BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221.	)	Case No. 08-888-EL-ORD

REPLY COMMENTS OF THE KROGER CO.

In accordance with the Entry issued on August 20, 2008 by the Public Utilities Commission of Ohio (the "Commission") in the above-captioned proceeding, The Kroger Co. submits these reply comments on the Commission Staff's ("Staff") proposed rules to implement Amended Senate Bill No. 221 ("SB 221").

Introduction

On September 10, 2008, numerous parties filed comments in response to Staff's proposed rules implementing the requirements of SB 221 for alternative and renewable energy programs and emissions control reporting. The Kroger Co. filed a number of comments on the proposed rules in Chapter 4901:1-39 which governs the peak demand reduction, demand response and energy efficiency programs ("Energy Savings Programs") of an electric distribution utility ("EDU"). The Kroger Co. commented on the importance of establishing rules that only promote the subsidization of demand reducing or energy efficiency measures that are too costly for a customer to have an economic incentive to implement on its own. Also, The Kroger Co. emphasized the importance of not giving an EDU credit for energy savings of its customers that were not a result of the efforts by the EDU to reduce energy consumption. Finally, The Kroger Co.

recommended that the Commission consider the creation of a state-wide non-profit organization to implement Energy Savings Programs rather than having several programs run by individual EDUs. With the above referenced recommendations in mind, The Kroger Co. submits these reply comments in response to the comments filed by various parties.

Comments

A. Confidential and Competitively Sensitive Data Should be Protected

Both the Ohio Environmental Council ("OEC") and the Ohio Consumer and Environmental Advocates ("OCEA") proposed additional reporting requirements regarding demand reduction measures taken by mercantile customers. Specifically, the OEC suggests that an EDU file benchmark reports that detail the EDU's energy savings efforts. *OEC Comments p. 13*. As part of the EDU's benchmark reports, OEC proposes to require that an EDU submit "a description of all demand reductions produced by mercantile customers and counted towards the (EDU's) goals, including a description of the methods taken to reduce demand and a description of the customers involved." *OEC Comments p. 14*. Additionally, the OCEA proposes that in order for mercantile customers to be eligible for special arrangements to bypass Energy Savings Programs charges, mercantile customers must file annual reports on their peak demand and energy reductions. *OCEA Comments p. 31*.

As The Kroger Co. noted in its initial comments, the Commission does not have jurisdiction over a customer's energy reduction efforts and any reporting requirements by the customer would exceed the Commission's jurisdiction. More importantly, any information filed at the Commission on a mercantile customer's demand response and energy efficiency measures could make confidential and competitively sensitive data available to outside parties. [1] The OCEA and OEC's proposed reporting requirements

[1] Both the OEC and OCEA filed several other comments proposing to expand the Commission's jurisdiction over mercantile customer's demand response measures that could make confidential and competitively sensitive data available to outside third parties. See *OEC Comments* pp. 8-9 (suggesting rules should be created to allow an independent third party auditor to, *inter alia*, verify mercantile customers energy savings); See *OCEA Comments p. 30* (proposing a rule that would require mercantile customers to

could reveal proprietary and confidential processes that give a particular customer an advantage over its competitors.

The Kroger Co. takes no issue with rules that require an EDU to report and verify its energy efficiency and demand reduction measures. However, because any reporting and verification of individual customer's energy efficiency and demand response measures may cause the release of confidential and competitively sensitive data, The Kroger Co. proposes that any such requirements be eliminated. If the Commission must have access to confidential information, a rule should be adopted that states that any customer information submitted to the Commission will be afforded confidential treatment. The Kroger Co. notes that this disclosure concern is, to some extent, ameliorated should a state-wide non-profit organization administer Energy Savings Programs, as such non-profit organization would presumably not be subject to Ohio's public records laws.

B. EDUs Should Not Recover Costs Associated With Lost Revenue and Utility Incentives

Proposed rule 4901:1-39-05 allows mercantile customers to opt out of an EDU's Energy Savings Programs and bypass all associated charges if mercantile customers commit their Energy Savings Programs for integration with the EDU's programs. OCEA proposes that mercantile customers exemption from charges associated with Energy Savings Programs should exclude "recovery of any lost revenues, utility incentives and monitoring and verification costs." *OCEA Comments pp. 28-29.* The Kroger Co. takes no issue with the exclusion from exemption of the monitoring and verification costs, because these costs are necessary to implement the integration of customers Energy Savings Programs; however, The Kroger Co. strongly objects to an EDU recovering costs associated with lost revenue and utilities incentives.

Just as an EDU is not required to return earnings gained from increased energy use, an EDU should not be able to recover lost profits associated with decreased revenue. Decreases in revenue can be remedied in a rate case and is one of the risks of doing business in the electric utility industry that is recognized in the rate of return.

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make available to Staff their energy savings and demand reduction accomplishments in order for mercantile customers to be eligible for special arrangements to bypass Energy Savings Programs charges).

Accordingly, it is a risk that is already borne by consumers. Also, if an EDU can recover all of its lost revenue from customers as a result of Energy Savings Programs, there is less incentive for customers to save energy. A customer would pay less for energy due to reduced energy consumption, only to turn around and pay more for energy due to a charge designed to recover an EDU's cost of lost revenues. Taking away a customer's ability to reduce its overall expense from energy savings would reduce a customer's willingness to save energy in the first place, and therefore would be counter productive towards the overall goal of reduced energy consumption.

Further, customers who opt out of demand response initiatives should not be required to pay utilities incentives costs. A customer would opt out of a utility's Energy Savings Program because the customer does require incentives to save energy. Requiring customers who opt out to pay charges for utility incentives requires those customers to pay for something they do not benefit from, and forces such customers to subsidize those who have failed to invest in energy efficiency. For the above reasons, The Kroger Co. recommends that mercantile customers who opt out of utility's Energy Savings Programs not be required to pay charges associated with the costs of lost revenue and utilities incentives.

C. Extension of Energy Savings Programs to Residential and Small Commercial Classes

Several parties commented that EDU's energy savings programs should be extended to residential and small commercial classes.[2] The Kroger Co. does not object to the inclusion of residential and small commercial customers in EDU's Energy Savings Programs. Residential and small commercial customers arguably are the types of customers that could benefit from Energy Savings Programs the most. Large commercial and industrial customers usually have sufficient economic incentives and adequate expertise to implement sophisticated energy savings measures. Smaller energy consumers, on the other hand, may be less likely to unilaterally take the most advanced

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[2] See *COSE Comments at p. 2* (arguing that small commercial classes customers should be able to aggregate their resources so that they can be considered a mercantile customer and qualify for EDU's Energy Savings Programs); See *OCEA Comments at pp. 15-16* (proposing a rule that requires an EDU's Energy Savings Programs be made available to all customer classes).

energy savings measures because their energy cost reduction may not be great enough for such customers to justify the initial cost of implementing the measures.

Therefore, The Kroger Co. recommends that Energy Savings Programs should be available *only* for residential and small commercial customers, and the larger consumers of electricity should be able to participate in Energy Savings Programs on a voluntary basis.[3]

The only caveat that The Kroger Co. would add is that the Energy Savings Programs for residential and small commercial customers should be paid for by the class of customers receiving the benefit of the programs. Therefore, each EDU's rate design should reflect the fact that there are separate programs for each class and size customer. Companies such as Dayton Power and Light and Duke Energy Ohio, who essentially have one rate class, should restructure their rate design to include rate classes for small commercial and residential customers so that the appropriate demand response and energy efficiency charges can be assigned to those classes that benefit from these programs.

The Kroger Co. notes that this would most easily be achieved by the formation of a state-wide non-profit administer of Energy Savings Programs. A flat charge could be assessed to each customer class that participates in the Energy Savings Programs, and the money would go directly to programs designed to benefit the class from which the program receives funding.

D. Recovery Cost of Energy Savings Measures not Taken for the Purpose of Energy Savings

FirstEnergy comments that an EDU should be able to recover costs for measures that may save energy, but are not taken for the purposes of saving energy, through the energy efficiency cost recovery mechanism in proposed rule 4901:1-39-05. For example, FirstEnergy contemplates measures taken for the purpose of improving reliability, that

[3] Customers have done quite well at achieving energy efficiency on a voluntary basis. Since 1970, U.S. energy consumption, as measured per economic output has been reduced by 50%. Also, given the right choices of investments in many *cost effective* but under utilized energy efficiency technologies it is estimated that the United States can *cost effectively* reduce energy consumption by 25-30% more in the next 20-25 years. See *The Invisible Energy Efficiency Boom: American Council of Energy Efficiency Ecconomy Report*; May 15, 2008, http://aceee.org/press/e083pr.htm.

also have the effect of achieving energy savings. *FirstEnergy Comments p. 9.* While there is a "natural" demand reduction associated with many measures implemented by an EDU, this is quite different from the deliberate demand reduction efforts for which an EDU seeks "credit" towards meeting its benchmarks. For example, normal replacement of conductors or transformers can incidentally reduce losses and therefore provide energy savings. The Kroger Co. believes that it may be appropriate in some circumstances for EDUs to recover costs for measures not designed to increase energy efficiency and reduce demand, however, this type of cost recovery is not appropriate in the cost recovery mechanism provided for in proposed rule 4901:1-39-05.

E. All Energy Savings Measures by Mercantile Customers Should be Counted Toward Demand Reduction

OCEA commented on Staff's proposed rule 4901:1-39-06 which allows mercantile customers to bypass charges associated with an EDU's Energy Savings Programs if a mercantile customer commits to integrate its energy savings programs with the EDU. OCEA proposes that, for purposes of section 4901:1-39-06, mercantile customers should not be able to count as energy savings projects, those projects that were completed prior to the three years that are used to determine an EDU's baseline energy savings level. OCEA's proposed rule is unfair to mercantile customers who committed early to energy efficiency and demand response. In effect, this rule would punish customers who became too energy efficient too early, and conversely customers that delayed demand response and energy efficiency measures would be rewarded.

The Kroger Co. has taken approximately 1.5 Billion kWh of electricity usage out of its 2,500 stores over the period of January , 2001 through June, 2008 as a result of successful energy savings projects. If OCEA's proposed rule were implemented, much of The Kroger Co.'s successful energy savings projects would not be counted towards their energy reduction, despite The Kroger Co. being at the forefront of its industry in energy savings. OCEA's proposed rule undermines the intent of SB 221, which is to encourage demand reduction and energy efficiency. For these reasons, The Kroger Co. proposes that OCEA's revisions to Staff's proposed rule 4901:1-39-06(B)(6) not be adopted and that all energy efficiency and demand reduction programs be counted when determining a mercantile customer's energy savings.

F. An EDU Should Not Receive Credit For Energy Savings That Was Not a Result of Its Own Efforts

Several EDUs commented on the Staff's proposed rule 4901:1-39-04 which prohibits EDUs from counting towards their energy efficiency and demand reduction targets, measures mandated by law. *DP&L Comments p. 9; FirstEnergy Comments p. 8*. The Kroger Co. would like to reiterate that an EDU should not get credit for demand reduction and energy efficiency measures that are not a result of an EDU's own efforts. Giving an EDU credit for energy savings outside an EDU's control undermines an EDU's incentives to efficiently use the resources allocated to its own energy efficiency and demand response programs. Further, such an approach would make it difficult to measure the success of an EDU's own energy savings initiatives because it would be difficult to determine how energy savings are achieved.

Any measure mandated by law that requires a customer to implement an energy savings measure at its own cost should not be credited towards meeting an EDU's benchmarks. If the law requires an EDU to expend money to reduce demand and increase energy efficiency, then The Kroger Co. sees no problem with counting these measures towards meeting an EDU's benchmarks. Therefore, the Kroger Co. proposes that rather than prohibiting EDUs from receiving credit for measures mandated by law, a rule should be added that prohibits an EDU from receiving credit towards meeting its benchmarks, that were not a direct result of an EDUs own demand reduction and energy efficiency efforts.

Conclusion

The Kroger Co. now respectfully requests that the Commission consider these reply comments and incorporate them into the proposed rules.

Respectfully submitted,

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