

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Amendment of Ohio)	
Administrative Code Chapter 4901:1-40,)	Case No. 12-2156-EL-ORD
Regarding the Alternative Energy Portfolio)	
Standard, to Implement Am. Sub. S.B. 315.)	

In the Matter of the Commission's Review)	
of its Rules for Energy Efficiency Programs)	Case No. 13-651-EL-ORD
Contained in Chapter 4901:1-39 of the Ohio)	
Administrative Code.)	

In the Matter of the Commission's Review)	
of its Rules for the Alternative Energy)	Case No. 13-652-EL-ORD
Portfolio Standard Contained in Chapter)	
4901:1-40 of the Ohio Administrative Code.)	

**INDUSTRIAL ENERGY USERS-OHIO'S
APPLICATION FOR REHEARING AND
MEMORANDUM IN SUPPORT**

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MAY 10, 2019

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**INDUSTRIAL ENERGY USERS-OHIO'S
APPLICATION FOR REHEARING**

Industrial Energy Users-Ohio ("IEU-Ohio") submits this Application for Rehearing of the Second Entry on Rehearing of the Public Utilities Commission of Ohio ("Commission"). While the Commission appropriately determined "that banked savings may not be used to calculate shared savings,"¹ it also amended proposed Rule 4901:1-39-05(A)(1)(c), Ohio Administrative Code ("O.A.C."), to "allow banked savings to trigger shared savings."²

Because the amended rule would authorize an electric distribution utility ("EDU") to use banked savings to calculate shared savings and such action would be

¹ Second Entry on Rehearing at ¶43 (Apr. 10, 2019).

² *Id.*

unreasonable and unlawful, IEU-Ohio seeks an order granting rehearing to address the following assignment of error.

The Second Entry on Rehearing's authorization of the use of banked savings to trigger shared savings is unlawful and unreasonable because it alters Commission policy without providing a reasoned and lawful basis for the change in policy, would produce unreasonable charges, and permits the recovery of shared savings in violation of statutory limitations on shared savings.

To correct the error in the Second Entry on Rehearing, the Commission should grant rehearing and clarify that that banked savings could be used only to demonstrate compliance with the annual benchmark.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission's Second Entry on Rehearing has introduced two concepts to the determination of shared savings that are mutually exclusive. Consistent with its prior policy, the Commission has correctly concluded that banked savings should be excluded from the shared savings calculation, but the Commission also has provided that banked savings can be relied upon to trigger shared savings.³ In the Second Entry on Rehearing, the Commission does not explain how an EDU can use banked savings to "trigger" shared savings while simultaneously excluding banked savings from the shared savings calculation.

³ Second Entry on Rehearing at ¶44.

“Triggering shared savings” appears to mean one of two things. First, “triggering” could mean that the ability to collect shared savings first requires that the EDU satisfy compliance with the annual benchmark, which could in turn be met with banked savings. Second, “triggering” could mean that banked savings could be included in the annual calculation of the shared savings percentage, which would confine the reference to shared savings calculation to the calculation of annual net benefits. In either case, the use of banked savings as a “trigger” is unreasonable and unlawful.

II. CURRENT COMMISSION PRACTICE FOR CALCULATING SHARED SAVINGS EXCLUDES BANKED SAVINGS

The Commission’s calculation of shared savings is not based on any statutory provision; instead it is a result of past practice, largely developed in settlements.⁴ The first step is a determination of the percentage that the EDU exceeded the annual energy efficiency and peak demand reduction (“EE/PDR”) benchmark with EE/PDR savings generated in the same year.⁵ Those annual savings (left side of the table below) determine the shared savings percentage (right side of table). This table to calculate the shared savings percentage has been utilized by all the EDUs, with a few minor differences.⁶

⁴ *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case Nos. 11-5568-EL-POR, *et al.*, Stipulation and Recommendation at 5 (Nov. 29, 2011) (“2011 AEP Portfolio Plan Stipulation”).

⁵ *Id.* at 7 (“AEP Ohio may only count savings for shared savings one time . . . and in the year in which the savings were generated.”); *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Energy Efficiency Portfolio Plan*, Case Nos. 13-833-EL-POR, *et al.*, Stipulation and Recommendation at 12 (Oct. 2, 2013) (“In a year in which previous years’ over-compliance is used to comply with the benchmarks, shared savings shall be based only on impacts generated in the current year.”) (“2013 DP&L Portfolio Plan Stipulation”).

⁶ 2011 AEP Portfolio Plan Stipulation at 5; *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its*

Achievement of Annual Target	Shared Savings Percentage
Less than 100 %	0 %
100 % to 105 %	5 %
Greater than 105 % to 110 %	7.5 %
Greater than 110 % to 115 %	10 %
Greater than 115%	13%

Not all savings qualify for inclusion in the shared savings calculation. Some savings (*i.e.*, transmission and distribution infrastructure projects that reduce line losses and savings generated from programs funded by the Universal Service Fund Riders) are prohibited by statute from counting towards shared savings.⁷ The Commission also excludes savings from mercantile self-direct projects and community action projects from being eligible towards counting for shared savings.⁸

Existing Portfolio, Case No. 11-4393-EL-RDR, Stipulation and Recommendation at 5 (Nov. 18, 2011) (“2011 Duke Portfolio Plan Stipulation”); *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 2013-2015*, Case Nos. 12-2190-EL-POR, *et al.*, Opinion and Order at 12-13, 15 (Mar. 20, 2013) (“2012 FirstEnergy Portfolio Plan Order”); 2013 DP&L Portfolio Plan Stipulation at 11. Duke’s first and current EE/PDR plan have a slightly different shared savings percentage schedule. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO, *et al.*, Stipulation and Recommendation at 24 (Oct. 27, 2008) (“Duke ESP I Stipulation”); *In the Matter of the Application of Duke Energy Ohio, Inc. for a Waiver to File a New Energy Efficiency and Peak Demand Reduction Portfolio Application*, Case No. 16-576-EL-POR, Amended Stipulation and Recommendation at 5 (Jan. 27, 2017) (“2016 Duke Amended Portfolio Plan Stipulation”).

⁷ R.C. 4928.66(A)(2)(d)(i)(IV) & (V).

⁸ See, e.g., 2013 DP&L Portfolio Plan Stipulation at 12; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at 147 (Oct. 12, 2016) (“The Commission has never allowed shared savings for programs like the historic mercantile customer program which involves no action by the Companies to achieve the energy savings” and also excluded from shared savings any energy savings from the Customer Action program).

The second step in the calculation is a determination of the annual net benefits generated by the portfolio programs implemented that same year. Net benefits, for purposes of shared savings, are determined using the Utility Cost Test (“UCT”).⁹ The net benefits are calculated based on all eligible programs implemented that year (subject to some exclusions).¹⁰ The net benefits, or gross shared savings, are stated in terms of dollars.

The product of the annual shared savings percentage and the annual net benefits determines the total dollar amount of shared savings. The product is then grossed up for taxes and charged to customers through a nonbypassable rider.

The Commission has already considered and rejected a proposal by Duke Energy Ohio, Inc. (“Duke”) to allow banked savings to be relied upon for purposes of calculating the shared savings percentage.¹¹ In an application filed in 2014, Duke argued that it should be permitted to rely on banked savings to calculate its shared savings percentage.¹² If Duke had generated annual savings less than the annual benchmark,

⁹ 2011 AEP Portfolio Plan Stipulation at 5; 2012 FirstEnergy Portfolio Plan Order at 16-17; 2013 DP&L Portfolio Plan Stipulation at 11.

¹⁰ See, e.g., 2013 DP&L Portfolio Plan Stipulation at 12 (“total gross, annualized savings” will be utilized for purposes of shared savings but will exclude ““Mercantile-Self Direct, Residential Low Income Affordability, Pilot Program, and Transmission and Distribution Infrastructure Improvements.””).

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs*, Case No. 14-457-EL-RDR, Finding and Order at 5 (May 20, 2015). While rehearing was pending, a settlement was reached by Duke and Staff that was ultimately approved by the Commission. The settlement noted that Duke had sought \$55 million in shared savings for 2013 through 2016, that Duke could collect \$19.75 million of shared savings for 2013 and 2014, and Duke could not collect any shared savings for 2015 and 2016. *Id.*, Stipulation at 6 (Jan. 6, 2016). The Commission approved the black-box settlement, noting the compromise on Duke’s ability to rely on banked savings to generate shared savings coupled with Duke’s commitment to not seek to rely on banked savings in the future (absent a change in law or rule permitting such an outcome). *Id.*, Second Entry on Rehearing at 13 (Oct. 26, 2016).

¹² *Id.*, Application for Rehearing of Duke Energy Ohio, Inc. at 16-17 (June 19, 2015).

Duke argued that it should be permitted to rely on the banked savings to move its shared savings percentage from zero up to the maximum shared savings percentage depending on the level of banked savings Duke wanted to count in a given year.¹³ The Commission determined that Duke's proposal was "improper."¹⁴ In reaching this determination, the Commission found that its policy to use shared savings as an incentive would be violated if Duke were permitted to secure shared savings based on the application of banked savings:

[T]he tiered incentive structure is designed to motivate and reward the utility for exceeding energy efficiency standards on an annual basis. As the mandated benchmark rises every year, Duke must continue to find ways to encourage energy efficiency. If it has a large bank of accrued savings to rely on, the motivation to push energy efficiency programs in following years diminishes.¹⁵

For shared savings to "serve as a true incentive," the Commission concluded that "banked saving cannot be used to determine the annual shared savings achievement level."¹⁶

Because the Commission has sought to use shared savings as an incentive, it has not authorized the use of banked savings to "trigger" the shared savings calculation. In fact, the phrase "triggering shared savings" does not appear in prior Commission rules or orders. Under the sound policy outlined in the *Duke* decision, the Commission has required an EDU to demonstrate that it generates enough annual savings to meet and exceed the annual benchmark before it is authorized to recover shared savings.

¹³ *Id.* Duke would have excluded the banked savings from the calculation of annual net benefits under its proposal. *Id.*

¹⁴ *Id.*, Finding and Order at 5 (May 20, 2015).

¹⁵ *Id.*

¹⁶ *Id.*

III. ALLOWING BANKED SAVINGS TO COUNT TOWARD THE SHARED SAVINGS CALCULATION IS A DEVIATION FROM COMMISSION PRECEDENT THAT LACKS A SUBSTANTIVELY LAWFUL AND REASONABLE EXPLANATION

The Commission must “respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.”¹⁷ If the Commission decides to “revisit a particular decision ... [and] change course, it must explain why” and “[t]he new course also must be substantively reasonable and lawful.”¹⁸ Because the Second Entry on Rehearing allows banked savings to count in some manner toward the calculation of the shared savings and the Commission has not explained a reasonable basis for this change of course, the Commission erred.

In the Second Entry on Rehearing, the Commission addressed banked savings “triggering” shared savings in several paragraphs, none of which provides a rationale for the potential deviation from precedent. In the first, a response to an assignment of error in which environmental groups challenged the Commission’s decision to adopt what appears to be the exclusion of banked savings from the shared savings calculation, the Commission states:

The Commission denies rehearing on this assignment of error because the definition of “shared savings” does not specifically exclude the option of triggering shared savings through previously banked savings. Furthermore, as explained in Paragraphs 43-44, the Commission clarifies its position on whether banked savings can trigger shared savings.¹⁹

¹⁷ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶ 52.

¹⁸ *Id.*

¹⁹ Second Entry on Rehearing at ¶17.

The Commission offers no explanation in that denial as to why it is clarifying its position on the use of banked savings other than to point to paragraphs 43 and 44 of the Entry.

The Commission does not offer any further explanation for the change in course in paragraph 43 or 44. In paragraph 43, the Commission states:

Based on AEP Ohio/DP&L and Duke's assignments of error, and in part, the Conservation Groups' assignment of error, we have amended proposed Ohio Adm.Code 4901:1-39-05(A)(I)(C) to allow banked savings to trigger shared savings. We have also clarified in the definition of shared savings in Ohio Adm.Code 4901:1-39-01(Y) that banked savings may not be used to calculate shared savings. We recognize that the EDUs have made an effort to bank savings when compliance costs were low. We also recognize that it is a benefit to customers for utilities to rely on banked savings as customers have already paid for those savings. Furthermore, as noted by the Conservation Groups, relying on banked savings allows EDUs to control costs when statutory benchmarks will increase in the future, pursuant to R.C. 4928.66(A)(1)(a). Consequently, the Commission grants rehearing on the assignments of error posed by AEP Ohio/DP&L and Duke, and in part, the Conservation Groups.

Paragraph 44 states:

To the extent that the Conservation Groups request us to clarify that any shared shavings mechanism must rely only on verified, real-world savings resulting from a utility's energy efficiency programs, the Commission declines to grant rehearing on this assignment of error. Utilities may utilize any statutorily approved energy savings in reaching their EE/PDR benchmark, thereby triggering shared savings.

In sum, paragraph 43 explains why the Commission permits the use of banked savings toward meeting benchmarks as a means of reducing program costs. It further lays out, consistent with current practice, that banked savings are excluded from the shared savings calculation. Paragraph 44 then states that banked savings can trigger shared savings. While paragraph 44 seems to be fully at odds with paragraph 43, neither paragraph provides any rationale for allowing banked savings to “trigger” shared savings (and fundamentally, the decision lacks any definition of what is even meant by triggering).

On its face, and to the extent “triggering” shared savings is intended to affect either part of the shared savings calculation, the Commission has failed to explain this change of course. Accordingly, the decision to allow banked savings to “trigger” shared savings is unlawful and unreasonable.

IV. A DEVIATION FROM COMMISSION POLICY EXCLUDING BANKED SAVINGS FROM THE SHARED SAVINGS CALCULATION IS SUBSTANTIVELY UNREASONABLE BECAUSE IT WILL PRODUCE ABSURD RESULTS

If the Commission intended that “triggering” shared savings allows an EDU’s banked savings to count towards the net benefits side of the shared savings calculation, it will produce an absurd result. In 2017, for example, AEP-Ohio reported annual net benefits of \$219.7 million from programs implemented in 2017 alone.²⁰ At the maximum 13% shared savings percentage, AEP-Ohio could have collected \$28.8 million (which would have been grossed-up and collected from customers but for a \$20 million after-tax cap on AEP-Ohio’s shared savings).

While banked savings currently cannot be counted toward shared savings, it is no secret that the EDUs have vastly over-complied with the EE/PDR benchmarks and have substantial banked savings balances.²¹ If “triggering shared savings” means that banked

²⁰ *In the Matter of the Application of Ohio Power Company to Update The Energy Efficiency and Peak Demand Reduction Rider*, Case No. 17-1266-EL-RDR, Application at Schedule 3 (May 15, 2017).

²¹ See, e.g. the annual EE/PDR portfolio status reports filed in *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Duke Energy Ohio, Inc.*, Case No. 17-689-EL-EEC, Annual Energy Efficiency Status Report of Duke Energy Ohio, Inc. (Apr. 17, 2017); *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Duke Energy Ohio, Inc.*, Case No. 18-396-EL-EEC, Annual Energy Efficiency Status Report of Duke Energy Ohio, Inc. (Mar. 29, 2018); *In the Matter of the Annual Portfolio Status Report Under Rule 4901:1-39-05(C), Ohio Administrative Code, by Ohio Power Company*, Case No. 18-835-EL-EEC, 2017 Portfolio Status Report of the Energy Efficiency and Peak Demand Response Programs (May 15, 2018); *In the Matter of The Dayton Power and Light Company’s Portfolio Status Report*, Case No. 18-742-EL-POR, The Dayton Power and Light Company’s Combined Notice of Filing of Portfolio Status Report and Application to Adjust Baselines (May 15, 2018); and *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report for the Ohio Edison Company*,

savings count in the net benefits portion of the calculation, the amount of banked savings that could be applied toward shared savings and collected from customers in a given year could be astronomical.

As noted above, the current practice of imposing revenue caps offers some rate protection from this potential absurdity from being realized.²² Under the proposed rules, however, the Commission appears to be eliminating the ability of parties to negotiate portfolio plans and thereby establish shared savings caps. As a result, uncapped shared savings where banked savings could be counted in the net benefits portion of the calculation could easily produce absurd, unjust, and unreasonable results.

V. AUTHORIZING THE USE OF BANKED SAVINGS TO COUNT IN EITHER PART OF THE SHARED SAVINGS CALCULATION COULD VIOLATE R.C. 4928.66(A)(2)(d)(i)(V)

To the extent the Commission intends to allow banked savings to be included in either part of the shared savings calculation, this authorization could result in a violation of R.C. 4928.66(A)(2)(d)(i)(V). That provision prohibits the use of savings derived from utility transmission and distribution investments in the calculation of shared savings. However, Commission rules do not establish any tracking of the specific programs that generated the banked savings. Because these transmission and distribution savings can

The Cleveland Electric Illuminating Company, and The Toledo Edison Company, Case Nos. 18-841-EL-EEC, *et al.*, Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report (May 15, 2018).

²² For example, the Commission has recently imposed an overall cost cap on all EDUs that would limit the ability to collect shared savings. Many other settlements have included express provisions setting a cap on the annual shared savings that an EDU can collect from its customers. The Commission also imposed a shared savings cap on FirstEnergy. 2012 FirstEnergy Portfolio Plan Order at 16 (Mar. 20, 2013).

be banked but are not tracked, banked savings could be included in the calculation of shared savings in violation of R.C. 4928.66(A)(2)(d)(i)(V).

VI. CONCLUSION

The Commission should grant rehearing and clarify that when it said it would “allow banked savings to trigger shared savings,” it only meant that banked savings could be used to demonstrate compliance with the annual benchmark. In any case, the Commission’s decision to amend its rules to permit banked savings to “trigger” shared savings is unlawful and unreasonable because it deviates from current policy without explanation and produces unreasonable and unlawful outcomes. Accordingly, the Commission should grant rehearing and revise its rules to prohibit the use of banked savings to “trigger shared savings.”

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document, filed with the Commission on May 10, 2019, upon the interested parties.

/s/ Frank P. Darr

Frank P. Darr

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in

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

Summary: Application Industrial Energy Users-Ohio's Application for Rehearing and Memorandum in Support electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio