

**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 ) Case No. 14-1580-EL-RDR  
Efficiency Programs through 2016. )

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**INITIAL POST-HEARING BRIEF OF  
THE KROGER COMPANY**

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**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 shared savings incentive mechanism for its energy efficiency programs. On November 5, 2014, The Kroger Company (Kroger) filed a motion to intervene in the above-captioned matter, which was subsequently granted.<sup>1</sup> Kroger also filed initial and reply comments on Duke's Application on December 5, 2014 and January 9, 2015, respectively.

An evidentiary hearing on the Company's Application took place on July 7, 2015. At the hearing, Duke witness Duff, Ohio Energy Group (OEG) witness Baron, Office of the Ohio Consumers' Counsel (OCC) witness Gonzalez, Ohio Manufacturers' Association (OMA) witness Seryak, and Commission staff (Staff) witness Scheck offered testimony. Pursuant to the attorney examiners' request at the hearing's conclusion, Kroger hereby submits its initial post-hearing brief.

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<sup>1</sup> *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, Entry at 2 (May 7, 2015).

## II. Argument

### A. The Commission should dismiss the Company's Application, as it failed to comply with the provisions of SB 310.

The Commission's decision on the propriety of the request included in Duke's Application is dependent upon the Commission's analysis of the Application in the context of 2014 Am. Sub. S.B. 310 (SB 310), which took effect on September 12, 2014. Sections 6 and 7 of SB 310, on which the Commission's analysis turns, are set forth herein in pertinent part:

**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.

- (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.

1. **The Commission may not lawfully modify Duke's existing portfolio plan, as sought in the Application.**

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 should arguably 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.

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

If it determines that Duke's 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). Section 7(B) of SB 310 prohibits the Commission from taking any actions regarding any portfolio plan or application except those actions (1) expressly authorized or required by Section 6; or (2) actions necessary to administer the implementation of existing portfolio plans.

Regarding the latter exception, the question of whether Duke may be awarded a shared savings incentive for 2016 does not affect its ability to recover actual expenses incurred in the establishment and management of its portfolio plan. 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. A Commission determination on the propriety of the use of a shared savings mechanism in a 2016 is not necessary to administer the implementation of Duke's existing portfolio plan.

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 SB 310 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.<sup>2</sup>

**B. In the event that the Commission determines that Duke is entitled to utilize a shared savings incentive mechanism for 2016, changes to its current shared savings incentive mechanism should be implemented.**

As discussed supra, Duke's failure to comply with the provisions of SB 310 frustrates the ability of the Commission to lawfully authorize Duke to extend the use of its shared savings incentive mechanism in 2016. In the event, however, that the Commission determines that the Company may make use of a shared savings incentive mechanism in 2016, Kroger believes that changes to Duke's current shared savings incentive mechanism are necessary.

**1. Duke should not be permitted to accrue a five percent shared savings incentive in circumstances where it merely meets its compliance benchmark.**

Pursuant to the shared savings incentive mechanism approved in Case No. 11-4393-EL-RDR, which adopted the incentive structure included in the stipulation in that case, Duke accrues shared savings according to the following schedule:

<u>Achievement of Annual Target</u>	<u>After-Tax Shared Savings</u>
≤100	0.0%
>100-105	5.0%
≥105-110	7.5%
≥110-115	10.0%
≥115	13.0%

As evidenced by the chart above, Duke is collecting a 5% shared savings incentive when it has merely met its annual target, i.e., at 100% compliance. At the evidentiary hearing, Duke witness Duff confirmed this result:

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<sup>2</sup> 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).

**Mr. Sechler:** [L]et's say hypothetically Duke meets 100 percent of its achievement level, exactly 100 percent, whether using bank[ed] savings or not, is it Duke's position that it would be a 5 percent incentive for hitting it 100 percent exactly?

**Mr. Duff:** Therefore, it would be eligible to earn incentive.<sup>3</sup>

In spite of Duke's belief to the contrary, no other electric distribution utility (EDU) receives an incentive for mere compliance with the applicable benchmark.<sup>4</sup> Moreover, the purposes behind a shared savings incentive mechanism, including incentivizing over-compliance, do not support granting an incentive for mere compliance with Duke's or any other EDU's benchmark. In the event the Commission permits Duke to utilize a shared savings incentive mechanism in 2016, Kroger contends that the Commission should not authorize Duke to collect a 5% shared savings incentive when it merely meets 100% of its annual target. Neither Duke nor any other EDU should be awarded an incentive for meeting the applicable benchmark, without more.

**2. Any shared savings mechanism that may be approved for Duke's use in 2016 should incorporate an explicit dollar cap.**

As Duke indicates in its Application, its current shared savings incentive mechanism does not incorporate a cap on the incentive that may be achieved. The lack of a cap in Duke's incentive mechanism differentiates its shared savings mechanism from those utilized by all other Ohio EDUs. The inclusion of a cap on shared savings serves as a consumer protection which provides a limit on the impact to customer bills resulting from the incentive.

If the Commission determines that Duke's shared savings mechanism should continue in 2016, Kroger believes that the Commission should adopt a cap on the shared savings

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<sup>3</sup> Tr. at 29.

<sup>4</sup> Id. at 29-30.

incentive that may be achieved by the Company. Kroger notes that Staff, OMA, OCC, and OEG are also supportive of the imposition of a cap on the shared savings incentive that may be earned by Duke if the Company is permitted to utilize a shared savings incentive mechanism in 2016.<sup>5</sup>

In support of its argument that its shared savings incentive mechanism should not feature a cap, Duke contends in its Application that “[i]n the two years that the Company has been operating under its approved shared savings incentive, Duke Energy Ohio’s earnings have not been found to be excessive.”<sup>6</sup> The fact, however, that Duke has not exceeded its significantly excessive earnings threshold in the two years in which the shared savings incentive mechanism has been operating does not support the argument that the mechanism is reasonable and should remain uncapped. In the event that the Commission finds that Duke’s shared savings mechanism should be extended for use in 2016, Kroger supports the imposition of a cap on the incentive that may be earned in order to strike a reasonable balance between the award that may inure to the Company and the funding of that award by Duke’s customers.

**3. Although Duke may use banked savings to meet the energy efficiency benchmark, the Commission should not permit it to use banked savings to incentivize itself if the Company has not met the benchmark.**

To the extent that the Commission determines that Duke’s shared savings incentive mechanism should continue in 2016, Kroger also respectfully requests that the Commission affirm in this case that although Duke is permitted to use banked savings to meet the compliance levels set forth in the energy efficiency benchmark, the Company is not permitted to

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<sup>5</sup> See Tr. at 102 (OEG); 118 (OCC); 166 (OMA); and 185 (Staff).

<sup>6</sup> Application at 3.

use banked savings to earn a shared savings incentive in a year in which it has failed to meet its energy efficiency benchmark.

In its recent Finding and Order in Case No. 14-457-EL-RDR, the Commission denied Duke the ability to collect a shared savings incentive for 2013 because Duke did not meet the applicable benchmarks without the use of banked savings.<sup>7</sup> Specifically, the Commission stated the following:

As to Duke's use of banked savings, the Commission \* \* \* finds the Company may only use the banked savings to reach its mandated benchmark. Therefore, the Commission finds Duke's use of banked savings to claim an incentive is improper. We note the tiered incentive structure is designed to motivate and reward the utility for exceeding energy efficiency standards on an annual basis. As the mandated benchmark rises every year, Duke must continue to find ways to encourage energy efficiency. If it has a large bank of accrued savings to rely on, the motivation to push energy efficiency programs in following years diminishes. Thus, in order for the structure to continue to serve as a true incentive for Duke to exceed the benchmarks, the Commission finds 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.<sup>8</sup>

As noted above, shared savings incentive mechanisms are designed to incentivize EDUs for over-compliance with the benchmarks. Permitting Duke to use banked savings in any year of its program to meet its benchmark and additionally earn a shared savings incentive, despite under-compliance, would frustrate the intent of the mechanism. In order to avoid this result, Kroger respectfully requests that the Commission affirm that Duke may not earn a shared savings incentive by means of banked savings in a year in which the Company does not meet its benchmarks but for the use of its previously banked savings.

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<sup>7</sup> *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).

<sup>8</sup> Id.



### **III. Conclusion**

As explained above, Kroger respectfully requests that the Commission dismiss Duke's Application to extend its shared savings incentive mechanism for use in 2016, as granting the Application would unlawfully require the Commission to modifying an existing portfolio plan. In the event, however, that the Commission finds that Duke may utilize a shared savings incentive mechanism in 2016, Kroger respectfully requests that the Commission deny Duke's collection of a shared savings incentive in instances where it merely meets the pertinent benchmark; impose a cap on the shared savings incentive Duke may earn in 2016; and affirm that Duke is not permitted to use banked savings to earn a shared savings incentive in a year in which the Company has failed to meet its energy efficiency benchmark.

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 August 21, 2015.

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915A-004.632426

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**Case No(s). 14-1580-EL-RDR**

Summary: Brief (Initial) of The Kroger Company electronically filed by Ms. Rebecca L Hussey  
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