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

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 comments on the Commission Staff's proposed rules to implement Amended Senate Bill No. 221 ("SB 221").

I. COMMENTS.

A. Introduction

The Kroger Co. is a large electric customer of several regulated investor owned electric utilities ("EDU") in the state of Ohio. Like all other retail customers in Ohio, The Kroger Co. may be profoundly affected by the changes to Ohio's electric utility law, made pursuant to SB 221. In submitting these comments to the proposed rules implementing SB 221, The Kroger Co. is mindful of the Commission's overall goal of crafting rules to address alternative energy resources, renewable energy credits, clean coal technology, and federal environmental regulations.

The Kroger Co. supports energy efficiency as a method to reduce costs for Ohio businesses, promote environmental stewardship and to meet increasing demand for energy by Ohio consumers. The Kroger Co. has actively engaged in, and implemented, numerous energy efficiency programs in Ohio and across the country, and continues to aggressively pursue energy efficiency measures where such opportunities are available and cost efficient. The Kroger Co. submits, however, that any energy efficiency components of an SSO should take into account substantial existing investments in energy efficiency by customers, as further discussed below.

B. An EDU Should Not Administer Energy Efficiency and Demand Response Programs

Chapter 4901:1-39 specifies a process by which benchmarks are set by the Commission for reduction of demand and energy consumption in an EDUs service territory. The EDU must achieve these benchmarks through the implementation of various peak demand reduction, demand response and energy efficiency programs ("Energy Savings Programs"). The rules also set forth a mechanism for EDUs to recover their costs of implementing these programs. This approach to reduce demand and energy consumption is flawed for several reasons.

First, EDUs have an inherent conflict of interest when they administer Energy Savings Programs. EDUs rely on increased sales for additional profits. Therefore, an EDU's incentive to implement Energy Savings Programs is undermined because these programs will inevitably decrease that EDUs sales and profits.

Second, EDU managed programs are typically structured in a way that disincents customers from engaging in economically viable energy efficiency and demand reduction measures on their own. Some measures that reduce energy consumption result in enough cost savings to give customers incentives to implement those measures without having further special incentive programs. However, if customers are not credited for investing on their own initiative, some customers may choose to wait to implement these measures until they can receive rebates or other incentives from the EDU for reducing demand and creating energy efficiency. This result is clearly counter-productive.

Finally, EDU administered Energy Savings Programs reward "inefficient" customers at the expense of "efficient" customers that have already invested in energy efficiency. While all customers will share the cost of these programs, the inefficient customers will receive the greatest amount of resources and benefits. An EDU will likely focus its efforts on the least efficient customers where it can get the most credit towards meeting its benchmarks. These programs will further discourage customers from implementing already economically viable energy efficiency and demand response measures on their own.

There are better ways to achieve the energy efficiency and demand reduction goals set forth in SB 221. The Kroger Co. submits the Commission should facilitate the creation of a not-for-profit corporation with the responsibility for implementing Energy Savings Programs for all EDUs state-wide. The non-profit could have broad stakeholder representation in its governance. These programs should focus on implementing measures that are not already economically efficient for customers to implement on their own. For example, the not-for-profit organization could subsidize the introduction of new technologies that, while expensive, will help a customer reduce the amount of energy consumed. The not-for-profit corporation could be funded by flat percent charge paid by all customers of the EDUs. In fact, the State of Oregon has already implemented a similar strategy through the creation of the not-for-profit corporation named the Oregon Energy Trust. *See* Or. Rev. Stat. §757.612 (2007).

A state-wide not-for-profit organization independently handling energy efficiency for all EDUs would provide many benefits including:

- economies of scale,
- avoidance of customer confusion via consistent customer information to all consumers state-wide,
- provide a consistent state-wide program,
- allow for easier, more comprehensive involvement of retailers, especially in border areas between EDUs,
- consistent, independent measurements of program results and reporting the same on a state-wide basis for all EDUs; and
- enhanced ability to tailor programs as experience is gained.

The Kroger Co. submits the Commission should seriously consider this model.

If the EDUs must administer their own individual Energy Savings Programs, the EDUs should not get credit towards their benchmark reduction for taking measures that are already economically efficient for customers to implement without receiving incentives from EDUs. Rather, EDUs should only get credit for implementing energy efficiency and demand reduction measures that a customer does not have an economic incentive to implement, without some form of subsidy provided by the EDU.

Finally, if EDUs must administer their own Energy Savings Programs and the programs are used to subsidize measures that are already cost efficient for customers to implement without subsidy, customers should have the ability to opt-out of these programs and bypass all associated charges. Many customers such as The Kroger Co. have extensive Energy Savings Programs already in place, and take seriously, as part of their business model, reducing demand and utilizing energy efficiently. Energy Savings Programs administered by the EDUs may be redundant to a customer's self implemented programs. Therefore, in order to ensure that customers have the incentive to maintain their current Energy Savings Programs, customers should have the option to opt-out of the EDU administered programs and bypass the related charges. Customers with the foresight to invest and implement their own comprehensive energy savings programs should not have to subsidize those that have not implemented such programs. This is especially true in the highly competitive retail sector.

C. Chapter 4901:1-39: Energy Efficiency and Demand Reduction Benchmarks

1. Section 4901:1-39-01: Definitions

Several of the definitions set forth in Section 4901:1-39-01 are vague and need clarification. For instance, the definition of "Demand response" in Subsection (A) of that section includes any "change in the customer's behavior or a change in customer owned or operated asset that effects [*sic*] the quality and/or timing of the electricity consumed as a result of price signals or other incentives." This definition could conceivably encompass anything that has the result of reducing a customer's demand, whether the result was intentional or not, and even if the change would have occurred absent demand response initiatives. In order to further the policy goals of reducing customer demand, and not give EDUs credit for reductions that would have occurred in any event, the definition of "Demand response" should only include changes in customer's behavior or a change in customer owned or operated assets that were intentionally implemented as a direct result of an EDUs demand response initiative.

The definition of "Energy efficiency" in Subsection (B) is also vague and should be clarified. "Energy efficiency" in this section is defined as "the energy content of the useful output from a process, device, or system divided by the energy input into that process, device, or system." This definition is essentially meaningless. While it may be possible, although costly, to measure the energy input into an individual process, device or system, The Kroger Co. sees no objective, consistent, practical and verifiable way to measure the "energy content of the useful output from a process, device, or system." Therefore, it would be impossible to achieve reliable, meaningful and verifiable percentage values on energy efficiency of a process, device, or system.

The definition of "Peak demand reduction" in Subsection (E) should be supplemented with a definition of the term "peak periods." The definition contemplates the reduction of demand during peak periods, but it does not clarify when such peak periods occur. To clarify, The Kroger Co. recommends that the Commission identify specific hourly ranges in the day, as well as months of the year, and days in those months, that would constitute peak periods.

2. **Section 4901:1-39-02: Purpose and scope**

Section 4901:1-39-02 states, among other things, that the purpose of Chapter 4901:1-39 is to provide "mechanisms by which investments to achieve energy savings and demand reductions by mercantile customers in their own facilities can be recognized in EDU programs as contributing to specific levels of energy savings and demand reductions." This language indicates that a mercantile customer's investments to achieve energy savings and demand reductions will be recognized in EDU programs as contributing to specific levels of energy savings and demand reduction. An EDU should not receive credit or benefit from a mercantile customer's investments in energy efficiency and demand reduction that have or will occur irrespective of the EDU's initiatives. Therefore, the language in this section should be modified to read:

> **4901:1-39-02 Purpose and scope**
>
> This chapter establishes requirements and processes for determining specific benchmarks for energy efficiency and peak reduction programs, which each electric utility must

implement pursuant to section 4928.66 of the Revised Code, and for establishing energy usage and demand baselines for measurement of annual energy savings and demand reductions. This chapter also provides mechanisms by which investments by an electric utility to achieve energy savings and demand reductions in ~~by~~ mercantile customers' ~~in their own~~ facilities can be recognized in electric utility programs as contributing to specific levels of energy savings and demand reductions.

3. **Section 4901:1-39-04: Benchmark Report Requirements**

Subsection (B)(4) of this section allows for an EDU to apply to amend its benchmark for regulatory, economic or technological reasons beyond its control. Presumably, an EDU would only apply to amend its benchmarks when reasons beyond its control prevent it from reducing demand or energy consumption. However, there are factors beyond an EDUs control that may help it achieve its benchmarks as defined. For instance, if an EDU's customer base is reduced or industrial production is reduced in the service territory, the utilities' electric demand and customers' energy consumption will be reduced without any action on the part of the EDU, which would contribute to the EDU achieving its benchmarks. Just as an EDU may apply to adjust benchmarks downwards, due to reasons beyond its control, an EDU should not get credit for achieving benchmarks for reasons beyond its control. Therefore, if demand or energy consumption has been reduced without any effort on the part of the EDU, the target benchmarks should be adjusted accordingly.

4. **Section 4901:1-39-05: Recovery Mechanism**

4901:1-39-05 states that EDUs may file an application with the Commission to recover costs to implement Energy Savings Programs, appropriate lost distribution revenues and potential shared savings. Ordinarily, in order to increase rates, as this section contemplates, an EDU must go through a rate case proceeding. However, this section allows EDUs to bypass the Commissions normal rate case procedures, and the customer safeguards of such procedures, and file a special application to increase rates to recover costs associated with an EDU's Energy Savings Programs. The Kroger Co. submits that there should be no special application process to increase rates for recovery of cost of Energy

Savings Programs, and that any increase in rates as a result of costs associated with these programs should follow the normal rate case process.

Subsection (A)(2) of this section allows mercantile customers who commit their Energy Savings Programs for integration with the electric utility's programs to be exempt from the economic development and demand response rate recovery mechanism of the EDU. The term "commit" is ambiguous and must further be defined. For instance, a mercantile customer who merely pledges to integrate its Energy Savings Programs with an EDU may be eligible for the rate recovery exemption under this language. The Kroger Co. recommends that the language in Subsection (A)(2) be modified to clarify that customers must actually, and verifiably, integrate their programs with the EDU in order to receive an exemption from the rate recovery mechanism.

5. 4901:1-39-06: Commitment for integration by mercantile customers

4901:1-39-06 allows customers to be exempt from the demand response and energy efficiency rate recovery mechanisms set forth in 4901:1-39-05, if the customer commits to integrate its Energy Savings Programs with the EDU program and the customer files an application for special arrangements, to be approved by the Commission. As part of the application, the customer must grant permission to the EDU and Commission's Staff ("Staff") to measure and verify energy savings.

It has been widely held by the Ohio Supreme Court that the Commission only has the authority conferred to it by statute, *See City of Columbus v. Public Utilities Commission*, (1921) 103 Ohio St. 79, 101. There is nothing in R.C. 4928 or other Ohio Statutes that grant the Commission jurisdiction over a customer's energy reduction efforts. By requiring the Staff to monitor and verify an individual customer's energy savings, Section 4901:1-39-06 confers authority to the Commission not authorized by statute.

More importantly, information in the application for special arrangements could make confidential and competitively sensitive data available to outside parties. For instance Subscection (B)(3) permits the EDU and Staff to monitor customer-sited programs and resources. Subsection (C) requires that an application include a description of all methodologies, protocols and practices used or proposed to be used in measuring and verifying program results. This information is important to many commercial and industrial customers because it could reveal proprietary and confidential processes that give a particular customer an advantage over its competitors. Requiring customers to provide this information on their applications, and filing the applications with the Commission will potentially make available valuable confidential and proprietary information to competitors, whether inadvertent or not.

The Kroger Co. submits that the Rules should not purport to grant the Commission jurisdiction over an individual customer's Energy Savings Programs, including the requirement that the EDU and Staff monitor a customer's Energy Savings Programs. Further, a customer should not be required to provide or make available confidential information in its application. If, however, the Commission must have access to confidential information, rules should be created that ensure that the application is appropriately afforded protection as trade secrets under Ohio law, and is not disclosed to the general public. A rule should be adopted that states that a customers' application for special arrangements will be treated as confidential. The Kroger Co. would note that this disclosure concern is, to some extent, ameliorated should a state-wide non-profit administer the program, as such non-profit would presumably not be subject to Ohio's public records laws.

D. Chapter 4901:1-40: Alternative Energy Portfolio Standard

This Chapter addresses the implementation of R.C. 4938.65 and 4928.65, which set forth specific percentages of an EDU's portfolio that must be attained from renewable sources on an annual basis. However, this Chapter does not specify how an EDU accounts for its own generation, that of subsidiaries or affiliates and power purchases as well as its total sales, when calculating its portfolio mix. The Kroger Co. suggests that this Chapter be clarified to reflect that the reporting is applicable to all sales and generation secured by the EDU and its subsidiaries and affiliates to assure there is no double counting and allocations among jurisdictions are appropriately tracked.

II. CONCLUSION.

In filing these comments The Kroger Co. seeks to ensure that goals of reduced energy demand and increased energy efficiency set forth in SB 221 are achieved fairly and economically. The Kroger Co. seeks to ensure that the rules create the proper incentives for both EDUs and customers so that the greatest degree of energy efficiency and demand reduction can be achieved at the lowest cost. It is important, however, that customers do not subsidize demand reduction and energy efficiency measures that would be economically efficient for customers to implement without subsidy. Rather, funding for any demand response or energy efficiency initiatives should go towards subsidizing demand reducing or energy efficiency measures that are too costly for a customer to have an economic incentive to implement. If demand response and energy efficiency resources are spent on subsidizing measures that inefficient customers should be doing already, customers that have implemented comprehensive energy measures should have the ability to opt out of these programs and bypass any applicable charges. This is especially true in the highly competitive retail commercial class.

Also, EDUs should not receive credit toward achieving benchmarks due to measures that reduce demand that were not due to the efforts of an EDU. Giving EDUs credit for energy savings outside the EDUs control undermines an EDUs incentives to efficiently use the resources allocated to their own energy efficiency and demand response programs. Further, such an approach would make it difficult to measure the success of an EDUs Energy Savings Programs because there would be no way of determining if an EDU hit its benchmarks as a result of the EDUs efforts, the efforts of others, or just plain luck.

Finally, The Kroger Co. urges the Commission to consider the creation of a state-wide non-profit to implement energy efficiency rather than having several programs run by individual EDUs. The Kroger Co. now respectfully requests that the Commission consider these comments and incorporate the revisions discussed herein into the proposed rules.

Respectfully submitted,

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ND: 4834-2826-6242, v. 10