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

THE OHIO HOSPITAL ASSOCIATION'S INITIAL POST-HEARING BRIEF

I. INTRODUCTION

For years, the Ohio Hospital Association ("OHA") has successfully performed as an administrator in Ohio Edison Company's, The Cleveland Electric Illuminating Company's, and The Toledo Edison Company's ("FirstEnergy") energy efficiency/peak demand reduction ("EE/PDR") portfolio programs. FirstEnergy leveraged OHA's relationships with its member hospitals and experience with hospitals to increase hospital participation in FirstEnergy's EE/PDR programs. This resulted in more hospitals participating in FirstEnergy's programs, which helped FirstEnergy meet its statutory obligations. FirstEnergy was not alone in working with OHA to implement EE/PDR programs. Ohio Power Company d/b/a AEP Ohio and Dayton Power and Light Company ("DP&L") also use OHA as an administrator of programs, which has benefited those utilities while also benefitting the hospitals they serve.

Despite OHA's years of experience successfully administering EE/PDR programs for hospitals, FirstEnergy has terminated OHA as an administrator. Not only has FirstEnergy abruptly abandoned its commitment to work with OHA to target hospitals for participation in FirstEnergy's EE/PDR program, but it also fails to explain why it suddenly reversed course. While FirstEnergy claims it has the "discretion" to terminate OHA for any reason (or for no reason at all), this rash decision negatively impacts hospitals in FirstEnergy's territories. OHA is better situated than any other organization to help target hospitals for participation in electric distribution utilities' EE/PDR programs. This is exactly why FirstEnergy chose OHA as an administrator in the first place, and why AEP Ohio, DP&L, and Duke Energy Ohio, Inc. ("Duke") continue to work with OHA.

FirstEnergy's decision to terminate OHA's administrator contract for no reason is unjust and unreasonable. Hospitals in FirstEnergy's territory are less likely to learn about and/or participate in FirstEnergy's programs due the termination of OHA. The Commission should order FirstEnergy to execute an administrator agreement with OHA, which would align FirstEnergy's proposed plans with its prior EE/PDR plans and other Ohio EDUs' EE/PDR plans, while also benefitting those hospitals served by FirstEnergy.

II. BACKGROUND

Pursuant to a Stipulation entered into in Case No. 08-0935-EL-SSO, FirstEnergy committed to using specific organizations as "administrators" in their portfolio programs.[1] The Stipulation from Case No. 08-0935-EL-SSO stated that the "Ohio Hospital Association will serve as administrator for the class of customers compromising hospitals in the service territories of [FirstEnergy]."[2] FirstEnergy uses administrators to "educate their respective customer segments" and to "'market' various programs being offered by [FirstEnergy] to achieve the program target and objectives."[3]

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[1] Stipulation and Recommendation ("Stipulation"), Exhibit B ("Proposed EE/PDR Plan") at pg. 11; Joint Ex. 1.

[2] *FirstEnergy*, Case No. 08-935-EL-SSO, Stipulation and Recommendation at pg. 26 (February 19, 2009); *FirstEnergy*, Case No. 08-935-EL-SSO Second Opinion and Order (March 25, 2009).

[3] Stipulation, Exhibit B at pg. 11; Joint Ex. 1.

The terms and conditions under which administrators perform their work were set forth in administrator agreements approved by the Commission in Case No. 09-553-EL-EEC. In that case, FirstEnergy stated in its application that administrators would perform the following tasks: (1) commit to a reasonable level of energy efficiency and peak demand reduction on behalf of their members; (2) agree to a reasonable administration fee; and (3) agree to track and provide documentation evidencing the incremental energy reduction and actual kWh savings achieved.[4] OHA's contract with FirstEnergy was one of the administrator agreements approved by the Commission on December 9, 2009. FirstEnergy continued to use OHA as an administrator for years and continued to provide funding for OHA so that it could successfully target hospitals for participation in FirstEnergy's programs.[5]

During FirstEnergy's last portfolio case (Case No. 12-2190-EL-POR), FirstEnergy witness Edward Miller testified regarding OHA's ability to successfully target member hospitals for participation in FirstEnergy's programs and discussed OHA's experience working with member hospitals.[6] Mr. Miller adopted OHA's recommendation regarding expanding the scope of ASHRAE audits for health facilities, which provided "[FirstEnergy] with more opportunities to generate savings towards their statutory targets."[7] In addition, Mr. Miller testified that FirstEnergy would earmark an additional $50,000 over the term of the portfolio plans to enable OHA to perform ENERGYSTAR benchmarking for member hospitals.[8] Mr. Miller testified that

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[4] *FirstEnergy*, Case No. 09-553-EL-EEC, Application for Approval of Administrator Agreements and Statements of Work at pg. 2 (June 30, 2009).

[5] *FirstEnergy*, Case No. 10-0388-EL-SSO, Opinion and Order at pg. 14 (August 25, 2010); *FirstEnergy*, Case No. 12-1230-EL-SSO, Opinion and Order at pg. 13 (July 18, 2012).

[6] Rebuttal Testimony of Edward C. Miller, Case No. 12-2190-EL-POR, at pg. 6-7; OHA Ex. 2.

[7] *Id.* at 7.

[8] *Id.* at 6-7.

FirstEnergy agreed that this approach would provide it with "additional savings opportunities" because of OHA's experience working with hospitals and its commitment to its member hospitals.[9]

When FirstEnergy initially filed its EE/PDR Plan in this proceeding, FirstEnergy indicated that OHA was on the list of potential administrators.[10] FirstEnergy entered into a Stipulation with some parties while the case was pending, but OHA was not one of these parties. Then, shortly before the Stipulation was filed, FirstEnergy notified OHA that it was being terminated as administrator.[11] The only basis upon which FirstEnergy relies for terminating OHA is Section 11 of the administrator agreement.[12] FirstEnergy has not indicated that OHA was terminated for failing to perform any of its obligations under the terms of the administrator agreement. Rather, FirstEnergy has indicated that it terminated OHA simply because it has the "discretion" to do so. No other rationale has been provided for suddenly ending OHA's role as administrator after all these years.

III. LAW AND ARGUMENT

A. The Commission's standard for examining stipulations.

The Commission has traditionally used a three-prong test when considering stipulations, which has been endorsed by the Ohio Supreme Court in *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992). The test considers:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

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[9] *Id.* at 7.

[10] Stipulation, Exhibit B at pg. 89; Joint Ex. 1.

[11] December 1, 2016 Notice to Terminate Program Administrator Agreement ("Notice to Terminate"); OHA Ex. 1.

[12] Vol. I, Tr. 107; Notice to Terminate, OHA Ex. 1.

2. Does the settlement package violate any important regulatory principle or practice?

3. Does the settlement, as a package, benefit ratepayers and the public interest?

As discussed below, the Stipulation fails the three-prong test because FirstEnergy's decision to terminate OHA as administrator does not benefit ratepayers or the public interest. Specifically, hospitals in FirstEnergy's territory are less likely to participate in and benefit from FirstEnergy's programs now that OHA has been terminated an administrator.

B. The Stipulation is not in the public interest because the Proposed EE/PDR Plan removes OHA from the role of administrator, which reduces the likelihood of hospitals participating in FirstEnergy's programs.

FirstEnergy has used certain entities as administrators for its EE/PDR programs for a number of years. These administrators are uniquely qualified to target their respective customer groups. Because of OHA's relationship with hospitals throughout Ohio, it is in the best positon to educate hospitals on utilities' EE/PDR programs and help hospitals obtain the maximum benefits from these programs. OHA is a nonprofit trade association comprised of 220 hospitals, 68 of which are served by FirstEnergy. Virtually every hospital in FirstEnergy's service area is a member of OHA. This is why FirstEnergy initially "committed" to using OHA as administrator and continued to use OHA as its administrator for years. And this is the same reason why every other electric distribution utility in Ohio has agreed to work with OHA to administer their EE/PDR programs and target OHA's member hospitals. FirstEnergy even listed OHA as a potential administrator when it initially filed its EE/PDR Plan in this case.

FirstEnergy, however, abruptly abandoned its "commitment" to work with OHA as an administrator and terminated OHA's administrator contract. FirstEnergy failed to provide any explanation regarding why OHA was terminated as administrator except for claiming it has the "discretion" to terminate OHA for no reason whatsoever. It is unreasonable for FirstEnergy to arbitrarily terminate an aspect of its EE/PDR programs that has benefited hospitals for years. FirstEnergy has presented almost no evidence whatsoever that explains how it intends to *specifically* target hospitals now that it has terminated OHA as administrator. While FirstEnergy may claim that it will use other vendors or contractors to work with hospitals, there is no evidence that these other entities have any experience working with hospitals or have any relationship with Ohio hospitals. OHA, on the other hand, has been actively working with hospitals for years to increase their participation in EDUs' EE/PDR programs. In fact, FirstEnergy witness Miller testified in Case No. 12-2190-EL-POR that OHA's experience and commitment to hospitals increases hospital participation in FirstEnergy's EE/PDR programs. There is no evidence that FirstEnergy's other contractors or vendors have had the same success as OHA.

Hospitals in FirstEnergy's territory support OHA's participation as program administrator. The Ohio Society for Healthcare Facilities Management ("OSHFM") has indicated its support for OHA[13]. Some OSHFM board members include Bellevue Hospital, Summa Health System, and Akron General Medical Center. MetroHealth also indicated its support for OHA in this case.[14] FirstEnergy's baseless termination of OHA as administrator results in an EE/PDR plan that fails to address the specific interest and needs of hospitals in FirstEnergy's territory.

C. FirstEnergy's failure to align its plans with other Ohio electric distribution utilities' plans disserves FirstEnergy hospitals and the public these hospitals serve.

FirstEnergy's decision to terminate OHA as an administrator is at odds with every other Ohio electric distribution utilities' current EE/PDR plan or proposed EE/PDR plan. The

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[13] See Public Comment filed by OSHFM on February 21, 2017.

[14] See Public Comment filed by MetroHealth on February 21, 2017.

Commission's rules demonstrate that EDUs should attempt to align their EE/PDR programs when possible. Ohio Administrative Code ("OAC") Section 4901:1-39-04(C)(3) states that the electric utility's program portfolio plan shall include a "description of attempts to align and coordinate programs with other public utilities' programs."

In its 2012-2014 EE/PDR Plan, AEP Ohio agreed to work collaboratively with OHA and provide funding to OHA so that it could market AEP Ohio's programs to hospitals and expand participation of hospitals in EE/PDR programs.[15] In its 2017-2020 EE/PDR Plan, AEP Ohio agreed to continue working with OHA to maximize hospital participation in EE/PDR programs.[16] In its 2013-2015 EE/PDR plan, DP&L committed to providing funding to OHA so that it could administer EE/PDR programs for its member hospitals.[17] In addition, DP&L filed a stipulation and recommendation in its pending portfolio case which extends its commitment to using OHA as an administrator.[18] Further, Duke has made a similar commitment to OHA in the stipulation filed in its pending portfolio case.[19]

It is clear that all of Ohio's EDUs, except for FirstEnergy, recognize the value of working with OHA to target hospitals for participation in EE/PDR programs. While all the other EDUs are seeking to leverage OHA's relationship with hospitals to implement cost-effective EE/PDR programs, FirstEnergy has decided to remove OHA from the role as administrator even though

[15] *Columbus Southern Power*, 11-5568-EL-POR et al., Opinion and Order at pg. 13 (March 21, 2012). AEP Ohio elected to continue its 2012-2014 Plan unchanged through 2016 under S.B. 310 and, therefore, its plan was not subject to the freeze.

[16] *Ohio Power Company*, Case No. 16-0574-EL-POR, Opinion and Order (January 18, 2017) and *Ohio Power Company*, Case No. 16-0574-EL-POR, Stipulation and Recommendation at pgs. 9-10 (December 9, 2016).

[17] *Dayton Power and Light Company*, Case No. 13-0833-EL-POR, Opinion and Order at 5-6 (December 4, 2013). DP&L elected to continue its 2013-2015 Plan unchanged through 2016 under S.B. 310 and, therefore, its plan was not subject to the freeze.

[18] *Dayton Power and Light Company*, Case No. 16-0649-EL-POR, Stipulation and Recommendation at 6-7 (December 13, 2016).

[19] *Duke*, Case No. 16-576-EL-POR Amended Stipulation and Recommendation at pgs. 15-16 (January 27, 2017).

FirstEnergy cannot identify a single legitimate reason for terminating OHA. Although FirstEnergy may claim it has the "discretion" to contract with whomever it chooses, it is unreasonable for it to abandon a portion of its plans which has benefited hospitals unless it has some legitimate basis. Hospitals in FirstEnergy's territory will be less inclined to participate in the EE/PDR program, which means these hospitals will forego projects that provide opportunities to reduce energy costs. In these challenging economic times, any opportunity for hospitals to reduce energy costs is critical to hospitals' financial ability to provide critical health services to the public. OHA is keenly aware of this goal for hospitals, and has been successfully working towards it for years. The Commission should deny FirstEnergy's attempt to remove OHA from the critical role it served in for years on the behalf of its member hospitals.

IV. CONCLUSION

Based on the foregoing, the Commission should deny the Stipulation and modify the Stipulation so that FirstEnergy is required to contract with OHA as administrator**.**

Respectfully submitted on behalf of
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties of record listed below this 21st day of February 2017 *via* electronic mail.

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