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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF
THE KROGER CO.**

I. APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code ("RC") § 4903.10 and Ohio Administrative Code ("OAC") 4901-1-35, The Kroger Co. respectfully submits this Application for Rehearing of the Finding and Order ("Application for Rehearing") issued by the Public Utilities Commission of Ohio ("Commission") on April 14, 2009 ("April 14 Order"). In the April 14 Order, the Commission erred for the following reasons:

- The definitions in OAC 4901:1-39-01 unlawfully and unreasonably fail to distinguish projects to upgrade transmission and distribution systems from projects to reduce customers' energy consumption.
- OAC 4901:1-39-07 unlawfully and unreasonably fails to provide for a demand-based charge in any rate recovery mechanism to recover the cost of distribution and transmission upgrades.

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- OAC 4901:1-39-08(B) unlawfully and unreasonably fails to provide sufficient protection of valuable proprietary information provided in a mercantile customer's application for a special arrangement to integrate demand reduction and energy savings with the utility.
- OAC 4901:1-39-08(B) unlawfully and unreasonably requires a mercantile customer to jointly file an application for special arrangements with the electric utility.
- OAC 4901:1-39-08 unlawfully and unreasonably fails to include sufficient specificity for certain requirements set forth in this rule.

The Kroger Co. submits that the Commission erred by approving these unreasonable and unlawful rules. For the reasons more fully set forth in its Memorandum in Support, The Kroger Co. respectfully asks that the Commission grant its Application for Rehearing on these issues.

II. MEMORANDUM IN SUPPORT

In the April 14 Order, the Commission erred by approving rules to implement the requirements of SB 221 since several of these rules were unlawful and unreasonable. The lack of discussion herein of any rule approved in the April 14 Order indicates neither support of nor opposition to any of those rules.

A. Energy Efficiency and Peak Demand Reduction Programs

OAC 4901:1-39-01(J) defines energy efficiency as "reducing the consumption of energy while maintaining or improving the end-use customer's existing level of

functionality, or while maintaining or improving the utility system functionality.” Peak demand reduction, while not specifically defined in OAC 4901:1-39, generally means reducing an Electric Distribution Utility’s (“EDU”) overall peak electric usage. However, the Commission’s rules make no distinction between energy efficiency and peak demand reduction achieved through customer-sited initiatives (“Customer EE), and energy efficiency and demand reduction achieved through upgrades to the T & D system (T& D EE”).

OAC 4901:1-39-07(A) allows an EDU to recover the costs associated with energy efficiency and peak demand reduction programs (“EE Programs”). Failure to make a distinction between Customer EE and T & D EE allows an EDU to fund only T & D EE Programs to the exclusion of Customer EE Programs.

An EDU has a strong incentive to fund only T & D EE Programs. An EDU can use T & D EE Programs to upgrade its T & D system without significant capital expenditures by the EDU.¹ If an EDU uses a T & D EE Program to upgrade its T & D system, that EDU will recover both lost distribution revenues, and shared savings from these upgrades.² Further, an EDU will recover all costs of the T & D EE Program (including lost distribution revenues, and shared savings) without filing a rate case. Because an EDU will not have to file a rate case to recover T&D EE upgrade costs, an EDU will not have to show that the cost to upgrade the T & D system is not offset by cost reductions achieved in other areas of the T & D system. In addition to these benefits, an EDU can count the energy and demand reduction toward its SB 221 mandated electric usage reduction requirements.

¹ An EDU can then earn an investment return on its own money that it ordinarily would be required to use to improve the T & D system.

² An EDU would ordinarily not recover these “costs” when funding an improvement to its T & D system.

R.C. 4928.66(A)(2)(d) states that energy efficiency and peak demand reduction programs implemented by an EDU may include “demand-response programs, customer-sited programs, *and* transmission and distribution infrastructure improvements that reduce line losses” (emphasis added). Clearly, the intent of SB 221 is to have both T & D EE Programs and Customer EE Programs. However, since the pure financial benefits of using EE Program rate recovery mechanism to upgrade the T & D system are disproportionate, an EDU has little incentive to fund Customer EE Programs, even if these customer EE Programs were more effective from a pure energy efficiency perspective. The Commission’s failure to include a distinction between T & D EE Programs and Customers EE Programs, as well as treating these programs the same for ratemaking purposes will likely result in an EDU solely funding T & D EE Programs. On rehearing, the Commission should modify the rules to include a definition of T & D EE Programs and Customers EE Programs.

B. Demand-based Charges for Distribution and Transmission Upgrades

OAC 4901:1-39-07(A) provides that an EDU may request a rate recovery mechanism to recover costs associated with “peak-demand reduction, demand response, energy efficiency program costs appropriate lost distribution revenues, and shared savings.” OAC 4901:1-39-07(A)(1) also provides that an EDU may recover the cost of transmission and distribution (“T & D”) investments that are attributable primarily to demand reduction and energy efficiency purposes. The Kroger Co. does not object to an EDU recovering the reasonable costs associated with T & D investments attributable primarily to demand reduction and energy efficiency. However, a recovery mechanism for T & D upgrades should be separate from a mechanism to recover costs for customer-

sited energy efficiency and demand reduction programs. Further, a recovery mechanism for T & D upgrades should contain a demand charge.

T & D rates generally contain a demand charge because the costs of serving customers on T & D systems are largely fixed costs attributable to electric demand. Similar to traditional T & D system improvements, the upgrades to the T & D system that arise out of SB 221 are likely to be fixed costs with a demand cost component. Aligning rates with costs is a well-established principle in utility ratemaking. Therefore, the recovery mechanism for upgrades to an EDU's T & D systems authorized in OAC 4901:1-39-07(A) should be treated no differently than recovery through traditional T & D rates.

A demand charge to a T & D recovery mechanism also sends appropriate price signals that will reduce customer demand. For instance, a charge based on peak demand usage will benefit customers who shift electric usage to off peak hours, thus reducing overall peak demand for electricity. Reducing peak demand usage is precisely the intent of SB 221.

Therefore, OAC 4901:1-39-07(A)(1) must be amended to require a separate mechanism for the recovery of the cost of upgrades to T & D systems. Further, OAC 4901:1-39-07(A)(1) must allow for a demand charge in the recovery mechanism for T & D system upgrades. Specifically, OAC 4901:1-39-07(A)(1) should be amended as follows:

The extent to which the cost of transmission and distribution infrastructure investments that are found to reduce line losses may be classified as or allocated to energy efficiency or peak-demand reduction programs pursuant to division (A)(2)(d) of section 4928.66 of the Revised Code shall be limited to the portion of those investments that are attributable to and undertaken primarily for energy efficiency or demand

reduction purposes. A mechanism to recover such costs shall be separate from the mechanism to recover all other costs authorized in rule 4901:1-39-07, and shall include a demand based charge.

C. Protections of Proprietary Information

OAC 4901:1-39-08 allows mercantile customers to file an application for a special arrangement to commit its energy savings and demand reduction for integration with the EDU and to avoid the EDU's energy savings and demand reduction cost recovery mechanism. To be eligible for exemption from the EE Programs cost recovery mechanism, OAC 4901:1-39-08(B) requires mercantile customers to file customer specific information in an annual report on energy savings and peak demand reduction. The rule also requires a mercantile customer to grant permission to the EDU to measure and verify peak demand reductions resulting from customer-sited projects. The information submitted and/or made available to the Commission and the EDU has great value to The Kroger Co. and constitutes confidential and proprietary information that derives its value almost solely from the fact that this information is not generally known. The Kroger Co. submits that the Commission's rules do not adequately protect proprietary information provided in an application for special arrangements. Further, the disclosure of this level of information is unnecessary and will create undue burden and cost to the customer; therefore, disclosure of this information should not be required.

The Kroger Co. expends substantial resources to research and analyze its electric usage and to develop effective efficiency measures to reduce energy consumption. Information relating to specific energy reduction measures has great value to The Kroger Co. that would be lost if this information were generally known. Moreover, the potential

harm to The Kroger Co. is not limited to disclosure of information to competitors.³ An EDU itself could also implement the programs detailed and described in a mercantile customer's annual report.⁴ Ultimately, EDU EE Programs could be used to reduce energy consumption and costs of competitors of The Kroger Co. Allowing the proprietary efforts of one mercantile customer to contribute to cost reduction of a competitor provides a strong disincentive to a mercantile customer to develop its own energy savings measures.

The risk created by the disclosure of a detailed description of a customer's energy savings projects is increased by the requirement that a mercantile customer disclose "an accounting of expenditures made by the mercantile customer for each project and its component energy saving and electric utility peak-demand reduction attributes."⁵ Requiring a mercantile customer to disclose a detailed list of its programs as well as the specific cost of these programs will provide valuable insight into that customer's margins, and potentially allow a competitor to mimic the disclosing customer's pricing patterns. In a low margin business such as The Kroger Co.'s, this creates a substantial advantage for competitors.

Further, requiring a customer to disclose specific information about energy savings programs, particularly the specific costs of these energy savings programs, does not further the goals and objectives of SB 221. The goal of SB 221 is to reduce energy

³ The Kroger Co. is not convinced of the effectiveness of protective orders and protective agreements approved by the Commission. Third party consultants will be hired by Staff and EDUs to analyze The Kroger Co.'s application and monitor and verify compliance. These consultants may also work for competitors that could use the information to The Kroger Co.'s detriment.

⁴ The Commission's rules require a mercantile customer file in its annual report "a listing and description of the customer projects implemented including measures taken, devices or equipment installed, processes modified or other actions taken to increase energy efficiency and reduce peak demand, including specific details such as the number type and efficiency levels both of the installed equipment and the old equipment that is being replaced if applicable." OAC 4901:1-39-08(B)(5).

⁵ OAC 4901:1-39-08(B)(6).

consumption. It does not matter how energy consumption is reduced, nor do the specific costs of reducing consumption matter. In fact, requiring disclosure of proprietary information will likely lead to increased energy consumption, because mercantile customers will be discouraged from expending substantial funds and effort to develop proprietary and innovative energy savings programs if those programs are quickly to become public knowledge.

The General Assembly adopted the option to opt-out of EDU EE Programs to give incentives for mercantile customers to pursue proprietary energy reduction measures. The General Assembly recognized that often it is more efficient to allow customers to implement specifically tailored, cost effective energy reduction measures rather than require those customers to participate in generally targeted EDU EE Programs. Participation in EDU EE Programs promotes participation only in energy reduction measures subsidized by the EDU. By unnecessarily requiring a mercantile customer to produce proprietary information to opt-out of an EDU EE Program, the Commission discourages mercantile customers from pursuing proprietary energy reduction measures.⁶ This is contrary to the expressed intent of SB 221, unlawful and unreasonable.

The Commission must eliminate the burdensome and costly requirements to disclose proprietary and confidential information in a mercantile customer's unique arrangement application and annual report. Specifically, the Commission must eliminate the requirement in OAC 4901:1-39-08(B)(5) that a mercantile customer provide a

⁶ This is not to imply The Kroger Co. will stop pursuing energy efficiency measures if The Kroger Co cannot opt-out of the EDU EE Programs. The Kroger Co. is, and always will be, an innovator in energy efficiency. However, if The Kroger Co. is paying into the EDU EE Project funds, without receiving much benefit in return, the available dollars for independent projects will be reduced.

detailed description of energy savings projects. At the very least, the Commission should adopt Staff's proposed rule that requires only a general listing of a mercantile customer's energy savings projects.⁷ Further, there is no legitimate need for a mercantile customer to provide the cost of its energy savings programs. Therefore, the requirement in OAC 4901:1-39-08(B)(6) must be removed from the Commission's rules.

D. Joint Filed Application for Special Arrangements

OAC 4901:1-39-08(B) requires that a mercantile customer file an application *jointly* with an EDU in order to be eligible for a special arrangement under OAC 4901:1-39-08. The requirement to file jointly with an EDU (as opposed to individually by a mercantile customer) is unlawful and unreasonable.

RC 4905.31 sets forth the process to file an application for special arrangements with the Commission. The statute allows the Commission to approve a special arrangement "pursuant to an application that is submitted by the public utility *or* the mercantile customer."⁸ RC 4905.31 clearly permits a mercantile customer *or* an EDU to file an application individually, without participation or permission of the other party. By requiring joint filing in OAC 4901:1-39-08(B), the Commission is changing the clear wording of RC 4905.31.

Not only is a joint filing requirement contrary to Ohio statute, the joint filing requirement inhibits a mercantile customer from exercising its right to opt-out of EDU EE Programs.⁹ A joint filing with an EDU requires that an EDU and the mercantile

⁷ The amount of information that a mercantile must provide under OAC 4901:1-39-08(B) is greatly increased compared to the Staff proposal. Staff's proposed rules required a mercantile customer to provide "a listing and description of the programs undertaken by a customer." Staff Proposed OAC 4901:1-39-06(B)(3).

⁸ R.C. 4905.31(E) (emphasis added).

⁹ R.C. 4928.66(A)(2)(c) provides that "any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt

customer agree to the terms of the special arrangement. While ideally the EDU and a mercantile customer could agree to the terms of a special arrangement, there are strong incentives for an EDU to oppose any "opt-out" of its EE Programs. As noted in section II(A) of this Application for Rehearing, an EDU receives several benefits from T & D EE programs, in addition to being able to count the demand reduction and energy savings toward its benchmark. Because of these additional benefits, EDUs will likely prefer that customers not opt-out of the EDU EE Programs. The incentives for an EDU to have all customers participate in its EE Programs could lead an EDU to act in bad faith when negotiating a special arrangement with a mercantile customer. The alteration of the statutory provision grants the EDU effective veto powers over any customer opt-out.

In order to protect a mercantile customer from bad faith negotiation with an EDU, a mercantile customer must have the option to file applications for special arrangements individually, without the permission of the EDU. The reasonableness of the terms of an individual application can be judged by the same standards as a joint application for an opt-out. Further, a mercantile customer will still have an incentive to try to file an application jointly with an EDU, because presumably the Commission is more likely to approve an application endorsed by the EDU.

For these reasons, on rehearing, the Commission must modify OAC 4901:1-39-08(B) to allow a mercantile customer to individually file an application for special arrangements, without the permission of an EDU. Specifically, the Commission should modify OAC 4901:1-39-08(B) as follows:

mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs."

The electric utility and mercantile customer shall file an joint application, jointly or individually, for approval of a special arrangement under this rule which may include a request for exemption from the cost recovery mechanism set forth in rule 4901:1-39-08 of the Administrative Code. To be eligible for such exemption, the mercantile customer must consent to providing an annual report on the energy savings and electric utility peak-demand reductions achieved in the customer's facilities in the *most* recent year. The report shall include the following:

E. Clarification to OAC 4901:1-39-08

As adopted by the Commission, OAC 4901:1-39-08 is too vague and and/or does not take into account the practical implications of meeting the requirements in this rule. Clarification of certain parts of OAC 4901:1-39-08 is required and certain impractical requirements should be eliminated and/or simplified.

OAC 4901:1-39-08(A)(3) requires that in its application, a mercantile customer “grant permission to the electric utility and staff to measure and verify energy savings and/or peak-demand reductions resulting from customer-sited projects and resources.” However, it is not clear which party will pay for monitoring and verification. The Kroger Co. submits that since an EDU receives the benefit of benchmark reduction, the EDU should pay for these activities. Therefore, upon rehearing, the Commission should amend OAC 4901:1-39-08(A)(3) as follows:

Grant permission to the electric utility and staff to measure and verify energy savings and/or peak-demand reductions resulting from customer-sited projects and resources. The cost of monitoring and verification activities shall be paid by the electric utility.

OAC 4901:1-39-08(A)(1) requires a mercantile customer to address in its application “coordination requirements between the electric utility and the mercantile

customer, including *specific communication* procedures and intervals.” The inclusion of specific communication procedures is a vague requirement and could potentially require a mercantile customer to list limitless detail on communication procedures, which ultimately would be impossible to enforce. For these reasons, upon rehearing, the Commission should modify OAC 4901:1-39-08(A)(1) as follows:

address coordination requirements between the electric utility and the mercantile customer, ~~including specific communication procedures and intervals.~~

The requirements of OAC 4901:1-39-08(B) also may create certain unintended consequences. For instance, OAC 4901:1-39-08(B)(1) requires a mercantile customer to include in its annual report “baselines for the mercantile customer's kilowatt-hour consumption.” A mercantile customer could increase its number or size of its stores, and thereby increase baseline energy consumption. However, the increase in baseline energy consumption would not be attributable to using energy inefficiently, rather it would be a direct result of increasing operational square footage. Therefore, using baseline energy consumption as a sole metric to measure energy efficiency could punish that customer for expanding economic activity in the region, and could favor those customers that reduce their economic activity without regard to whether those customers were using energy “efficiently.”

OAC 4901:1-39-08(B)(3) requires an accounting of the energy saved for each project. Practically, it is nearly impossible to determine the precise amount of energy saved by each project. Requiring additional tracking mechanisms to verify energy saved will increase the cost of a project, thus decreasing the rate of return for implementing a

project. This could result in otherwise beneficial energy saving projects not being pursued by a mercantile customer because such projects are no longer cost effective once the costs of regulatory compliance are factored in.

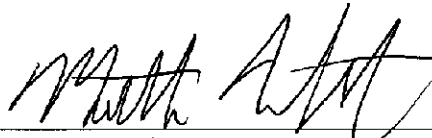
OAC 4901:1-39-08(B)(4)(A) requires that the annual report, “quantify the energy savings or peak-demand reductions of projects initiated prior to 2009 in the baseline period recognizing that projects may have diminishing effects over time as technology evolves or equipment degrades.” It is not clear from this requirement whether mercantile customers will receive less credit towards benchmark reductions from effective projects implemented before 2009. Regardless, this requirement is too vague and should be eliminated.

In general, the Commission modified proposed OAC 4901:1-39-08 requires far more information in a mercantile customer’s application for special arrangements and annual reports than originally proposed by Staff. Many of these requirements are vague, serve no apparent purpose, are unduly burdensome, are difficult to practically implement, and may actually hinder the energy efficiency efforts of mercantile customers. Therefore, the Commission must eliminate, simplify and/or clarify many of the requirements in OAC 4901:1-39-08 as discussed herein.

III. CONCLUSION

For the reasons set forth above, The Kroger Co. respectfully requests the Commission grant this Application for Rehearing. Upon rehearing, The Kroger Co. requests that the Commission modify the rules as discussed herein.

Respectfully submitted,

Handwritten signatures of John W. Bentine and Mark S. Yurick, with a horizontal line drawn across the bottom of the signatures.

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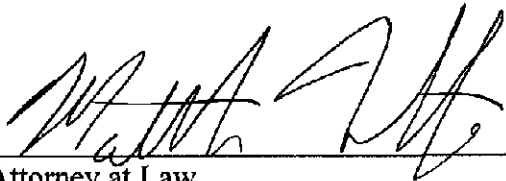
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Application for Rehearing and Memorandum in Support of The Kroger Company was served via by first-class, postage prepaid U.S. mail, and, where indicated, electronic on this 15th day of May, 2009 upon the following:

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