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 Plans for 2017 to 2019.	)	Case No. 16-743-EL-POR

COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

Matthew R. Pritchard (Reg. No. 0088070)
(Counsel of Record)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
mpritchard@mcneeslaw.com
(willing to accept service by e-mail)

MARCH 26, 2021

COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO

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 Plans for 2017 to 2019.	))))))	Case No. 16-743-EL-POR

COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

The Office of the Ohio Consumers' Counsel ("OCC") filed an application for rehearing on January 29, 2021, raising a meritless claim that FirstEnergy's Economic Load Response ("ELR") Program was part of FirstEnergy's energy efficiency and peak demand reduction ("EE/PDR") portfolio plan and should be eliminated.[1] Industrial Energy Users-Ohio ("IEU-Ohio") filed a timely response to OCC's application for rehearing demonstrating that OCC's position was without merit and that the same argument had already been raised and rejected multiple times by the Public Utilities Commission of Ohio ("Commission").

As set forth in more detail below, the history, purpose and nature of the ELR program, as well as the Commission's prior findings with respect to the ELR program, demonstrate that the ELR program is an economic development and job retention program authorized as a term of FirstEnergy's current ESP. Because the ELR program

[1] As used herein, "FirstEnergy" refers collectively to the Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company.

is not an EE/PDR program under FirstEnergy's portfolio plan, the ELR program was not required to be eliminated pursuant to R.C. 4928.66(G)(3). The Commission need take no further action in this EE/PDR case with respect to the ELR program, or recovery through the DSE1 charge. Accordingly, IEU-Ohio again requests that the Commission deny OCC's application for rehearing.

I. COMMENTS

In its January 29, 2021 application for rehearing, OCC incorrectly asserted that the ELR program was part of FirstEnergy's EE/PDR program.[2] The ELR program was never intended, proposed, or considered as part of FirstEnergy's portfolio plan under R.C. 4928.66. As the Commission has already determined, the ELR program is an economic development program that aids in reliability and stability for customers across FirstEnergy's service territory.[3] Any benefits of the ELR in assisting FirstEnergy to meet portfolio mandate compliance was incidental to its intended purpose of securing economic development and providing interruptible programs to aid in reliable service for all customers. In fact, the Commission has twice rejected claims that the ELR program was part of FirstEnergy's EE/PDR program.[4] There is no basis for the Commission to reverse course and conclude otherwise.

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

---

[2] OCC App. for Rehearing at 2.

[3] *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., Opinion & Order at 94 (March 31, 2016) ("ESP IV Case").

[4] ESP IV Case, Fifth Entry on Rehearing at 113 (October 12, 2016); *see also* Eighth Entry on Rehearing at 70 (August 16, 2017).

The ELR program was recently addressed in FirstEnergy's current electric security plan ("ESP") proceeding, the ESP IV Case.[5] The record evidence demonstrated that the ELR program provided economic development and job retention benefits.[6] The record evidence in that case further 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.[7]

The record in the ESP IV Case also clearly showed that the ELR program provided economic benefits by lowering market prices for all customers during peak times and reducing need for additional capacity resources.[8] Based on all of this record evidence, the Commission correctly concluded in its decision approving the ESP IV that "ELR is an economic development program."[9] 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.[10]

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 in the ELR program prohibited those participating customers from opting-out of the portfolio plan.[11] The Commission rejected the argument and confirmed that the ELR

---

[5] ESP IV Case, Opinion & Order at 94.

[6] *Id* at 72 (citing Nucor Ex. 1 at 8; Co. Ex. 146 at 18-19; Tr. Vol. XXX at 6133-34, 6172-75).

[7] *Id*. (*citing* Tr. Vol. XXX at 6131, 6154, 6156; Tr. Vol. II at 259-260).

[8] *Id.* (citing OEG Ex. 1 at 9).

[9] ESP IV Case, Fifth Entry on Rehearing at 113 (October 12, 2016); *see also* ESP IV, Opinion & Order at 94.

[10] *See* ESP IV Case, Opinion & Order at 94.

[11] ESP IV Case, 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).

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."[12] The Commission continued noting that the ELR program was an economic development program, and thus not an EE/PDR program under the portfolio plan.[13]

Later in the same case, those same Environmental Advocates filed additional applications for rehearing in the ESP IV Case raising the same argument.[14] 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.[15] The Commission again concluded that "the ELR programs existed long before the statutory energy efficiency and peak demand reduction mandates."[16] The Commission again reaffirmed that the ELR program was an economic development program.[17] The Commission found three separate times in the ESP IV Case 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.

The argument made by OCC in its application for rehearing, that the ELR program is part of FirstEnergy's EE/PDR program 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, OCC argued

---

[12] ESP IV Case, Fifth Entry on Rehearing at 146.

[13] *See Id.* at 113, 146.

[14] ESP IV Case, Environmental Advocates' Application for Rehearing of the Fifth Entry on Rehearing at 25-29 (November 14, 2016).

[15] ESP IV Case, Eighth Entry on Rehearing at 70 (August 16, 2017).

[16] *Id.*

[17] *Id.*

that because one result of the ELR program is a reduction in peak demand that could count towards FirstEnergy's statutory PDR compliance, it automatically must be considered part of FirstEnergy's prior EE/PDR portfolio plan.[18] But, as the Commission stated repeatedly in the ESP IV Case, the ELR program predated the statutory EE/PDR mandates and was an economic development program, not an EE/PDR program.[19]

In its recent entry soliciting comments, the Commission asked whether the ELR program should be considered part of FirstEnergy's portfolio plan as mandated under R.C. 4928.66 and subject to termination under R.C. 4928.66(G). The Commission itself has answered this question and correctly concluded that the ELR program was not a part of FirstEnergy's portfolio plan.

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

The Commission's entry soliciting comments was prompted by arguments in an application for rehearing filed but OCC, however, the argument raised by OCC is barred by collateral estoppel. OCC presented 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. As stated above, the Commission has already decided the question at issue here: whether the ELR program is a part of FirstEnergy's EE/PDR program that has been terminated pursuant to R.C. 4928.66(G). The determination of whether the ELR program is part of the EE/PDR is barred by the doctrine of collateral estoppel.

---

[18] *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.

[19] *See*, *e.g.*, ESP IV Case, Fifth Entry on Rehearing at 146.

The Commission has previously found that when issues have been heard and decided they are precluded from being heard again, even if the cause of action differs.[20] 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)."[21]

While IEU-Ohio appreciates the opportunity to comment on this question, the issue of whether the ELR program is a part of FirstEnergy's EE/PDR portfolio plan has already been thoroughly litigated and decided. OCC had the opportunity in the ESP IV Case to appeal that factual conclusion in the case. Neither OCC, nor any other party in the ESP IV Case, appealed that factual determination and that proceeding is now final as a matter of law. Moreover, there have been no factual changes to the ELR program since it was authorized in the ESP IV Case that would justify raising it here. The Commission should

---

[20] *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 (December 18, 2019).

[21] *Id.* Furthermore, the Supreme Court of Ohio has found that collateral estoppel applies even when the party raising the issue is not the original party, so long as the parties have privity, such as "a mutuality of interest, including an identity of desired result." *See O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 61, 2007-Ohio-1102, P9, 862 N.E.2d 803, 806 (citing *Brown v. City of Dayton*, 89 Ohio St. 3d 245, 248, 730 N.E.2d 958, 962, 2000-Ohio-148).

adhere to its prior ruling and state that the ELR program is not a part of FirstEnergy's EE/PDR program and should not be terminated.

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. The Commission should affirm its previous decisions and allow the ELR program to continue without modification.

Respectfully submitted,

/s/ Matthew R. Pritchard

Matthew R. Pritchard (Reg. No. 0088070)
(Counsel of Record)
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
mpritchard@mcneeslaw.com
(willing to accept service by e-mail)

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 *Comments 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 26th day of March 2021, *via* electronic transmission, hand-delivery or U.S. mail, postage prepaid.

/s/Matthew R. Pritchard
Matthew R. Pritchard

edanford@firstenergycorp.com
bknipe@firstenergycorp.com
KJKLaw@yahoo.com
mrgladman@jonesday.com
stostado@jonesday.com
tdougherty@theoec.org
mleppla@theoec.org
jfinnigan@edf.org
rkelter@elpc.org
swilliams@nrdc.org
christopher.healey@occ.ohio.gov
John.Jones@ohioattorneygeneral.gov
mwarnock@bricker.com
dborchers@bricker.com
dparram@bricker.com
sechler@carpenterlipps.com
rdove@keglerbrown.com
joliker@igsenergy.com
callwein@keglerbrown.com
Bojko@carpenterlipps.com
wygonski@carpenterlipps.com
paul@carpenterlipps.com
mkl@smxblaw.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
Lauren.augostini@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/26/2021 3:27:26 PM

in

Case No(s). 16-0743-EL-POR

Summary: Comments of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio