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 Distributed 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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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I. Introduction

In this case, the Public Utilities Commission of Ohio ("Commission") is addressing an amended stipulation that will refund several million dollars of tax savings to customers of the FirstEnergy electric distribution utilities ("FE EDUs") and authorize the collection of funding for grid modernization. In initial briefs, several parties opposing the amended stipulation recommend a $30 million increase in the cost of the grid modernization plan for smart thermostats. Initial Brief of the Smart Thermostat Coalition (Mar. 1, 2019)

("STC Initial Brief"); Initial Brief of the Environmental Law and Policy Center, Natural Resource Defense Council, and Ohio Environmental Council (Mar. 1, 2019) ("ELPC Initial Brief"). One of these parties also recommends a revision to the three prong test that has guided Commission review of settlements for many years. ELPC Initial Brief at 16-17. The Commission should not adopt either recommendation.[1]

II. The Commission should reject the recommendation to increase the cost of the Distribution Modernization Plan by up to $30 million for smart meter rebates

STC and ELPC request the Commission to approve an additional commitment to support rebates for smart thermostats. STC Brief, *passim*; ELPC Brief at 28-36. The rebates would be used to implement as many as 210,000 installations in the FE EDUs' service territories. STC Initial Brief at 20. The estimated cost would be up to $30 million over three years for the rebates and administrative costs. *Id*. According to STC, this additional support is necessary to realize the benefits of the advanced meters. *Id*. at 6-14. The Commission should reject this request to modify the Stipulation because meter rebates are already incorporated into current rates, and this substantial expansion would be inconsistent with PowerForward principles.

The current energy efficiency and peak demand response ("EE/PDR") plans for the FE EDUs include smart meter support. *In the Matter of the Application of the Ohio Edison, 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 to 2019*, Case No. 16-743-EL-POR, Opinion and Order at 12 (Nov. 21, 2017), appeal pending, Sup. Ct. Case No. 18-379 ("*FE POR Case*"). Under the plans,

[1] Industrial Energy Users-Ohio reply brief is limited to two issues. Its failure to oppose any other position raised in Initial Briefs should not be taken as support.

the Commission has already made the determination that the current level of funding is cost effective based on independent review. As is apparent from the inclusion of smart meter support in the EE/PDR portfolio plan, this matter has been and is better addressed in the context of the EE/PDR process.

The significant expansion of the support for smart thermostats would also circumvent a Commission's decision to constrain the support of EE/PDR costs through a cost cap. Under the order approving the current portfolio plan through 2019, the Commission has imposed a cap on EE/PDR programs of four percent of the FE EDU's 2015 total sales to ultimate customers as reported on FERC Form 1. *Id.* at 23. Approval of additional funding for thermostat rebates in addition to the EE/PDR spending would effectively increase customer rates in violation of the cap the Commission has imposed.

Further, approval of this requested funding would undermine the determination in the PowerForward proceeding to allow market mechanisms to frame the investment in behind-the-meter solutions to take advantage of advanced metering capabilities. While STC is correct that the Commission in the PowerForward report recognized that EDUs may request rebate programs for enabling technologies, STC Initial Brief at 15, it also established a general policy encouraging private investment in behind-the-meter products and concluded that "the current retail marketplace structure should prevail." PowerForward: A Roadmap to Ohio's Electricity Future at 23 (Aug. 29, 2018). Several reasons support this hands-off approach:

> Arguably, the pursuit of an enhanced customer experience through innovation is more likely to succeed in the competitive marketplace than in a regulated environment. Assuming utility deployment of foundational assets through an architectural construct that provides access to non-utilities, innovative products and services can then be introduced. The introduction of nonregulated capital investment would mitigate the need for

> economic regulation and recovery, and more equitably allocate costs to those consumers who find net value in the product or service offered. If barriers to market entry are minimized, ample incentive should exist to attract non-EDU participants into the market.

Id.

The conditions for successful implementation of privately funded investment in smart thermostats is evident in this case. First, EDUs are positioned to begin the rollout of the advanced meters necessary for successful implementation of products such as smart thermostats. Second, nonregulated capital is investing in smart thermostats such that there is little need for economic regulation and recovery. Under these conditions, consumers will be able to elect to purchase the products and services that best meet their needs. *See* R.C. 4928.02(B).

Despite its preference for market-based investment for behind-the-meter products to take advantage of advanced meters, the Commission identified two social policy justifications that would allow an EDU to participate in providing behind-the-meter applications. EDU participation might be justified due to social inequity in deployment or an instance in which the marketplace has not developed sufficiently. *Id.* at 23-24. Neither circumstance has been demonstrated in this case. There is no evidence that the provision of meters is subject to disparities in roll-out. Further, the presence of the STC members is evidence of the substantial private investment in smart meters that is already taking place. STC Ex. 4 at 1. On this record, therefore, the Commission should defer to private investment instead of regulatory fiat to expand the deployment of smart meters beyond what has been currently authorized.

III. The Commission should reject ELPC's proposed revision to the three prong test for review of a contested stipulation

Under the three prong test, parties supporting a stipulation must establish that the settlement is the product of serious bargaining among capable, knowledgeable parties, that the settlement, as a package, benefits ratepayers and the public interest, and that the settlement does not violate any important regulatory principle or practice. *See, e.g., FE POR Case*, Opinion and Order at 14. The Ohio Supreme Court has endorsed the use of this test. *Industrial Energy Consumers of Ohio Power Co. v. Pub. Utils. Comm'n of Ohio*, 68 Ohio St. 3d 559 (1994).

As part of its opposition to approval of the Stipulation, ELPC recommends that the Commission should revise its three prong test and include "a different standard of review" so that contested stipulations "will be subject to the original statutory standard established for their respective subject-matter." ELPC Initial Brief at 16-17. In support of its recommendation, ELPC initially states it cannot locate a case in which the Commission did not approve a stipulation because it was not the product of serious bargaining among knowledgeable parties. ELPC Initial Brief at 16. According to ELPC, the fact that it cannot locate such a case "speaks to the problem for parties facing the choice between signing onto a settlement without a chance for meaningful input or taking their chances in litigation, a dilemma illustrated by this case." *Id.* Additionally, it states that other agencies follow a procedure that incorporates a finding that a contested settlement meets state or federal law requirements. *Id*. at 17. Because neither argument compels a revision of the three prong test, the Commission should decline ELPC's invitation to change it.

The alleged take-it-or-leave-it dilemma identified by ELPC is not demonstrated in this case or others. In this case, several parties unable to support the stipulation filed on

November 9, 2018 continued to discuss changes to the settlement and eventually reached terms that were acceptable to them. That revised agreement was filed on January 25, 2019 and is the subject of this hearing. Recent experience in other proceedings has been similar. *See, e.g, 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 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO (supplemental stipulations filed after the initial stipulation was filed) ("*FE ESP Case*"). Thus, the alleged "dilemma" does not present some sort of insurmountable barrier to parties seeking to reach a settlement of case issues.

The fact that other states have explicitly adopted an approach to contested settlements that is alleged to be different also does not warrant a change because Ohio law already requires the same approach. As the Ohio Supreme Court concluded in a 2004 case addressing the Commission's authority to terminate the market development period under Senate Bill 3 for Monongahela Power Company, the Commission cannot exceed its statutory authority under the guise of a settlement. *Monongahela Power Co. v. Pub. Utils. Comm'n of Ohio*, 104 Ohio St. 3d 571, 577 (2004).

Further, the Commission reviews the lawfulness of the Stipulation under the currently stated test much in the same manner as that requested by ELPC. Under the second and third prongs, the Commission must find that the settlement, as a package, benefits ratepayers and the public interest, and that the settlement does not violate any important regulatory principle or practice. In contested settlement cases in which the Commission applies the three prong test, it regularly addresses in great detail the lawfulness and reasonableness of terms and conditions set out in stipulations. *See, e.g., FE ESP Case*, Opinion and Order at 46-113 (Mar. 31, 2016). Thus, the current test effectively provides for the review that ELPC is demanding with its proposed "change" to the three prong test.

IV. Conclusion

For the reasons stated above, the Commission should not add to the cost of the grid modernization plan or rewrite the three prong test for review of settlements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 12th day of March, 2019, *via* electronic transmission.

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