the PUCO to determine whether the EE/PDR Plan is just, reasonable, and consistent with Ohio law and the PUCO's rules. Additionally, without proper support and justification for the proposal or the opportunity to challenge it, there can be no

¹"FirstEnergy" refers collectively to the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

assurances that the benefits promised to customers under the EE/PDR Plan are justified by the costs that customers pay for the EE/PDR Plan.

The September 23, 2016 Motion to Strike (Motion) filed by FirstEnergy is antithetical to these important objectives and in any event is premised on a flawed interpretation of the doctrine of collateral estoppel. In its Motion, FirstEnergy urges the PUCO to strike the pre-filed testimony submitted on behalf of the Ohio Manufacturers' Association Energy Group (OMAEG) and the Office of the Ohio Consumers' Counsel (OCC) (collectively, Joint Intervenors) with respect to the following issues covered in its EE/PDR Plan: (1) the goal to achieve 800,000 MWh of energy efficiency savings annually; (2) the eligibility of all cost-effective programs for shared savings; and (3) the establishment of the \$25 million after-tax shared-savings cap (collectively, the Contested Issues). OMAEG witness John Seryak's pre-filed testimony addresses topics 2 and 3.² OCC witness Richard Spellman's pre-filed testimony addresses topics 1, 2, and 3.³

If FirstEnergy's request to exclude the Joint Intervenors' pre-filed testimony on the Contested Issues is granted, it will thwart parties' due process rights to challenge the filed EE/PDR Plan and will deprive the PUCO of valuable information bearing directly on whether the EE/PDR Plan is in the best interests of customers. To ensure that customers' interests are adequately considered in this proceeding, the PUCO should deny FirstEnergy's motion to strike and allow the pre-filed testimony submitted by the Joint Intervenors to stand as filed.

² Pre-filed Testimony of John Seryak on Behalf of OMAEG (September 13, 2016).

³ Pre-filed Testimony of Richard Spellman on Behalf of OCC (September 13, 2016).

II. DISCUSSION.

A. FirstEnergy cannot meet all the elements necessary to invoke the doctrine of collateral estoppel.

FirstEnergy claims that the Joint Intervenors' pre-filed testimony addressing the Contested Issues should be stricken under a theory of collateral estoppel because, according to FirstEnergy, the PUCO decided the Contested Issues in its March 31, 2016 Opinion and Order in Case No. 14-1297-EL-SSO (*ESP IV Order*),⁴ which modified and approved FirstEnergy's fourth electric security plan (ESP IV).⁵ The doctrine of collateral estoppel provides that a "fact or point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different."⁶ "Essentially, collateral estoppel prevents parties from relitigating facts and issues that were fully litigated in a previous case."⁷

For the reasons discussed below, FirstEnergy cannot meet all the elements required to establish the applicability of collateral estoppel. Its Motion should therefore be denied and the Joint Intervenors' pre-filed testimony should be permitted to stand as filed to ensure that the PUCO has an adequate evidentiary record upon which to base its decision.

⁴*In the Matter of the Application 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 R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order (March 31, 2016) (*ESP IV Order*).

⁵ FirstEnergy Motion, Memorandum in Support at 1.

⁶*Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998).

⁷*Glidden Co. v. Lumbersmens Mut. Cas. Co.*, 112, Ohio St.3d 470, 2006-Ohio-6553, ¶ 46.

1. The PUCO did not decide the Contested Issues in the *ESP IV Order*.

The plain language of the *ESP IV Order* belies FirstEnergy's assertion that the Contested Issues were previously decided. At most, the PUCO concluded in its *ESP IV Order* that it was reasonable for FirstEnergy to include the Contested Issues in a future application for approval of its EE/PDR Plan.

As FirstEnergy admits, each Contested Issue is located under Section V.E of the Third Supplemental Stipulation and Recommendation (Stipulation), entitled "Resource Diversification."⁸ Under the "Resource Diversification" heading, the Stipulation states among other things that (1) FirstEnergy's "EE/PDR Portfolio Plan offerings would strive to achieve over 800,000 MWh of energy savings annually, subject to customer opt outs"; (2) "cost effective energy efficiency programs shall be eligible for shared savings"; and (3) the "after-tax annual shared savings cap shall be increased from \$10 million to \$25 million and shall continue to be recovered in Rider DSE."⁹

In its *ESP IV Order*, the PUCO addressed the commitments made under the "Resource Diversification" heading and explicitly stated that it was not deciding these issues:

OCC/NOAC also contend that the provisions for grid modernization and *resource diversification* violate regulatory principles because they lack details. However, the Stipulations merely require the Companies to file, and support, applications in separate proceedings for grid modernization and *resource diversification*. All appropriate details will be addressed in the applications or during the

⁸ FirstEnergy Motion, Memorandum in Support at 3.

⁹ In the Matter of the Application 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 R.C. 4928.143 in the Form of an Electric Security Plan, Case No. 14-1297-EL-SSO, Third Supplemental Stipulation and Recommendation at 11-12 (December 1, 2015).

Commission proceedings. Any interested party will have an opportunity to intervene in the separate proceedings and raise any relevant issues, and *we will rule on the applications based solely on the evidence in the record of the separate proceeding.*¹⁰

This passage unequivocally demonstrates that the Contested Issues, all of which fall under the “Resource Diversification” heading, were *not* decided in the *ESP IV Order*. This proceeding—not the ESP IV proceeding—is precisely the proceeding the PUCO envisioned when it stated that it would rule on issues pertaining to “Resource Diversification” in a separate proceeding and would base its decision on the “evidence in the record of the separate proceeding.”¹¹ In other words, the PUCO plainly recognized the rights of the Joint Intervenors to create an evidentiary record in the current proceeding to address and rebut any assertions made by FirstEnergy related to the Contested Issues.

Collateral estoppel prevents the relitigation of issues that were “litigated and decided” in a prior case.¹² The *ESP IV Order* makes clear that the PUCO did not consider the Contested Issues “litigated and decided” in the ESP IV case. The PUCO’s statement that it would not decide the Contested Issues until a separate proceeding where interested parties would have the opportunity to intervene and “raise any relevant issues” directly contradicts any claims of collateral estoppel.¹³ Accordingly, collateral estoppel does not apply and FirstEnergy’s motion to strike should be denied.

¹⁰*ESP IV Order* at 111 (emphasis added).

¹¹ *Id.*

¹²*In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 40.

¹³*ESP IV Order* at 111.

2. Collateral estoppel does not apply because the *ESP IV Order* is not final.

The ESP IV Order is not final because it is currently pending on rehearing. Specifically, in a May 11, 2016 Entry on Rehearing in Case No. 14-1297-EL-SSO (*Rehearing Entry*), the PUCO granted OMAEG's, OCC's, and other intervenors' applications for rehearing, explaining "that sufficient reasons have been set forth by the parties to warrant further consideration of the matters specified in the applications for rehearing."¹⁴ Given that the *ESP IV Order* may be subject to further PUCO modifications on rehearing, including matters regarding the Contested Issues, FirstEnergy cannot point to a final appealable order. Without a final appealable order, collateral estoppel does not apply. "The doctrine of collateral estoppel cannot be invoked when there is no final order."¹⁵ "The issues must have been determined by a final appealable order."¹⁶

FirstEnergy cites a laundry list of cases in support of the proposition that the "finality" prong is met here because the *ESP IV Order* is not "avowedly tentative."¹⁷ The *Rehearing Entry*, however, expressly states that the *ESP IV Order* is currently under further consideration. In other words, there may be additional changes to the structure of FirstEnergy's ESP IV. While it remains to be seen what these potential modifications could be, it is possible that the PUCO will reconsider the Contested Issues and the context in which it addressed them, including the decision to defer approval to a future, separate proceeding. The potential for further PUCO modifications to the Contested

¹⁴ Entry on Rehearing at 3, Case No. 14-1297-EL-SSO (May 11, 2016).

¹⁵ *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112, Ohio St.3d 470, 2006-Ohio-6553, ¶ 46.

¹⁶ *Id.* at ¶ 45.

¹⁷ FirstEnergy Motion to Strike at footnote 56.

Issues plainly defeats FirstEnergy's notion that the *ESP IV Order* is final for the purposes of collateral estoppel.

Lastly, none of the authority cited by FirstEnergy in support of its "finality" argument is controlling. The Supreme Court of Ohio exercises revisory jurisdiction over the PUCO's decisions.¹⁸ FirstEnergy, however, cites various federal district courts, many outside of Ohio, and no PUCO orders or Ohio Supreme Court decisions in support of its argument that an order for which rehearing has been granted for further consideration is a final order. Under binding precedent from the Supreme Court of Ohio, collateral estoppel does not apply if there is no final appealable order.¹⁹ That simple principle is more than sufficient to refute any countervailing principles cited in FirstEnergy's non-binding authority.

3. Joint Intervenors did not have a full and fair opportunity in the ESP IV proceeding to litigate the Contested Issues contained in FirstEnergy's EE/PDR Plan.

FirstEnergy's collateral estoppel argument is also flawed because the Joint Intervenors did not have a full and fair opportunity to litigate the Contested Issues of the EE/PDR Plan in the ESP IV proceeding. Collateral estoppel does not apply if a party did not have a full and fair opportunity to litigate the issue in the first action.²⁰

The Contested Issues that FirstEnergy seeks to preclude testimony on were negotiated through a Stipulation that was filed before the EE/PDR Plan was even docketed. The PUCO's *ESP IV Order* that modified and approved FirstEnergy's ESP IV was issued on March 31, 2016. Two weeks later, on April 15, 2016, FirstEnergy filed its

¹⁸ Ohio Const. Art. IV, § 2(B)(2)(d) and R.C. 4903.13.

¹⁹ *Glidden Co.*, 2006-Ohio-6553, ¶ 45.

²⁰ *State ex. rel. Fraternal Order of Police v. Tegreene*, 58 Ohio St.2d 235, 236, 389 N.E.2d 851 (1979).

EE/PDR Plan. Accepting the logic of FirstEnergy’s argument, the Joint Intervenors were required to evaluate the impact of the Contested Issues on the EE/PDR Plan before even seeing what the contours of the EE/PDR plan would look like. That is contrary to the Supreme Court of Ohio’s directive that the interests of “fundamental fairness” should be considered when evaluating the doctrine of collateral estoppel.²¹ To hold that the Joint Intervenors are barred from testifying on the Contested Issues before even seeing how the Contested Issues would be integrated into the EE/PDR Plan would make a mockery of the “full and fair opportunity to litigate” prong of the collateral estoppel test. A reasonable application of the doctrine of collateral estoppel must account for the way in which the Contested Issues were first proposed.²² The PUCO envisioned that the Contested Issues would be fully vetted in a separate proceeding that followed the issuance of the *ESP IV Order*.

The overriding purpose of an ESP proceeding is for an electric distribution utility to establish a “standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.”²³ An ESP proceeding may provide for the inclusion of other features, but at a minimum the ESP “shall include provisions relating to the supply and pricing of electric generation service.”²⁴ In contrast to an ESP proceeding, in an EE/PDR proceeding, the electric distribution utility “shall design and propose a comprehensive energy efficiency and peak-demand reduction program portfolio, including a range of

²¹*Jacobs v. Teledyne, Inc.*, 39 Ohio St.3d 168, 170-171, 529 N.E.2d 1255 (1988).

²²*Cf.*, *Id.* at 171 (“While res judicata does apply to administrative proceedings, it should be applied with flexibility.”).

²³ R.C. 4928.141(A).

²⁴ R.C. 4928.143(B)(1).

programs that encourage innovation and market access for cost-effective energy efficiency and peak-demand reduction for all customer classes, which will achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.”²⁵

The distinction between the purpose of an ESP proceeding and an EE/PDR proceeding underscore the inherent problem with FirstEnergy’s argument that, if adopted, would essentially require the intervenors to litigate an EE/PDR proceeding in an ESP proceeding. As the text of the statutes and regulations make clear, an ESP proceeding and an EE/PDR proceeding accomplish markedly different purposes. Therefore, it is just and reasonable to permit the Joint Intervenors to testify about how the Contested Issues will impact the implementation of the EE/PDR Plan in this proceeding.

III. CONCLUSION

FirstEnergy’s Motion should be denied and the pre-filed testimony submitted on behalf of the Joint Intervenors should be allowed to stand as filed. Denying FirstEnergy’s Motion will ensure that the PUCO has an adequate evidentiary record to base its decision on and will enable the PUCO to determine whether FirstEnergy’s proposal is in the best interest of customers. Moreover, the PUCO did not conclusively decide the Contested Issues in the *ESP IV Order* and the *ESP IV Order* is pending on rehearing thus collateral estoppel does not apply. There is no basis to strike the Joint Intervenors’ testimony.

²⁵Ohio Adm. Code 4901:1-39-04(E).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on September 30, 2016.

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Summary: Memorandum Joint Memorandum Contra Of The Ohio Manufacturers' Association Energy Group And The Office Of The Ohio Consumers' Counsel To The Ohio Edison Company's, The Cleveland Electric Illuminating Company's, And The Toledo Edison Company's Motion To Strike Portions Of Intervenor Witnesses' Testimony

electronically filed by Debra A Gaunder on behalf of Ohio Manufacturers' Association Energy Group