

**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 Energy) Case No. 16-0743-EL-POR
Efficiency and Peak Demand Reduction Program Portfolio)
Plans for 2017 through 2019.)

**THE OHIO HOSPITAL ASSOCIATION'S REPLY TO THE COMPANIES'
OPPOSITION TO MOTION TO COMPEL AND REQUEST FOR IMMEDIATE
PRE-HEARING CONFERENCE**

I. OHA should be allowed to determine FirstEnergy's rationale for terminating OHA as contract administrator because the administrator contracts are discussed in FirstEnergy's portfolio plans.

FirstEnergy's decision to use certain contract administrators is one part of the Revised EE/PDR Portfolio Plans. OHA is specifically listed as a potential administrator in the plans. OHA should be able to ask questions regarding FirstEnergy's decision not use OHA as an administrator. It is common in portfolio cases for parties to ask why the company included a program in its portfolio or why it structured its portfolio in a certain manner. For example, in FirstEnergy's 2013-2015 portfolio case (Case No. 12-2190-EL-POR), the parties were allowed to ask the following questions of FirstEnergy's witnesses without objection:

- Why didn't the companies require that commercial and industrial customers transfer ownership of energy efficiency credits in order to participate in the companies C&I programs. Vol. I, Tr. 45.
- Why didn't the companies bid projected energy efficiency projects into the PJM base residual auction. Vol. I, Tr. 47-48.
- Why did the companies decide to use energy efficiency kits in its portfolio? Vol. I, Tr. 57.

- Why did the companies choose to budget certain amounts for their demand response programs? Vol. II, Tr. 336.
- Why didn't the companies partner with other electric distribution utilities to implement their energy efficient products program? Vol II. Tr. 370.
- Why were there increases in the projected program budget amounts? Vol. III, Tr. 441.
- Why did the companies believe they should receive shared savings for meeting the benchmark rather than exceeding the benchmark? Vol. III, 483.

These are just a few questions that were raised during the hearing in Case No 12-2190-EL-POR that were intended to determine FirstEnergy's thought-process while structuring its portfolio. The reason why FirstEnergy chooses to (or chooses not to) implement a program is relevant and important for the Commission's analysis. Parties should not be prevented from asking a utility its rationale for its decision simply because the utility claims it had a contractual or other "right" to make this decision. This would set a very dangerous precedent. Every utility could simply claim that "why" it chose to act is irrelevant unless the action was unlawful or precluded by contract.

II. FirstEnergy's breach of contract argument is a red-herring.

This is not a breach of contract case. The issue before the Commission is whether the Revised EE/PDR Portfolio Plans are just and reasonable and whether the Stipulation meets the three-pronged test. FirstEnergy contends that the reasons why it terminated OHA are irrelevant because it had the discretion to terminate OHA pursuant to the terms of the contract. OHA does not concede this fact. However, assuming *arguendo* that FirstEnergy had the discretion to terminate OHA, that does not mean its decision benefits the public interest. For example, under the administrator contract, it was OHA's obligation to help encourage hospitals to participate in FirstEnergy's portfolio programs and facilitate hospital participation. If OHA performed its obligations as required but was terminated for no reason, this is relevant to the reasonableness of

FirstEnergy's plans with respect to hospital participation. The Commission would consider such evidence relevant even if FirstEnergy had a contractual right to terminate OHA. The Commission's ability to examine the reasonableness of a utility's decision is not limited by a utility's contractual rights, and Commission should avoid establishing such a rule in this case.

III. Conclusion.

The Commission should grant OHA's motion to compel. No matter what contractual right it believes is has, FirstEnergy should not be allowed to prevent parties from asking if the companies have any rationale or basis for their decisions.

Respectfully submitted on behalf of
THE OHIO HOSPITAL ASSOCIATION



Richard L. Sites
Regulatory Counsel
OHIO HOSPITAL ASSOCIATION
155 East Broad Street, 3rd Floor
Columbus, OH 43215-3620
Telephone:(614) 221-7614
Facsimile: (614) 221-4771
Email: rick.sites@ohiohospitals.org

and

Matthew W. Warnock
Dylan F. Borchers
Devin D. Parram
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone:(614) 227-2388; 227-4914
Facsimile: (614) 227-2390
E-mail: mwarnock@bricker.com
dborchers@bricker.com
dparram@bricker.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties of record listed below this 6th day of January 2017 *via* electronic mail.



Devin D. Parram

eostrowski@firstenergycorp.com
christopher.healey@occ.ohio.gov
cmooney@ohiopartners.org
tdougherty@theOEC.org
jfinnigan@edf.org
mfleisher@elpc.org
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylerncohn@BKLawfirm.com
paul@carpenterlipps.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
bojko@carpenterlipps.com
ghiloni@carpenterlipps.com
sechler@carpenterlipps.com
gpolous@enernoc.com
Callwein@keglerbrown.com
Mpritchard@mwncmh.com
dstinson@bricker.com
rdove@attorneydove.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/6/2017 12:29:45 PM

in

Case No(s). 16-0743-EL-POR

Summary: Reply OHA Reply to Companies Memo in Opposition to Motion to Compel electronically filed by Mr. Devin D. Parram on behalf of Ohio Hospital Association