

**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) Case No. 16-743-EL-POR
Energy Efficiency and Peak Demand)
Reduction Program Portfolio Plans for 2017)
through 2019.)

**REPLY COMMENTS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Parties supporting continuation of FirstEnergy's Economic Load Response program ("Program") include those who like being subsidized at the expense of residential consumers. But charges to residential consumers for the Program should end for at least two good reasons. One reason is that in tainted House Bill 6 the legislature repealed the mandated energy efficiency programs that gave rise to this Program in its current form.

The second reason is that residential consumers should not be made to subsidize the Program for the benefit of corporate customers. If the PUCO continues charges for this program against law and reason, then the PUCO should limit charges for the subsidy to the business customer classes that contain the recipients of the subsidy. (Note that FirstEnergy should be welcome to continue the program on its own dime.)

After all, tainted House Bill 6—which FirstEnergy so ardently sought—was sold to the public in part on saving consumers money that they were spending for energy efficiency. Does FirstEnergy not remember that H.B. 6 claim?

Further, most of the comments supporting the Program do not confront the law or the subsidy issues. Rather, the focus is especially on the history of the Program, the type of case it was approved in, whether and to what extent the program provides economic development and reliability benefits, and other irrelevant information.

The fact is, charges for the Economic Load Response Program were “authorized by the commission for compliance with” peak demand reduction mandates, which is all that is required for R.C. 4928.66(G)(3) to apply. And R.C. 4928.66(G)(3) says that all such charges “*shall terminate*” (emphasis added). That is what the law requires. The PUCO must end these charges immediately and refund to customers any amounts paid in 2021.

II. REPLY COMMENTS

A. The PUCO should follow the law and end charges to at least residential consumers under FirstEnergy’s energy efficiency rider for the Program.

One party erroneously claims in its initial comments that OCC has asked for the Economic Load Program to “be eliminated.”¹ This is not true. OCC’s position, as stated in its application for rehearing and initial comments, is that *charges* to customers for the Program under FirstEnergy’s energy efficiency rider should end. As stated, FirstEnergy is welcome to continue offering the Program on its own dime. But the law (R.C. 4928.66(G)(3)) does not allow FirstEnergy to continue charging customers to subsidize the Program under its energy efficiency rider.

¹ IEU Comments at 1.

B. Whether the Economic Load Program provides reliability or economic development benefits is irrelevant under R.C. 4928.66(G)(3).

Parties supporting continuation of charges for the Economic Load Response Program spend much time touting the claimed benefits of the Economic Load Program, including what they believe are economic development benefits and service reliability benefits.² OCC neither concedes nor disputes that such benefits exist. They are beside the point.

R.C. 4928.66(G)(3) says that “any electric distribution cost recovery mechanisms authorized by the commission for compliance” with energy efficiency and peak demand reduction mandates “shall terminate.” It does not say that charges may continue if the Program provides economic development or reliability (or any other) benefits. Thus, whether the Economic Load Program provides the benefits claimed by other parties has no bearing in this case.

The PUCO is a creature of statute and must follow the law.³ Simply, the authority for the PUCO to approve such charges to consumers has been removed from the law.

C. Whether the Economic Load Program was approved in an Electric Security Plan case as opposed to an energy efficiency portfolio case is irrelevant under R.C. 4928.66(G)(3).

Parties supporting continuation of charges for the Economic Load Response Program argue that because the Program was approved in FirstEnergy’s Electric Security Plan case and not its energy efficiency portfolio case, the charges can continue.⁴ This argument fails because R.C. 4928.66(G)(3) makes no such distinction.

² Nucor Comments at 4-10; OEG Comments at 2, 11, 15; IEU Comments at 2-3.

³ *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under Elec. Sec. Plan of Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20 (“The commission is a creature of statute and may act only under the authority conferred on it by the General Assembly.”).

⁴ Nucor Comments at 3, 10-15; OEG Comments at 12; IEU Comments at 3-4; FirstEnergy Comments at 3-9.

Again, R.C. 4928.66(G)(3) says that “any electric distribution cost recovery mechanisms authorized by the commission for compliance” with energy efficiency and peak demand reduction mandates “shall terminate.” The law makes no reference to the type of case in which a charge is approved. The law simply says that all such charges shall end.

The parties’ focus on the type of case elevates form above substance. As OCC explained in its initial comments, R.C. 4928.66(G)(3) applies to the Economic Load Response Program because that Program was approved to support FirstEnergy’s compliance with energy efficiency and peak demand reduction mandates.⁵ R.C. 4928.66(G)(3) therefore applies, regardless of the docket in which the PUCO happened to approve the Program.

D. Parties claim that peak demand reduction is only an “ancillary” or “secondary” benefit of the Economic Load Program, but the PUCO-approved tariffs say otherwise.

Parties supporting continuation of charges for the Economic Load Program claim that R.C. 4928.66(G)(3) does not apply to the Economic Load Response program because peak demand reduction is only an “ancillary” or “secondary” benefit of the Program.⁶ This argument fails for two reasons.

First, it fails because it is not true that peak demand reduction is an ancillary or secondary benefit of the program. To the contrary, meeting peak demand reduction mandates is a central feature of the Program; a customer can *only* participate in the Economic Load Response Program if the demand response benefits from participation are used for compliance with the now-defunct peak demand reduction mandates under R.C. 4928.66.⁷

⁵ OCC Comments at 4-5.

⁶ Nucor Comments at 15; IEU Comments at 3; OEG Comments at 3.

⁷ See Ohio Edison Co., Rider ELR, Sheet 101; Cleveland Electric Co., Rider ELR, Sheet 101; Toledo Edison, Rider ELR, Sheet 101.

Indeed, as one party notes, there are seven requirements for participating in the Program.⁸ Among these seven requirements, *three* pertain to peak demand reduction.⁹ And although parties claim that economic development is a central purpose of the Program, *none* of the seven requirements pertain to job creation, capital investment, or any other economic development purpose.¹⁰

Second, it fails because it is irrelevant. Under R.C. 4928.66(G)(3), all charges to customers for energy efficiency and peak demand reduction programs approved to meet the now-defunct mandates must end. The statute does not say that charges for programs with “secondary” or “ancillary” energy efficiency and peak demand reduction purposes may continue.

E. OCC is not barred by collateral estoppel from arguing that charges to customers for the Economic Load Response Program under FirstEnergy’s energy efficiency rider must end.

OCC explained in its initial comments (and previously in its application for rehearing) that R.C. 4928.66(G)(3) prohibits FirstEnergy from charging customers for its Economic Load Response Program under its energy efficiency rider. IEU claims that OCC’s position is barred by collateral estoppel. According to IEU, parties in FirstEnergy’s most recent Electric Security Plan argued that the Economic Load Response Program should have been considered in FirstEnergy’s energy efficiency portfolio docket and not in the Electric Security Plan docket.¹¹ IEU’s argument misinterprets the doctrine of collateral estoppel, which does not apply here.

⁸ OEG Comments at 7.

⁹ See Ohio Edison Co., Rider ELR, Sheet 101; Cleveland Electric Co., Rider ELR, Sheet 101; Toledo Edison, Rider ELR, Sheet 101 (customer not allowed to participate in other peak demand reduction programs if it participates in the Economic Load Response program; customer must commit its demand response savings to meet Ohio’s now-defunct mandates; PUCO must fine that the demand response savings are counted for purposes of meeting the now-defunct mandates).

¹⁰ *Id.*

¹¹ IEU Comments at 5-6.

As IEU noted, “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.’”¹² But it would be impossible for collateral estoppel to apply here because the law in question—R.C. 4928.66(G)(3)—first took effect in October 22, 2019, and FirstEnergy’s Electric Security Plan case was decided more than three years earlier in March 2016.¹³ Neither OCC nor anyone else could possibly have litigated the impact of R.C. 4928.66(G)(3) in 2016, when that law did not yet exist. Collateral estoppel does not apply.

III. CONCLUSION

The law (R.C. 4928.66(G)(3)) does not allow FirstEnergy to continue charging customers for its Economic Load Response Program. The Program’s charges were “authorized by the commission for compliance with” now-defunct energy efficiency and peak demand reduction mandates. The PUCO must apply the law as written and terminate these charges. And customers should get a refund for any charges they have paid for this Program in 2021. At the least, FirstEnergy should be barred from charging residential consumers for this corporate Program.

¹² IEU Comments at 6 (quoting *Ohio Power Co.*, 2015-Ohio-2056).

¹³ Case No. 14-1297-EL-SSO, Opinion & Order (Mar. 31, 2016).

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Christopher Healey

Christopher Healey (0086027)
Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone: (614) 466-9571
Christopher.healey@occ.ohio.gov
(willing to accept service by email)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was served on the persons stated below via electronic transmission, this 12th day of April 2021.

/s/ Christopher Healey _____
Christopher Healey
Assistant Consumers' Counsel

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SERVICE LIST

john.jones@ohioattorneygeneral.gov	bknipe@firstenergycorp.com
natalia.messenger@ohioattorneygeneral.gov	edanford@firstenergycorp.com
mkurtz@BKLawfirm.com	mrgladman@jonesday.com
kboehm@BKLawfirm.com	mkl@smxblaw.com
jkylercohn@BKLawfirm.com	joe.oliker@igs.com
Bojko@carpenterlipps.com	Mnugent@igs.com
Wygonski@carpenterlipps.com	Bethany.allen@igs.com
rdove@keglerbrown.com	rkelter@elpc.org
tdougherty@theOEC.org	swilliams@nrdc.org
mleppla@theOEC.org	mpritchard@mcneeslaw.com
paul@carpenterlipps.com	dborchers@bricker.com
dutton@carpenterlipps.com	sechler@carpenterlipps.com
callwein@keglerbrown.com	

Attorney Examiner:
Lauren.augostini@puco.ohio.gov

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