BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs through 2016.	))))	Case No. 14-1580-EL-RDR

REPLY COMMENTS OF
THE KROGER COMPANY

I. Introduction

On September 9, 2014, Duke Energy Ohio, Inc. (Duke or the Company) filed an application (Application) seeking approval from the Public Utilities Commission of Ohio (Commission) to continue, through 2016, the cost recovery (shared savings) mechanism for its energy efficiency programs. On September 30, 2014, Ohio Partners for Affordable Energy (OPAE) filed a motion to dismiss Duke's Application (Motion to Dismiss).

By entry dated October 22, 2014, the Attorney Examiner set an initial procedural schedule for the matter, directing that comments on the Application be filed by December 5, 2014, and that reply comments be submitted by January 9, 2015. Several parties, including The Kroger Company (Kroger), the Office of the Ohio Consumers' Counsel (OCC), OPAE, Ohio Energy Group (OEG), Industrial Energy Users-Ohio (IEU-Ohio), Ohio Manufacturers' Association (OMA), and the Natural Resources Defense Council, Environmental Law and Policy Center, and Ohio Environmental Council (collectively, Environmental Advocates) filed initial comments on the Application on December 5, 2014. Kroger submits the reply comments herein in response to the comments filed by other parties for the Commission's consideration.

II. Comments

A. <u>The Commission's resolution of this case is dependent upon its understanding and interpretation of Duke's Application in the context of S.B. 310.</u>

The Commission's determination in this case is dependent upon its interpretation of Duke's Application in the context of S.B. 310, which was approved on September 12, 2014. The sections of S.B. 310 which are pertinent to the Commission's analysis are set forth herein:[1]

SECTION 6. (A) If an electric distribution utility has a portfolio plan that is in effect on the effective date of this section, the utility shall do either of the following, at its sole discretion:

(1) Continue to implement the portfolio plan with no amendments to the plan, for the duration that the Public Utilities Commission originally approved, subject to divisions (D) and (E) of this section;

(2) Seek an amendment of the portfolio plan under division (B) of this section.

(B) (1) An electric distribution utility that seeks to amend its portfolio plan under division (A)(2) of this section shall file an application with the Commission to amend the plan not later than thirty days after the effective date of this section. The Commission shall review the application in accordance with its rules as if the application were for a new portfolio plan. The Commission shall review and approve, or modify and approve, the application not later than sixty days after the date that the application is filed. Any portfolio plan amended under this division shall take effect on January 1, 2015, and expire on December 31, 2016. If the Commission fails to review and approve, or modify and approve, the application on or before January 1, 2015, the plan shall be deemed approved as amended in the application and shall take effect on January 1, 2015, and expire on December 31, 2016.

* * *

(C) If an electric distribution utility fails to file an application to amend its portfolio plan under division (B) of this section within the required thirty-day period, the electric distribution utility shall proceed in accordance with division (A)(1) of this section.

[1] [1] References to "Section 6" and "Section 7" herein refer to those sections of S.B. 310.

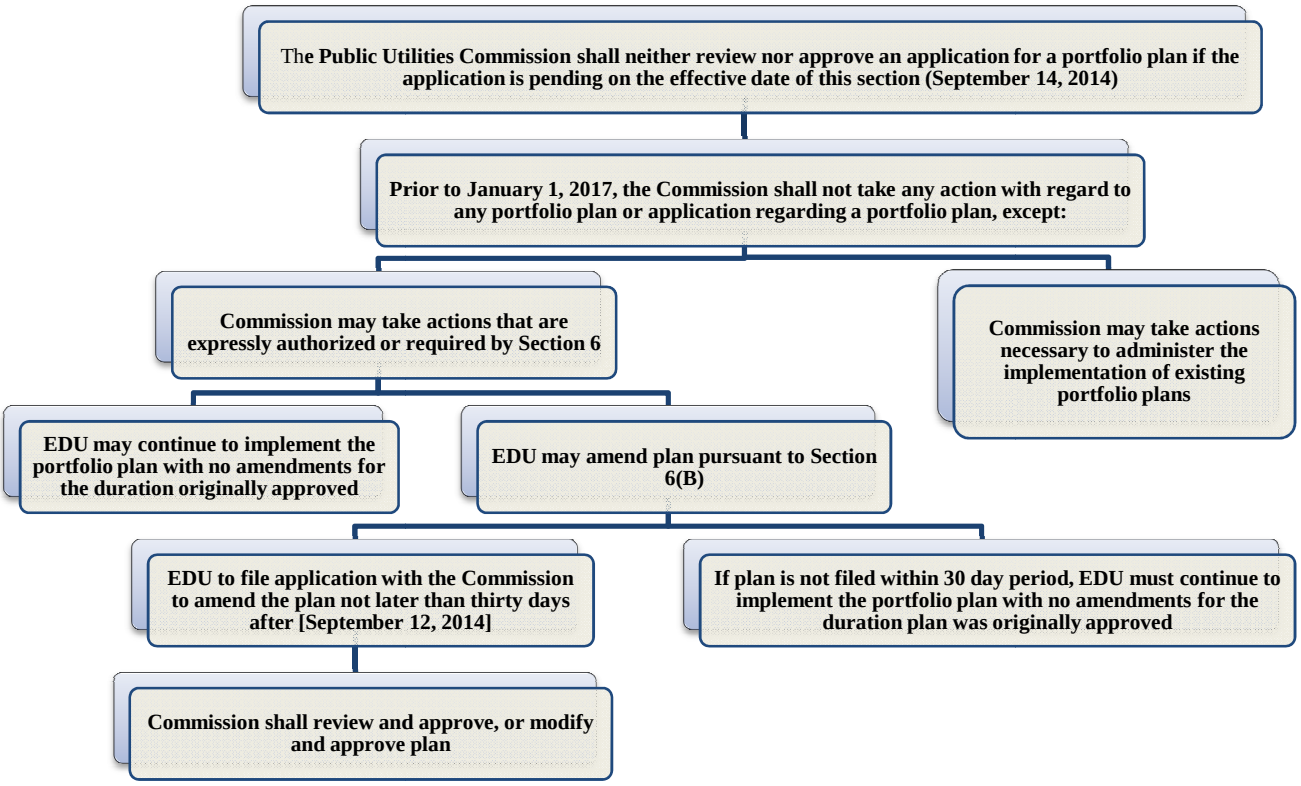
(D) If an electric distribution utility implements its portfolio plan under division (A)(1) of this section for the plan's original duration and if the plan expires before December 31, 2016, the Commission shall automatically extend the plan through December 31, 2016, with no amendments to the plan.

* * *

SECTION 7. (A) The Public Utilities Commission shall neither review nor approve an application for a portfolio plan if the application is pending on the effective date of this section.

(B) Prior to January 1, 2017, the Commission shall not take any action with regard to any portfolio plan or application regarding a portfolio plan, except those actions expressly authorized or required by Section 6 of this act and actions necessary to administer the implementation of existing portfolio plans.

Although thorough, certain portions of S.B. 310 are difficult to follow, so for ease of reference, Kroger offers the flow chart below, which summarizes and streamlines the operative portions of Sections 6 and 7 of S.B. 310 that are pertinent to the Commission's review herein:



B. **Duke's Application should arguably be dismissed by the Commission pursuant to Section 7(A) of S.B. 310.**

As an initial matter, pursuant to Section 7(A), the Commission may neither review nor approve an application for a portfolio plan if the application was pending on September 12, 2014. The Application under consideration herein was filed on September 9, 2014 and, thus, was pending on the effective date of the rule. As such, the Commission must determine whether the Application at issue is an application for a portfolio plan. The shared savings Duke seeks are the direct result of its portfolio plan, and were previously approved within that context. Accordingly, Duke's Application may be interpreted as an application for a portfolio plan, pending prior to September 12, 2014, which may be neither reviewed nor approved by the Commission. If the Commission determines that this logic applies, it must dismiss Duke's Application.

C. **Commission action is not necessary to administer the implementation of Duke's existing portfolio plan.**

If it determines that the Application passes the initial review outlined above, the Commission must determine whether it may take action pursuant to the exceptions set forth in Section 7(B). In their initial comments, the Environmental Advocates contend that a Commission determination on Duke's Application is necessary to successfully implement Duke's existing portfolio plan.[2] Indeed, Duke has attempted to persuade the Commission that certain intervenors would not agree to its recovery of energy efficiency (EE) program costs. However, no intervenor in this case has challenged Duke's ability to continue collecting its EE program costs. The majority of the intervenors have, however, strenuously objected to various aspects of Duke's collection of shared savings in 2016 in this case and numerous others.

[2] Initial Comments of Environmental Advocates at 9-11.

The question of whether Duke is awarded shared savings for 2016 does not affect its ability to recover actual expenses incurred in the establishment and management of its portfolio plan. Despite the contentions of the Environmental Advocates, shared savings incentives are not an integral part of energy efficiency programs. In fact, the Environmental Advocates concede Duke's Application "makes no request to modify the cost-recovery mechanism approved in the 2011 and 2013 dockets."[3] Duke's current plan is fully implemented and approved for use through 2016, with the exception of the shared savings mechanism, which expires at the end of 2015. As such, a determination on the use of a shared savings mechanism in a 2016 is not in any way necessary to administer the implementation of Duke's existing portfolio plan.

D. <u>If the Commission determines that the Application constitutes an amendment to Duke's portfolio plan, it should find that the amendment was not properly filed within the specified 30-day period</u>.

The remaining exception provides that in relation to a portfolio plan or an application regarding a portfolio plan, the Commission may take those actions that are expressly authorized or required by Section 6. Pursuant to Section 6(B), an EDU may amend its plan, but it must do so within the 30-day period following September 12, 2014. As mentioned previously, Duke filed its Application on September 9, 2014. A close reading and interpretation of the law demonstrate that the Application was not filed within the 30-day period following September 12, 2014. Given that Duke did not adhere to the provisions of the law, it must necessarily continue to implement its portfolio plan, with no amendments, through 2016. Under this interpretation, Duke's shared savings mechanism would terminate in 2015, as negotiated by interested parties in its last portfolio plan case and approved by the Commission.[4]

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[3] Id. at 8.

[4] See *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio Programs*, Case No. 13-431-EL-POR, Opinion and Order at 14 (December 4, 2013).

E. **<u>If the Commission determines that Duke's application was a timely-filed amendment, it should modify Duke's shared savings mechanism</u>.**

In the event that the Commission finds that Duke's Application is functionally an amendment, Kroger urges the Commission against deeming Duke's portfolio plan to be approved as amended in its Application, effective January 1, 2015, pursuant to Section 6(B)(1). Such a determination would significantly undermine the full development of the positions advanced in this case, as permitted by the October 22, 2014 procedural schedule established for this matter. Further, consideration of the amendment after January 1, 2015 does not impose an undue hardship on any party because, by its very terms, it is unnecessary for the provision at to be effective until 2016. Additionally, the underlying facts of this case, including the filing of the Application outside of the prescribed time frame and the lack of any declaration that the Application was intended to amend (or was not intended to amend) Duke's portfolio plan, further frustrated the proper categorization of the Application. Accordingly, the Commission should not deem the request advanced in the Application, if categorized as an amendment, to be approved as of January 1, 2015.

Moreover, if the Commission construes the Application as an amendment, it should review and modify the proposal in the Application prior to its approval. As advanced in Kroger's initial comments and the initial comments of OCC, OEG, and OMA, if the Commission determines that Duke's shared savings mechanism should be extended for use in 2016, it should impose an explicit dollar cap on the shared savings that Duke can earn under the plan.[5] Given that the Commission has previously approved caps on the shared savings mechanisms of FirstEnergy, AEP Ohio, and The Dayton Power and Light Company, it is appropriate for the

[5] See Initial Comments of The Kroger Company at 4-5; Comments by the Office of the Ohio Consumers' Counsel at 5-8; Comments of the Ohio Energy Group (OEG Initial Comments) at 4; Initial Comments of the Ohio Manufacturers' Association at 6.

Commission to impose such a cap on Duke's shared savings mechanism.[6] A cap would protect consumers from paying unbounded incentives to Duke.

Further, if the Commission finds that if Duke's shared savings mechanism should continue in 2016, it should clarify that Duke may not use banked savings to earn shared savings in a year in which it has failed to meet its energy efficiency benchmark. As referenced by OEG and others, Staff has previously testified that Duke should not be able to used banked EE savings for purposes of triggering its incentive mechanism.[7]

III. Conclusion

As explained in detail above and in its Initial Comments submitted in this proceeding, Kroger respectfully requests that the Commission dismiss Duke's Application to authorize use of its shared savings mechanism in 2016. To the extent, however, that the Commission determines that Duke's Application should be treated as an amendment to its portfolio plan and extends the shared savings mechanism for use in 2016, Kroger requests that the Commission modify the mechanism by imposing a specific dollar cap on shared savings, and clarify that Duke is not permitted to use banked savings to earn shared savings in a year in which it has failed to meet its energy efficiency benchmark.

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[6] See *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 11-5568-EL-POR, et al., Opinion and Order at 8 (March 21, 2012); *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 Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, et al., Opinion and Order at 16 (March 20, 2013); and *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio Program Plan for 2013 through 2015*, Case No. 13-833-EL-POR,et al., Opinion and Order at 8 (December 4, 2013).

[7] See OEG Initial Comments at 5, citing the testimony of Staff witness Scheck in *In the Matter of the Application of Duke Energy Ohio, Inc., for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Tr. at 126 (June 7, 2012).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on January 9, 2015.

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Summary: Reply Comments of The Kroger Company electronically filed by Ms. Rebecca L Hussey on behalf of The Kroger Company