BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	))))))	Case No. 23-23-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority	)))	Case No. 23-24-EL-AAM

MOTION FOR LEAVE TO FILE AS TIMELY THE POST-HEARING REPLY BRIEF OF THE ENVIRONMENTAL LAW & POLICY CENTER

The Environmental Law & Policy Center (ELPC) hereby moves for leave to file as timely its Post-Hearing Reply Brief. Reasons for this motion are set forth in the accompanying Memorandum in Support. ELPC has also attached its Post-Hearing Reply Brief to this Motion. No party would be prejudiced by a grant of this Motion.

ELPC respectfully requests that its Motion for Leave to File as Timely the Post-Hearing Reply Brief be granted.

Dated: January 2, 2024

Respectfully Submitted,

/s/ Robert Kelter

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MEMORANDUM IN SUPPORT

The filing deadline for Post-Hearing Reply Briefs in Case Nos. 23-23-EL-SSO and 23-24-EL-AAM was Friday, December 22, 2023. ELPC filed its Post-Hearing Reply Brief on December 22, 2023 in Case No. 23-23-EL-SSO and received an E-Filing Confirmation via email from the PUCO Docketing Information System. On December 27, 2023, ELPC received email notification that the filing was rejected for the reason that it was not filed into all case numbers listed, namely, Case No. 23-24-EL-AAM. As ELPC offices were closed for the holidays from Monday, December 25, 2023 through Monday, January 1, 2024, its staff was only now available to attend to correcting this clerical oversight.

ELPC emailed a courtesy copy of its Post-Hearing Reply Brief as filed in Case No. 23-23-EL-SSO to the Attorney Examiners and all parties immediately after it was filed on December 22, 2023 and, therefore, other parties will not be prejudiced by a grant of this Motion for Leave to File as Timely.

Accordingly, ELPC respectfully requests that its Motion for Leave to File as Timely the Post-Hearing Reply Brief be granted. ELPC has attached its Post-Hearing Reply Brief to this Motion.

Dated: January 2, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion for Leave to File as Timely the Post-Hearing Reply Brief* submitted on behalf of the Environmental Law & Policy Center was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on January 2, 2024. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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POST-HEARING REPLY BRIEF OF THE ENVIRONMENTAL LAW & POLICY CENTER

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December 22, 2023

Table of Contents

I. INTRODUCTION

On December 1, 2023, fourteen parties filed briefs in support of the Joint Stipulation and Recommendation (Stipulation) in this proceeding,[1] with seven parties explicitly supporting the proposed Smart Thermostat Demand Response Program, namely Citizens Utility Board of Ohio (CUB), Direct Energy Business LLC and Direct Energy Services LLC (Direct Energy), Environmental Law & Policy Center (ELPC), Interstate Gas Supply, LLC (IGS), Ohio Environmental Council (OEC), Retail Energy Supply Association (RESA), and Ohio Power Company (AEP Ohio or the Company). Under this Program, customers receive a rebate for a smart thermostat and, in return, agree to participate in a demand response program that allows AEP Ohio to reduce their electricity usage at peak times.

Only the Ohio Consumers' Counsel (OCC) expressly opposed the Smart Thermostat Demand Response Program, arguing that it does not meet the second two prongs of the Commission's three-prong test for approving settlements. OCC Initial Brief at 26-27, 36-40. As discussed below, OCC's arguments fail on both prongs. The Smart Thermostat Demand Response Program satisfies the Commission's three-prong test, as does the Stipulation as a whole, *see, e.g.,* Staff Initial Brief (arguing more comprehensively that the Stipulation satisfies the three-prong test, as well as the MRO test), and ELPC encourages the Commission to adopt it unmodified.

[1] Parties that filed briefs in support of the Stipulation are: AEP Ohio; Staff of the Public Utilities Commission of Ohio (Staff); CUB; Direct Energy; ELPC; IGS; Ohio Energy Group (OEG); Ohio Energy Leadership Council (OELC); OEC; Ohio Manufacturers' Association Energy Group (OMAEG) and Kroger Co. (filing jointly); Ohio Partners for Affordable Energy (OPAE); RESA; and Walmart, Inc.
In addition to OCC, Calpine Retail Holdings, Constellation, and One Energy Enterprises opposed approval of the Stipulation, at least without modification, however these parties did not expressly oppose or address the Smart Thermostat Demand Response Program.

II. ARGUMENT

A. OCC Fails to Show That the Smart Thermostat Demand Response Program Is Not in the Public Interest.

The Smart Thermostat Demand Response Program benefits customers through reduced peak demand, decreased stress on the electric system, and reduced costs and enhanced reliability. Joint Ex. 1 at § III.I, ¶ 34 (pp. 21-22); AEP Ohio Ex. 2 at 23; Staff Ex. 1 at 10. Therefore, it satisfies the second prong of the Commission's three-prong test, which requires that a settlement benefit ratepayers and the public interest. *See In re Ohio Power Co. & Columbus S. Power Co. for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, et al., Opinion & Order at 27 (Dec. 14, 2011). OCC complains that the Stipulation did not include a cost-benefit analysis to support the Smart Thermostat Demand Response Program. OCC Initial Brief at 27. However, the Commission's three-prong test does not require such an in-depth analysis. Rather, it requires a more general showing of benefits to customers and the public interest, which this Stipulation fulfills.

In fact, OCC witness Colleen Shutrump acknowledged that the Smart Thermostat Demand Response Program provides customer and system benefits. During cross-examination, Ms. Shutrump stated: "Successful demand response programs have the opportunity to reduce stress on the grid at peak times." Tr. at 440; *see also* OCC Ex. 5 at 14 (recognizing that customers can "participate in the program and benefit from the rate design that allows consumers to reduce their usage and AEP to reduce demand in times when the grid is stressed."); OCC Initial Brief at 39-40 (making the same statement). And when discussing customer education, Ms. Shutrump referenced the "benefits of smart thermostats" and "how the latest technologies can help save them [i.e., customers] money." OCC Ex. 5 at 11; *see also* OCC Initial Brief at 38 (making the same statement).

OCC incorrectly claims that there are "no specific dollar caps" associated with the Program and other spending under the gridSMART Rider proposed in the Stipulation, and therefore it could harm ratepayers and the public interest. OCC Initial Brief at 26. In fact, the Smart Thermostat Demand Response Program's budget is capped at $5 million annually for this ESP's four-year term, and the Stipulation specifies that this budget will cover all costs associated with the program, including any marketing and administrative costs. Joint Ex. 1 at § III.I, ¶ 34 (pp. 21-24). Moreover, the total estimated bill impact of the Stipulation as a whole is modest: a typical residential customer using 1000 kWh per month would experience a bill increase of less than 1% per year, or about $1.50 monthly, over the four-year term of the ESP. Staff Ex. 1 at 5. With its $5 million annual budget, the Smart Thermostat Demand Response Program contributes only a small fraction to this limited bill increase. Although the Commission's three-prong settlement test does not require a formal cost-benefit analysis, the limited costs associated with the Smart Thermostat Demand Response Program as compared to its system and customer benefits nonetheless weigh in favor of Commission approval.

B. The Smart Thermostat Demand Response Program Does Not Violate Any of the Regulatory Principles That OCC Identifies.

In addition to requiring settlements to benefit customers and the public interest, the Commission's three-prong test indicates that settlements should not violate regulatory principles or practices. The Smart Thermostat Demand Response Program also satisfies this third prong of the Commission's test. ELPC Initial Brief at 6-8. In claiming that the Program violates regulatory principles related to encouraging market competition, OCC fails to recognize the various Program elements that obviate its concerns. Signatory parties, including RESA and competitive suppliers, worked together to develop a program that comports with state policy to encourage market competition by appropriately enabling CRES engagement with the program. Joint Ex. 1 at § III.I, ¶ 34 (pp. 22-23); *see also* Direct Energy Initial Brief at 6-9 (arguing that the Program benefits customers and the public interest because it reasonably protects customer choice and the competitive market, and does not violate any regulatory principles); IGS Initial Brief at 9-10, 13 (similar argument); RESA

Initial Brief at 9-12 (similar argument). In addition, as OCC acknowledges, the Stipulation provides for a working group to allow AEP Ohio and other interested stakeholders to meet semi-annually to "collaborate on ways to maximize the benefits of the program," including specifically to discuss changes that may be necessary to enable CRES participation in the program and offering competitive demand response products. Joint Ex. 1 at § III.I, ¶ 34 (p. 24); OCC Initial Brief at 36. Therefore, should any challenges arise within the Program related to market competition, this working group will serve as a forum for AEP Ohio and interested parties, including OCC, to address them.

OCC first alleges that the Smart Thermostat Demand Response program violates R.C. 4928.02(H), which specifies the following state policy: "Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates." OCC Initial Brief at 37. According to OCC, the proposed Program violates this provision because it would "force SSO consumers [to] pay for smart thermostats that will be used to help electric marketers market and sell their product." OCC Initial Brief at 37. OCC's claim is incorrect. In reality, CRES and non-CRES residential customers pay the same costs for the Program and have the same opportunity to receive the associated smart thermostat rebate, whether it comes to them from AEP Ohio or through a CRES provider promoting the discount. Joint Ex. 1 at § III.I, ¶ 34 (pp. 21-23). As OCC witness Shutrump recognized during cross-examination, all AEP Ohio customers—whether or not they receive service from a CRES provider—pay for non-bypassable riders (like the gridSMART rider that would fund the Smart Thermostat Demand Response Program), Tr. at 440; Joint Ex. 1 at § III.I, ¶ 34 and, thus, the funding for the Program comes from all customers.

SSO customers are not paying for CRES customers' smart thermostats, as OCC claims and, therefore, the Program is not an "anticompetitive subsidy" and does not violate R.C. 4928.02(H).

OCC also argues that the Smart Thermostat Demand Response Program violates R.C. 4928.02(D), which says it is state policy to: "Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure." OCC claims that the Program violates this subsection because the Program would "forc[e] consumers to fund smart thermostats which are readily available in the competitive market with numerous choices in retailers, brand, and price." OCC Initial Brief at 37-38. However, while various retailers may sell several brands of smart thermostats, OCC witness Shutrump was unable to provide any details about the volume of sales or any retailer discounts, nor did she know what percentage of customers in AEP Ohio's service territory have smart thermostats, Tr. at 446-49. Going forward, rebates provided through the Smart Thermostat Demand Response Program would offset the cost of smart thermostats for all customers. Logically, lower costs will enable more customers to purchase smart thermostats from competitive retailers, and then participate in the AEP Ohio demand response program, as well as a CRES demand response program and/or time-of-use rates. In this way, the Program increases market access to demand-side management programs and time-differentiated pricing. Indeed, as Ms. Shutrump recognized, "… the smart thermostat is what allows the demand response program to be successful." Tr. at 448; *see also* Tr. at 445-46 (when asked whether "smart thermostats have the potential to help customers take advantage of time differentiated price programs," Ms. Shutrump responded "Yes.").

Finally, OCC makes a similar argument with respect to R.C. 4928.02(G), stating that the Smart Thermostat Demand Response Program violates this provision and recent Commission decisions by allowing "AEP Ohio to charge consumers for smart thermostats that are accessible in the market." OCC Initial Brief at 38-40 (referring to Commission decisions supporting the use of market-based approaches for energy efficiency in recent cases). R.C. 4928.02(G) specifies the following state policy: "Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment." Again, contrary to OCC's argument, the Program advances this state policy by recognizing the role that CRES providers may play by allowing these providers to sign up customers and receive the value of customers' rebates in order to provide deeper discounts and to offer competitive demand response programs. *See* ELPC Initial Brief at 7-8 (citing Joint Ex. 1 at § III.I, ¶ 34 (pp. 22-23) and RESA Ex. 1 at 4-5). The proposed Smart Thermostat Demand Response Program enables competitive providers to offer benefits to their customers and is consistent with the Commission's preference for market-based approaches expressed in recent orders.

III. CONCLUSION

As argued in our initial brief, the Smart Thermostat Demand Response Program satisfies all three parts of the Commission's three-part test. Notably, although OCC opposes the Program and the Stipulation as a whole, several public interest organizations, namely CUB, ELPC, OEC, and OPAE, signed on and support it, as do Commission Staff. ELPC reiterates its recommendation that the Commission approve the Smart Thermostat Demand Response Program, along with the rest of the Stipulation.

Dated: December 22, 2023

Respectfully Submitted,

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