

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Filing by Ohio)
Edison Company, The Cleveland)
Electric Illuminating Company, and) Case No. 16-481-EL-UNC
The Toledo Edison Company of a Grid)
Modernization Business Plan)

In the Matter of the Filing by Ohio)
Edison Company, The Cleveland)
Electric Illuminating Company, and) Case No. 17-2436-EL-UNC
The Toledo Edison Company)
Application for Approval of a)
Distributed Platform Modernization Plan)

In the Matter of the Application of Ohio)
Edison Company, The Cleveland)
Electric Illuminating Company and The) Case No. 18-1604-EL-UNC
Toledo Edison Company to Implement)
Matters Relating to the Tax Cuts and)
Jobs Act of 2017)

In the Matter of the Application of Ohio)
Edison Company, The Cleveland)
Electric Illuminating Company, and The) Case No. 18-1656-EL-ATA
Toledo Edison Company for Approval of)
a Tariff Change)

MEMORANDUM CONTRA OF INDUSTRIAL ENERGY USERS-OHIO

Frank P. Darr (Reg. No. 0025469)
(Counsel of Record)
Matthew R. Pritchard (Reg. No. 0088070)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mcneeslaw.com
mpritchard@mcneeslaw.com

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COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO

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MEMORANDUM CONTRA OF INDUSTRIAL ENERGY USERS-OHIO

I. Introduction

In this case, the Public Utilities Commission of Ohio (“Commission”) approved 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 the decision approving the amended stipulation, the Commission denied a request by the Environmental Law and Policy Center, the Natural Resources Defense Council, and the Ohio Environmental Council (“ELPC”) for a \$30

million increase in the cost of the grid modernization plan to fund a program to encourage the purchase of smart thermostats. Opinion and Order ¶ 109 (July 17, 2019). ELPC seeks rehearing of that denial. Application for Rehearing by the Environmental Law and Policy Center, the Natural Resources Defense Council and the Ohio Environmental Defense Council (Aug. 16, 2019) (“ELPC Application for Rehearing”). For several reasons, the Commission should deny that application for rehearing.¹

II. The Commission’s Decision

After a thorough review of the record concerning the benefits and costs of adding \$30 million to fund a smart thermostat program to the FirstEnergy EDUs’ agreed to distribution modernization plan, the Commission rejected ELPC’s recommendation. Opinion and Order ¶¶ 79-85 & 109. The Commission concluded that a smart thermostat program was not necessary for customers to realize the projected benefits of the grid modernization projects that were to be funded. *Id.* Because so large a percentage of the FirstEnergy EDUs’ customers were taking generation service from competitive electric suppliers, the Commission expected them and their suppliers to take advantage of the “platform” and make their own decisions to implement smart thermostat solutions. *Id.* Moreover, the Commission found that reliance on markets was consistent with Commission policy, particularly as laid out in its recent PowerForward report. *Id.* The Commission further noted that thermostat sellers could work with competitive suppliers to improve the availability of smart thermostats in the FirstEnergy EDU service territory without tapping all customers paying for grid modernization for an additional \$30 million in funding stimulus. *Id.*

¹ Industrial Energy Users-Ohio’s memorandum contra is limited to one issue. Its failure to oppose any other position raised in ELPC’s Application for Rehearing should not be taken as support.

III. EPLC's Application for Rehearing

In its Application for Rehearing, ELPC states, "The purpose of this Application for Rehearing is to seek change that would adopt the smart thermostat program proposed by [the Environmental Law and Policy Center, the Natural Resources Defense Council and the Ohio Environmental Defense Council] and to change the finding regarding the confidentiality of negotiations." ELPC Application for Rehearing at 2. The Application for Rehearing provides no other statement of the ground on which ELPC considers the Commission's order to be unreasonable or unlawful.

Separately in its Memorandum in Support, EPLC provides an argument to support its claim that the Commission got it "wrong" when it denied EPLC's request for funding for smart thermostats. ELPC Application for Rehearing, Memorandum in Support at 2. Repeating many of the factual claims that the Commission reviewed and found insufficient to warrant adding \$30 million to customers' bills, ELPC argues that the benefits of smart thermostats are supported by the FirstEnergy EDU's cost-benefit analysis and that energy efficiency portfolio plans will not sufficiently support increased use of the devices. *Id.*, Memorandum in Support at 2-4.

IV. Argument

A. The EPLC Application for Rehearing fails to specifically set forth the ground or grounds on which it considers the order of the Commission unreasonable or unlawful

After the Commission issues an order, a party such as ELPC may seek rehearing of the order within 30 days by filing an application for rehearing. R.C. 4903.10. "Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." *Id.* To assure

that the application lays out with specificity the ground or grounds on which the applicant is relying, Commission rules further state that “[a]n 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.” Rule 4901-1-35(A). This statement of the ground or grounds is separate from the additional argument the applicant may make in support of its application for rehearing. To satisfy the latter interest, “[a]n application must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing and which shall be filed no later than the application for rehearing.” *Id.*

As the Supreme Court of Ohio explained in *Discount Cellular, Inc. v. Public Utilities Commission of Ohio*, 112 Ohio St.3d 360, 375 (2006), the specificity requirement is not satisfied by broad and general claims. To satisfy the statutory requirement for specificity, 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. *Id.* at 374. Further, some basic compliance with the requirements of the Commission rule is necessary to focus attention on what the applicant is seeking to have reviewed. *Id.* at 374-75.

In this instance, ELPC has not complied with either the statutory or administrative requirements for specificity.

Initially, it has not offered any ground for the Commission to grant rehearing. In its Application for Rehearing, ELPC states the following: “The purpose of this Application for Rehearing is to seek [a] change that would adopt the smart thermostat program proposed

by [the Environmental Law and Policy Center, the Natural Resources Defense Council and the Ohio Environmental Defense Council] and to change the finding regarding the confidentiality of negotiations.” Because ELPC does not state the ground or grounds that make the Commission’s order unreasonable or unlawful as to either the smart thermostat program or the finding regarding confidentiality of negotiations, it has failed to meet the specificity requirement in R.C. 4903.10.

Even when EPLC tries to persuade the Commission to grant rehearing in its supporting memorandum, the Commission must search for what ELPC is complaining about. Initially, it offers nothing more than a statement that smart thermostats “play an essential role in customer savings.” *Id.*, Memorandum in Support at 2. It is only in the first paragraph of its Argument that ELPC finally asserts that the Commission got it “wrong.” *Id.* It then spends three pages reasserting factual claims that the Commission found insufficient to support ELPC’s request to add \$30 million to customer bills. *Id.* at 2-4. Only if the Commission examines and dissects the ELPC memorandum in support can it determine why ELPC seeks rehearing.

Such an effort is not required. As the Supreme Court of Ohio has stated in a similar context, “Where, as here, it is necessary to examine minutely an appellant's complaint before the commission, the order of the commission, appellant's application for rehearing, his notice of appeal and his brief in this court merely to discover what questions he is raising on appeal which were also presented to and decided by the commission on the application for rehearing, appellant has failed to comply with the provisions of Section 4903.10, Revised Code.” *Agin v. Public Utilities Commission of Ohio*, 12 Ohio St.2d 406 (1967).

To prevent rewarding ELPC for its failure to comply with the requirement to state with specificity the ground or grounds on which it is seeking rehearing, the Commission should deny rehearing of ELPC's attempt "to seek a change that would adopt the smart thermostat program." ELPC Application for Rehearing at 2.

B. ELPC's Memorandum of Support of its Application for Rehearing fails to present any new material argument not previously considered and rejected by the Commission

In its memorandum in support, ELPC raises three claims to support its request for the Commission to authorize the FirstEnergy EDUs to bill \$30 million for a smart thermostat program. First, it states that time of use rates will only have value if customers cut back on usage and that smart thermostats are necessary to encourage that result. ELPC Application for Rehearing, Memorandum in Support at 3. Second, it points to the FirstEnergy EDUs' pilot for support for the benefits of the smart thermostat proposal. *Id.*, Memorandum in Support at 3-4. Finally, it urges the Commission to recognize that energy efficiency programs will be ending as a result of the passage of House Bill 6. *Id.*, Memorandum at 4.

Initially, the first two claims were fully addressed by the Commission in its order and rejected. Opinion and Order ¶¶ 79-85 & 109. Accordingly, these repeated and rejected claims do not provide a basis to grant rehearing. *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, *et al.*, Fifth Entry on Rehearing ¶ 83 (Apr. 5, 2017).

The third claim concerning the availability of energy efficiency programs to advance the use of smart thermostats and the demise of those programs as a result of

the enactment of HB 6 does not materially challenge the Commission order. While the Commission noted that there were smart thermostat programs under the current portfolio plans, it made clear that it was looking to markets, not regulated and expensive portfolio plans, to advance thermostat adoption. As the Commission explained, “customers will benefit if time-varying rate offers are provided by competitive suppliers. The Stipulation recognizes this by establishing the platform, making the necessary data and systems available, and allowing customers and competitive suppliers the ability to benefit from [automated meter infrastructure] and time-varying rates, which may incorporate enabling technologies through direct purchase by the consumer or a competitive supplier program.” Opinion and Order ¶ 109. The Commission also explained that the PowerForward report also pointed to competitive markets to advance the benefits of the platform. *Id.* If competitors saw an opportunity, the Commission encouraged them “to actively work with competitive suppliers currently lacking such programs or propose manufacturer marketing campaigns.” *Id.* Contrary to ELPC’s claim, the Commission was not relying on portfolio plans to secure the benefits of smart thermostats; it instead was looking to market participants, both customers and vendors, to realize whatever benefits that smart thermostats might provide.

C. The Commission correctly found that it would be improper to modify the Stipulation to fund \$30 million in smart thermostats

According to ELPC, the Commission rejected its recommendation to modify the Stipulation to add a \$30 million charge “[d]espite considerable evidence of savings from smart thermostats.” ELPC Application for Rehearing, Memorandum in Support at 4. Like its misreading of the Commission’s reliance on portfolio programs, the Commission did not look past whatever value was claimed for smart thermostats. Instead, it found that

markets and market participants should be the ones securing those benefits directly instead of through a \$30 million expansion in the grid modernization program. That decision was correct.

Initially, 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. As the Commission noted in the Opinion and Order, the PowerForward report established a general policy encouraging private investment in behind-the-meter products and concluded that “the current retail marketplace structure should prevail.” Opinion and Order ¶ 109, citing 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.

PowerForward: A Roadmap to Ohio’s Electricity Future at 23 (Aug. 29, 2018).

The conditions for successful implementation of privately funded investment in smart thermostats are evident in this case. First, the FirstEnergy 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).

V. Conclusion

For the reasons stated above, the Commission should not grant rehearing to ELPC based on its faulty application and the factual claims it makes in support of its Application.

Respectfully submitted,

/s/ Frank P. Darr

Frank P. Darr (Reg. No. 0025469)

(Counsel of Record)

Matthew R. Pritchard (Reg. No. 0088070)

MCNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

fdarr@mcneeslaw.com

mpritchard@mcneeslaw.com

COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO

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 *Memorandum Contra of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record on August 26, 2019, via electronic transmission.

Brian J. Knipe (0090299)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
bknipe@firstenergycorp.com

James F. Lang (0059668)
Mark T. Keaney (0095318)
CALFEE, HALTER & GRISWOLD LLP
1405 Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
jlang@calfee.com
mkeaney@calfee.com

**COUNSEL FOR OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY**

COUNSEL FOR THE OHIO ENVIRONMENTAL COUNCIL

Colleen Mooney
OHIO PARTNERS FOR AFFORDABLE ENERGY
P.O. Box 12451
Columbus, OH 43212-2451
cmooney@opae.org

**COUNSEL FOR OHIO PARTNERS FOR AFFORDABLE
ENERGY**

/s/ Frank P. Darr

Frank P. Darr

Terry L. Etter (0067445)
(Counsel of Record)
Christopher Healey (0086027)
Angela O'Brien (0097579)
BRUCE WESTON (0016973)
ASSISTANT CONSUMERS' COUNSEL
65 East State Street 7th Floor
Columbus, OH 43215
terry.etter@occ.ohio.gov
christopher.healey@occ.ohio.gov
angela.obrien@occ.ohio.gov

**COUNSEL FOR OFFICE OF THE OHIO CONSUMERS'
COUNSEL**

Miranda Leppla (0086351)
1145 Chesapeake Avenue, Suite 1
Columbus, OH 43212-3449
mleppla@theoec.org

Angela Paul Whitfield (0068774)
Stephen E. Dutton (0096064)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
paul@carpenterlipps.com
dutton@carpenterlipps.com

COUNSEL FOR THE KROGER Co.

Madeline Fleisher
Robert Kelter
ENVIRONMENTAL LAW & POLICY CENTER
21 West Broad Street, 8th Floor
Columbus, OH 43215
mfleisher@elpc.org
rkelter@elpc.org

COUNSEL FOR THE ENVIRONMENTAL LAW & POLICY CENTER

Robert Dove (0092019)
KEGLER BROWN HILL & RITTER Co., L.P.A.
65 E. State Street, Suite 1800
Columbus, OH 43215
rdove@keglerbrown.com

COUNSEL FOR NATURAL RESOURCES DEFENSE COUNCIL

Rebekah J. Glover (0088798)
Mark A. Whitt (0067996)
WHITT STURTEVANT LLP
88 E. Broad Street, Suite 1590
Columbus, OH 43215
glover@whitt-sturtevant.com
whitt@whitt-sturtevant.com

COUNSEL FOR DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
mkurtz@bkllawfirm.com
kboehm@bkllawfirm.com
jkylercohn@bkllawfirm.com

COUNSEL FOR OHIO ENERGY GROUP

Dylan F. Borchers
Devin D. Parram
E. Nicki Hewell
BRICKER & ECKLER
100 South Third Street
Columbus, OH 43215-4291
dborchers@bricker.com
dparram@bricker.com
nhewell@bricker.com

COUNSEL FOR THE OHIO HOSPITAL ASSOCIATION

Kimberly W. Bojko (0069402)
Brian W. Dressel (0097163)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
bojko@carpenterlipps.com
dressel@carpenterlipps.com

COUNSEL FOR THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Bethany Allen (0093732)
Joseph Oliker (0086088)
Michael Nugent (0090408)
IGS ENERGY
6100 Emerald Parkway
Dublin, OH 43016
Bethany.allen@igs.com
joe.oliker@igs.com
Michael.nugent@igs.com

COUNSEL FOR IGS

Dane Stinson (0019101)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
dstinson@bricker.com

Glenn S. Krassen (0007610)
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
gkrassen@bricker.com

COUNSEL FOR NOPEC

Michael D. Dortch (0043897)
Richard R. Parsons (0082270)
Justin M. Dortch (0090048)
KRAVITZ, BROWN & DORTCH, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215 mdortch@kravitzllc.com
rparsons@kravitzllc.com
jdortch@kravitzllc.com

COUNSEL FOR CALPINE ENERGY SOLUTIONS, LLC

Barth E. Royer (0016999)
BARTH E. ROYER, LLC
2740 East Main Street
Bexley, OH 43209
barthroyer@aol.com

COUNSEL FOR THE SMART THERMOSTAT COALITION

Gretchen L. Petrucci (0046608)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216
glpetrucci@vorys.com

**COUNSEL FOR THE OHIO CABLE
TELECOMMUNICATIONS ASSOCIATION**

Dave Yost
John H. Jones
Thomas G. Lindgren
PUBLIC UTILITIES SECTION
30 East Broad Street, 16th Floor
Columbus, OH 43215
John.Jones@ohioattorneygeneral.gov
Thomas.Lindgren@OhioAttorneyGeneral.gov

ATTORNEY EXAMINERS

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