BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code.	**Case No. 12-2156-EL-ORD**
In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code.	**Case No. 13-651-EL-ORD**
In the Matter of the Amendment of Ohio Administrative Code Chapter 4901:1-40, Regarding the Alternative Energy Portfolio Standard, to Implement Am. Sub. S.B. 315.	**Case No. 13-652-EL-ORD**

APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

Robert M. Endris (0089886)
ATTORNEY FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

76 South Main Street
Akron, OH 44308
Tel: (330) 384-5728
Fax: (330) 384-3875
rendris@firstenergycorp.com

Pursuant to R.C. 4903.10 and Rule 4901:1-35, Ohio Administrative Code, Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies"), hereby file their Application for Rehearing of the Finding and Order entered in the journal on December 19, 2018, in the above-captioned case. As explained in more detail in the attached Memorandum in Support, the Commission's Finding and Order in this case needs to be clarified and/or is unreasonable and unlawful on the following grounds:

- Rule 4901:1-39-05(A)(1)(c) is unjust and unreasonable in that it arbitrarily precludes banked energy savings from being used to trigger the shared savings mechanism.

- Rule 4901:1-39-05(C) needs clarification and/or is unreasonable because it is unclear as to logistics of recommended revisions to the Technical Resource Manual ("TRM").

- Rule 4901:1-39-05(D) is unjust and unreasonable because the process does not contemplate or allow time for reply comments prior to scheduling a hearing or issuing an Opinion and Order.

- Rule 4901:1-39-05(F) is unjust and unreasonable because the process lacks direction as to the effective dates of TRM revisions and thus may create conflicts with current or filed portfolio plans and evaluation results.

- Rule 4901:1-39-06(A) needs clarification and/or is unjust, unreasonable and unlawful in that it requires the utility to demonstrate, in each annual rate adjustment proposal, justification for recovery mechanisms approved in prior proceedings such as the Companies' ESP IV.

- Rule 4901:1-39-06(B) is unjust and unreasonable because the process does not contemplate or allow time for reply comments prior to scheduling a hearing or issuing an Opinion and Order.

- Rule 4901:1-39-06(B) is unjust, unreasonable, and unlawful because it could require utilities to expend or commit funds for compliance that are later disallowed through no fault of the utility.

For these reasons, as discussed in greater detail below, the Companies respectfully request that the Commission grant the Companies' Application for Rehearing and modify the rules appropriately.

Respectfully submitted,

/s/ *Robert M. Endris*
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
rendris@firstenergycorp.com

ATTORNEY FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

MEMORANDUM IN SUPPORT

Electric distribution utilities ("EDUs") are mandated to implement energy efficiency and peak demand reduction programs pursuant to Ohio Revised Code ("O.R.C.") 4928.66 (A)(1). The Ohio General Assembly has seen fit to declare energy efficiency as a policy goal for the state, and to implement the policy by imposing benchmarks or required mandates for compliance, along with penalties for non-compliance. Cost recovery is critical and necessary to support utility efforts to achieve the statutory required mandates, and the new Rules will leave EDUs unfairly exposed to program cost recovery risks and cause harm to customers absent the implementation of appropriate safeguards as explained below.

On January 29, 2014, the Commission issued an Entry requesting comments on proposed amendments to the rules contained in Chapters 4901:1-39 and 4901:1-40. Comments were filed by several parties on February 28, 2014, and reply comments on March 24, 2014. On December 19, 2018, the Commission issued its Finding and Order adopting several amendments to Chapters 4901:1-39 and 4901:1-40.

As a creature of statute, the Commission has only the jurisdiction conferred upon it by the General Assembly.[1] And, while the Commission has general authority to promulgate regulations and rules of procedure, this authority is limited by precluding the Commission from legislating through the promulgation of rules which are in excess of legislative policy, or which conflict with the enabling statute.[2]

The Finding and Order adopted a number of rules that have several unintended negative consequences, potentially nullify the effect of prior Commission orders, and

---

[1] *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, (1995) 72 Ohio St. 3d 1, 5.
[2] *English v. Koster*, (1980) 61 Ohio St. 2d 17, 19.

conflict with the language and intent of Section 4928.66, O.R.C. rendering such rules unjust, unreasonable and unlawful. For those reasons the Commission should grant rehearing.

ARGUMENT

I. Rule 4901:1-39-05(A)(1)(c) is unjust and unreasonable in that it arbitrarily precludes banked energy savings from being used to trigger the shared savings mechanism.

The Commission has amended Rule 4901:1-39-05(A)(1)(c) by requiring that banked surplus energy savings shall not be used to trigger shared savings. This restriction of the adopted Rule was not vetted in the original comments and therefore is not based on the record before the Commission in this docket. The Companies submit that it is unreasonable to arbitrarily exclude banked savings from being used to trigger shared savings. Many utilities, including the Companies, specifically targeted high levels of program performance in prior years to build a bank of energy savings in anticipation of the rising cost of compliance, the anticipated reduction in market potential, as well as the need to achieve increasing legislative benchmarks in future years. These past compliance efforts benefited all customers by achieving results that produced economic savings earlier than necessary for program participants and non-participants alike. The ability to bank savings and apply them toward compliance in future years was specifically contemplated by the General Assembly and included in section 4826.662(G), make it possible to achieve future thresholds at a lower cost than if the Companies had not targeted and achieved prior performance above the required mandates.

Excluding banked savings from triggering shared savings will have an immediate and negative unintended consequence by reducing or eliminating the incentive to the

Companies and other EDUs to implement programs at levels that achieve incremental energy efficiency savings in the most cost-effective manner. The Commission should grant rehearing and accept the current practice, that was enabled by the legislation, to permit banked savings and shared savings to work in tandem to maximize benefits to customers. Specifically, the Commission should either declare that banked savings may be used to trigger shared savings, or, in the alternative, reserve the determination to a future proceeding wherein EDUs may present evidence for a case-by-case evaluation.

II. Rule 4901:1-39-05(C) needs clarification and/or is unreasonable because it is unclear as to logistics of recommended revisions to the Technical Resource Manual.

The Commission's adopted Rule 4901:1-39-05(C) is unclear as to the logistics of revisions to the Technical Reference Manual ("TRM") that are recommended by the Independent Program Evaluator ("IPE"). The Companies appreciate that the Commission confirmed that revisions to the TRM are applicable on a prospective basis only. However, the Companies believe it would be more appropriate to address TRM revisions in a separate docket from the IPE report to allow each process to run its own course without hampering the other. While the timing of filing such reports may nearly coincide, subsequent docket activity as contemplated in the adopted rules may result in different timing of the effective date for updates or revisions to the TRM. The Companies request clarification or that rehearing be granted to require that TRM updates be filed in a separate docket from the IPE Report contained in 4901:1-39-05(B) and with an independent comment and reply comment process.

III. Rule 4901:1-39-05(D) is unjust and unreasonable because the process does not contemplate or allow time for reply comments prior to scheduling a hearing or issuing an Opinion and Order.

Adopted Rule 4901:1-39- 4901:1-39-05(D) spells out a process and timing for the filing of comments by "any person" regarding the electric utility's annual portfolio performance report or the IPE report within thirty (days) of the filing of the IPE's report. However, the adopted rules fail to provide the Companies with the opportunity to respond to comments that may be misleading or factually incorrect. With the Commission's stated goal of due process within these rules, the Companies or IPE should be afforded the opportunity to reply, just as the Rules provide for a reply to memoranda contra and rebuttal to expert testimony, in order to provide a complete and accurate record for the Commission to base its decision on whether a hearing is necessary. The Commission should grant rehearing to insert a modest 15-day time period for replies to comments.

IV. Rule 4901:1-39-05(F) is unjust and unreasonable because the process lacks direction as to the effective dates of TRM revisions and thus may create conflicts with current or filed portfolio plans and evaluation results.

Much like the problem with adopted Rule 4901:1-39-05(C), the Commission's adopted Rule 4901:1-39-05(F) does not indicate an effective date for the updated TRM to be used in evaluating portfolio performance. Further, while the TRM may be "automatically approved" thirty days after filing, such approval could arrive too late to incorporate into the new September 1 annual plan filing. Similarly, such approval could come after plan filing and before plan performance is implemented or evaluated. In either case, it would be unfair and contrary to Commission precedent to use different versions of

the TRM for plan design and plan performance evaluation.[3] The Commission should clarify or grant rehearing to provide that updates to the TRM become *effective* for use on January 1 following the approval of the updated TRM and only applicable for subsequently filed Energy Efficiency and Peak Demand Reduction Program Portfolio Plan filings. Such a clarification eliminates the possibility of a newly issued TRM being applied to Portfolio Plans currently being implemented, or to Portfolio Plans about-to-be or recently filed. The clarification also allows sufficient time for discussion of prospective impacts within the collaborative process to be considered and factored into plan development. The same TRM that was used in support of a Companies' Portfolio Plan should also be used to evaluate plan performance.

V. Rule 4901:1-39-06(A) needs clarification and/or is unjust, unreasonable and unlawful in that requires the utility to demonstrate, in each annual rate adjustment proposal, justification for recovery mechanisms approved in prior proceedings.

The Commission adopted Rule 4901:1-39-06(A) requires an EDU to demonstrate "how it proposes recovery and why" in each rate recovery mechanism filed contemporaneously with the annual portfolio plan filing. However, for many EDUs, including the Companies, the Commission has already determined how energy efficiency recovery should occur and approved energy efficiency recovery mechanisms that are in effect today.[4] The Rules must not contradict Commission orders, and prior-approved

[3] See, for example, *In the Matter of the Protocols For the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Efforts*, Case No. 09-512-FE-UNC, Finding and Order, October 15, 2009, p. 9-10 (Issue 3)(adopting provisional recommendation that deemed and deemed calculated values for costs and energy savings and finding that for compliance purposes "ex ante estimates should be used for the life of the investment.")

[4] See, for example, *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015.* Case No. 12-2190-EL-POR et. al, Opinion and Order, p 42 (March 20, 2013) (Commission found that issues involving the rate design of Rider DSE2,

mechanisms should not be subject to re-litigation in annual filings under the new rule. The Commission should grant rehearing to clarify that Commission-approved energy efficiency recovery mechanisms in effect will remain in place and that cost recovery mechanisms approved in other Commission proceedings need not be re-justified in an annual rate adjustment filing under this rule.

VI. Rule 4901:1-39-06(B) is unjust and unreasonable because the process does not contemplate or allow time for reply comments prior to scheduling a hearing or issuing an Opinion and Order.

Similar to adopted Rule 4901:1-39-05(D), and in conjunction with issue VII discussed below, adopted Rule 4901:1-39-06(B) is unfair, unjust and unreasonable in that it does not provide an opportunity for the Companies to file a reply to comments filed by other parties. EDUs should have the last word before a Commission ruling, just as in motions or testimony. The uncertainty and potential lengthy resolution of recovery mechanism proceedings resulting from this Rule leaves EDUs exposed to the risk of disallowance after programs have already been implemented. As a result, the EDUs may be forced to mitigate the cost recovery risk by altering or discontinuing planned program activities to the detriment of customers

The Companies propose that the Rule provide a modest period of fifteen days for replies to comments on the proposed rate adjustment mechanism. If no comments are filed, the fifteen-day period is not triggered, and the mechanism is automatically deemed reasonable as the adopted rule provides. If comments are filed, however, fifteen days is not a significant delay in exchange for the benefit of a more fulsome record.

---

which is the rider through which the Companies' energy efficiency and peak demand reduction costs are recovered, are better addressed in the Companies' next SSO proceeding).

VII. Rule 4901:1-39-06(B) is unjust, unreasonable, and unlawful because it could require utilities to expend or commit funds for compliance that are later disallowed through no fault of the utility.

Adopted Rule 4901:1-39-06(B) establishes a comment period and potential hearing process regarding a utility's proposed rate adjustment mechanism. However, since there is no deadline for concluding the hearing process, the Commission could issue an Order well after the start of the performance period. The collaborative process among diverse stakeholders, no matter how inclusive, does not guarantee consensus on a comprehensive portfolio plan or the corresponding proposed rate adjustment mechanism. To the extent that parties disagree on aspects of programs within a portfolio plan, their recourse under the new Rule is through the rate adjustment mechanism process. Parties may urge the Commission to "defund" the programs they disfavor or the portfolio in its entirety through challenges to the proposed rate adjustment mechanism, which would leave utilities at risk during the pendency of rate adjustment mechanism proceedings.

As discussed above, a potential solution for utilities would be to delay or cease program activity expenditures until conclusion of the hearing process. In addition to putting the utility at risk of non-compliance with the statutory benchmarks, the resulting discontinuity of annual start/stop cycles could be very disruptive to vendors and customers, leading to customer confusion and dissatisfaction, increased costs, and a negative impact on the business community. Commercial and industrial customer projects often have extended investment cycles that would be significantly disrupted by such discontinuity, while energy efficiency vendors may scale down business operations in Ohio to commit resources to steadier opportunities elsewhere.

The Commission should proactively address this potential discontinuity, disruption, and dissatisfaction by declaring that utility energy efficiency expenditures made in good faith and consistent with the proposed portfolio plan will not be subject to disallowance prior to a final Commission order on the rate adjustment mechanism hearing process. In such instances, the utility should also be allowed a reasonable amount of time to curtail any program activities impacted by the order, during which time the utility shall continue to receive full recovery of all costs reasonably incurred.

CONCLUSION

For all of the foregoing reasons, the Commission should grant rehearing on the issues discussed above.

Respectfully submitted,

/s/ *Robert M. Endris*
Robert M. Endris (0089886)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5728
(330) 384-3875 (fax)
rendris@firstenergycorp.com

Attorney for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

CERTIFICATE OF SERVICE

I certify that the foregoing Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company has been filed with the Commission's Docket Information System and is available for all interested parties.

/s/ *Robert M. Endris*
One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/18/2019 5:14:04 PM

in

Case No(s). 12-2156-EL-ORD

Summary: App for Rehearing Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Mr Robert M Endris on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company