

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review)	
of its Rules for Energy Efficiency Programs)	Case No. 12-2156-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. 13-651-EL-ORD
Portfolio Standard Contained in Chapter)	
4901:1-40 of the Ohio Administrative Code.)	

In the Matter of the Amendment of Ohio)	
Administrative Code Chapter 4910:1-40,)	Case No. 13-652-EL-ORD
Regarding the Alternative Energy Portfolio)	
Standard, to Implement Am. Sub. S.B. 315.)	

**MEMORANDUM CONTRA OF INDUSTRIAL ENERGY USERS-OHIO TO
APPLICATIONS FOR REHEARING**

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**ATTORNEYS FOR INDUSTRIAL ENERGY USERS-
OHIO**

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I. INTRODUCTION

In the order adopting modifications to the energy efficiency and peak demand reduction ("EE/PDR") program rules, the Public Utilities Commission of Ohio ("Commission") clarified its proposed rule on the use of shared savings toward benchmark compliance to make clear that "banked surplus energy savings shall not be used to trigger shared savings incentive."¹ In applications for rehearing, Duke Energy Ohio, Inc. ("Duke"),² Ohio Edison Company, The Cleveland Electric Illuminating Company, and The

¹ Finding and Order, Attachment A at 25 (Dec. 19, 2018); see also *id.* at ¶ 97 (clarifying Rule 4901:1-39-05(A)(1)(c)).

² Application for Rehearing of Duke Energy Ohio, Inc. at 6 (Jan. 18, 2019) ("Duke Application for Rehearing").

Toledo Edison Company (collectively, “FirstEnergy”),³ Ohio Power Company (“AEP-Ohio”) and The Dayton Power & Light Company (“DP&L”),⁴ and the Environmental Law & Policy Center (“ELPC”), Environmental Defense Fund (“EDF”), Natural Resources Defense Council (“NRDC”), and Ohio Environmental Council (“OEC”) (collectively, “Environmental Advocates”)⁵ seek rehearing of the clarification. Because the applications for rehearing do not demonstrate that the clarification is either unjust or unwarranted, the Commission should deny the assignments of error.

II. ARGUMENT

There is no statutory right to collect shared savings triggered by banked savings, and the applications for rehearing do not offer a reasoned basis for the Commission to deviate from its long-standing precedent preventing electric distribution utilities (“EDUs”) from imposing additional nonbypassable charges on customers for shared savings based on banked savings.

Under R.C. 4903.10, the Commission “may grant and hold ... rehearing on [a] matter specified in [an application for rehearing], if in its judgment sufficient reason therefor is made to appear.” If it grants rehearing, the Commission may abrogate or modify its original order if the Commission finds that the original order or any part of it is in any respect unjust or unwarranted or should be changed. *Id.*

The applications for rehearing of the Commission’s clarification of its rule prohibiting the use of banked savings to trigger savings raise procedural and substantive issues.

³ Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 2-3 (Jan. 18, 2019) (“FirstEnergy Application for Rehearing”).

⁴ Application for Rehearing of Ohio Power Company and The Dayton Power & Light Company at 8-10 (Jan. 18, 2019) (“AEP-Ohio/DP&L Application for Rehearing”).

⁵ Application for Rehearing by the Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, and Ohio Environmental Council at 16-17 (Jan. 18, 2019) (“Environmental Advocates Application for Rehearing”).

Raising procedural issues, FirstEnergy and Duke both complain that the clarification is a surprise.⁶ Although they correctly note that the Commission has authorized shared savings, they ignore that the Commission has refused to permit EDUs from collecting shared savings based on banked savings.⁷ The EDUs' claim of surprise is unsupported.

On the merits of the clarification, the EDUs and Environmental Advocates urge that the Commission's clarification will frustrate efforts to realize the full benefits of energy efficiency programs.⁸ To this end, they assert that banking extraordinary amounts of shared savings when the compliance levels were lower will help lower the cost of future compliance.⁹ This curious argument apparently rests on the notion that EDUs should be permitted to place banked savings on the bottom of the "stack" of savings in any future year and then assert victory in regard to additional program-related savings and reap shared savings to the extent that banked savings push current year EE/PDR savings over the annual target. This behavior is exactly the kind of gaming of the EE/PDR compliance programs that the Commission has previously rejected.¹⁰ Nothing reasonable either in additional EE/PDR compliance or reasonable costs comes from codifying such gaming.

⁶ FirstEnergy Application for Rehearing at 2-3; Duke Application for Rehearing at 6.

⁷ *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).

⁸ FirstEnergy Application for Rehearing at 2-3; Environmental Advocates Application for Rehearing at 16-17. In a variation on the theme, AEP-Ohio and DP&L argue that the Commission is frustrating its own directive to the EDUs to manage their programs. AEP-Ohio and DP&L Application for Rehearing at 8-10.

⁹ The Environmental Advocates correctly note that the EDUs are already banking significant amounts of shared savings due to overcompliance. Environmental Advocates Application for Rehearing at 16 n.2.

¹⁰ *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).

Moreover, the applications for rehearing are notably free of any citation to a statute that authorizes the EDUs to charge customers for such shared savings triggered by banked savings. In fact, there is none. The only statutory references to “shared savings” in the context of EE/PDR programs are prohibitions of shared savings for transmission and distribution improvements.¹¹

Further, the law already provides an adequate “incentive” for compliance. Rather than bolstering EDU income statements with inflated earnings to “incent” implementation of energy efficiency measures, the legislative structure directs the EDUs to comply with the EE/PDR requirements and mandates penalties for an EDU’s failure to comply.¹² Overlaying a bonus paid by customers for exceeding what the law requires, especially a gamed bonus, is not supported by statute or sound policy.

Additionally, expanding the EDUs’ opportunity to bill customers for incentives to expand EE/PDR programs runs counter to the attempts to reign in the costs being passed on to customer bills. As the Commission has become increasingly aware that the cost of compliance with EE/PDR requirements has itself become unreasonable, the Commission has imposed limits on the amounts that EDUs may seek to pass on to customers to meet EE/PDR requirements.¹³ Increasing those costs with unneeded “incentives” makes no sense.

Presenting an additional take on the need to free the EDUs from the statutory framework, the Environmental Advocates argue that the EDUs should have “flexibility to

¹¹ R.C. 4928.66(A)(2)(d)(ii) and 4928.662(E).

¹² R.C. 4928.66(C).

¹³ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion and Order at ¶ 56 (Nov. 21, 2017), appeal pending, Sup. Ct. Case No. 2018-379 (Notice of Appeal, Mar. 12, 2018).

design a shared savings mechanism that maximizes benefits to customers.”¹⁴ This so-called administrative flexibility, however, does not find support in Ohio law, is inconsistent with prior Commission orders discussed previously, and introduces complexities that are unnecessary to the implementation of the EE/PDR requirements. For example, the Environmental Advocates have not explained how the Commission could track savings to prevent recovery of shared savings for banked savings associated with transmission and distribution improvements. Letting such savings count for shared savings would violate R.C. 4928.66(A)(2)(d)(ii) and 4928.662(E), but goes unaddressed.

The demand by EDUs and Environmental Advocates for bonus payments has already been rejected by the Commission. In rejecting Duke’s prior request to rely on banked savings to trigger the opportunity to collect shared savings, the Commission stated that the purpose of shared savings was to reward an EDU for exceeding the applicable annual EE/PDR mandate; providing a bonus for savings in a prior year provides no “incentive” to do anything in the year in which the banked savings is being applied.¹⁵ Because the Commission is required to respect its precedent,¹⁶ the Commission should again reject the various efforts to revive this long-discredited claim that EDUs should be permitted to trigger shared savings with banked savings.

¹⁴ Environmental Advocates Application for Rehearing at 16 (Jan. 18, 2019).

¹⁵ *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).

¹⁶ *In re Application of Duke Energy Ohio Inc.*, 2017-Ohio-5536 at ¶ 23 (quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975)).

III. CONCLUSION

The applications for rehearing of the EDUs and Environmental Advocates do not demonstrate sufficient reasons to grant rehearing of the Commission's order clarifying a rule to prohibit the use of banked savings to trigger shared savings. Accordingly, the applications should be denied.

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 upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra of Industrial Energy Users-Ohio to Applications for Rehearing* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 28th day of January 2019, via electronic transmission or regular U.S. mail, postage prepaid.

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