

# 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 AUTHORITY TO  
ESTABLISH A STANDARD SERVICE OFFER  
PURSUANT TO R.C. 4928.143 IN THE  
FORM OF AN ELECTRIC SECURITY PLAN.

CASE NO. 23-301-EL-SSO

## FINDING AND ORDER

Entered in the Journal on December 18, 2024

### I. SUMMARY

{¶ 1} The Commission finds that Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company have a statutory right to withdraw its application for an electric security plan and, therefore, approves the notice of withdrawal. The Commission further finds that the withdrawal effectively terminates the electric security plan and that this proceeding should be dismissed.

### II. APPLICABLE LAW

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities (EDUs), as defined in R.C. 4928.01(A)(6), and public utilities, as defined under R.C. 4905.02. As such, the Companies are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 mandates that an EDU shall provide a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation service, to all consumers within its certified territory. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} Pursuant to R.C. 4928.143(C)(2)(a), if the Commission modifies and approves an application for an ESP filed under R.C. 4928.143(C)(1), the EDU may withdraw the application, thereby terminating it. Furthermore, pursuant R.C. 4928.143(C)(2)(b), if the utility exercises its statutory right to terminate an application for an ESP under R.C. 4928.143(C)(2)(a), the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO until a subsequent SSO is authorized.

### III. PROCEDURAL HISTORY

{¶ 5} In Case No. 14-1297-EL-SSO, the Commission modified and approved, pursuant to the stipulations filed in that case, FirstEnergy's application for its fourth ESP (ESP IV) to commence on June 1, 2016, and continue through May 31, 2024, pursuant to R.C. 4928.143. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (*ESP IV Case*), Opinion and Order (Mar. 31, 2016); Fifth Entry on Rehearing (Oct. 12, 2016); Eighth Entry on Rehearing (Aug. 16, 2017).

{¶ 6} On April 5, 2023, FirstEnergy filed an application (Application) to establish the Companies' fifth ESP for a period to commence on June 1, 2024 (ESP V).

{¶ 7} A technical conference was held on May 10, 2023, to allow interested persons the opportunity to better understand the Companies' Application.

{¶ 8} Local public hearings were conducted on September 7, 2023, in Cleveland; on September 14, 2023, in Toledo; and on September 26, 2023, in Akron.

{¶ 9} By Entry issued October 11, 2023, the following parties were granted intervention in this case: Ohio Energy Leadership Council (OELC), Ohio Energy Group (OEG), Northeast Ohio Public Energy Council (NOPEC), Ohio Partners for Affordable Energy, Ohio Consumers' Counsel (OCC), Calpine Retail Holdings LLC, Interstate Gas Supply (IGS), Citizens Coalition and Utilities for All, Northwest Ohio Aggregation Coalition (NOAC), Ohio Manufacturers' Association Energy Group (OMAEG), Walmart Inc., Nucor

Steel Marion (Nucor), Utility Workers Union of America Local 126, One Energy Enterprises Inc. (One Energy), Constellation Energy Generation LLC and Constellation NewEnergy Inc. (together, Constellation), Ohio Hospital Association, Armada Power LLC, Nationwide Energy Partners, The Kroger Co. (Kroger), Citizens Utility Board of Ohio (CUB), Environmental Law and Policy Center (ELPC), Retail Energy Supply Association (RESA), Enel North America Inc., Ohio Environmental Council (OEC), Utica East Ohio Midstream LLC, and collectively Direct Energy Business LLC, Direct Energy Services LLC, Reliant Energy Northeast LLC, Stream Ohio Gas and Electric LLC, and XOOM Energy Ohio LLC.<sup>1</sup>

{¶ 10} The hearing commenced on November 7, 2023, and concluded on December 6, 2023.

{¶ 11} By Opinion and Order, issued May 15, 2024, the Commission approved the Application, as modified by Staff's recommendations and the Opinion and Order. ESP V was thus established, effective June 1, 2024.

{¶ 12} On June 14, 2024, applications for rehearing were filed by FirstEnergy; One Energy; OMAEG; jointly by OCC and NOAC; and jointly by ELPC, CUB, and OEC. On June 24, 2024, memoranda contra the applications for rehearing were filed by FirstEnergy; OEG; OCC; Nucor; OELC; OMAEG; and jointly by RESA and IGS.<sup>2</sup>

{¶ 13} On October 29, 2024, FirstEnergy filed a notice of withdrawal (Notice) of its Application for ESP V, stating that it is exercising its statutory right to withdraw its Application under R.C. 4928.143(C)(2)(a). Additionally, citing to R.C. 4928.143(C)(2)(b), FirstEnergy further states that it is exercising its statutory right to implement its most recent SSO, i.e., ESP IV. The Notice was filed in this proceeding. In the *ESP IV Case*, FirstEnergy

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<sup>1</sup> ChargePoint, Inc. filed a motion to intervene on May 10, 2023, and subsequently filed a notice to withdraw on September 15, 2023. Thus, its motion to intervene was never granted.

<sup>2</sup> The applications for rehearing were ultimately denied by operation of law as a result of an Ohio Supreme Court decision. See *In re Application of Moraine Wind, L.L.C.*, Slip Opinion No. 2024-Ohio-3224.

filed a motion to amend the ESP IV tariffs and proposed revised tariffs (Proposed Tariffs) asserted to be consistent with the tariffs approved in the *ESP IV Case* that were in effect before June 1, 2024, when ESP V became effective.

{¶ 14} By Entry dated October 31, 2024, the administrative law judge (ALJ) invited any party to this proceeding to file initial and reply comments to the Notice on or before November 13, 2024, and November 20, 2024, respectively.<sup>3</sup> Staff, NOPEC, OEG, OELC, Constellation, RESA, jointly OCC and NOAC, and jointly OMAEG and Kroger timely filed initial comments. FirstEnergy, Nucor, OEG, OELC, jointly OCC and NOAC, and jointly OAMEG and Kroger timely filed reply comments.

#### IV. DISCUSSION

##### A. Parties' Arguments<sup>4</sup>

{¶ 15} In their comments, Staff, OEG, OELC, NOPEC, OCC, and NOAC concede that FirstEnergy has the right to withdraw ESP V. They state that the Commission modified the ESP V application, so FirstEnergy has the statutory right to withdraw under Ohio law.

{¶ 16} Neither RESA, Constellation, nor Nucor take a position on FirstEnergy's right to withdraw, but instead focuses their arguments on how ESP IV should be implemented if the withdrawal is approved.

{¶ 17} Jointly, OMAEG and Kroger argue that FirstEnergy lost its right to withdraw ESP V because the Opinion and Order became a final order. Citing R.C. 4928.143(C)(2)(a), they assert that the statutory right of withdrawal may be invoked after the Commission

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<sup>3</sup> This is the same date that memoranda contra and replies to FirstEnergy's motion to amend ESP IV tariffs were to be filed in the *ESP IV Case*.

<sup>4</sup> To the extent that these filings include comments related to the Proposed Tariffs, those items will be addressed in the *ESP IV Case*. In this case, we will address only FirstEnergy's withdrawal of its ESP V Application.

approves and modifies an ESP application, but is barred once the Commission issues a final, appealable order and the ESP takes effect. They reason that when the ESP is a product of a final Commission order, it is no longer an application, which may be withdrawn, but an implemented ESP. They state that if the right to withdraw from an ESP extends indefinitely, other parties' substantive rights would be affected, and those parties would be prevented from appealing to the Ohio Supreme Court. As to FirstEnergy's denied application for rehearing, OMAEG and Kroger add that FirstEnergy could have filed a notice of appeal to the Supreme Court anytime between August 17, 2024, and September 8, 2024, but did not do so. The parties note that a party loses its opportunity to challenge a Commission decision if it fails to appeal or request rehearing, citing *Office of Consumers' Counsel v. Public Utilities Comm. of Ohio*, 16 Ohio St.3d 9, 475 N.E.2d 782, 783 (1985). They assert that FirstEnergy lost its opportunity to withdraw when it chose not to appeal to the Ohio Supreme Court. OMAEG and Kroger suggest that FirstEnergy has financial motives for withdrawing from ESP V. OMAEG and Kroger represent that numerous benefits of ESP V, including expansion of Rider NMB, a decrease in Rider ELR credits, a reduced ESP term, and other benefits would be lost if the Commission allowed the Companies to withdraw. For these reasons, OMAEG and Kroger ask that the Commission deny FirstEnergy's request to withdraw from ESP V.

{¶ 18} In response, the Companies argue that OMAEG and Kroger's arguments contradict R.C. 4928.143 and Commission precedent. They argue that the right to withdraw is absolute if the Commission modifies the ESP, and there is no time limitation for the ability to withdraw identified in the statute or that can be found in Commission precedent. In fact, the Companies point to Commission precedent allowing withdrawal after the Commission issued final, appealable orders and after the ESPs had already taken effect, citing *In re the Application of Dayton Power and Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 16-395-EL-SSO, et al. (*DP&L ESP III Case*), Finding and Order (Dec. 18, 2019) at ¶16; *In re the Application of Dayton Power and Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-426-EL-SSO, et al.

(*DP&L ESP II Case*), Finding and Order (Aug. 26, 2016). FirstEnergy also asserts that there is no requirement to appeal to the Ohio Supreme Court before withdrawing. To counter any allegation that they withdrew from ESP V for a financial windfall, the Companies project that residential customers would save two to three dollars per month under the proposed ESP IV tariffs as compared to the higher ESP V tariffs. Instead, they emphasize that they are seeking to withdraw to obtain certainty for the Companies and their customers, reasoning that ESP V set material terms for only the first two years of the ESP term.

### ***B. Commission Conclusion***

{¶ 19} The Commission finds that, under R.C. 4928.143(C)(2)(a), FirstEnergy has a statutory right to withdraw its Application for ESP V. R.C. 4928.143(C)(2)(a) unambiguously provides:

If the Commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or under [R.C. 4928.142].

Stated simply, R.C. 4928.143(C)(1) requires that the Commission issue an order that does “one of three things: (1) approve, (2) modify and approve, or (3) disapprove the application.” *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶ 24. The Supreme Court of Ohio has “stated on numerous occasions that if the meaning of a statute is clear on its face, then it must be applied as it is written.” *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 634 N.E. 2d 611 (1994). Thus, a plain reading of R.C. 4928.143(C)(2)(a) demonstrates that the only statutory precondition to the utility’s right to withdraw the application is that the Commission modify and approve the application by order. The Commission issued the May 15, 2024 Opinion and Order modifying and approving FirstEnergy’s Application for ESP V. As acknowledged in most

of the comments, no other action need occur to trigger FirstEnergy's statutory right under R.C. 4928.143(C)(2)(a) to withdraw that application, thus terminating ESP V.

{¶ 20} OMAEG and Kroger assert that the right to withdrawal is barred once the Commission issues a final, appealable order and the ESP takes effect. Specifically, they contend that R.C. 4928.143(C)(2)(a) does not apply because there is no longer an application to withdraw now that ESP V is a product of a final Commission order. We do not find the argument persuasive. First, the statute itself identifies no timeline or limitations on the right to withdrawal. We also note that their argument is not consistent with how the Commission has previously considered application withdrawals. For example, in a renewable energy generating facility case, the Commission allowed an applicant to withdraw his application after the application was approved, a certificate has been issued, and many years had passed. *See In re the Application of Mitchell Heim for Certification as an Ohio Renewable Energy Resource Generating Facility*, Case No. 12-439-EL-REN, Finding and Order (Apr. 18, 2018). Thus, the Commission has allowed withdrawals of an application after it is the product of a final Commission order and a significant amount of time has passed. Also, DP&L was permitted to withdraw from its ESP II after it was effective for nearly three years and withdraw from its ESP II after it was effective for over two years. *DP&L ESP II Case*, Finding and Order (Aug. 26, 2016); *DP&L ESP III Case*, Finding and Order (Dec. 18, 2019). We add that OMAEG and Kroger have identified no precedent where the Commission has disallowed the withdrawal of an application due to a final Commission order approving such application. For these reasons, we do not find such argument to be persuasive.

{¶ 21} OMAEG and Kroger also argue that by waiting to file the Notice until the ESP V Order is final, other parties lose their right to appeal to the Ohio Supreme Court. We point out that, if the ESP V withdrawal is what intervenors would seek to appeal, this Finding and Order would be the appropriate order to challenge. Alternatively, had FirstEnergy filed its Notice earlier when applications for rehearing were eligible for appeal to the Ohio Supreme Court, parties with a pending application for rehearing would be limited to appeal only the issues they identified in their application for rehearing. *Lycourt-*

*Donovan v. Columbia Gas of Ohio, Inc.*, 152 Ohio St.3d 73, 2017-Ohio-7566, 93 N.E.3d 902, ¶ 52, citing R.C. 4903.10; *In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶ 54. No party included FirstEnergy's withdrawal in its application for rehearing, as the withdrawal had not happened at that point. For these reasons, FirstEnergy's decision to file its Notice after the appeal window closed did not affect other parties' right to appeal.

{¶ 22} Turning to the argument that FirstEnergy should not be allowed to withdraw because it did not appeal the order modifying ESP V to the Ohio Supreme Court, we find that R.C. 4928.143(C)(2)(a) includes no such requirement to exhaust appeal options before withdrawing. The Companies are withdrawing their ESP V application as allowed by statute, not challenging a Commission decision, as suggested by OMAEG and Kroger.

{¶ 23} In conclusion, the Commission approves FirstEnergy's Notice withdrawing its application for an ESP, thereby terminating ESP V. Accordingly, the Commission finds that this case should be dismissed.

## V. ORDER

{¶ 24} It is, therefore,

{¶ 25} ORDERED, That FirstEnergy's notice of withdrawal of its application in Case No. 23-301-EL-SSO be approved. It is, further,

{¶ 26} ORDERED, That this case be dismissed. It is, further,



{¶ 27} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

**COMMISSIONERS:**

*Approving:*

Jenifer French, Chair  
Daniel R. Conway  
Lawrence K. Friedeman  
Dennis P. Deters  
John D. Williams

JWS/mef

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**Case No(s). 23-0301-EL-SSO**

Summary: Finding & Order that the Commission finds that Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company have a statutory right to withdraw its application for an electric security plan and, therefore, approves the notice of withdrawal. The Commission further finds that the withdrawal effectively terminates the electric security plan and that this proceeding should be dismissed. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio.