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 BY
THE ENVIRONMENTAL LAW & POLICY CENTER, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and Ohio Environmental Council (collectively, "Conservation Groups") file this Application for Rehearing of the December 19, 2018 Finding and Order ("Order") in this proceeding. The Order approved a host of amendments to Ohio Administrative Code Chapters 4901:1-39 and 4901:1-40, the Public Utilities Commission of Ohio ("Commission") rules regarding implementation of Ohio's energy efficiency and renewable energy portfolio standards.

These rules would codify a major shift in the Commission's approach to energy efficiency programs: a change from pre-implementation review and approval of multi-year program portfolio plans based on input from all interested parties, to post-implementation approval of cost recovery for utility-designed programs. This change is fundamentally unreasonable and inconsistent with Ohio policy. It would leave utilities to run programs without the certainty provided by pre-approval or other detailed guidance from the Commission on key questions regarding program design and cost recovery. Without that certainty, utilities are likely to be overly conservative, unwilling to innovate or alter program design if there is any danger of opposition from any stakeholder or disapproval by the Commission. The result will be programs that may achieve technical compliance with the energy efficiency requirements under R.C. 4928.66, but that fail to provide customers with high-quality programs that produce long-term savings.

This problem is exacerbated by the many open questions around energy efficiency in Ohio today. Notably, the Commission issued these rule amendments nearly five years after the last comments were filed in March 2014. In the intervening time, the Ohio General Assembly has enacted legislation making major alterations to the statutory energy efficiency and renewable standards, and as of 2021, the four Ohio electric utilities will face a doubling of the annual energy savings benchmark from 1% to 2% of customer energy usage. Additionally, the overall efficiency market is changing, with new energy-saving improvements emerging and old ones becoming simply a baseline level of efficiency.

Although we respect the Commission's desire to address the issues raised in 2013 and 2014, the most pressing problems of the day are significantly different in 2019. Yet the Commission has not solicited the up-to-date formal stakeholder input that is necessary to shed light on the most important rulemaking considerations at present. The result is a set of rules that rest on untested, and often incorrect, assumptions. Most importantly, the Order fails to recognize the importance of retaining pre-approval review of utility efficiency programs in order to effectively deal with new laws and changing conditions.

As further explained in the accompanying Memorandum in Support, the Order, and the rules it adopts, are therefore unlawful and unreasonable for seven reasons:

1. The Commission unreasonably and unlawfully failed to provide reasonable notice and an opportunity for comment in accordance with the Ohio Administrative Procedure Act, Ohio Revised Code Chapter 119, because it made significant changes to its rules without providing the Conservation Groups and other interested stakeholders a meaningful opportunity to provide public comment on those changes.
2. The Commission unreasonably shifted review of utility energy efficiency programs to a "post-approval" approach under Rule 4901:1-39-05 that reduces its ability to exercise effective oversight of those programs; eliminates the certainty regarding program design and customer benefits that is necessary for robust and successful efficiency programs; undermines participation in wholesale markets; and significantly decreases the ability of any non-utility stakeholders to achieve beneficial changes in utility efficiency programs.
3. The Commission unreasonably approved a definition of "shared savings" in Rule 4901:1-39-01 that may not be workable in future program years.
4. The Commission unreasonably failed to clarify the appropriate process for verifying energy savings for purposes of triggering a shared savings mechanism and for earning incentive payments once a shared savings mechanism is triggered.

5. The Commission unreasonably approved a definition of the "total resource cost" test in Rule 4901:1-39-01 that does not appropriately weigh all relevant benefits of energy efficiency against its costs.

6. The Commission unreasonably failed to provide a process for ensuring timely updates to the Ohio Technical Resource Manual.

7. The Commission unreasonably failed to specify whether "verified savings" should include line losses.

Given these serious flaws in multiple aspects of the rules, and the overall staleness of the record in this proceeding, we respectfully urge the Commission to retract these rules and re-open a new comment period. That approach will provide all interested persons a meaningful opportunity to thoroughly consider these rules and provide input on the appropriate future direction for implementation of the state's energy efficiency and renewable portfolio standards.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, NATURAL RESOURCES DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND

I. INTRODUCTION

The Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and Ohio Environmental Council (collectively, "Conservation Groups") seek rehearing of the December 19, 2018 Finding and Order ("Order") in this proceeding. The Order approved amendments to Ohio Administrative Code Chapters 4901:1-39 and 4901:1-40, the Public Utilities Commission of Ohio ("Commission") rules regarding implementation of Ohio's energy efficiency and renewable energy portfolio standards. The rule changes adopted by the Commission were initially proposed in January 2014, and interested persons last had an opportunity to file formal comments on in March 2014 – almost five years ago.

Because of the many changes in both the applicable law and relevant facts since March 2014, the Commission's Order fails to address a number of important issues, especially related to energy efficiency, and in other cases seeks to resolve such issues without having received input from interested stakeholders. The resulting rules are unlawful and unreasonable in multiple respects, and therefore the Commission should grant rehearing under R.C. 4903.10 and offer a full opportunity for the public and intervening parties to provide comments on the rules.

II. FACTS

A. Current Events

Since this docket was last active in 2014, a number of things have changed.

First, as the Order acknowledges, the Ohio General Assembly enacted Senate Bill 310, which as of September 12, 2014, made a number of changes to the state's energy efficiency standard. Among the changes was a new provision regarding measuring energy savings for purposes of compliance with R.C. 4928.66(A)(1)(a), R.C. 4928.662. This provision contains certain new directives for "measuring and determining compliance with the energy efficiency and peak demand reduction requirements," including that the 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, including resources associated with such savings or reduction that are recognized as capacity resources by the regional transmission organization operating in Ohio in compliance with section 4928.12 of the Revised Code, shall count toward compliance with the energy efficiency and peak demand reduction requirements.
>
> (B) Energy efficiency savings and peak demand reduction achieved on and after the effective date of S.B. 310 of the 130th general assembly shall be measured on the higher of an as found or deemed basis, except that, solely at the option of the electric distribution utility, such savings and reduction achieved since 2006 may also be measured using this method. For new construction, the energy efficiency

> savings and peak demand reduction shall be counted based on 2008 federal standards, provided that when new construction replaces an existing facility, the difference in energy consumed, energy intensity, and peak demand between the new and replaced facility shall be counted toward meeting the energy efficiency and peak demand reduction requirements.
>
> (C) The commission shall count both the energy efficiency savings and peak demand reduction on an annualized basis.
>
> (D) The commission shall count both the energy efficiency savings and peak demand reduction on a gross savings basis.

R.C. 4928.662.

The net effect of this provision is to expand the categories of savings that utilities count toward compliance. Those savings now include efficiency improvements that result from voluntary customer actions outside the utility efficiency programs or from federal efficiency standards. They also include savings calculations that may reflect ex ante assumptions higher than the savings actually found in utility programs. However, R.C. 4928.662 does not address the appropriate counting methodology for purposes of determining shared savings incentives payments. In 2016, the Commission did hold that utilities cannot count "customer action" in determining whether they have triggered shared savings, a precedent that would be incorporated in the definition of shared savings under these rules. Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at 147; Order at 13. But there remain open questions as to whether a utility can earn shared savings based on energy "savings" from categories such as *ex ante*, assumed savings that turn out to be inflated beyond verified, real life savings.

Meanwhile, all four regulated Ohio electric distribution utilities are now planning for a coming 2021 increase in their annual benchmarks under R.C. 4928.66, from 1% to 2% of the utility's energy sales. None of the utilities have achieved 2% annual savings under their prior or current portfolio plans.

Finally, the federal government has been increasing efficiency standards for devices like lighting and appliances, driving customer efficiency outside the utility programs. In particular, under the 2007 Energy Independence and Security Act ("EISA"), as of January 1, 2020, most non-specialty halogen and incandescent lightbulbs will not meet minimum federal efficiency standards and thus will not be available for purchase in the United States. As a result, LED lightbulbs will become the baseline product for most customers. At the same time, new products like smart thermostats have become commercially available and even gained Energy Star certification based on their validated electricity and natural gas savings. Utilities such as AEP Ohio are even touting customer energy savings from new grid modernization investments, and seeking to include measures and programs in their energy efficiency plans that seek to leverage technologies such as smart meters.

Accordingly, implementation of the energy efficiency standard is in a very different place than it was in early 2014. Utilities can now count more savings toward compliance, but in less than two years their compliance benchmarks will double. Within a year there will be a major change in the residential lighting market, with most customers switching to LED lighting as a baseline. General use LED lightbulbs will therefore no longer offer the efficiency "improvement" that has, to date, provided substantial amounts of savings for the Ohio utilities in both achieving compliance with R.C. 4928.66 and earning shared savings incentive payments for achieving additional benefits for customers. Meanwhile, new technologies and program designs are emerging that promise new opportunities for Ohio efficiency programs. Put simply, the utility efficiency program portfolios of the future will likely need to be significantly different than those of the past, either in scope, design, or both. As discussed further below, these changes make pre-approval of efficiency plans even more important than before.

B. The Amended Energy Efficiency Rules

As amended by the Order, the energy efficiency rules create a process designed, in the Commission's own words, to accommodate a world where "the Commission generally anticipates annual filings to be a continuation of prior year programs with minor revisions." Order at 31. Under these rules, the utility files its program plan for the coming year along with a proposed cost recovery mechanism by September 1, ostensibly incorporating input from the stakeholder collaboratives. Parties then have 30 days to file comments on the cost recovery mechanism, followed by another 30-day period in which the Commission either schedules a hearing on the cost recovery mechanism or it is automatically deemed reasonable. The Commission is to consider comments on the actual substance of the utility's programs, however, in conjunction with the recommendations of the independent program evaluator report which is prepared in the "post-approval" review process. The Commission's review may result in disallowance of cost recovery through a "decision issued in the annual performance verification process." Rule 4901:1-39-06(B).

Under this new approach, therefore, Commission decisions on the appropriate structure for utility cost recovery (including shared savings), and on the reasonableness of utility program spending are likely to occur long after the utility has already entered into contracts for particular programs and spent significant sums of money on their implementation. With respect to the cost recovery mechanism, any material dispute regarding its structure would at best be set for hearing at the start of the implementation year, with a Commission decision likely to be delayed for some time after that. Meanwhile, the cost recovery itself would not be finalized until well after the end of the implementation year. Eliminating the pre-approval process thus leaves the Commission with only the option to disallow costs for programs that have already been implemented poorly for a year or more. In fact, if an independent program evaluation is not completed within the first few months after a program year concludes, a comment process, hearing (if necessary), and Commission decision on any contested issues regarding program design may not conclude until a program has run for a full two years.

II. ARGUMENT

<u>Rehearing Argument 1</u>: The Commission unreasonably and unlawfully failed to provide the process required under the Ohio Administrative Procedure Act, Ohio Revised Code Chapter 119.

The Ohio Administrative Procedure Act, codified in Ohio Revised Code Chapter 119, governs the agency rulemaking process in Ohio. It "requires, among other protections, public notice, the opportunity for public comment, and a public hearing before agency rules can be validly imposed." *Fairfield Cty. Bd. of Commrs. v. Nally*, 2015-Ohio-991, ¶ 43, 143 Ohio St. 3d 93, 104, 34 N.E.3d 873, 884 (citing R.C 119.03). The Commission did not provide an opportunity for public comment regarding at least one major aspect of its rule amendments, the incorporation of changes in response to the intervening enactment of Senate Bill 310. The Order makes a number of changes to the proposed rules based on references to that legislation. *See, e.g.*, Order at 33, 34, 59, 64. At the same time, the Order does not make any reference to R.C. 4928.662, a new provision enacted in S.B. 310 that creates a need for some changes in the energy efficiency rules to avoid unintended consequences of the shared savings provisions, as detailed below. The Conservation Groups would have comments regarding all such revisions given the opportunity; but since the Commission's original notice of this rule review, was issued well before the General Assembly enacted S.B. 310, the Commission moved forward without that input. That process does not comply with the requirement under R.C. 119.03 to provide "[r]easonable public notice . . . at least thirty days prior to the date set for a hearing" on a rule amendment.

Even if the Commission technically complied with the notice and hearing requirement under Rule 119.03 back in 2013 and 2014, it was unreasonable to continue to rely on that compliance in issuing a final rule five years later, in December 2018. When a record becomes so stale that it is no longer "representative" of the relevant facts, the Commission has an obligation to revisit the issue in order to ensure a reasonable final decision. *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 284 U.S. 248, 260 (1932) (finding that changed economic conditions in a utility proceeding required granting a petition for rehearing); *see also Berishaj v. Ashcroft*, 378 F.3d 314 (3d Cir. 2004); *Gambashidze v. Ashcroft*, 381 F.3d 187 (3d Cir. 2004) (both recognizing agency obligation to correct outdated administrative records). The Commission should do so here by putting aside the proposed rules and opening the door to full public comment on what amendments to the rules may be relevant and appropriate today.

<u>Rehearing Argument 2</u>: The Commission unreasonably shifted to a "post-approval" review of utility energy efficiency programs under Rule 4901:1-39-05.

The most significant, and most detrimental, amendment to the energy efficiency rules in the Order is the shift to a "post-approval" review of utility energy efficiency programs. The Order asserts that:

> Such an approach promotes efficiency, reduces regulatory delay, and minimizes administrative costs because EDUs will avoid the need to extensively litigate their portfolio plans prior to implementing them. Furthermore, post-approval verification process is in line with other, similar verification processes currently in place at the Commission, such as the Distribution Investment Rider and the Alternative Energy Rider.

Order at 31-32. This vision, however, is not based on a reasonable assessment of the relevant law or facts.

A. The Post-Approval Approach Is Inconsistent with Ohio Law and Policy.

As a starting point, the "post-approval" approach is not consistent with Ohio law and policy. The law provides for the Commission to exercise "general supervision" over utilities. R.C. 4905.06. In its most recent legislation regarding the state energy efficiency standard, the General Assembly included multiple references to this supervision occurring in the context of a utility "portfolio plan," suggesting that the legislature did not intend the many changes it made to the standard to be carried out without a robust pre-approval process to address implementation questions. *See, e.g.*, R.C. 4928.6610(C).

Indeed, pre-approval review of such a plan is the only reasonable way to accomplish supervision of utility efficiency programs while carrying out state policy to "[e]ncourage innovation . . . for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management." R.C. 4928.02(D). This policy recognizes that utility service should reach beyond simply "prudence" or bare cost-effectiveness in order to deliver the best value to customers. That is especially true in the energy efficiency space, where there are many possible choices for the selection and design of programs that can determine whether the utilities' expenditure of millions of dollars merely provides cost-effective savings in a given year, or delivers innovative service to maximize customer value over the long term. The possibilities for innovation in an area such as purchasing renewable energy credits under an Alternative Energy Rider or routine replacement of aging distribution infrastructure under a Distribution Investment Rider may be limited; for energy efficiency, innovation is both possible and necessary, and the Commission must consider how to reasonably exercise its supervisory authority to foster such innovation.

At best, post-approval review may allow the Commission to deny cost recovery to utilities where it finds those decisions imprudent or require a utility to adopt program changes suggested by an independent evaluator or other stakeholders. However, the Commission will never be able to turn back the clock on a year or more of sub-par efficiency programs and lost customer savings. Meanwhile, interested parties will not be able to effectively push for up-front commitments to innovative program improvements, which risk-averse utilities may be reluctant to undertake even if they may pay significant dividends in customer value. Certainty regarding cost recovery is a top priority for utilities in implementing energy efficiency programs, and the new rules fail to provide needed assurance.

The only options the Commission offers to complement post-approval review are the utility stakeholder collaboratives, or a complaint case. Order at 23, 41. But neither of these are adequate to provide the level of certainty required for a utility to confidently pursue innovative, cost-effective programs, particularly if different stakeholders provide conflicting input to utilities in the collaborative process. Moreover, both are poor substitutes for the due process currently afforded to stakeholders in the current pre-approval system, which allows significant substantive input to ensure robust program design and implementation. In both cases (as the Commission acknowledges), the burden is on the non-utility party to change the utility's proposed approach. That is the reverse of a portfolio plan pre-approval case, where the burden appropriately lies on the utility to justify its proposed programs and cost recovery mechanism as reasonable. A switch to post-approval review thus unreasonably undermines the ability of stakeholders to hold the utility accountable to provide well-designed and well-implemented programs, which will ultimately hurt utility customers and reduce energy efficiency savings.

Pre-approval is also vital on a fundamental level to provide utilities a basis for effective participation in the wholesale markets. The Commission states in the Order that it expects the utilities to prudently bid efficiency and peak demand reduction resources into the PJM capacity auction to earn wholesale revenues. However, often the best way for the utility to maximize that revenue is to bid the resources into the Base Residual Auction, which occurs three years in advance of the capacity delivery year. That cannot occur without Commission pre-approval. The Ohio utilities have consistently decided it would not be prudent to bid all planned energy efficiency resources in the PJM Base Residual Auctions where they did not have explicit Commission pre-approval for that year's programs, often resulting in significantly lower revenues from subsequent incremental auctions. See Attachment A, AEP Ohio Collaborative, PJM Results (Dec. 2018). The current portfolio approval process, although not perfect, at least allows a utility to plan and judge prudence of PJM bidding on a multiyear basis with significantly more certainty. Without that process, customers will receive less market revenue even if the utilities run the same programs producing the same efficiency resources, and the wholesale price for capacity will rise artificially as those resources are not timely bid into the PJM market.

Finally, compared to the current approach of staggering pre-approval of utility programs every three years or so, the post-approval approach is so burdensome that it seems likely important issues will fall through the cracks. Under these rules, the Commission and relevant stakeholders will have to review four sets of utility programs every year on the accelerated schedule necessary to ensure evaluation results can be incorporated into future programs in a timely manner. That will require far more time and resources – with much lower prospects for success – than simply building in good program design and safeguards up front on a longer-term basis. Moreover, the Commission can expect a litany of complaints filed by intervenors, because they will have no other avenues to address program shortcomings.

B. The Post-Approval Process Is Unreasonable Under Present-Day Conditions.

Regardless of whether the transition to post-program review would have been reasonable five years ago, in the current climate of uncertainty around utility program design and shared savings constructs, it is vital to retain the pre-approval process. The pre-approval process allows utilities and stakeholders to work through disagreements based on a full exchange of information and a robust litigation process with the aim of getting certainty from the Commission up-front rather than trying to hash out complex and controversial issues well after the fact. This is especially important to do before utilities become entrenched in defending the prudency of their program spending in order to ensure cost recovery. Basic common sense dictates that once utilities have spent a year and millions of dollars implementing a given program, they will be reluctant to change that program in response to criticism that the money was not spent well.

As detailed above, the utilities' benchmarks are changing, the framework for determining savings for compliance is changing, and the state of the efficiency market is changing. This means the utility programs, and the associated cost recovery and shared savings mechanisms, will have to change. However, such changes will be infinitely more difficult if the Commission's position on cost recovery of any new element of a portfolio plan or the overall cost recovery mechanism is not clear until after implementation begins, or even after the utility has spent millions of dollars on efficiency programs that may be deemed imprudent.

That lack of up-front certainty can lead to exactly the sort of "extensive[] litigat[ion]" that the Commission is trying to avoid. For example, one of the most heavily litigated issues in recent Commission history regarding the energy efficiency programs was in fact a question that did not arise until the post-implementation review of cost recovery for those programs: the question of whether Duke could earn shared savings in years where it used banked savings to meet and exceed the annual compliance target. *See, e.g.*, Case Nos. 14-457-EL-RDR, 15-534-EL-RDR. Ultimately, the Commission ruled that Duke could not trigger shared savings incentive payments using banked savings, and now seeks to commemorate that position in the energy efficiency rules. Case No. 14-457-EL-RDR, Finding and Order (May 20, 2015) at 5; Order at 34. But in the meantime, Duke customers lost out on a year of strong programs aimed at fully achieving the statutory target without the use of banked savings.

That is also not the end of the debate over shared savings. While the Commission's precedent regarding banked savings has been incorporated into utility portfolio plans over the last several years that provide both strong, cost-effective efficiency programs and an opportunity for utilities to earn shared savings, that may not be true in the years to come, and the post-approval review process is not well-suited to address that issue. Especially as utilities move to a 2% annual savings target, they will face the challenge of identifying the prudent course of action to ensure cost recovery while providing cost-effective energy savings for customers consistent with the Commission's stated goal of creating a shared savings "incentive structure [that] is designed to motivate and reward the utility for exceeding energy efficiency standards on an *annual* basis." Case No. 14-457-EL-RDR, Finding and Order (May 20, 2015) at 5 (emphasis added). Utilities have two general options to consider as a "prudent" approach: (1) they could build on and/or modify the design of their cost-effective programs to ensure enough annual savings to achieve their applicable benchmark and to trigger shared savings incentive payments under these rules; or (2) they could spend less on programs and instead rely on banked savings to achieve annual compliance while giving up on the opportunity to earn shared savings, in order to avoid after-the-fact accusations of not utilizing a statutorily permissible compliance mechanism to lower costs in the short term (even if it might impose higher long-term costs on consumers by depriving the market of cost-effective demand-side resources). The Commission's new post-approval review regime deprives utilities of the ability to propose one or the other approach for Commission review ahead of time.

Furthermore, since utilities are unlikely to pursue an approach that puts them at risk of not getting full program cost recovery, they may well move toward the second option of significantly reducing their annual efficiency program offerings in favor of relying heavily on banked savings. That would deprive customers of the cost-effective *annual* program offerings to which they have had access in the past and that the Commission has routinely endorsed. The ultimate effect would be to raise customers' total costs in the long-run, by reducing the availability of cost-effective energy efficiency resources and driving additional reliance on higher-priced generation. The Commission must consider the prospect of such a negative outcome in determining the reasonableness of a post-approval review process.

Additionally, the shift to a 2% annual savings target, along with continuing evolution of the efficiency market, is likely to undermine the Commission's expectation based on input from years past that "annual filings . . . [will] be a continuation of prior year programs with minor revisions." Order at 31. Over the last several years, the utilities have already responded to stricter minimum federal lighting standards by transitioning rebates from CFL to more efficient and long-lasting LED lightbulbs. *See, e.g.*, Case No. 16-743-EL-POR, Stipulation and

Recommendation (Dec. 9, 2016) at 4. They have also started to experiment with different types of programs for residential customers, such as smart thermostat programs and energy management tools that seek to leverage smart meter data, as efficient lighting becomes more of the baseline and less of a source of substantial savings. *See, e.g.*, AEP Ohio, It's Your Power, http://itsyourpowerohio.com. This innovation and experimentation can produce better, more successful programs than if utilities rely principally on programs that the Commission has approved in the past, which may pass the minimum cost-effectiveness threshold but fail to provide long-term value to customers – for example, behavioral programs that are cheap to run but produce savings that may be short-lived. Such innovation may become even more necessary once the Commission updates the Technical Resource Manual ("TRM"), which dates back almost a decade, to reflect more accurate savings assumptions based on the current market. Once the TRM incorporates savings estimates that rest on more recent efficiency baselines, the out-of-date, inflated savings numbers that trump real-world savings data under R.C. 4928.662 will no longer provide a basis for over-estimating energy savings.[1] That will further drive the utilities to modify their program offerings to achieve savings from other measures emerging in today's efficiency market. Pre-approval will provide the certainty they need to do so; post-approval review does not.

Finally, the enactment of Senate Bill 310 has raised entirely new issues regarding shared savings that the Commission has yet to address. For example, as noted above, under R.C.

[1] The impact of such changes could be large; for example, in the 2017 annual status report for Cleveland Electric illuminating Company ("CEI"), the utility claimed to have triggered shared savings based on ex ante energy savings assumptions from the TRM and other sources, when the actual ex post verified savings in the CEI program evaluations reached less than 100% of the utility's annual target. *See* Case No. 18-1646-EL-RDR, Objections by the Environmental Law & Policy Center (Jan. 2, 2019) (providing calculations).

4928.662, compliance with federal efficiency standards now counts toward utility compliance with annual energy savings targets. But should those savings resulting from federal action be eligible to trigger a utility's shared savings incentive, or provide a basis for calculating net benefits under a shared savings mechanism? The Commission has said no to that idea for savings resulting from customer action, but left the federal action question unaddressed. Similarly, what about "savings" from inflated ex ante assumptions that are higher than the verified savings from utility programs? The Conservation Groups take the position that shared savings triggers and payments should be based only on verified, real-world savings resulting from utility efficiency programs. If the savings are not real, there is nothing to share; and if the savings are real, but the utility had no role in producing them, then it is inappropriate to ask customers to "share" them with the utility. Ultimately, the Commission will need to address this issue, and can most effectively do so through a prospective decision.

These are all contentious issues that the Commission and stakeholders did not anticipate back in 2013. A pre-approval approach is in fact the most efficient way to resolve them. It will provide up-front certainty for the utilities to design programs and cost recovery mechanisms based on whatever policy guidance the Commission provides, so that program budgets are spent the right way the first time rather than being bogged down in uncertainty or mismanagement. Indeed, the Commission has recently endorsed that pre-approval approach in a utility Distribution Investment Rider, contrary to the Order's citation of such riders as an example of the suitability of after-the-fact review. In its December 19, 2018 Opinion and Order regarding a stipulated settlement of, among other issues, Duke's Distribution Investment Rider, the Commission explicitly modified the settlement to require pre-filing and approval for a proposed battery storage project contemplated in the stipulation. Case Nos. 17-0032-EL-AIR, et al., Opinion and Order ¶ 208. The Commission recognized that such prospective review is the best way to ensure good outcomes where utility investments involve areas of uncertainty or significant policy debate. While after-the-fact audits may suffice for traditional utility spending in more mundane areas such as routine replacement of aging distribution infrastructure or renewable energy credit purchases (see Order at 32), energy efficiency program plans are not so straightforward, and require a different process.

Rehearing Argument 3: The Commission unreasonably approved a definition of "shared savings" in Rule 4901:1-39-01 that may not be workable in future program years.

The definition of "shared savings" locks in the Commission's ruling that a utility may not trigger shared savings in a year that it relies on banked savings for compliance. However, as described above, that definition may not be workable to encourage strong utility efficiency programs in a post-approval regime where the utility cannot be certain whether a program evaluator or other stakeholder will argue after-the-fact that the utility should in fact have relied on banked savings in a given year. Moreover, even if the Commission returns to a pre-approval approach, this treatment of banked savings unreasonably constrains parties' flexibility to design a shared savings mechanism that maximizes benefits to customers. If a utility does not believe it can prudently implement programs to meet the coming 2% annual savings benchmark without relying on banked savings, then without the incentive of shared savings, this definition may drive a utility to propose full or majority reliance on banked savings.[2] Meanwhile, stakeholders who believe it is prudent and achievable to purse a higher level of current-year program that would

[2] All four Ohio utilities have significant amounts of banked savings that could allow them to comply with R.C. 4928.66 for years to come without achieving any additional savings or running additional efficiency programs.

reduce total electricity costs to customers will have had no opportunity to make that case in a regulatory process in which the Commission could objectively judge the relative merits of the two positions. While that result might suffice for technical compliance with R.C. 4928.66, it could ultimately deprive customers of years of cost-effective energy savings that the Commission and Ohio law identify as a priority for the state. Case Nos. 09-1947-EL-POR, Entry on Rehearing (Sept. 7, 2011) at 6 ("[E]very kWh of energy that can be displaced through cost-effective energy efficiency programs is a savings, not a cost, to the Companies' customers.")**;** R.C. 4905.70. While the Conservation Groups support the Commission's historic application of a bar on triggering shared savings in a year where the utility relies on banked savings, the Commission should leave the door open to revisit the topic where a utility portfolio plan proposal conclusively demonstrates that some limited reliance on banked savings would provide real value to customers.

<u>Rehearing Argument 4</u>: The Commission unreasonably failed to clarify the appropriate process for verifying energy savings for purposes of triggering a shared savings mechanism and for earning incentive payments once a shared savings mechanism is triggered.

Historically, the Ohio utilities have utilized shared savings mechanisms that have two stages. First, the utility calculates its threshold annual energy savings to determine whether it has triggered a shared savings payment by over-complying with the annual benchmark, and the applicable percentage tier based on the percentage of over-compliance (i.e., what "share" of net benefits the utility will receive). Second, the utility calculates net avoided costs for customers from those energy savings, as a basis for receiving its shared savings incentive payment based on the applicable percentage tier. The rules address, in the definition of shared savings, some questions regarding both stages: the definition precludes banked savings from being used in the trigger stage, and savings from "historical mercantile programs, transmission and distribution infrastructure projects, customer action programs, special improvement districts . . ., and banked savings" from being used to calculate net savings. However, the rules do not address the full universe of what savings eligible for compliance under R.C. 4928.662 may also count at the trigger stage for shared savings, such as compliance with federal efficiency standards or savings assumptions that are higher than actual verified savings. If those savings do qualify to trigger shared savings, then customers will end up providing incentive payments to utilities that have no connection to the utility's actual efforts to help customers save energy. The Order is therefore unreasonable to the extent it does not make clear that any shared savings mechanism must rely only on actual verified energy savings resulting from a utility's energy efficiency programs.

Rehearing Argument 5: The Commission unreasonably approved a definition of the "total resource cost" test in Rule 4901:1-39-01 that does not appropriately weigh all quantifiable benefits of energy efficiency against its costs.

The Order confirms the Commission's default approach of determining the cost-effectiveness of utility energy efficiency programs for purposes of cost recovery based on the total resource cost ("TRC") test. However, the Commission's definition of that test unreasonably fails to make clear that it should include all relevant benefits of energy efficiency in weighing benefits versus costs. The purpose of the TRC test is to weigh *all* quantifiable utility and program participant benefits of a measure or program against *all* utility and participant costs. However, the utility practice to date has been to include all participant costs while omitting numerous participant benefits – most notably, natural gas savings – in applying the TRC test. That practice is not reasonable. It effectively turns the Total Resource Cost test into a "Total Resource Cost, Partial Resource Benefits" test, inconsistent with standard industry practice across the United States. *See, e.g.*, California Standard Practice Manual, Economic Analysis of Demand-Side Programs and Projects (Oct. 2001) at 27 ("For DSM programs or program elements that reduce electricity and natural gas consumption, costs and benefits from both fuels should be included."); National Efficiency Screening Project, National Standard Practice Manual for Assessing Cost-Effectiveness of Energy Efficiency Resources (Spring 2017) at 31-32, *available at* https://nationalefficiencyscreening.org/national-standard-practice-manual. Thus, Commission should clarify the definition of the TRC test to ensure utilities do include avoided natural gas costs among the benefits of energy efficiency measures that reduce natural gas usage. This will ensure Ohio utilities are reasonably implementing efficiency programs that maximize all customer benefits rather than arbitrarily excluding measures based on a narrow focus on electricity benefits alone.

In lieu of a reasonable definition of the TRC test, the Commission must instead apply the utility cost test ("UCT test") – which compares just the electric utility system costs of efficiency programs to the just electric utility system benefits that they produce – to reasonably and accurately gauge the cost-effectiveness of utility efficiency programs, in either pre-approval or post-approval. *See, e.g.*, *In re Consumers Energy Co.*, Case No. U-18025, Order Approving Settlement Agreement (Mich. Pub. Serv. Comm'n Sept. 8, 2016) (applying UCT test to determine cost-effectiveness of programs for cost recovery purposes). That alternative approach is necessary so that utility efficiency programs are based on reasonable practices, consistent with national industry standards, for comparing costs to benefits on an "apples-to-apples" basis.

<u>Rehearing Argument 6</u>: The Commission unreasonably failed to provide a process for ensuring timely updates to the Ohio Technical Resource Manual.

As explained above, the Ohio TRM is nearly a decade old. It contains a number of unreasonably inflated savings assumptions for measures where the baseline consumer product has become more efficient over the last several years. *See, e.g.*, Case Nos. 18-841-EL-EEC *et* *al.*, Environmental Comments (June 14, 2018) at 6 (providing example of TRM value for savings from refrigerator recycling that is more than 70% higher than the real-world evaluation figure from FirstEnergy's 2017 annual status report). It also fails to provide any savings assumptions for some newer efficiency measures that have emerged in the market since 2010, such as smart thermostats. Yet these potentially erroneous assumptions receive special status under R.C. 4928.662 as potentially unassailable "deemed" savings numbers to the extent the Commission designates the TRM as a "safe harbor" providing "verified savings" for utilities. Order, Att. A at 9. Because of this special status, it is vital for the Commission to keep the TRM as up-to-date as possible in order to avoid utility savings claims that accurately reflect real benefits to customers. While these rules provide a process for the Independent Program Evaluator to suggest periodic updates to the TRM, there is no specific timeframe for considering or adopting those suggestions, and no specific avenue for any other party to identify TRM assumptions that have become unreasonable over time. The Commission should therefore add the following language to Rule 4901:1-39-05:

> (G) Within thirty days of an electric utility's filing of its annual portfolio performance report, any person may file comments in that docket or in any open docket regarding updates to the technical resource manual to recommend updates to the technical resource manual.

Additionally, in order to ensure that proposed TRM updates are resolved in a timely manner and that utilities do not continue to rely on outdated savings assumptions in the interim, the Commission should add the following language to the definition of "verified savings" in Rule 4901:1-39-(EE):

> If the independent program evaluator or any other person has recommended that an assumption or method in the Ohio technical resource manual be updated pursuant to Rule 4901:1-39-05(C) or Rule 4901:1-39-05(G), until the Commission has made a determination on the recommended updates, no utility may rely on that assumption or

method to calculate verified savings without demonstrating a reasonable basis for doing so.

These proposed changes will provide an incentive for all stakeholders to expeditiously resolve questions regarding the reasonableness of TRM assumptions and methodologies, while ensuring that in the meantime the utility is able to move forward with program design and implementation based on demonstrably reasonable savings calculations.

Rehearing Argument 7: The Commission unreasonably failed to specify whether "verified savings" should include line losses.

The Order correctly provides a definition of "[e]nergy baseline" as based on a utility's long term forecast report "kilowatt-hours of distribution service sold to retail customers," in accordance with the statutory language stating that the efficiency benchmark should be based on "kilowatt-hour sales of the electric distribution utility . . . to customers in this state." R.C. 4928.66(A)(1)(a). This language makes clear that the energy efficiency standard is based on energy use as measured at the customer meter "in this state." However, the definition of "verified savings" fails to make clear that the determination of compliance in meeting that standard should be based on kilowatt-hours saved at the customer meter (i.e., not including line losses). Over the last several years, that lack of clarity has led to inconsistent savings calculations among the Ohio utilities, with some utilities claiming avoided line losses as part of their savings. Therefore, the Commission should clarify that "verified savings" should be measured at the customer meter.

IV. CONCLUSION

Given the years since stakeholders last provided input in this docket and the many relevant circumstances that have changed in the interim, it would be both reasonable and efficient for the Commission to take a step back and reopen these rules for another round of comments and revisions. Such comments are vital to fully illuminate the risks of implementing the rules as currently drafted. Most importantly, the shift to post-approval review for utility efficiency plans – never an advisable approach to achieving high-quality programs with room for innovation and experimentation – is more vital than ever given the many new developments regarding energy efficiency over the last five years and the uncertainty for utilities in trying to respond to those developments without guidance from the Commission. The Conservation Groups therefore respectfully urge the Commission not to move forward with the transition to post-approval review, and instead to open the door to stakeholder input for how to improve the current pre-approval review process for energy efficiency programs.

January 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon all parties to the case via electronic mail on January 18, 2019.

/s/ Madeline Fleisher
Madeline Fleisher

Attachment A

AEP Ohio Collaborative

PJM

December 2018

AEP OHIO
An AEP Company

PJM EE Cleared Capacity and estimated revenues

Yellow indicates added since last update

Bid Year		MW Bid	Auction Price/ MW-Day	Value (Estimated) $ Mil.	Total
2015/2016	Base	211.1	$ 136.00	$ 10,479,004	$ 10.5
2016/2017	Base	52.1	$ 59.37	$ 1,129,010	
	CP Transition	82.7	$ 134.00	$ 4,044,857	
	3IA	31.8	$ 5.02	$ 58,267	$ 5.2
2017/2018	Base	65.9	$ 120.00	$ 2,886,420	
	CP Transition	68.5	$ 151.50	$ 3,787,879	$ 6.7
2018/2019	Base-Base	100.7	$ 149.98	$ 5,512,590	
	Base -CP		$ 164.77	$ -	
	2IA - Base	5.7	$ 5.00	$ 10,403	
	2IA- CP	14.1	$ 50.00	$ 257,325	
	3IA - Base	3.3	$ 14.29	$ 17,212	
	3IA - CP	1.9	$ 34.99	$ 24,266	$ 5.8
2019/2020	Base	16.5	$ 80.00	$ 481,800	
	Base - CP	24.4	$ 100.00	$ 890,600	
	1IA - Base	28.1	$ 15.00	$ 153,848	
	1IA - CP	44.8	$ 51.33	$ 839,348	
	2IA - Base	8.9	$ 32.87	$ 106,778	
	2IA- CP	3.7	$ 32.87	$ 44,391	$ 2.6
2020/2021	CP-Annual	67.3	$ 76.53	$ 1,879,921	
	CP-Summer	0	$ 76.53	$ -	
	1IA -CP	12	$ 42.90	$ 187,902	$ 2.1
2021/2022	CP-Annual	80	$ 140.00	$ 4,088,000	
	CP-Summer	23.1	$ 140.00	$ 595,056	$ 4.7
		946.6		$ 37,474,876	$ 37.6