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**

MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO APPLICATIONS FOR REHEARING BY CONSERVATION GROUPS AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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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 Memorandum Contra to the Application for Rehearing filed by the Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and Ohio Environmental Council (collectively "Conservation Group") and the Office of the Ohio Consumers' Counsel ("OCC") seeking modification of the Commission's Finding and Order entered in the journal on December 19, 2018, in the above-captioned case ("December Order").

As explained in more detail below, the Commission's December Order in this case with respect to the issues raised by OCC and Conservation Groups and with the Companies' recommended Rehearing revisions is reasonable and lawful. For the reasons set forth herein, the Commission should deny OCC's and the Conservation Groups' Applications for Rehearing.

ARGUMENT

I. The Commission did not err when it declined to specify exactly how shared savings should be triggered.

In their fourth Assignment of Error, Conservation Groups argue the Commission erred by failing to specify in the rules how several items should be precluded from triggering shared savings incentives.[1] As a preliminary matter, the Companies note that many, if not all, of the issues Conservation Groups raise have been dealt with frequently and consistently in the Companies' and other EDUs' prior portfolio plan cases. Conservation Groups' effort to reverse this history here is improper and misguided.

[1] Application for Rehearing of Conservation Groups, p. 17-18.

Conservation Groups argue that shared savings should only be triggered by after-the-fact evaluated and verified energy savings. This is contrary to all of the Ohio EDUs' prior and current shared savings mechanisms, which use *ex ante* calculations for triggering and determining net benefits for shared savings purposes. This *ex ante* approach is appropriate because the Commission has already determined *ex ante* is the appropriate metric for determining compliance with the statutory targets and the purpose of shared savings is to incent utilities to exceed their compliance targets. [2] *Ex post,* or evaluated and verified savings, take into consideration factors outside the utilities' control and are not known until several months after the end of a program year. Thus, changing the process from *ex ante* to *ex post* would be fundamentally unfair as it could penalize utilities for factors occurring beyond their control and that happen after program implementation actions were taken. Further, utilities would not be able to track progress throughout the year and would not be able to accurately predict the trigger or amount of shared savings. Changing the process from *ex ante* to *ex post* also unnecessarily complicates the shared savings mechanism and undermines the role of the incentive during program implementation.

Conservation Groups also argue that federal efficiency standards should be precluded from triggering shared savings. This is counterintuitive because utilities only provide incentives for customers to complete or undertake energy efficiency

[2] See, for example, *In the Matter of the Protocols for the Measurement and Verification of Energy Efficiency Measures and Peak Demand Reduction Measures,* Case No. 09-512-GE-UNC ("*Protocols*") Finding and Order, October 15, 2009, at par.32 ("In determining the reasonableness of program cost recovery and compliance with energy efficiency and peak demand reduction benchmarks, estimates for cost, energy, and demand savings are to be based on the best information available at the time the estimates or calculations are derived, (i.e., ex ante).")

improvements and are calculating the energy savings as directed by and consistent with Ohio law. R.C. 4928.662 counts energy savings from compliance with federal standards:

> For the purpose of measuring and determining compliance with the energy efficiency and peak demand reduction requirements under section 4928.66 of the Revised Code, the public utilities commission shall count and recognize compliance as follows:
>
> (A) Energy efficiency savings and peak demand reduction achieved through actions taken by customers or through electric distribution utility programs that comply with federal standards for either or both energy efficiency and peak demand reduction requirements…shall count toward compliance with the energy efficiency and peak demand reduction requirements.

With respect to Conservation Groups' assertion that "the definition of shared savings precludes banked savings from being used in the trigger stage," Conservation Groups misunderstand and mischaracterize the newly adopted amendments as they apply to the multiple-step process for determining shared savings. The definition of shared savings precludes banked savings from the net savings (or net benefits) process step, not the initial trigger step in the process. To provide clarity and avoid future misunderstanding, the Companies recommend that the definition of "shared savings" replace the term "net savings" with "net benefits" throughout the definition as follows:

> (~~X~~Y) "Shared savings" means the percentage of the net ~~savings~~ benefits that a distribution electric utility may earn in any year in which it exceeds a statutory energy efficiency and/or peak demand reduction benchmark. The net ~~savings~~ benefits is the difference in the present value of the EDU's portfolio of avoided generation, transmission and distribution costs minus the total costs of the energy efficiency programs inclusive of each program's measurement and verification costs. The net ~~savings~~ benefits do not include any ~~savings~~ benefits related to historical mercantile programs, transmission and distribution infrastructure projects, customer action programs, special improvement districts as defined in section 1710.01, Revised Code, and banked savings.

For all of these reasons, Conservation Groups' fourth Assignment of Error should be denied.

II. The Commission did not fail to establish a timely process for ensuring updates to the Ohio Technical Reference Manual.

In their sixth Assignment of Error, Conservation Groups assert that the Commission failed to ensure a process for timely updates to the Technical Reference Manual ("TRM").[3] Conservation Groups also assert that a special process is required to give interested stakeholders an opportunity to "identify TRM assumptions that have become unreasonable over time."[4] Conservation Groups thus recommend adding a subsection that would give any person the right to file comments in a utility's portfolio plan or in any open docket to "recommend updates" to the TRM, and that would no longer permit utilities to rely on the applicable TRM provision until subsequently ruled on by the Commission. This would make portfolio plan performance measurement subject to subsequent TRM revisions. Conservation Groups' recommendation is unnecessarily duplicative, unreasonable, and would likely delay a utility's compliance efforts.

Conservation Groups' recommendation is also duplicative because the Commission has already established a process for the Independent Program Evaluator to timely recommend updates to the TRM in adopted Rule 4901:1-39-05, and for parties to provide input to those updates. Allowing a separate and potentially simultaneous procedural track for TRM updates would waste Commission and parties' resources. Conservation Groups' proposal would also unduly hinder program development and

[3] CG Application, p. 19-21.
[4] Id. at 20.

implementation because the utilities and program vendors would not have the safe harbor TRM provisions to rely on while any updates to the TRM are being considered.

Further, Conservation Groups' recommendation is contrary to the Commission's previously stated intent and the role of the TRM to provide administrative simplicity as well as predictability and consistency for the benefit of the electric utilities, gas utilities, customers, and the Commission. In a thorough and thoughtful discussion, the Commission fully explained how use of the TRM should be implemented, much of which directly refutes Conservation Groups' arguments.[5] The Commission recognized that there would always be differences of opinions on the TRM content and implementation. Thus, the Commission established the TRM as a set of guidelines rather than a mandate, and provided that prescriptive compliance with the TRM will serve as a safe harbor for utilities, subject to other parties' challenges.[6] The adopted rules remain consistent with all of these objectives.

Moreover, Conservation Groups advocate holding utilities in limbo for the outcome while any proposed TRM updates are being considered. This would be inconsistent with the Commission's stated purpose for the TRM to provide utilities with predictability. It would also be inappropriate and unreasonable to subject utilities to this new source of performance and compliance risk. The Companies reiterate their prior recommendation to clarify that any TRM updates be used to evaluate portfolio plan performance and for program planning on a prospective basis only. Conservation Groups' sixth assignment of error should be denied.

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[5] *Protocols,*, Entry on Rehearing, July 31, 2013, at par. 33.
[6] *Id*. ("Any utility that elects to adhere to the guidance in the TRM will benefit from a presumption of reasonableness, which any other party not in agreement would have the burden to rebut in any applicable proceeding.")

III. The Commission did not err when it did not specify whether "verified savings" should include line losses.

In its seventh assignment of error, Conservation Groups assert that the Commission unreasonably failed to specify that line losses should not be included in "verified savings." Conservation Groups erroneously assume that the definition of "verified savings" has any bearing on the determination of compliance in meeting the energy efficiency statutory benchmarks. Conservation Groups' assertion is wrong for several reasons.

First, as noted earlier, the Commission has already ruled that compliance with energy efficiency and peak demand reduction benchmarks are to be based on *ex ante* savings (not *ex post* verified savings as Conservation Groups imply).

Second, the statute recognizes that there are savings resulting from energy efficiency beyond those measured at the customer meter, including line losses resulting from projects undertaken on the transmission and distribution system.[7] If energy is not consumed and therefore not delivered because of the utility's energy efficiency efforts, then the corresponding line losses are not incurred and those costs are thus avoided by customers.

Third, Ohio law specifically directs that line losses are to be included. Section 4928.66(A)(2)(c), O.R.C., specifies that energy savings should be grossed up for line losses:

> Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs … *adjusted upward by the appropriate loss factors.*[8]

[7] R.C. 4928.662(E) ("The commission shall count energy efficiency savings and peak demand reductions associated with transmission and distribution infrastructure improvements that reduce line losses.")
[8] R.C. 4928.66(A)(2)(c) (emphasis added).

Given the statutory directive and the clear avoided cost savings for customers, the Commission should deny Conservation Groups' seventh assignment of error.

IV. The Commission's rules do not allow utilities to charge customers any amount they want in any manner they want.

In a single assignment of error, OCC asserts that the new process established by the Commission "does not allow for meaningful stakeholder participation" and "allows utilities to charge customers any amount they want in any manner they want, without PUCO approval, in violation of R.C. 4905.22."[9] However, OCC simply ignores the process established by the Commission for stakeholder input and potential hearings on the rate adjustment mechanism reflected in 4901:1-39-06.

Moreover, the Companies and others have proposed the Commission's rule should specifically include language stating that justification for cost recovery beyond direct program costs be consistent with Commission directives in other proceedings, such as a Commission approved Electric Security Plan. Continuing to allow for an energy efficiency cost recovery mechanism to be addressed in proceedings outside of the utility's portfolio plan filings, and not be subject to re-litigation in the annual filings under the new rule, will provide opportunities for meaningful participation as well as administrative efficiency. Further, the Commission noted in its Order the continuing role of the "collaborative process" in shaping utilities' annual portfolio plans. The Companies observe that many, if not all, of the interested parties participating in this rulemaking proceeding also participated in the Companies' most recent ESP case and also routinely actively participate in the Companies' quarterly collaborative process meetings.

[9] Application for Rehearing of the Office of the Ohio Consumers' Counsel, p.3.

As for OCC's conjecture that utilities with impunity could propose actions as part of their portfolio plans that violate Ohio laws, the Companies submit that the Commission has well-established remedies if an EDU were to engage in the activities OCC suggests. OCC's wild speculation of potential harms brings no value to the Commission's reconsideration of its Order.

For these reasons, the Commission should deny OCC's assignment of error.

CONCLUSION

For all of the foregoing reasons, the Commission should deny the Applications for Rehearing of Conservation Group and OCC, and grant rehearing on the Companies' Application for Rehearing previously filed in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Memorandum Contra 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

Case No(s). 12-2156-EL-ORD, 13-0651-EL-ORD, 13-0652-EL-ORD

Summary: Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company to Applications for Rehearing by Conversation Groups and the Office of the Ohio Consumers' Counsel electronically filed by Mrs. Ashlee E Waite on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company and Endris, Robert M Mr.