

**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 Distribution Platform Modernization Plan	)	
	)	
	)	Case No. 17-2436-EL-UNC
	)	
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	)	
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

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA  
THE APPLICATION FOR REHEARING OF THE ENVIRONMENTAL LAW &  
POLICY CENTER, THE NATURAL RESOURCES DEFENSE COUNCIL, AND THE  
OHIO ENVIRONMENTAL COUNCIL**

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**I. INTRODUCTION**

The Application for Rehearing of the Commission’s July 17, 2019 Opinion and Order (“Opinion and Order”) filed by the Environmental Law & Policy Center, the Natural Resources Defense Council, and the Ohio Environmental Council (hereinafter, “ELPC/NRDC/OEC”) fails to state valid grounds for rehearing. The Commission should deny the Application for Rehearing

because 1) it offers nothing new for the Commission to consider; and 2) ELPC/NRDC/OEC's recycled arguments lack merit.

## **II. ARGUMENT**

### **A. The Commission Did Not Err in Determining that a Smart Thermostat Program is Not Necessary for Customers to Realize the Projected Benefits Associated with Grid Mod I.**

ELPC/NRDC/OEC argue in their first assignment of error that the Commission should have included an additional \$30 million in the price of Grid Mod I to fund a smart thermostat program.<sup>1</sup> Similarly, ELPC/NRDC/OEC contend that enabling technologies like smart thermostats are necessary to provide customers with savings from advanced metering infrastructure.<sup>2</sup> Yet in advancing these claims, ELPC/NRDC/OEC have not offered any new arguments for the Commission to consider on rehearing. Instead, they have merely restated the same arguments the Commission already rejected, and they have made no effort to show that the Commission acted unreasonably in approving the Stipulation in this proceeding. Nor have they undercut the Commission's conclusion, which was that the evidence does not show that a smart thermostat program is required to realize the AMI benefits projected for Grid Mod I.<sup>3</sup> As such, the ELPC/NRDC/OEC's first assignment of error fails to state valid grounds for rehearing.

As the Companies<sup>4</sup> and other Signatory Parties underscored in post-hearing briefing, the proposal to include \$30 million in funding for smart thermostats is, in part, an effort by certain companies to improve market share in the smart thermostat industry.<sup>5</sup> Thus, the Commission

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<sup>1</sup> ELPC/NRDC/OEC Application for Rehearing ("ELPC/NRDC/OEC AFR"), pp. 2-5.

<sup>2</sup> *Id.*

<sup>3</sup> Opinion & Order, ¶ 109.

<sup>4</sup> The "Companies" collectively refers to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

<sup>5</sup> See Companies Post-Hearing Reply Brief, pp. 29-30; Opinion and Order, ¶ 83.

properly found that the \$30 million smart thermostat proposal “would run in direct contradiction to the Commission’s objective of encouraging a robust marketplace.”<sup>6</sup> ELPC/NRDC/OEC offer no rebuttal to this finding.

While ELPC/NRDC/OEC extol the benefits of smart thermostats,<sup>7</sup> most of the claimed benefits are wholly unrelated to grid modernization. Nearly all smart thermostat features do not require grid modernization to provide any of their benefits to customers.<sup>8</sup> In fact, the only tie between grid modernization and smart thermostats made by ELPC/NRDC/OEC is that, once advanced metering infrastructure (“AMI”) is deployed and customers have subscribed to time-varying rates, smart thermostats can be programmed to pre-cool a home before peak pricing starts.<sup>9</sup> The Commission correctly recognized that this solitary benefit does not justify including a \$30 million smart thermostat program in Grid Mod I.<sup>10</sup>

ELPC/NRDC/OEC incorrectly claim that the Commission’s decision to reject the \$30 million proposal was based “in significant part on the assumption that smart thermostats will be addressed in the Company’s next energy efficiency case.”<sup>11</sup> This is untrue. The Commission rejected ELPC/NRDC/OEC’s proposal for a variety of reasons, including but not limited to: 1) a smart thermostat program is entirely unnecessary to realize the projected benefits associated with

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<sup>6</sup> Opinion and Order, ¶ 109. In fact, even without the implementation of a smart thermostat program, there is ample record evidence, as recognized by the Commission, that Grid Mod I will result in the creation of innovative products and an environment conducive to allowing customers to better manage their energy usage, including elements such as a web portal to allow CRES providers access to customer interval data and to enable customers to monitor and adjust their usage. *Id.* at ¶ 110.

<sup>7</sup> ELPC/NRDC/OEC AFR, p. 3.

<sup>8</sup> Tr. Vol. II at 285.

<sup>9</sup> ELPC/NRDC/OEC AFR, p. 3.

<sup>10</sup> Opinion and Order, ¶ 109 (describing it as an “uncertain cost paradigm”).

<sup>11</sup> ELPC/NRDC/OEC AFR, p. 4.

Grid Mod I; 2) Grid Mod I, as proposed and approved by the Commission (i.e., without a smart thermostat program), facilitates and stimulates market participation consistent with state policy, the PowerForward Roadmap, and the ESP IV Order; 3) the proposed smart thermostat program amounts to an “uncertain cost paradigm”; 4) there is “ample uncontested evidence” that Grid Mod I, as proposed and approved, will create innovative products and allow customers to better manage energy usage; and 5) the Companies will offer a time-varying rate until such time as the competitive market develops its own alternative and comparable products.<sup>12</sup> In short, the basic reasoning and essential findings underlying the Opinion and Order are not premised on the assumption that smart thermostats will be addressed in a future proceeding.

In addition, the reference to a future proceeding is misleading. The Commission’s finding, supported by testimony at hearing, was that smart thermostats are included in the Companies’ *existing* energy efficiency portfolio plans.<sup>13</sup> And as ELPC/NRDC/OEC note, HB 6 extends those existing portfolio plans, including their smart thermostat programs. Plus, HB 6 is evidence of the legislature’s intent that customers should be free to choose their own energy efficiency options. ELPC/NRDC/OEC obviously disagree with the general assembly’s preferred course, but that is not a basis for granting rehearing in this proceeding.

As such, ELPC/NRDC/OEC have failed to state valid grounds for rehearing on the first assignment of error.

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<sup>12</sup> Opinion and Order, ¶¶ 109-110.

<sup>13</sup> Tr. Vol. I at 211 (describing Companies’ two programs under which customers have received or will receive tens of thousands of smart thermostats).

**B. The Commission Did Not Err in Determining that Serious Bargaining Occurred and that the Attorney Examiner Properly Precluded Inquiry into the Content of Confidential Settlement Discussions.**

ELPC/NRDC/OEC's second assignment of error contends that the Commission must "reconsider its ruling regarding the confidentiality of negotiations as it pertains to the cross-examination of FirstEnergy Witness Fanelli."<sup>14</sup> Although ELPC/NRDC/OEC concede that the Signatory Parties are capable and knowledgeable,<sup>15</sup> they cite Ohio Rule of Evidence 408 and Ohio Supreme Court precedent in an attempt to show that the Commission is not only permitted, but required, to allow parties to probe the content of confidential settlement discussions on cross-examination to determine if serious bargaining occurred.<sup>16</sup> Given that the Commission already considered and rejected an identical argument advanced by ELPC/NRDC/OEC in post-hearing briefing, the second assignment of error fails to state valid grounds for rehearing.<sup>17</sup>

It is noteworthy that ELPC/NRDC/OEC failed to cite *any* authority supporting the proposition that Ohio Rule of Evidence 408 generally permits the disclosure of "what took place"<sup>18</sup> during confidential settlement discussions. The failure to provide any legal support for this contention is not surprising because no such authority exists. To make matters worse, ELPC/NRDC/OEC misstate the scope of Ohio Rule of Evidence 408, as well as its application in Commission proceedings. Specifically, ELPC/NRDC/OEC contend that Rule 408 "allows the Commission to consider information regarding settlement discussion, excluding elements of

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<sup>14</sup> ELPC/NRDC/OEC AFR, p. 5.

<sup>15</sup> ELPC/NRDC/OEC AFR, p. 6.

<sup>16</sup> *Id.* at 5-7.

<sup>17</sup> Opinion and Order, ¶¶ 16-19; *see also* ELPC/NRDC/OEC Initial Post-Hearing Brief, pp. 10-11.

<sup>18</sup> *Id.*

negotiations from the record only if they relate to validity of a claim or the amount of a claim.”<sup>19</sup> But Rule 408 protects far more than that. Indeed, the plain language of Rule 408 explains that “[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible.”<sup>20</sup>

Nevertheless, even if Rule 408 only excluded settlement discussions related to the validity or amount of a claim as ELPC/NRDC/OEC posit (which is not true), the Commission is not strictly bound by the Ohio Rules of Evidence.<sup>21</sup> Instead, the Commission possesses the expertise necessary to accord appropriate weight to testimony and evidence, and the Commission is entitled to exercise discretion on questions of evidence admissibility.<sup>22</sup> Here, the Commission reasonably exercised its discretion, consistent with its prior holdings and longstanding Supreme Court precedent, to prohibit ELPC/NRDC/OEC’s inquiry into the content of confidential settlement discussions.

Tellingly, although ELPC/NRDC/OEC rely on *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, it does not support the outcome they seek.<sup>23</sup> According to ELPC/NRDC/OEC, this decision **obligates** the Commission to “investigate the context and circumstances of the settlement discussions” to ensure

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<sup>19</sup> *Id.* at 5.

<sup>20</sup> Evid.R. 408 (emphasis added).

<sup>21</sup> See *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals, et al.*, Case No. 10-2376-EL-UNC, *et al.*, 2011 Ohio PUC LEXIS 1325, Opinion and Order (Dec. 14, 2011), at \*33.

<sup>22</sup> *Id.*

<sup>23</sup> ELPC/NRDC/OEC AFR, pp. 5-6.

serious bargaining occurred.<sup>24</sup> ELPC/NRDC/OEC made the same argument in post-hearing briefing, which the Commission considered and properly rejected.<sup>25</sup>

In *Ohio Consumers' Counsel*, the Supreme Court merely held that side agreements between signatory parties to a stipulation are discoverable to determine if any concessions or inducements were made that would give parties an unfair advantage in the bargaining process.<sup>26</sup> It did *not* authorize the Commission to more generally investigate the “context and circumstances of the settlement discussions” as alleged by ELPC/NRDC/OEC. In fact, as the Commission observed in the Opinion and Order, longstanding Ohio Supreme Court and Commission precedent reflect an unwillingness to mandate any specific negotiation process to follow in order to satisfy the serious bargaining prong, so long as there is no evidence an entire class of customers was excluded from settlement discussions.<sup>27</sup> Here, the record evidence reveals that no party (let alone an entire class of customers) was intentionally excluded from settlement discussions.<sup>28</sup> With nothing new or different to add to arguments already weighed and rejected by the Commission, ELPC/NRDC/OEC have not stated valid grounds for rehearing.

ELPC/NRDC/OEC also claim that the Commission’s refusal to probe the content of confidential settlement discussions renders the first prong<sup>29</sup> in the Commission’s three-part test

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<sup>24</sup> *Id.* at 6.

<sup>25</sup> See ELPC/NRDC/OEC Initial Post-Hearing Brief, pp. 10-11; Opinion and Order, ¶¶ 16-19.

<sup>26</sup> *Ohio Consumers' Counsel*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 86.

<sup>27</sup> Opinion and Order, ¶ 61.

<sup>28</sup> Indeed, the Stipulation enjoys support from several representatives of residential, commercial and industrial customers. Even if environmentalists could be viewed as a customer class (they are not), the Stipulation is supported by an environmental advocate – the Environmental Defense Fund. See Supplemental Stipulation, p. 10 (signatory page).

<sup>29</sup> The first prong in the Commission’s three-part test is as follows: Is the settlement a product of serious bargaining among capable, knowledgeable parties?

“meaningless.”<sup>30</sup> ELPC/NRDC/OEC reason that when reaching a stipulation, parties must accept that “some of the details of the negotiations will get exposed” and that the disclosure of “some details will be necessary for the Commission to determine whether serious bargaining occurred.”<sup>31</sup> However, this argument is a classic straw man and reflects a distorted interpretation of the Companies’ position, as well as the Commission’s holding in the Opinion and Order.

Neither the Commission nor the Companies have ever suggested that *all* details about settlement meetings are confidential, inadmissible, and protected by Rule 408. In fact, at hearing, the Companies submitted ample evidence of the serious bargaining that occurred during settlement discussions, including: 1) describing the timing and occurrence of their meetings with Staff; 2) the initiation of the initial settlement meeting among all parties on November 1, 2018 and two other meetings among all parties thereafter; 3) the Companies’ good faith efforts to contact and assemble other parties unable to attend the group settlement meetings; 4) the Companies’ efforts to meet with parties in one-on-one or small group meetings; 5) the exchange of information between the parties to facilitate inclusive and meaningful negotiations; and 6) following the signing of the Original Stipulation, the Companies’ determination to continue negotiating and meeting with other non-signatory parties to elicit even broader support for the Stipulation, including a group meeting among all parties and numerous discussions and information exchanges with one or more parties (which eventually culminated in OCC, NOPEC and OPAE joining the Stipulation in late January 2019).<sup>32</sup> The Companies never objected to the disclosure of *all* details surrounding the parties’ settlement discussions; rather, the Companies merely objected to the disclosure of the *substantive*

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<sup>30</sup> ELPC/NRDC/OEC AFR, pp. 6-7.

<sup>31</sup> *Id.*

<sup>32</sup> See Direct Testimony of Santino L. Fanelli (“Fanelli Direct”), pp. 7-8; Supplemental Testimony of Santino L. Fanelli (“Fanelli Supp.”), pp. 3-4.



*content of confidential* settlement discussions – a fact the hearing transcript substantiates and the Commission affirmed.<sup>33</sup>

The Commission’s decision to preclude inquiry into the content of confidential settlement negotiations promotes and is consistent with well-settled public policy of encouraging settlement in contested cases.<sup>34</sup> As such, ELPC/NRDC/OEC’s proposal would violate longstanding public policy in Ohio. If ELPC/NRDC/OEC had their way, parties attending settlement conferences would be stifled to speak freely since any proposed solutions discussed could be used against those seeking a good faith, amicable resolution of disputed issues. Under such circumstances, communication would be drastically inhibited as parties would be unable to abandon their adversarial tendencies or offer creative solutions to difficult problems. Without confidentiality, parties would more often forego negotiations for the relative formality of a protracted, costly hearing that would unnecessarily drain the resources of the Commission and the parties. As such, the Commission should remain unwilling to depart from well-established public policy that favors confidential settlement of disputed cases, especially where, as here, the case involves a multitude of parties with different and often divergent interests.

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<sup>33</sup> Tr. Vol. I at 38, 41; Opinion and Order, ¶ 19.

<sup>34</sup> *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, et al.*, Case No. 99-1658-EL-ETP, et al., 2000 Ohio PUC LEXIS 337, at \*5; *Humm v. City of N. Royalton*, 8th Dist. Cuyahoga No. 33431, 1975 Ohio App. LEXIS 6049, at \*6 (Apr. 3, 1975) (“It is well settled that public policy favors the settlement of controversies and the avoidance of litigation. In furtherance of this policy, testimony relating to offers of compromise is deemed incompetent for without such a rule it would be difficult for parties to attempt ‘the amicable adjustment or compromise of disputes.’”).

### III. CONCLUSION

ELPC/NRDC/OEC have failed to show that the Opinion and Order was unreasonable or unlawful. Therefore, for the reasons stated above, the Commission should deny ELPC/NRDC/OEC's Application for Rehearing.

Respectfully Submitted,

/s/ James F. Lang

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### **CERTIFICATE OF SERVICE**

I certify that the foregoing Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 26<sup>th</sup> day of August, 2019. The PUCO's e-filing system will electronically serve notice of the filing of this docket on counsel for all parties.

/s/ Mark T. Keaney  
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Summary: Memorandum Memorandum Contra the Application for Rehearing of the Environmental Law & Policy Center, the Natural Resources Defense Council, and the Ohio Environmental Council electronically filed by Mr. Mark T Keaney on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company