

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Tariff Update of the Demand Side	)	
Management and Energy Efficiency Riders	)	
Of Ohio Edison Company, The Cleveland	)	Case No. 20-1673-EL-RDR
Electric Illuminating Company, and The	)	
Toledo Edison Company	)	

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**MOTION OF INDUSTRIAL ENERGY USERS-OHIO  
TO INTERVENE, MEMORANDUM IN SUPPORT,  
AND COMMENTS**

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Matthew R. Pritchard (Reg. No. 0088070)  
(Counsel of Record)  
Rebekah J. Glover (Reg. No. 0088798)  
Bryce A. McKenney (Reg. No. 0088203)  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 719-2842  
Telecopier: (614) 469-4653  
mpritchard@mcneeslaw.com  
rglover@mcneeslaw.com  
bmckenney@mcneeslaw.com  
(willing to accept service via email)

**JUNE 24, 2021**

**COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO**

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Industrial Energy Users-Ohio ("IEU-Ohio") respectfully moves the Public Utilities Commission of Ohio ("Commission"), pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11, to intervene in the above-captioned matter with the full powers and rights granted by the Commission, specifically by statute or by the provisions of the Ohio Administrative Code, to intervening parties. Additionally, IEU-Ohio provides the attached Memorandum in Support and Comments in response to the Objections ("Comments") filed by the Office of the Ohio Consumers' Counsel ("OCC").

On June 1, 2021, the FirstEnergy electric distribution utilities ("FirstEnergy")<sup>1</sup> filed updated tariff sheets in this docket to update component 1 of FirstEnergy's Demand Side Management and Energy Efficiency Rider ("DSE"). On June 9, 2021, OCC filed objections raising the exact same meritless arguments that were raised by OCC on rehearing and in comments in Case No. 16-743-EL-POR. As all the parties in that case demonstrated, OCC's arguments are without merit (and procedurally improper) because the economic load response ("ELR") program is an economic development and job

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<sup>1</sup> Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company.

retention program authorized in the current electric security plan (“ESP”) proceeding. IEU-Ohio’s members include customers of FirstEnergy that would be negatively impacted by OCC’s meritless position. Accordingly, IEU-Ohio has a direct, real, and substantial interest in the issues and matters involved in this proceeding and is so situated that the disposition may, as a practical matter, impair or impede IEU-Ohio’s ability to protect its interest.

IEU-Ohio believes that its participation will not unduly prolong or delay this proceeding and that it will significantly contribute to the full development and equitable resolution of the factual and other issues. The interests of IEU-Ohio will not be adequately represented by other parties and, as such, IEU-Ohio is entitled to intervene with the full powers and rights granted by the Commission, specifically by statute and by the provisions of Commission rules to intervening parties. Accordingly, IEU-Ohio respectfully requests that the Commission grant its Motion to Intervene and give due consideration to its Comments.

Respectfully submitted,

/s/ Bryce A. McKenney

Matthew R. Pritchard (Reg. No. 0088070)

(Counsel of Record)

Rebekah J. Glover (Reg. No. 0088798)

Bryce A. McKenney (Reg. No. 0088203)

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**MEMORANDUM IN SUPPORT  
AND COMMENTS**

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IEU-Ohio is an association of ultimate customers of FirstEnergy that will be directly affected by the outcome of this proceeding. IEU-Ohio's members are located in the FirstEnergy service territory, pay Rider DSE, and participate in FirstEnergy's ELR program.

FirstEnergy's ELR program is an economic development program that aids in reliability and stability for customers across the FirstEnergy service territory.<sup>2</sup> The Commission has already twice rejected claims that the FirstEnergy ELR program is or ever was part of FirstEnergy's energy efficiency and peak demand reduction ("EE/PDR") program.<sup>3</sup> The ELR program is an interruptible load program where certain customers can interrupt their demand on an electric utility's distribution system, providing system reliability and stability to the entire electric distribution system. Interruptible load programs

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

<sup>3</sup> *ESP IV Case*, Fifth Entry on Rehearing at 113 (October 12, 2016); see also Eighth Entry on Rehearing at 70 (August 16, 2017).

like FirstEnergy's ELR are particularly useful during emergencies, such as extreme weather events, to prevent the need for the utility to resort to load-shedding.

## **I. Procedural History**

On June 1, 2021, FirstEnergy filed updated tariff sheets to update the rates for Rider DSE. Rider DSE currently contains two components – DSE1 and DSE2. DSE2 was formerly used by FirstEnergy to recover the costs associated with its EE/PDR programs implemented to secure compliance with Ohio's former EE/PDR requirements. However, since Ohio's EE/PDR requirements have been repealed and the programs terminated, DSE2 has been set to \$0.00. On the other hand, under DSE1, FirstEnergy recovers its costs associated with customers taking service under the ELR program. The ELR program is an economic development and job retention program authorized as a term of FirstEnergy's current ESP.<sup>4</sup> Interruptible tariff provisions such as the ELR program benefit all customers by providing system reliability and stability. One specific benefit of interruptible programs is their availability during an emergency, such as an extreme weather event, where the utility can call on certain customers to interrupt their load to prevent the need for the utility to resort to load-shedding, thus maintaining reliability and providing a clear benefit to all customers.

However, on June 9, 2021, OCC filed Objections in this case asserting that the ELR program is associated with FirstEnergy's EE/PDR program and should be terminated. The argument OCC makes was already rejected by the Commission on

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<sup>4</sup> *ESP IV Case*, Opinion and Order (Mar. 31, 2016) at 94; Fifth Entry on Rehearing (October 12, 2016) at 113; *see also* Eighth Entry on Rehearing (August 16, 2017) at 70.

multiple occasions in FirstEnergy's ESP IV case, should be rejected by the Commission in Case No. 16-743-EL-POR, and should be rejected in this proceeding.

**II. The ELR Program is a lawful and reasonable economic development and job retention program authorized as part of FirstEnergy's ESP IV.**

The Commission should reject OCC's meritless objection to FirstEnergy's quarterly update to DSE Rates for the reasons IEU-Ohio and other parties briefed in Case No. 16-743-EL-POR, which are summarized below. FirstEnergy's ELR program existed long before the utilities' EE/PDR programs.<sup>5</sup> The Commission has already ruled multiple times that the ELR program is an economic development and job retention program that was authorized as part of an ESP.<sup>6</sup> The Commission has also explicitly rejected claims that because the economic development and job retention program provides additional ancillary benefits, for example peak demand reduction, that it should automatically be considered part of FirstEnergy's portfolio plan. Having already rejected the same argument OCC raises in Case No. 16-743-EL-POR and here, the Commission should follow its prior precedent and again reject the meritless argument presented by OCC.

**III. The arguments raised by OCC in this case are barred by Collateral Estoppel and Res Judicata.**

The arguments raised by OCC in this case should be rejected under the doctrines of *Res Judicata* and *Collateral Estoppel*. The Commission has previously found that when issues have already been heard and decided, they are precluded from being heard

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<sup>5</sup> *ESP IV Case*, Fifth Entry on Rehearing at 146 ("[t]he ELR programs existed long before the statutory energy efficiency and peak reduction mandates.").

<sup>6</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., Opinion & Order (March 31, 2016) at 94 ("ESP IV Case"); *See also*, *ESP IV Case*, Fifth Entry on Rehearing at 113 (October 12, 2016); *ESP IV Case*, Eighth Entry on Rehearing at 70 (August 16, 2017).

again, even if the cause of action differs.<sup>7</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>8</sup>

The argument raised by OCC in its Comments filed on June 9, 2021, in this proceeding has already been addressed (and rejected) by the Commission in the FirstEnergy ESP IV proceeding. Further, OCC has already sought to relitigate this issue in Case No. 16-743-EL-POR. By filing Comments in this proceeding, OCC continues its attempts to compel the Commission to relitigate an issue that has already been decided. The Commission should not give OCC another bite at the apple. OCC’s arguments in this case lack merit and have been improperly raised in this proceeding.

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<sup>7</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 (December 18, 2019).

<sup>8</sup> *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).

#### **IV. Conclusion**

IEU-Ohio has a real and substantial interest inasmuch as this proceeding may directly or indirectly impact the rates and provisions of electric service to IEU-Ohio members' manufacturing facilities. IEU-Ohio's direct interest in this proceeding is the result of the effect that this proceeding will have upon the price, adequacy, and reliability of electric service. IEU-Ohio respectfully requests that the Commission grant its Motion to Intervene and give due consideration to these Comments.

Respectfully submitted,

/s/ Bryce A. McKenney

Matthew R. Pritchard (Reg. No. 0088070)

(Counsel of Record)

Rebekah J. Glover (Reg. No. 0088798)

Bryce A. McKenney (Reg. No. 0088203)

MCNEES WALLACE & NURICK LLC

21 East State Street, 17<sup>TH</sup> Floor

Columbus, OH 43215

Telephone: (614) 719-2842

mpritchard@mcneeslaw.com

rglover@mcneeslaw.com

bmckenney@mcneeslaw.com

**COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO**



## **CERTIFICATE OF SERVICE**

In accordance with Ohio Adm.Code 4901-1-05, 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 *Motion to Intervene, Memorandum in Support, and Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 24th day of June, 2021, *via* electronic transmission.

/s/ Bryce A. McKenney

Bryce A. McKenney

Kimberly W. Bojko  
Thomas V. Donadio  
Bojko@carpenterlipps.com  
donadio@carpenterlipps.com

### **On Behalf of OMA**

Angela Paul Whitfield  
paul@carpenterlipps.com

### **On Behalf of The Kroger Co.**

Robert Dove  
rdove@keglerbrown.com

### **On Behalf of OPAE**

Emily Danford  
Brian J. Knipe  
edanford@firstenergycorp.com  
bknipe@firstenergycorp.com

### **On Behalf of FirstEnergy**

Bethany Allen  
Joseph Olikier  
Evan Betterton  
Bethany.allen@igs.com  
Joe.oliker@igs.com  
Evan.betterton@igs.com

### **On Behalf of IGS**

Michael L. Kurtz, Esq.  
Kurt J. Boehm, Esq.  
Jody Kyler Cohn, Esq.  
mkurtz@BKLawfirm.com  
kboehm@BKLawfirm.com  
jkylercohn@BKLawfirm.com

### **On Behalf of Ohio Energy Group**

Christopher Healey  
Christopher.healey@occ.ohio.gov

### **On Behalf of OCC**

John Jones  
john.jones@ohioAGO.gov

Megan Addison  
Gregory Price  
megan.addison@puco.ohio.gov  
gregory.price@puco.ohio.gov

### **On Behalf of Commission Staff**

**This foregoing document was electronically filed with the Public Utilities**

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Summary: Motion to Intervene of Industrial Energy Users-Ohio, Memorandum in Support and Comments electronically filed by Bryce A McKenney on behalf of Industrial Energy Users-Ohio