

**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 ) Case No. 16-743-EL-POR  
Edison Company for Approval of Their )  
Energy Efficiency and Peak Demand )  
Reduction Program Plans for 2017 to 2019. )

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**MEMORANDUM CONTRA to APPLICATION FOR REHEARING OF OFFICE  
OF OHIO CONSUMERS' COUNSEL OF  
INDUSTRIAL ENERGY USERS-OHIO**

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The Office of the Ohio consumers' Counsel ("OCC") incorrectly asserts in its application for rehearing that the Economic Load Response ("ELR") program was part of FirstEnergy's energy efficiency and peak demand reduction ("EE/PDR") program.<sup>1</sup> In fact, the Commission has twice rejected claims that the ELR program was part of FirstEnergy's energy efficiency and peak demand reduction ("EE/PDR") program. OCC's argument should be rejected as substantively incorrect and because it is barred by res judicata.

OCC's also raises a procedural error based on the Commission's failure to address its claim; however, because the ELR was not part of the EE/PDR portfolio plan and because no party had even raised issue with the ELR the Commission did not commit any procedural error in not addressing the issue.

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<sup>1</sup> As used herein, 'FirstEnergy' refers collectively to the Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company.

## I. Argument

### A. The Commission has twice rejected the argument that the ELR Program is part of FirstEnergy's EE/PDR Portfolio Plan.

The ELR program was most recently addressed in FirstEnergy's current electric security plan ("ESP") proceeding, Case No. 14-1297-EL-SSO (the "ESP IV Case").<sup>2</sup> The record evidence in that case demonstrated that the ELR plan benefited all customers by providing reliability and stability, and during emergency and severe weather events the interruptible program helps to avoid load-shedding.<sup>3</sup> Additionally, the record evidence further demonstrated that the ELR program provided economic benefits by lowering market prices for all customers during peak times and reducing need for additional capacity resources.<sup>4</sup> The record evidence further demonstrated that the ELR program provided economic development and job retention benefits.<sup>5</sup> Based on all of this record evidence, the Commission correctly concluded in its decision approving ESP IV that "ELR is an economic development program."<sup>6</sup> In addition to the ELR program being an economic development program, the Commission also noted that it had additional reliability and energy efficiency ancillary benefits.<sup>7</sup>

On rehearing in the ESP IV Case, several environmental groups asserted that the ELR program was part of FirstEnergy's energy efficiency plan and, therefore, participation

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<sup>2</sup> *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 14-1297-EL-SSO et al., Opin. & Order (Mar. 31, 2016) ("ESP IV").

<sup>3</sup> *Id.* at 72 (citing Tr. Vol. XXX at 6131, 6154, 6156; Tr. Vol. II at 259-260).

<sup>4</sup> *Id.* (citing OEG Ex. 1 at 9).

<sup>5</sup> *Id.* (citing Nucor Ex. 1 at 8; Co. Ex. 146 at 18-19; Tr. Vol. XXX at 6133-34, 6172-75).

<sup>6</sup> ESP IV, Fifth Entry on Rehearing at 113 (Oct. 12, 2016); see also ESP IV, Opin. & Order at 94.

<sup>7</sup> See ESP IV, Opin. & Order at 94.

in the ELR program prohibited those customers from opting-out of the portfolio plan.<sup>8</sup> The Commission rejected the argument and confirmed that the ELR program was not part of the portfolio plan, stating that “[t]he ELR programs existed long before the statutory energy efficiency and peak reduction mandates began.”<sup>9</sup> The Commission continued noting that the ELR program was an economic development program, and thus not an EE/PDR program under the portfolio plan.<sup>10</sup>

Those same Environmental Advocates, again, sought additional rehearing in the ESP IV raising the same argument.<sup>11</sup> The Commission again confirmed that customers participating in Rider ELR could opt-out of the EE/PDR mandates because the ELR program was not part of the EE/PDR plan.<sup>12</sup> The Commission again concluded that “the ELR programs existed long before the statutory energy efficiency and peak demand reduction mandates.”<sup>13</sup> The Commission again reaffirmed that the ELR program was an economic development program.<sup>14</sup> The Commission found three separate times in the ESP IV proceeding that the ELR program was an economic development program, and twice explicitly rejected the claim that the ELR program was part of FirstEnergy’s EE/PDR portfolio plan.

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<sup>8</sup> ESP IV, App. for Rehearing of the Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund (“Environmental Advocates”) at 23-24 (May 2, 2016).

<sup>9</sup> ESP IV, Fifth Entry on Rehearing at 146.

<sup>10</sup> See *id.* at 113, 146.

<sup>11</sup> ESP IV, Environmental Advocates’ Application for Rehearing of the Fifth Entry on Rehearing at 25-29 (Nov. 14, 2016).

<sup>12</sup> ESP IV, Eighth Entry on Rehearing at 70 (Aug. 16, 2017).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

OCC's argument here is substantively the same as that of the Environmental Advocates that was repeatedly rejected by the Commission in the ESP IV Case. Just like the Environmental Advocates arguments in the prior case, here OCC argues that because one result of the ELR program is a reduction in peak demand that by statute was authorized to be counted towards EE/PDR mandate compliance, it automatically must be considered part of FirstEnergy's prior EE/PDR portfolio plan.<sup>15</sup> But, as the Commission stated repeatedly in the ESP IV Case, the ELR program predates the statutory EE/PDR mandates, and is as an economic development program not an EE/PDR program.<sup>16</sup>

Accordingly, the Commission was correct in not addressing Rider DSE1, ordering its elimination, or ordering elimination of the ELR program in total. As such, the only substantive argument presented by OCC is without merit and OCC's application for rehearing should be denied.

**B. OCC's Application for Rehearing is Barred by Collateral Estoppel.**

OCC presents the same argument on rehearing here that was rejected in the ESP IV Case, a proceeding in which OCC participated. In fact, OCC was in the same procedural position as the Environmental Advocates, opposing the Stipulated ESP IV. The determination of whether the ELR program is part of the EE/PDR is barred by the doctrine of collateral estoppel.

The Commission has previously found that when issues have been heard and decided on, they are precluded from being brought again, even if the cause of action

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<sup>15</sup> See OCC App. for Rehearing at 2-4; see also ESP IV, Environmental Advocates' App. for Rehearing of the Fifth Entry on Rehearing at 25-29.

<sup>16</sup> See, e.g., ESP IV, Fifth Entry on Rehearing at 146.

differs.<sup>17</sup> As the Commission has stated, “collateral estoppel ‘operate[s] to preclude the re-litigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.’ *Ohio Power Co.*, 2015-Ohio-2056 at ¶ 20 (quoting *Consumers’ Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)). ‘Collateral estoppel may be applied in a civil action to bar the re-litigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings.’ Third Entry on Rehearing at ¶ 33 (quoting *Tedesco v. Glenbeigh Hosp. of Cleveland, Inc.* (Mar. 16, 1989), Cuyahoga App. No. 54899, 1989 WL 24908).”<sup>18</sup>

The issue of whether the ELR program is a part of FirstEnergy’s EE/PDR portfolio plan has been litigated and decided in a case that involved OCC and FirstEnergy. OCC had the opportunity in the ESP IV Case to appeal that factual conclusion in the case. Neither OCC, not any other party in the ESP IV Case, appealed that factual determination and the matter is now final. Moreover, there have been no factual changes to the ELR program since it was authorized in the ESP IV Case. The Commission’s determination that the ELR program is not part of the EE/PDR plan is final and there has not been any factual changes that would warrant any reconsideration of the issue. OCC should be barred from relitigating that factual determination here.

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<sup>17</sup> See, e.g., *In re Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO et al., Second Finding and Order at 12 (Dec. 18, 2019).

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

**C. Contrary to OCC’s assertion, the Commission was not required to address an item not at issue in the proceeding.**

OCC asserts that the Commission failed to explain its reasoning for allowing the ELR program to continue after the EE/PDR portfolio plan ended in violation of R.C. 4903.09.<sup>19</sup> Initially, this assignment of error should be rejected for the same reasons addressed above: the ELR program is not part of the EE/PDR portfolio plan. Moreover, R.C. 4903.09 only applies in “contested cases” and not party raised any issue with the ELR program prior to the Commission’s decision that OCC now challenges.<sup>20</sup>

In a November 18, 2020 Finding and Order in this proceeding, the Commission directed each electric utility to file proposed revised tariffs setting their EE/PDR riders to zero.<sup>21</sup> In response, FirstEnergy filed in Case Nos. 20-1673-EL-RDR, *et al.* its proposed tariffs setting Rider DSE2 to zero.<sup>22</sup> The DSE2 charge was calculated based on the EE/PDR portfolio plan costs and did in fact collect such costs from customers. The completely separate ELR program has its associated cost-recovery in FirstEnergy’s Economic Development Rider (“EDR”) and the DES1 charge. Accordingly, FirstEnergy correctly did not propose any changes to the EDR or DSE1 rates in Case Nos. 20-1763-EL-RDR, *et al.*<sup>23</sup>

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<sup>19</sup> OCC App. for Rehearing at 4.

<sup>20</sup> R.C. 4903.09, “In all contested cases. . . the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.”

<sup>21</sup> Finding and Order at 3.

<sup>22</sup> *Tariff Update of the Demand Side Management and Energy Efficiency Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case Nos. 20-1673-EL-RDR et al., Application at 3 (Dec. 1, 2020).

<sup>23</sup> *Id.*

OCC intervened in the above-captioned proceeding as well as in Case Nos. 20-1763-EL-RDR, *et al.*, before the Commission issued the decision from which OCC seeks rehearing. However, neither OCC nor any other party raised any issue with FirstEnergy's ELR program, EDR rates, or DSE1 rates (in either proceeding) leading up to the Commission's December 30, 2020 decision that OCC now challenges on rehearing. Because the ELR program, EDR rates, and DSE1 rates were not at issue (as they relate to the collection of costs for an economic development program and not an EE/PDR program) and because no party had raised any issue with the ELR program, EDR rates, or DSE1 rates in this proceeding or in Case Nos. 20-1763-EL-RDR, *et al.*, the Commission had no reason to address them in the Commission December 30, 2020 Entry. OCC's assignment of error related to R.C. 4903.09 is therefore without merit and should be denied.

## **II. Conclusion**

The ELR program is not a part of FirstEnergy's EE/PDR portfolio plans, and is therefore not subject to the statutory provisions eliminating the EE/PDR portfolio plans. The Commission has already decided this issue, and has stated multiple times that the ELR program is an economic development program that predates those EE/PDR statutory mandates. OCC is barred by collateral estoppel from bringing this issue now, and therefore the application for rehearing should be denied.



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 *Memorandum Contra Office Ohio Consumers' Counsel's Application for Rehearing of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio, to the following parties of record on this 8th day of February 2021, via electronic transmission, hand-delivery or U.S. mail, postage prepaid.

/s/Matthew R. Pritchard  
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