

THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 12-2156-EL-ORD

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. 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

FOURTH ENTRY ON REHEARING

Entered in the Journal on August 28, 2019

I. SUMMARY

{¶ 1} The Commission denies the applications for rehearing filed by Industrial Energy Users-Ohio, Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and the Ohio Environmental Council.

II. DISCUSSION

A. *Procedural History*

{¶ 2} R.C. 111.15(B) requires all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules.

{¶ 3} On December 19, 2018, the Commission issued a Finding and Order (Finding and Order), addressing written comments filed by parties and revising certain rules within Ohio Adm.Code Chapters 4901:1-39 and 4901:1-40 based on the comments.

{¶ 4} Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding by filing an application within 30 days after the Commission's order is journalized.

{¶ 5} On January 18, 2019, various parties filed applications for rehearing. Several parties also filed memoranda contra on January 28, 2019. On February 6, 2019, the Commission granted the applications for rehearing for the purpose of further consideration of the matters specified in the applications for rehearing.

{¶ 6} On April 10, 2019, the Commission issued a Second Entry on Rehearing, granting, in part, the applications for rehearing filed by Ohio Power Company (AEP Ohio) and the Dayton Power & Light Company (DP&L); Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy); Duke Energy Ohio, Inc. (Duke); and Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and the Ohio Environmental Council (collectively, the Conservation Groups), and denying the applications for rehearing filed by Interstate Gas Supply, Inc. and the Ohio Consumers' Counsel.

{¶ 7} On May 10, 2019, Industrial Energy Users-Ohio (IEU) and the Conservation Groups timely filed applications for rehearing of the Commission's Second Entry on Rehearing.

{¶ 8} On May 20, 2019, FirstEnergy filed a memorandum contra to IEU and the Conservation Groups' applications for rehearing. On that same day, AEP Ohio and Duke (collectively, AEP Ohio/Duke) jointly filed a memorandum contra to IEU's application for rehearing.

{¶ 9} By Entry dated June 5, 2019, the Commission granted the applications for rehearing filed by IEU and the Conservation Groups for the purpose of further consideration of the matters specified in their applications for rehearing.

B. IEU's Application for Rehearing

{¶ 10} IEU raises one assignment of rehearing, arguing that 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. In support of its argument, IEU raises four distinct points. First, IEU states that current Commission practice for calculating shared savings excludes banked savings. IEU points to a previous case to demonstrate that the Commission has already considered and rejected a proposal by Duke to allow banked savings to be relied upon for purposes of calculating the shared savings achievement level. *In re 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 (*Duke Rider Case*), Finding and Order (May 20, 2015). IEU claims that in the *Duke Rider Case*, the Commission determined that Duke's proposal was improper and 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. (IEU App. for Rehearing at 4-7.)

{¶ 11} Second, IEU states that allowing banked savings to count toward the shared savings calculation is a deviation from Commission precedent that lacks a substantively lawful and reasonable explanation. IEU argues that 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." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 52. IEU further explains that the Second Entry on Rehearing, especially Paragraphs 43 and 44, are in conflict with each other and neither

provides any rationale for allowing banked savings to trigger shared savings. (IEU App. for Rehearing at 8-10.)

{¶ 12} Third, IEU argues that a deviation from current Commission policy excluding banked savings from the shared savings calculation is substantively unreasonable because it will produce absurd results. IEU explains that if triggering shared savings means that banked 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. While IEU notes that the current practice of imposing revenue caps offers some rate protection, it states that under the proposed rules, the Commission appears to be eliminating the ability of parties to negotiate portfolio plans and thereby establish shared savings caps. (IEU App. for Rehearing at 10-11.)

{¶ 13} Finally, IEU indicates that 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). IEU elaborates that this statute prohibits the use of savings derived from utility transmission and distribution investments in the calculation of shared savings. However, according to IEU, the Commission rules do not establish any tracking of the specific programs that generated the banked savings. As such, IEU surmises that because these transmission and distribution savings can be banked but are not tracked, banked savings from those sources could be included in the calculation of shared savings in violation of R.C. 4928.66(A)(2)(d)(i)(V). (IEU App. for Rehearing at 11-12.)

{¶ 14} In response to IEU's application for rehearing, AEP Ohio/Duke initially state that the allowance of banked savings to trigger shared savings and the prohibition against using banked savings to calculate shared savings are clear, internally consistent, and logical. The parties clarify, as further explained below, that these two aspects involve separate steps in the three-step shared savings process. (AEP Ohio/Duke Memorandum Contra at 3-4.)

{¶ 15} With regard to IEU's reliance on the *Duke Rider Case*, AEP Ohio/Duke state that the Commission's decision in that case does not support IEU's present position. The parties explain that in the *Duke Rider Case*, Duke initially proposed to use banked savings to meet the annual benchmark and to trigger shared savings. The Commission determined that "the banked savings cannot be used to determine the annual shared savings achievement level. Duke's use of the banked savings to reach the mandated benchmark, however, is permissible." *Duke Rider Case*, Finding and Order (May 20, 2015) at 5. Whether it was permissible for Duke to use banked saving to calculate shared savings, the parties surmise, was never definitively determined as the *Duke Rider Case* was resolved via stipulation. Thus, AEP Ohio/Duke conclude that the Commission did not fully and finally reject Duke's position, rendering IEU's reliance on the preliminary ruling in the *Duke Rider Case* invalid. Additionally, AEP Ohio/Duke argue that the Commission may change its policy based on a simple explanation of rationale, as it has done here. *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 309, 2006-Ohio-5789, 856 N.E.2d 213 (2006); *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984). (AEP Ohio/Duke Memorandum Contra at 7-9). FirstEnergy echoes AEP Ohio/Duke's concerns and notes that IEU only cites to stipulations and other settlements as evidence of current Commission practice. FirstEnergy clarifies that stipulations, by their terms, do not set precedent for other proceedings. (FirstEnergy Memorandum Contra at 2.)

{¶ 16} Next, AEP Ohio/Duke address IEU's contention that triggering shared savings will allow an EDU's banked savings to count towards the net benefits side of the shared savings calculation and will provide absurd results. The parties explain that there are three distinct steps to annually calculating shared savings: (1) calculate the percentage by which an EDU exceeded the annual energy efficiency and peak demand reduction benchmark, (2) calculate the annual net savings generated in the current year by the portfolio, and (3) multiply the applicable shared savings percentage, which is determined by the terms in the EDU's portfolio plan, by the net savings to get the earned shared savings earned by the utility for that year, which is then grossed up for taxes. The parties clarify

that the Second Entry of Rehearing and proposed Ohio Adm.Code 4901:1-39-05(A)(1)(c) reinforce that banked savings may be used to achieve or exceed compliance benchmarks for purposes of step one in the shared savings process. Moreover, AEP Ohio/Duke indicate that proposed Ohio Adm.Code 4901:1-39-01(Y) and Ohio Adm.Code 4901:1-39-05(A)(1)(c) also make it clear that net savings associated with banked savings are not included in shared savings for the current year's calculation of shared savings or step two of the calculation process. Second Entry on Rehearing at ¶ 43. (AEP Ohio/Duke Memorandum Contra at 3-5.)

{¶ 17} FirstEnergy states that IEU's arguments are based on the mistaken premise that the Commission has permitted banked savings to be used to calculate shared savings. FirstEnergy clarifies that the Commission's Second Entry does not permit banked savings to be used in the calculation of the net benefits and financial incentive of shared savings. Rather, FirstEnergy notes, the Commission merely clarified that banked savings may be used in the eligibility or trigger phase. FirstEnergy states that the trigger phase is independent from the calculation of the shared savings incentive amount or the net benefits phase. (FirstEnergy Memorandum Contra at 1-2.)

{¶ 18} AEP Ohio/Duke also note that the Commission's decision regarding banked savings triggering shared savings is amply supported by strong policy considerations that benefit ratepayers. The parties note that in the Second Entry on Rehearing, the Commission understood three significant policies favoring their approach. Second Entry on Rehearing at ¶ 43. The parties elaborate that the Commission recognized that the banked savings were accumulated "as low-hanging fruit that was highly cost-effective." Second, the Commission recognized that including banked savings in step one of the three-step shared savings calculation process actually reduces the shared savings payout in the current year. Finally, the parties state that the Commission recognized the benefit of certainty and cost control through the banking strategy. The parties also note that EDUs have been prudently planning ahead by banking savings that are cost-effective and avoided facing the steep

benchmark increase from one percent to two percent that has been coming for years and will arrive in 2021. As such, AEP Ohio/Duke conclude that the Second Entry on Rehearing properly acknowledges and preserves this established compliance method and reasonably balances the relevant policy considerations. (AEP Ohio/Duke Memorandum Contra at 9-10).

{¶ 19} Finally, AEP Ohio/Duke state that IEU is factually incorrect in claiming that under the Commission's ruling, R.C. 4928.66(A)(2)(d)(V) could be violated. The parties claim that shared savings are only generated from new eligible savings obtained in the current program year, program exclusions from the shared savings calculation remain in place, and the Commission's ruling does not make any changes to those requirements. Additionally, they note that the exclusions under R.C. 4928.66(A)(2)(d) are not used to generate savings. Consequently, the parties state that no banked savings are used in the third step of the shared savings calculation. (AEP Ohio/Duke Memorandum Contra at 10-11.)

{¶ 20} Upon review, the Commission denies IEU's application for rehearing. AEP Ohio/Duke and FirstEnergy correctly note that the calculation of whether an EDU has triggered shared savings is a different step from the calculation of net savings generated by the EDU in the current year, within the three-step calculation process for shared savings. Our Second Entry on Rehearing distinctly noted that banked savings could only be used to trigger shared savings. However, we also clearly held that net savings associated with banked savings could not be included in the shared savings calculation. Furthermore, we identified various policy considerations behind allowing EDUs to utilize previously banked savings to trigger shared savings, including the fact that doing so allowed EDUs to control costs. Second Entry on Rehearing at ¶ 43. We note that IEU relies on the *Duke Rider Case* for the proposition that we have deviated from our past precedent with regard to shared savings. However, we find that our ruling in that case is not in conflict with our present decision to allow EDUs to use banked savings to trigger shared savings. As noted by AEP

Ohio/Duke, in that case we found that “Duke’s use of banked savings to reach the mandated benchmark* * * is permissible.” *Duke Rider Case* at 5. We find nothing in our Second Entry on Rehearing that contradicts this prior ruling. As a final point, because banked savings will not be utilized in the third step of the shared savings calculation, we find that R.C. 4928.66(A)(2)(d)(i)(V) will not be violated due to our holding. Consequently, we deny IEU’s application for rehearing.

C. Conservation Groups’ Application for Rehearing

{¶ 21} As its first assignment of error, the Conservation Groups argue that the Commission unreasonably provided for the filing of market potential studies only at extended five-year intervals. The Conservation Groups state that these studies are essential to provide the utility, Staff, and all interested stakeholders with current-day facts about baseline market conditions in a utility’s service territory, customer inclination to adopt efficiency measures beyond that baseline, and reasonable assumptions for savings from those measures. Without recent and Ohio-specific information about such trends, the Conservation Groups argue that the Technical Resource Manual may become outdated and stakeholders may not be well-positioned to determine whether the utilities are pursuing programs that provide real savings. To bolster their point, the Conservation Groups point out that the most recent market potential studies available for the four Ohio electric distribution utilities are from 2017 (DP&L) or 2016 (AEP Ohio, FirstEnergy, and Duke). Under proposed Ohio Adm.Code 4901:1-39-03(A), the Conservation Groups state that new studies may not arrive until 2021 or 2022. After that, the Conservation Groups state utilities may not file additional market potential studies until 2026. As such, the Conservation Groups urge that the Commission amend proposed Ohio Adm.Code 4901:39-03(A) to provide for each utility to file a market potential study at least every three years. (Conservation Groups Second App. for Rehearing at 2-3.)

{¶ 22} In its memorandum contra, FirstEnergy argues that the Conservation Groups overlook the fact that the proposed rules enable EDUs to perform market potential

studies more frequently than they did historically. Because the proposed rules require EDUs to file new portfolio plans annually, EDUs are able to update their market potential studies as frequently as every year. FirstEnergy conjectures that the proposed rules give EDUs the flexibility to respond to market conditions when it is cost-effective, by filing updated market potential study reports between one and five years apart. (FirstEnergy Memorandum Contra at 2-4.)

{¶ 23} Upon review, we find that it is improper for the Conservation Groups to raise this argument at this juncture of the proceeding because they did not raise it in their first application for rehearing and this issue was not discussed in our Second Entry on Rehearing. As such, the Conservation Groups' first assignment of error is untimely and we cannot consider it. See, e.g., *In re Elyria Foundry Company v. Ohio Edison Company*, Case No. 05-796, Second Entry on Rehearing (May 2, 2007), at ¶ 12 (holding that "only if a claimed error arose for the first time in the entry on rehearing, whether by granting of rehearing and resultant modification of the underlying order or by the Commission erring in some new manner in the entry, is that claim an appropriate ground for a second application for rehearing). Furthermore, we note that proposed Ohio Adm.Code 4901:1-39-03(A) states that market potential studies should be conducted "at least once every five years" and "may be updated by the electric utility from time to time, at less than five year intervals, as market conditions warrant." Thus, Conservation Groups' suggestion is unnecessary. For these reasons, we deny the Conservation Groups' first assignment of error.

{¶ 24} In their second assignment of error, the Conservation Groups state that the Commission unreasonably established program portfolio plan filing requirements that do not require each utility to include key information necessary to support useful stakeholder input. The Conservation Groups explain that proposed Ohio Adm.Code 4901:1-39-04(A) now contemplates a process for initial stakeholder input into utility portfolio plans based on September 1 filings, which means that stakeholders realistically have just a few months to provide substantive feedback on those plans, for all four utilities at once. However, the

Groups claim that the Commission did not materially change the required elements of the plan filing to facilitate thorough stakeholder review and input during this more abbreviated process. Accordingly, in order to provide a reasonable basis for a productive collaborative process, the Conservation Groups urge the Commission to require the utilities to include additional information with their annual portfolio filings, such as comparisons of projected program information with actual results. (Conservation Groups Second App. for Rehearing at 4-6).

{¶ 25} FirstEnergy argues that the Conservation Groups' second assignment of error is procedurally deficient because their application for rehearing does not point to any changes made in the Commission's Second Entry to the four-month process for initial stakeholder input that were not already reflected in the Finding and Order issued on December 19, 2018. FirstEnergy further argues that the Conservation Groups' second assignment of error also fails on its merits because Ohio Adm.Code 4901:1-39-04 already requires extensive information to be filed with the annual plans. FirstEnergy notes that stakeholders may obtain additional information or provide input during the collaborative process. (FirstEnergy Memorandum Contra at 4-5.)

{¶ 26} We agree with FirstEnergy's contention that the Conservation Groups' second assignment of error is procedurally deficient as it does not relate to any changes made to proposed Ohio Adm.Code 4901:1-39-04 via our Second Entry on Rehearing. As we noted above, the Conservation Groups' assignment of error is untimely as this issue should have been raised in its initial application for rehearing. Moreover, we also agree with FirstEnergy that the collaborative process outlined in Ohio Adm.Code 4901:1-39-03(D) affords stakeholders an additional avenue to provide input. Finally, we have previously noted that continuing issues can be addressed during the performance verification process outlined in Ohio Adm.Code 4901:1-39-05. Second Entry on Rehearing at ¶23. Consequently, we deny the Conservation Groups' second assignment of error.

III. ORDER

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That IEU and the Conservations Groups' May 10, 2019 applications for rehearing be denied. It is, further,

{¶ 29} ORDERED, That a copy of this Fourth Entry on Rehearing be served upon all commenters and parties of record in this matter.

COMMISSIONERS:

Approving:

M. Beth Trombold
Daniel R. Conway
Dennis P. Deters

Recusal:

Sam Randazzo, Chairman
Lawrence K. Friedeman

AS/mef

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Summary: Entry Fourth Entry on Rehearing that the Commission denies the applications for rehearing filed by Industrial Energy Users-Ohio, Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and the Ohio Environmental Council. electronically filed by Docketing Staff on behalf of Docketing