

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Application Of Ohio)	
Power Company For Approval Of Its Energy)	
Efficiency And Peak Demand Reduction)	Case No. 16-0574-EL-POR
Program Portfolio Plan for 2017 Through)	
2020.)	
)	
In The Matter Of The Application Of Duke)	
Energy Ohio, Inc. For Approval of Its 2017-)	Case No. 16-576-EL-POR
2019 Energy Efficiency And Peak Demand)	
Reduction Program Portfolio Plan.)	
)	
In The Matter Of The Application Of The Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and the Toledo Edison)	Case No. 16-0743-EL-POR
Company for Approval Of Their Energy)	
Efficiency And Peak Demand Reduction)	
Program Portfolio Plans For 2017 Through)	
2019.)	
)	
In The Matter Of The Application Of The)	
Dayton Power and Light Company For)	
Approval Of Its Energy Efficiency and Peak)	Case No. 17-1398-EL-POR
Demand Reduction Program Portfolio Plan)	
For 2018-2020.)	
)	

**COMMENTS OF
THE KROGER CO.**

I. INTRODUCTION.

On October 23, 2019, the Public Utilities Commission of Ohio (Commission) issued an Entry in the above-captioned proceedings requesting “comments from interested persons regarding the appropriate steps to be taken with respect to energy efficiency programs once the statewide cap

of 17.5 percent, set by Am. Sub. House Bill 6, has been met.”¹ Specifically, the Commission is focused on two questions: “(1) whether the Commission should terminate the energy efficiency programs (Energy Efficiency Programs) once the statutory cap of 17.5 percent has been met; and (2) whether it is appropriate for electric distribution utilities (EDUs) to continue to spend ratepayer provided funds on Energy Efficiency Programs after the statutory cap has been met.”²

The Kroger Co. (Kroger) has a long-standing and significant commitment to energy efficiency. In 2019, Kroger once again received the U.S. EPA Energy Star Partner of the Year Award. At its facilities, Kroger is focused on improving energy efficiency to meet its goal of achieving electricity savings of 40% by 2020. Kroger’s new grocery stores are designed with energy efficient features while existing stores are retrofitted with new technologies so Kroger can continue to capture energy savings across its portfolio. Similarly, Kroger’s plants and warehouses also have made significant energy efficiency improvements. As such, Kroger has a significant interest in the Energy Efficiency Programs offered by electric distribution utilities (EDUs) in the State of Ohio. Thus, Kroger appreciates the opportunity to submit these comments for the Commission’s consideration.

II. COMMENTS.

1. The Commission Must Apply Ohio Revised Code 4928.66 As Written, And Thus, Cannot Terminate The Energy Efficiency Programs Before December 31, 2020 Regardless Of When The Minimum Threshold Cumulative Energy Savings Of 17.5 Percent Is Met.

It is well-established law that the Commission may not read words into the statute that do not exist:

It is a cardinal rule of statutory construction that where the terms of a statute are clear and unambiguous, the statute should be applied without interpretation.” *Wingate v. Hordge*, 60 Ohio St.2d 55, 58,

¹ Entry at 1 (October 23, 2019).

² *Id.* at 2.

396 N.E.2d 770 (1979), citing *Provident Bank v. Wood*, 36 Ohio St.2d 101, 304 N.E.2d 378 (1973). “If [the statute] is ambiguous, we must then interpret the statute to determine the General Assembly’s intent. If it is not ambiguous, then we need not interpret it; we must simply apply it.” *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 13, citing *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus (“An unambiguous statute is to be applied, not interpreted”). **“When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said,”** *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12, citing *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000), **and give effect only to the words the legislature used, making neither additions to, nor deletions from, the statutory language.** See *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19.

Wilson v. Lawrence, 2017-Ohio-1410, ¶ 11, 150 Ohio St. 3d 368, 370–71, 81 N.E.3d 1242, 1244 (emphasis added); see also *Gulf Oil Corp. v. Kosydar*, 44 Ohio St.2d 208, 216, 339 N.E.2d 820, 824 (1975) (“If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly.”).

As a creature of statute,³ the Commission must apply the statute as written. In doing so, it is clear that the Commission cannot terminate the Energy Efficiency Programs prior to December 31, 2020.

A. The Cumulative Energy Savings By The EDUs Are Not “Capped” By The 17.5 Percent Threshold Under R.C. 4928.66(G).

As an initial matter, the first question posed by the Commission in seeking these comments has a flawed premise. In its October 23, 2019 Entry, the Commission refers to the 17.5 percent

³ See *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999) (“The Commission is a creature of statute and can exercise only the authority conferred upon it by the General Assembly.”).

threshold as a “statutory cap.” By applying the clear language of R.C. 4928.66(G), it is not a “cap” at all. Rather, it is a minimum threshold. The statutory section expressly provides:

If the cumulative energy savings collectively achieved as determined by the commission under division (G)(1) of this section is **at least** seventeen and one-half per cent of the baseline described in division (G)(1)(b) of this section, then full compliance with division (A)(1)(a) of this section shall be deemed to have been achieved notwithstanding any provision of this section to the contrary.

R.C. 4928.66(G)(2)(a) (emphasis added). Thus, by its express terms, the statute is not setting a “cap” such that the Energy Efficiency Programs should be terminated once the “cap” is met. Instead, the General Assembly set a minimum threshold and in fact, invited that threshold to be exceeded by stating “at least” 17.5 percent. As such, whether or not the cumulative energy savings collectively reaches 17.5 percent is of no moment to whether the Energy Efficiency Programs should be terminated prior to December 31, 2020.

B. The Express Language Of R.C. 4928.66 Makes It Clear That The Energy Efficiency Programs Cannot Be Terminated Prior To December 31, 2020.

In applying a plain reading to the express language of R.C. 4928.66, it is clear that the Commission cannot as a matter of law terminate any EDU’s Energy Efficiency Programs prior to December 31, 2020.

First, R.C. 4928.66(G) expressly provides that the Commission shall determine the cumulative energy savings as of December 31, 2020:

Not later than February 1, 2021, the commission shall determine the cumulative energy savings collectively achieved, since 2009, by all electric distribution utilities in this state **as of December 31, 2020**.

R.C. 4928.66(G)(1)(emphasis added). As such, the Commission cannot even make the determination of the cumulative energy savings collectively achieved until sometime after

December 31, 2020 and before February 1, 2021. And, if no such determination can even be made prior to 2021, then the Commission cannot unilaterally terminate the Energy Efficiency Programs prior to December 31, 2020.

Second, R.C. 4928.66(G)(1) also includes what information the Commission shall include and use in making its determination of cumulative energy savings: (a) the energy savings estimated to be achieved “as of December 31, 2020”; and (b) an energy savings baseline that is the average of the total kilowatt hours sold by all EDUs in “the calendar years 2018, 2019, and 2020.” *Id.* Clearly, both of these components contemplate that the Energy Efficiency Programs have been in in effect through calendar year 2020.

Third, R.C. 4928.66(F)(2) expressly provides that any EDU’s Energy Efficiency Program that expires prior to December 31, 2020 must be extended through that date.

If an electric distribution utility has a portfolio plan in effect as of the effective date of the amendments to this section by H.B. 6 of the 133rd general assembly and **that plan expires before December 31, 2020, the commission *shall* extend the plan through that date. All portfolio plans shall terminate on that date.**

R.C. 4928.66(F)(2)(emphasis added). This extension mandate is not conditioned upon whether or not the statutory benchmark of 17.5 percent has been met. The mandate is absolute and unconditional.

Finally, R.C. 4928.66(A)(1)(a) requires that, beginning in 2009, EDUs in the State of Ohio must implement Energy Efficiency Programs that achieve energy savings of a certain threshold each year. It unambiguously requires that such energy savings under Energy Efficiency Programs occur in 2020: “The annual savings requirements shall be, for years 2017, 2018, 2019, **and 2020**, an additional one percent of the baseline.” R.C. 4928.66(A)(1)(a) (emphasis added).⁴

⁴ Similarly, R.C. 4928.66(A)(1)(b) mandates that, “[i]n 2017 **and each year thereafter through 2020**, the utility shall achieve an additional seventy-five hundredths of one per cent reduction in peak demand.” *Id.* (emphasis added).

In sum, if the Commission were allowed to terminate Energy Efficiency Programs prior to December 31, 2020, then the General Assembly would have removed the references to calendar year 2020 and changed the mandate that all portfolio plans must extend through December 31, 2020. The General Assembly did not do so. As such, the Commission must apply the statute as written and continue Energy Efficiency Programs through December 31, 2020 regardless of whether the statutory benchmark of 17.5 percent has been met or not.

2. It Is Appropriate And Reasonable For EDUs To Continue To Offer Cost-Effective Energy Efficiency Programs Through December 31, 2020.

Not only is the Commission legally prohibited from terminating Energy Efficiency Programs prior to December 31, 2020 for the reasons set forth above, but it is also appropriate and reasonable from a customer's standpoint to continue to offer cost-effective Energy Efficiency Programs through 2020 regardless of whether the minimum threshold has been met.

As an initial matter, Kroger and other mercantile customers have an expanded option under HB 6 to opt-out of Energy Efficiency and Peak Demand Reduction Programs (collectively, EE/PDR Programs) if they so choose. Specifically, HB 6 now gives customers the choice of whether to participate in, and pay for, their EDU's EE/PDR Program. Giving customers the discretion to make this choice, but then unilaterally terminating the Energy Efficiency Programs prior to December 31, 2020, essentially nullifies the choice customers were given. This customer protection should not be nullified by the Commission by terminating the Energy Efficiency Programs prior to the statutory mandated date.

Moreover, Kroger's payment for, and participation in, Energy Efficiency Programs through 2020 already has been factored into various energy management and operation decisions, as well as budgeting considerations. The availability of rebates and other incentives through

Energy Efficiency Programs play a role in the business planning for Kroger and other similarly-situated customers. Thus, for the Commission to unilaterally terminate the Energy Efficiency Programs prior to the statutorily mandated date of December 31, 2020, would be unfair and unreasonable, and could have unintended consequences on Kroger and other customers' business decisions and pending or scheduled energy efficiency projects.

Finally, Ohio customers benefit when demand response is bid into PJM's capacity auction. Not only does it reduce the costs associated with operating the demand response programs, but it can suppress capacity prices. To ensure that these benefits are achieved, the EDUs should be required to continue to bid capacity resources into the capacity auctions. This will provide additional benefits to Ohio customers through 2020.

III. CONCLUSION.

As explained herein, the Commission should apply the statute as written and refuse to terminate Energy Efficiency Programs prior to December 31, 2020 regardless of whether the minimum threshold of 17.5 percent has been met.

Respectfully submitted,

/s/ Angela Paul Whitfield

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail on November 25, 2019.

/s/ Angela Paul Whitfield
Angela Paul Whitfield

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Summary: Comments COMMENTS OF THE KROGER CO. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.