

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio	)	
Power Company for Authority to Establish a	)	Case No. 23-0023-EL-SSO
Standard Service Offer Pursuant to R.C.	)	
4928.143 in the Form of an Electric Security	)	
Plan.	)	

In the Matter of the Application of Ohio	)	
Power Company for Approval of Certain	)	Case No. 23-0024-EL-AAM
Accounting Authority.	)	

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**REPLY BRIEF OF THE OHIO ENVIRONMENTAL COUNCIL**

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The Ohio Environmental Council (“OEC”) respectfully submits this brief in reply to the Ohio Consumers’ Counsel opposition to the Joint Stipulation and Recommendation (the “Stipulation”) filed by the Ohio Power Company (“AEP”) on September 6, 2023.

December 22, 2023:

Respectfully Submitted,

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**II. INTRODUCTION**

The Ohio Environmental Council (OEC) asks this Commission to reject proposed modifications by the Ohio Consumer’s Counsel (OCC) and approve the Stipulation as proposed. Demand response is a critical reliability tool, not a luxury service to be exclusively left to the unregulated market. There are certainly services under the demand response umbrella where the competitive market can provide critical services. However, a critical reliability tool for the distribution grid cannot be solely dependent on the unregulated market. The Stipulation in this case fulfills the dual policy of providing a reliability tool while ensure effective competition where possible.

Since the legislature deregulated Ohio’s energy generation services to give customers choice, it has acknowledged the balance needed between preserving competitive consumer choice and ensuring customers have access to reliable electric service. *See e.g.*, R.C. 4928.14 (utilities’ provider of last resort responsibility). Throughout the legislation creating Ohio’s

competitive energy market, the legislature has reiterated that reliability and access is the guiding mandate for this commission. *See e.g.*, 4928.143 (B)(2)(h) (creating exceptions from prohibitions in Title 49 for recovery of reliability related costs in an ESP). The very first principle under state policy is to ensure the availability of adequate, reliable electric service. R.C. 4928.02(A). Thus, grid reliability, and the services that contribute to it, cannot be reduced to exclusively competitive services.

### **ARGUMENT**

The OCC's arguments regarding the Stipulation's demand response program are not persuasive because it confuses the directives in state policy regarding competitive services and fails to provide any evidence that demand response is an exclusively competitive service. Demand response is not defined as a competitive service in Ohio law and the OCC does not point to a single provision of the law that states demand response or energy efficiency more broadly is a competitive service. Instead, the OCC makes contradictory arguments regarding the scope of state policy and the Stipulation's relationship to these objectives. A closer look at both the law and the Stipulation in this case, shows it fulfills state policy rather than violating it.

The OCC's arguments with respect to demand response are overbroad and contradictory. The OCC argues that the demand response program in this case violates state policy against using ratepayer dollars towards a competitive service, obstructing "market access." OCC Brief at 37 (arguing smart thermostats are already in the marketplace). This argument is based on the unsupported assumption that demand response programs are an exclusively competitive service. *Id.* Then, the OCC argues the Stipulation uses ratepayer dollars to prop up the competitive market. *Id.* (arguing SSO rates "will help electric marketers market and sell their product"). These arguments overlook the details and goals of the specific program in this case.

The state's policy to ensure effective competition does not exist in a vacuum, but in conversation with the other state policies outlined in 4928.02. *See, In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, 2018-Ohio-4698, 155 Ohio St. 3d 326, 338, 121 N.E.3d 320, 333–34. No one section of 4928.02 imposes “strict conditions” on this Commission. *Id.* Instead, the Commission must weigh these policies against each other and the facts of a particular case to determine how best to achieve these state policies as a whole. *Id.*

This Commission is tasked with the balancing the need to foster a competitive market and maintaining consumers' access to reliable electric service for all Ohioans. The OCC cannot pluck certain components of state policy out of its larger framework to satisfy its own argument. As a whole, the Stipulation balances the reliability needs of the electric grid against preserving opportunities for market access to relevant components of the demand response services.

**A. In its effort to paint all potential energy efficiency services as a single competitive product, the OCC fails to understand the different roles demand response plays in both the market and the distribution system.**

The OCC fails to understand the diversity within the energy efficiency field and the narrowly tailored demand response program in this case. In order to support its arguments against the demand response program in this Stipulation, the OCC attempts to paint the vastly different services and products under the large umbrella of energy efficiency as a single product. OEC Brief at 37. However, this Commission must look at the specific facts of this case, and the proposal in this Stipulation, to weigh whether it meets the state policies outlined in 4928.02 as a package. R.C. 4928.142. This case provides a narrowly tailored critical reliability tool that is distinguishable from past Commission decisions cited by the OCC.

Energy efficiency is a broad category of services that provides key reliability benefits to the grid. The Supreme Court of Ohio has defined energy efficiency as any effort to reduce demand on the grid. *In re Application of Ohio Edison Co.*, 2019-Ohio-4196, 158 Ohio St. 3d 27, 28–29, 139 N.E.3d 875, 876–77. *Id.* The court has also acknowledged that demand side management provides a benefit to the grid by contributing to reliability and reducing the price of energy. *Id.*

Within this broad category, however, there are several distinct roles and opportunities for energy efficiency. There are proactive peak load shifting measures such as the use of smart thermostats and energy efficiency appliances that can reduce overall energy consumption or time of use rates that incentivize customers to shift usage to times when grid operators expect lower demand. Tr. III at p. 542-543. In contrast, demand response is a reactive peak load shifting program which can avoid forced shutoffs during unanticipated peaks, often caused by severe weather. Where proactive programs can help control the flow of demand throughout conventional grid peaks, demand response acts as a net to catch unanticipated demand at emergency peak periods. *Id.* at p. 440, lines 23-25 (“Successful demand response programs have the opportunity to reduce stress on the grid at peak times.”).

Even within the umbrella of demand response programs, there are different roles available to ensure reliability across the electric grid. As noted by Witness Sioshansi, the electric grid encompasses both transmission and distribution. *Id.* at p. 570, line 3-9 (explaining potential relational effects between the transmission and distribution system). The grid also serves a variety of customers from commercial and industrial to residential. Across these sectors, demand response holds different opportunities for the competitive and noncompetitive markets. For example, PJM provides a market for bidding in avoided energy. PJM already utilizes this market

for an established commercial and industrial demand response program.<sup>1</sup> Competitive Retail Electric Service (CRES) providers and other third-party providers can bid their customers' avoided energy into this existing market, offering programs with a financial benefit to both the CRES provider and customer. RESA Exhibit 1 at pp. 4-5. AEP also already has a demand response program for commercial and industrial customers under its IRP rate offering. AEP Ohio Exhibit 2, Direct Testimony of Jaime L. Mayhan at pp.8-10.

However, a big hole remains in this net of critical demand response services: residential customer programs on the distribution system. Without this additional service, communities will fall through this net when the participating industrial and commercial demand response customers do not cover all areas of the distribution grid. That is exactly what happened during the 2022 summer heatwave outages, and will happen again if not addressed by this Commission.<sup>2</sup>

The residential, distribution demand response program in this case fulfills the competing interests in 4928.02 because it is narrowly tailored to meet the needs of the distribution grid, leaving the competitive market to occupy residential offerings on the transmission system. AEP will not bid any events it calls on the distribution system into the PJM market. The program also commits to ensuring coordination between the distribution events called by AEP and the PJM events called by CRES to ensure effective operation of both services. Thus, the narrowly tailored demand response program in this Stipulation meets the dual needs of fostering a competitive market where possible and maintaining critical reliability services on the distribution grid. The Stipulation's provisions on preserving the role of the competitive market is distinguishable from

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<sup>1</sup> *In the Matter of the Power Outages that Occurred June 14-16, 2022, as Explained by AEP Ohio and PJM Interconnection, LLC.*, Transcript of Proceedings, p. 7, lines. 15-19 (July 13, 2022) (hereinafter "2022 Summer Outages Review Tr.") available at: <https://puco.ohio.gov/static/emplibrary/files/Power+outage+review/July+13th+2022+AEP+Ohio+and+PJM+Interconnection+power+outage+review+minutes.pdf>.

<sup>2</sup> A Report by the Staff of the Public Utilities Commission of Ohio, *Summer 2022 Electric Outages* at 6 (jan. 3, 2023) available at: <https://puco.ohio.gov/static/emplibrary/files/Power+outage+review/outage+report+010323.pdf>.

past Commission precedent where the Commission has chosen to rely on the competitive market.<sup>3</sup> None of the Commission's prior decisions cited by OCC include a stipulation where multiple stakeholders, including CRES suppliers operating in the competitive market, put forward a comprehensive demand response proposal.<sup>4</sup>

The OCC's arguments fail to respond to this narrowly tailored program, but rather argue that all potential programs under the vast umbrella of energy efficiency be left up to a theoretical competitive market. OCC provides no evidence that residential demand response programs exist in the AEP service territory. Instead, it argues that one small component of the demand response program is available in the competitive market: smart thermostats. OCC Brief at 37. The OCC makes no assertion that demand response programs are available in the competitive marketplace, assuming smart thermostats and demand response are the same product. *Id.* This confusion between the smart thermostat device, and the demand response program misses the reliability role the Stipulation's program offers.

The proposal in this case only uses smart thermostats as a tool to achieve the larger demand response goal. The smart thermostat serves as an incentive to gain program participation and an assistive technology for implementation. The adoption of smart thermostats is not the goal of the program in this case, distinguishing it from the Commission precedent OCC relies on in its argument. The goal of this program is to actively manage peak load during emergency situations, like the 2022 summer heatwave.

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<sup>3</sup> *C.f.*, *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Case No. 21-637-GA-AIR et al., Opinion and Order (Jan. 26, 2023).

<sup>4</sup> *See, Id.* (stipulation removed all energy efficiency proposals); *See also, In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its 2021 Energy Efficiency and Demand Side Management Portfolio of Programs and Cost Recovery Mechanism*, Case No. 20-1013-EL-POR, et al., Entry (June 17, 2020) (no stipulation in this case); *See also, In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR et al., Opinion and Order Adopting the Joint Stipulation and Recommendation (Nov. 17, 2021) (stipulation in that case removed the residential demand side management program).

OCC also provides little evidence of actual adoption or reliability effects. When pressed by the Environmental Law and Policy Center's counsel for some evidence on the actual adoption of smart thermostats in the marketplace, the primary evidence Witness Shutrump provides is the past work of *utility run* rebate programs. Tr. III at p. 444, line 2-3 & 18-23. Otherwise, Witness Shutrump could provide no numbers or prevalence of smart thermostat adoption in the AEP service territory from the competitive market suppliers she cites in her testimony. *Id.* Despite this lack of evidence, the OCC asks this Commission to rely exclusively upon the competitive market's availability of smart thermostats for grid reliability.

**B. Reliability is not a competitive service.**

Critical grid reliability tools, like demand response, are not exclusively a competitive service. The OCC's argument that state policy prohibits spending ratepayer funds on competitive services relies on the assumption that demand response is a competitive service. However, the legal definition of a competitive service does not currently include demand response. The law breaks retail electric service<sup>5</sup> into two categories: (1) unregulated electric generation service, and (2) regulated distribution service. R.C. 4928.03, 4928.05, and R.C. 4928.15(A). In practice these two categories are not bright lines; they rely on each other to serve the consumer. From a statutory perspective though, the definition of a competitive service does not include demand response programs.

Demand response is not a competitive service under Ohio law and thus exempt from any restriction to use ratepayer funding to support competitive service. Under Ohio law, a competitive retail service is one designated by the Ohio Revised Code or by PUCO order following an investigation and public order. R.C. 4928.01(A)(4). The Ohio Revised Code sets

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<sup>5</sup> R.C. 4928.01(D).



aside only “generation, aggregation, power marketing, and power brokerage supplied to consumers” as competitive services. R.C. 4928.03. The PUCO has yet to provide an investigation, public hearing, and then subsequent order declaring demand response programs an exclusively competitive service as required by 4928.04(A)(1)-(2). While the commission has noted that the competitive market is able to join and offer energy efficiency programs generally, it has not deemed energy efficiency, or demand response specifically, as a competitive service under the state law definition.

The OCC provides no evidence to support its assertion that demand response programs are a competitive service, especially demand response programs restricted to the distribution grid. It does not cite to any language in the Ohio Revised Code defining demand response as a competitive service. It also does not cite to a commission order, following an investigation and hearing, declaring demand response a competitive service. Instead, it cites to Commission orders reviewing specific energy efficiency program designs, rather than investigations into market prevalence and efficacy in serving consumer needs, as required by Ohio law.

**C. The Stipulation preserves a potential competitive market for demand response in the regional transmission market.**

The OCC mischaracterizes the Stipulation’s intent to preserve the competitive market as a subsidy. The OCC argues RC 4928.02(H)’s prohibition on using distribution rates for anti-competitive subsidies prevents any use of demand response program funding to preserve customer choice in the regional transmission market. OCC Brief at 37. However, any funding anticipated through the Stipulation for the purpose of collaborating with competitive marketers is intended to spur competition, not prevent it. Joint Exhibit 1, Joint Stipulation and Recommendation at para 34 (AEP intends to hold working groups to explore ways to collaborate and “maximize the benefits of the program.”).

While demand response generally is not an exclusively competitive service, there is room among the different components of demand response for competitive marketers to participate. Getting this balance between competitive opportunities in the transmission market and reliability needs on the distribution system will take coordination between AEP, third-party vendors, and the competitive marketers. The Stipulation facilitates this need for cooperation.

The Stipulation in this case establishes a working group to discuss potential barriers competitive marketers may face as both the transmission and distribution systems work together to meet the grid's reliability needs. *Id.* The Stipulation also anticipates that if these barriers to segregating the transmission and distribution products involve fees, the demand response program budget will be used to address those barriers. *Id.* This budget allocation would not be payments directly to CRES providers and would not be exclusively for the benefit of CRES providers. Instead, it would benefit the entire grid by ensuring the distribution and transmission systems can simultaneously maximize reliability potential during an emergency peak load event.

### **III. CONCLUSION**

The OEC requests this Commission reject OCC's arguments and approve the Stipulation as filed. The OCC's arguments fail to appreciate the narrowly tailored details of the program in this case which distinguish it from past Commission decisions. The OCC also fails to show demand response programs are a competitive service under the Ohio Revised Code. Finally, the OCC provides contradicting arguments, simultaneously arguing it stifles market access and subsidizes the competitive market. This Commission must navigate the nuance between the twin state policies of ensuring effective competition and necessary electric service reliability on a case by case basis. The residential demand response program in this case does just that. It allows for

grid reliability improvements while preserving the opportunity for competitive markets to enter this space as well.

December 22, 2023:

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## **CERTIFICATE OF SERVICE**

The PUCO's e-filing system will electronically serve notice of the filing of this document on the parties. I hereby certify that a courtesy copy of the foregoing has been served upon the following parties by electronic mail this 22nd day of December 2023.

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Summary: Brief Reply Brief in Support of the Joint Stipulation and  
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