BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 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 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. 13-652-EL-ORD

OHIO POWER COMPANY'S AND DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING

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OHIO POWER COMPANY'S AND DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING

I. INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") should deny Industrial Energy Users-Ohio's (IEU's) application for rehearing of the Commission's April 10, 2010 Second Entry on Rehearing. IEU's application for rehearing is premised on a misinterpretation of the Commission's Second Entry on Rehearing that it claims "alters Commission policy without providing a reasoned and lawful basis for the change in policy." IEU AFR at 2. IEU attempts to create an internal conflict within the decision by incorrectly claiming that it "has introduced two concepts to the determination of shared savings that are mutually exclusive." IEU AFR at 3. *See also* IEU AFR at 9 ("paragraph 44 seems to be fully at odds with paragraph 43"). IEU ultimately concludes that the Second Entry on Rehearing is unlawful and unreasonable. In the process of arguing that the Commission should follow its precedents, IEU misinterprets those rulings and argues for a result that turns years of compliance planning and the terms of existing EDU portfolio plans on their heads. Ohio Power Company ("AEP Ohio") and Duke Energy Ohio, Inc. ("Duke") submit that the Second Entry on Rehearing's balanced determinations regarding shared savings are lawful and reasonable, consistent with the terms of AEP Ohio's and Duke's portfolio plans as approved by the Commission, and amply supported by additional policy considerations. Consequently, IEU's Application for rehearing should be denied.

II. ARGUMENT

A. The Second Entry on Rehearing is internally consistent and sufficiently clear

IEU devotes much of its application for rehearing attempting to establish an inconsistency of internal conflict in the Second Entry on Rehearing's discussion of banked energy savings and shared savings. IEU's indictment is that "paragraph 44 seems to be fully at odds with paragraph 43" because the Commission "permits the use of banked savings toward meeting benchmarks as a means of reducing program costs" while also providing that "banked savings are excluded from the shared savings calculation." IEU AFR at 9. In reality, neither aspect of the decision creates an internal conflict or a difficulty in implementing the ongoing shared savings mechanisms. The Commission's Second Entry on Rehearing was sufficiently clear and is eminently reasonable. IEU's attempt to create an internal conflict and lack of clarity in the order should be rejected.

There are three steps to annually calculating shared savings: (1) calculate the percentage that an EDU exceeded the annual energy efficiency and peak demand reduction benchmark, (2) calculate the annual net benefits (*i.e.*, 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. IEU agrees with these same steps and similarly described them in their AFR at pages 4-6. The Commission recites these same steps in the Second Entry on Rehearing (at ¶ 38). The two aspects of the Commission decision complained of by IEU on rehearing – 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 two rulings challenged by IEU, the adopted Rule 4901:1-39-01(Y)

defining shared savings and the adopted Rule 4901:1-39-05(A)(1)(c) governing the use of banked savings, address two different things. Moreover, the two complementary provisions involve separate steps in the three-step shared savings process (step one and step three, respectively). And as further discussed below, the two features are cohesive in ensuring important policy objectives are met.

The first aspect of the shared savings ruling is reinforcement that banked savings may be used to achieve or exceed compliance benchmarks for purposes of step one in the shared savings process. While IEU suggests this is unclear, the following features of the Commission decision make this discrete point very clear:

- In the Second Entry on Rehearing (¶ 43), the Commission indicated that "we have amended proposed Ohio Adm.Code 4901:l-39-05(A)(l)(C) to allow banked savings to trigger shared savings."
- Adopted Rule 4901:1-39-05(A)(1)(c) directly provides: "Banked surplus may be used by the utility to trigger the shared savings incentive. However, the shared savings incentive is only eligible for energy and demand savings achieved in the current program year."

Thus, the decision made it abundantly clear that banked savings can be used for purposes of step one of the shared savings determination.

The second aspect of the ruling is that the net savings associated with banked savings is not included in shared savings for the current year's calculation of shared savings. While IEU suggests this is also unclear, the following features of the Commission decision make this clear:

- In the Second Entry on Rehearing (¶ 43), the Commission indicated that "[w]e have also clarified in the definition of shared savings in Ohio Adm.Code 4901:l-39-01(Y) that banked savings may not be used to calculate shared savings."
- Adopted Rule 4901:1-39-01(Y) provides that "net savings do not include banked savings."
- In adopted Rule 4901:1-39-05(A)(1)(c), the new language affirmatively provides that only energy and demand savings achieved in the current year are eligible for shared saving.

Stated differently, the net savings associated with banked savings is not used to generate shared savings in the current year's calculation of shared savings. Thus, this second component is also clear and is beneficial to ratepayers because the banked savings displaces (more expensive) current program costs that would otherwise be incurred to meet the benchmarks – and by extension limits the utility's shared savings incentive for the year in which the banked savings are used. This is also fair and logical because the net benefits (NPV of benefits less cost) was already included in the net savings for the year in which the savings were originally generated.

In this regard, IEU wrongly claims (at 10-11) that the Commission's rulings will "produce absurd results" and the resulting shared savings "could be astronomical." This hyperbolic statement lacks basis and the reality is that all of the utilities have hard annual caps on their shared savings incentive programs. Absolutely no extreme result would occur under any circumstances since the maximum amount possible was already agreed to and approved in the form of annual shared savings caps. Moreover, contrary to IEU's claim that shared savings are unreasonably increased under the Commission decision, the opposite is actually true – as can be readily illustrated.

For example, if a utility achieves savings associated with current programs in the current year of 95% and uses banked savings to bump it to 115%, the utility would qualify for 13% share of the net benefits of the new savings only (*i.e.*, 13% of the net savings associated with the 95% of current eligible savings) with customers receiving the rest. Another example is where the utility makes no new savings and has to use its banked savings to get to 115% of the benchmark; because net savings only applies to current savings (which are zero in this case), the utility receives zero shared savings. A final example is where the utility makes 75% new savings in the current year and uses banked savings to report 400% of the benchmark (as could happen in

the final year of benchmark requirements); because net savings apply only to new savings, the utility qualifies for 13% share of the net benefits only associated with the 75% new eligible savings with customers receiving the rest of the net benefits.

Under all of these examples, the utility only gets a portion of shared savings on the net savings associated with current savings and the banked savings help save costs and *reduce* the utility's shared savings. If the utility were not able to use banked savings, it would be required to spend more and create additional programs in order to meet or exceed the benchmarks – in additional to creating a larger utility share of a larger amount shared savings in the current year. Moreover, if the utility were able to collect shared savings on net savings associated with banked savings, it would either double count those benefits or over-collect shared savings. So the bottom line is that using banked savings under the Commission's carefully-balanced decision *decreases* the utility's shared savings as demonstrated by the examples above.

Thus, the Commission's rulings in the Second Entry on Rehearing balance the incentives and provides an advantage to ratepayers. Moreover, as further discussed below (in Section C), the Commission's approach is fully supported by policy considerations and IEU's proposed approach would yield irrational results that are harmful to both ratepayers and utilities. Contrary to IEU's rehearing argument, the Second Entry on Rehearing appropriately and with clarity confirmed that banked energy savings can be used to trigger shared savings (under step one) but may not be used to calculate shared savings (under step two).

B. The Duke decision cited by IEU is not a valid or binding precedent in this case but the Commission explained the reasons for its current decision to the extent it can be considered a change from the Duke decision.

Next, IEU is misplaced in relying on *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 (May 20, 2015). The Commission's decision in Duke's 14-457 case (*Duke Rider Case*) does not support IEU's present position and is readily distinguished from the current situation. Duke initially proposed to use banked savings to meet the annual benchmark and to trigger shared savings. The Commission determined that "the banked saving 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 at 5. This ruling does not conflict with the Second Entry on Rehearing in this proceeding; and as shown below, the Commission itself previously indicated that it did not consider the ruling a final decision. Whether it was permissible for Duke to use banked saving to calculate shared savings was never definitively determined as the case was resolved. This is supported by the fact that the stipulation that the Commission approved in that case expressly provided that "[i]f there is a change in law or regulation regarding shared savings, Duke may seek a shared savings incentive consistent with such change in law, regulation, or order." *Id.* at 6. Regardless, the Commission's ruling in the Second Entry on Rehearing in this proceeding explained the basis for its current ruling and it can further clarify that on rehearing if it feels the need to do so.

It is important to understand that the Commission did not consider its initial ruling as a final order. In the *Duke Rider Case*, Duke filed a rehearing application from the initial ruling and entered into a settlement with Staff and others after rehearing was granted for additional

consideration. *Duke Rider Case*, January 6, 2016 Settlement. In challenging the Settlement, OCC and OPAE argued that Duke's receipt of shared savings under the settlement does not benefit ratepayers because "the Commission ruled that Duke's use of banked savings was impermissible in this case." *Duke Rider Case*, Entry Rehearing (October 26, 2016) at ¶ 34. The Commission disagreed and found that "[w]hile the intervenors, and Staff, argued that Duke was not entitled to any shared savings, Duke, as discussed, believed it had earned up to $55 million (Tr. Vol. I at 329). A compromise of $19.75 million, combined with Duke's agreement to not pursue future shared savings, alleviates the risk to ratepayers of having to pay significantly more (Duke Ex. 1 at 4-5)." *Id*. at ¶ 36. Thus, the Commission did not fully and finally reject Duke's position and IEU's reliance on the preliminary ruling in the *Duke Rider Case* is not valid. And in its final rehearing ruling in the *Duke Rider Case*, the Commission doubled down on the same position: "The argument that the stipulated $19.75 million recovery should not be considered a compromise is unpersuasive. As discussed, Duke believed it was entitled to up to $55 million of recovery through multiple cases that were not on final order and still pending before the Commission (Tr. Vol. 1 at 329)." *Duke Rider Case*, Fourth Entry on Rehearing (April 10, 2019) at ¶ 23. Thus, the Commission clearly did not consider its initial in ruling in the *Duke Rider Case* as final and, as such, that decision should not be used as a precedent.

The Commission's well-considered ruling in the instant proceeding is more recent, fully supported, and appropriate for a rulemaking proceeding. As a related matter, the Commission may change its policy based on a simple explanation of the rationale – which the Commission did here. *Consumers' Counsel v. Pub. Util. Comm.*, 111 OhioSt.3d 300, 309 (2006); *Consumers' Counsel v. Pub. Util. Comm*., 10 Ohio St.3d 49, 50-51 (1984). So any inconsistency should be resolved in favor is the current proceeding. Finally, there is no basis to conclude that the ruling

in the *Duke Rider Case* considered and rejected the more nuanced and balanced two-pronged approach adopted in the Second Entry on Rehearing here (can use banked savings in step one but cannot use banked savings in step three). On the contrary, as further discussed below, the current ruling is fully supported by policy considerations and satisfies the same policy concerns the Commission raised in its initial ruling in the *Duke Rider Case* (ongoing incentive to exceed the benchmarks while considering ratepayer cost impacts).

C. The Second Entry on Rehearing is amply supported by strong policy considerations that benefit ratepayers.

In its proper context, the Second Entry on Rehearing's distinction between permitting banked savings to trigger shared savings versus not permitting banked savings to calculate shared savings is logical and fair. In Paragraph 43 of the Second Entry on Rehearing, the Commission explained several policy justifications supporting its shared savings rulings.

In the Second Entry on Rehearing, the Commission explained the policies supporting its two-part ruling:

> 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).

Second Entry on Rehearing at ¶ 43. Thus, the Commission understood three significant policies favoring their two-pronged approach. In the first sentence quoted above, the Commission recognized that the banked savings were accumulated as low-hanging fruit that was highly cost-effective. In the second sentence, the Commission recognized (what is demonstrated above through the examples listed above) that including banked savings in step one actually *reduces* the shared savings payout in the current year. In the third sentence, the Commission recognized the benefit of certainty and cost control through the banking strategy.

All of these policies support a prudent approach (taken by all the utilities) to bank savings early and prepare for 2021 when the benchmark would double. This is a strategy undertaken by all utilities. In this regard, IEU also crows (at 10) that "it is no secret" that the EDUs have over-complied with the benchmarks and have substantial banked balances. It is true that EDUs have prudently been planning ahead and banking savings that are cost-effective and avoided facing the steep benchmark increase from 1% to 2% that has been coming for years and will arrive in 2021. It is unfair and would overturn years of prudent utility planning to now up-end these prudent utility decisions by effectively taking away shared savings that were built into the utility portfolio plans and approved by the Commission. This intent to utilize the bank to obtain approximately 1% of the 2% requirement each year combined with new savings to meet or exceed the remaining goal has been long-standing and widely shared. The Second Entry on Rehearing properly acknowledges and preserves this established compliance method and reasonably balances the relevant policy considerations.

D. IEU is factually incorrect in claiming that the Second Entry on Rehearing could create a statutory violation relating to mandatory exclusions from the shared savings calculation.

Finally, IEU argues that R.C. 4928.66(A)(2)(d)(V) could be violated under the Commission's ruling. IEU AFR at 11-12. This is a red herring and lacks any merit. Shared savings are only generated from new eligible savings obtained in the current program year. All program exclusions from the shared savings calculation remain in place and this ruling does not make any changes to those requirements. The exclusions under R.C. 4928.66(A)(2)(d) are not

used to generate shared savings. Thus, no banked savings are used in the step three shared savings calculation so they necessarily avoid any violation of R.C. 4928.66(A)(2)(d)(V).

III. CONCLUSION

IEU's application for rehearing fails to demonstrate that the Second Entry on Rehearing is unlawful or unreasonable. For the reasons set forth above, therefore, the Commission should deny IEU's application for rehearing in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO'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 was sent by, or on behalf of, the undersigned counsel to the following parties of record this 20th day of May, 2019.

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Summary: Memorandum - Ohio Power Company's and Duke Energy Ohio, Inc.'s Memorandum Contra Industrial Energy Users-Ohio's Application for Rehearing electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company and Duke Energy Ohio, Inc.