

FILE

10

RECEIVED-DOCKETING DIV
2009 MAY 27 PM 5:07
PUCO

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

THE KROGER CO.'S MEMORANDUM CONTRA
APPLICATION FOR REHEARING

Pursuant to Ohio Administrative Code ("OAC") 4901-1-35(B), The Kroger Co. submits this Memorandum Contra applications for rehearing filed in this proceeding.

I. INTRODUCTION

On April 14, 2009, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("April 14 Order") approving rules to implement the requirements of SB 221. On May 15, 2009, several interested parties in this proceeding, including The Kroger Co., applied for rehearing on a number of rules approved by the Commission. The Kroger Co. will not restate its arguments for rehearing in this Memorandum Contra. However, The Kroger Co. respectfully requests that the Commission consider The Kroger Co.'s comments on the Applications for Rehearing filed by other parties. Comment on an issue discussed herein does not necessarily indicate The Kroger Co.'s opposition to a rehearing on the issue.

II. RESPONSE TO REQUEST FOR REHEARING

A. Recovery for Transmission and Distribution Upgrades

In its Application for Rehearing, OCEA requests rehearing on OAC 4901:1-39-07(A)(2), which allows a mercantile customer to opt-out of the energy efficiency and demand reduction cost recovery mechanism (“DSM Rider”) with the Commission’s approval. Upon rehearing, OCEA requests that the Commission amend the rule to require that mercantile customers opting-out of the DSM Rider pay for lost distribution revenues.¹

Before discussing OCEA’s proposed amendment to OAC 4901:1-39-07(A)(2), The Kroger Co. reiterates its objection to an electric distribution utility (“EDU”) recovering lost revenues for demand reduction and energy savings initiatives (“EE”).² An EDU should not be able to recover lost revenues that result from the implementation of a new technology or system upgrade unless an EDU is willing to forgo additional revenue caused by demand increases that result from technological innovation.³ It is asymmetrical to allow an EDU to recover lost revenues from more efficient technology, without requiring them to forego revenues that result from demand increasing technologies.

However, if a mercantile customer that opts-out of the DSM Rider must pay for lost distribution revenues, the allocation of lost distribution revenues must have a demand component. Most lost distribution revenues will result from a reduction in peak demand.

¹ OCEA Application for Rehearing at p. 13-14.

² See The Kroger Co. Reply Comments at 3-4 (arguing an EDU should not be allowed to recover costs associated with lost distribution revenues).

³ For example, if an EDU recovers lost revenue that results from the installation of more efficient light bulbs, an EDU should return revenue generated from customers increased usage as a result of electronic picture frames or any other technology that increase customer electric usage.

A higher percentage of peak demand reduction is attributable to low load-factor customers, because low load factor customers have the highest percentage of demand to reduce.

OCEA asserts that R.C. 4928.141(A) requires an EDU to provide consumers “on a comparable and nondiscriminatory basis within its service territory, a standard service offer.” According to OCEA’s own logic, the Commission must not discriminate when applying the rate recovery mechanism for lost distribution revenues. Because lost distribution revenues are attributable to peak demand reduction, a demand component must be used to allocate lost distribution revenues. To do otherwise would be discriminate against high load factor customers and violate R.C. 4928.141(A).

B. Mercantile Customer Application to Integrate Energy Savings

In its Application for Rehearing, Dayton Power and Light Company (“DP&L”) requested rehearing on OAC 4901:11-39-08 which requires a mercantile customer to file an application with the Commission to integrate its energy efficiency and demand reduction (“EE”) with an EDU. DP&L argues that the application for reasonable arrangements and the subsequent reporting requirements are too complex, burdensome and intrusive for mercantile customers.⁴ The Kroger Co. supports DP&L’s request for rehearing on this issue. Requiring over burdensome, costly and unnecessary application and reporting requirements could deter a mercantile customer from applying for reasonable arrangements. This is even more so if the reporting requires disclosure of confidential and proprietary information. As noted in The Kroger Co.’s Application for Rehearing, allowing customers to opt-out of utility EE programs encourages a customer

⁴ DP&L Application for Rehearing at 24-25.

to invest in cost effective energy efficiency and demand response measures on its own.⁵ For these reasons, the Commission must order a rehearing to reduced and or eliminate many costly and unnecessary requirements of OAC 4901:11-39-08.

C. One Time Payment to Mercantile Customers That Commit Energy Savings

In its Application for Rehearing, AEP proposes to amend OAC 4901:11-39-08 to allow an EDU to make a one-time incentive payment to a mercantile customer that commits its EE to an EDU.⁶ The Kroger Co. generally agrees with including more options for a mercantile customer to commit its EE with that of an EDU. Flexibility to commit EE enables mercantile customers and EDUs to precisely tailor EE programs in a way that achieves maximum energy savings and demand reduction.

However, the availability of a one-time payment to mercantile customers must not supplant the ability of a mercantile customer to avoid a DSR Rider all together. In this brief, and in several other pleadings filed in this proceeding, The Kroger Co. demonstrated the importance of allowing a mercantile customer to opt-out of an EDU's EE program. Therefore, The Kroger Co. supports AEP's proposal to include the option to give incentive payments to mercantile customers, but cautions that this measure must supplement, not substitute, the other measures used by EDU's and mercantile customers to obtain energy savings and demand reduction.

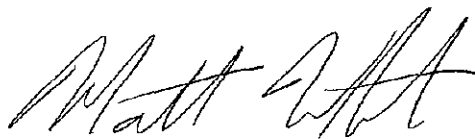
⁵ The Kroger Co. Application for Rehearing at 12.

⁶ AEP Application for Rehearing at 16-18.

III. CONCLUSION

The Kroger Co. respectfully requests that the Commission consider the matters discussed herein, if rehearing is ordered in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Bentine", is written over a horizontal line.

John W. Bentine, Esq. (0016388)

E-Mail: jbentine@cwslaw.com

Direct Dial: (614) 334-6121

Mark S. Yurick, Esq. (0039176)

E-Mail: myurick@cwslaw.com

Direct Dial: (614) 334-7197

Matthew S. White, Esq. (0082859)

E-Mail: mwhite@cwslaw.com

Direct Dial: (614) 334-6172

Chester, Willcox & Saxbe LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215-4213

(614) 221-4000 (Main Number)

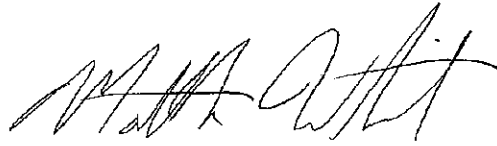
(614) 221-4012 (Facsimile)

Attorneys for The Kroger Co.

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 27th day of May, 2009 upon the following:

SEE ATTACHED LIST

A handwritten signature in black ink, appearing to be 'M. A. Alt', written over a horizontal line.

Attorney at Law

Kenneth R. Alfred, Executive Director
Ohio Fuel Cell Coalition
737 Bolivar Road
Cleveland, OH 44115

Langdon D. Bell
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215
Lbell33@aol.com
Attorney for Norton Energy Storage

Mary W. Christensen
Christensen Christensen Donchatz
Kettlewell & Owens, LLP
100 East Campus View Blvd., Suite 360
Columbus, OH 43235
mchristensen@columbuslaw.org
Attorney for Great Lakes Energy
Development
Task Force

Dale R. Arnold, Director, Energy Services
Ohio Farm Bureau Federation
280 North High St.
P.O. Box 182383
Columbus, OH 43218
darnold@ofbf.org

David Caldwell, Legislative Coordinator
United Steelworkers, District 1
777 Dearborn Park Lane - J
Columbus, OH 43085

Joseph M. Clark
Lisa G. McAlister
McNees Wallace & Nurick, LLC
21 East State Street, 17th Floor
Columbus, OH 43215
jclark@mwncmh.com
lmcalister@mwncmh.com
Attorneys for Industrial Energy Users-Ohio

Paul A. Colbert, Associate General Counsel
Elizabeth H. Watts, Assistant General Counsel
Rocco O. D'Ascenzo, Senior Counsel
Amy B. Spiller, Associate General Counsel
Duke Energy Ohio, Inc.
139 East Fourth Street
P.O. Box 960
Cincinnati, OH 45201

Mark S. Fleiner, President
Rolls-Royce Fuel Cell Systems, Inc.
6065 Ship Avenue NW
North Canton, OH 44720

Amy Gomberg, Program Director
Environment Ohio
203 East Broad Street, Ste 3
Columbus, OH 43215

Mark A. Hayden
Firstenergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com
Attorney for Ohio Edison Company, the
Cleveland Electric Illuminating Company and
the Toledo Edison Company

Chester Jourdan, Jr., Executive Director
Erin Miller, Director, Center for Energy &
Environment
Mid-Ohio Regional Planning Commission
111 Library Street, Suite 100
Columbus, OH 43215
emiller@morpc.org

Christine M. Falco
PJM Interconnection, LLC
965 Jefferson Avenue
Norristown, PA 19403
falcoc@pjm.com

P. Flem, President
Retco Molded Products
4425 Appleton St.
Cincinnati, OH 45209

Gary S. Guzy, General Counsel
John Melby, President
APX, Inc.
5201 Great America Parkway #522
Santa Clara, CA 95054
gguzy@apx.com
jmelby@apx.com

Jon A. Husted
Speaker, Ohio House of Representatives
77 South High Street
Columbus, OH 43215
District37@ohr.state.oh.us

Rodger A. Kershner
Howard & Howard Attorneys PC
39400 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304
rak@h2law.com
Attorney for LS Power Associates, LP

Joseph P. Koncelik
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114
jkoncelik@frantzward.com
Attorney for Vertus Technologies Industrial, LLC

Steve Lankenau
American Ag Fuels
815 Greenler Street
Defiance, OH 43512

Michael K. Lavanga
Garrett A. Stone
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington D.C. 20007
mkl@bbrslaw.com
gas@bbrslaw.com
Attorneys for Nucor Steel Marion, Inc.

David Marchese
Haddington Ventures, LLC
2603 Augusta, Suite 900
Houston, TX 77057

Steve Millard, President and Executive Director
The Council of Smaller Enterprises
The Higbee Building
100 Public Square, Suite 210
Cleveland, OH 44113

Michael L. Kurtz
David F. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
mkurtz@BKLawfirm.com
dboehm@BLKlawfirm.com
Attorneys for Ohio Energy Group

Connie L. Lausten
New Generation Biofuels
4308 Brandywine St. NW
Washington, D.C. 20016
cclausten@newgenerationbiofuels.com

Dwight N. Lockwood, Group Vice President
Global Energy, Inc.
312 Walnut Street, Suite 2300
Cincinnati, OH 45202
dnlockwood@globalenergyinc.com

Ann McCabe, Midwest Regional Director
The Climate Registry
1543 W. School St
Chicago, IL 60657
ann@theclimateregistry.org

Jennifer Miller, Conservation Program Coordinator
Sierra Club Ohio Chapter
131 N. High St., Ste 605
Columbus, OH 43215

Nolan Moser
Trent A. Dougherty
The Ohio Environmental Council
1207 Grandview Ave., Suite 201
Columbus, OH 43212
nmoser@theOEC.org
tdougherty@theOEC.org

Thomas J. O'Brien
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215
tobrien@bricker.com
Attorneys for Northeast Ohio Public Energy
Council

Vincent A. Parisi
5020 Bradenton Ave.
Dublin, OH 43017
vparisi@igsenergy.com
Attorney for Interstate Gas Supply, Inc.

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215
BarthRoyer@aol.com
Attorney for Ohio Environmental Council

Kenneth D. Schisler
EnerNOC, Inc.
75 Federal St., Suite 300
Boston, MA 02110
kschisler@enernoc.com

Steven T. Nourse
Marvin I. Resnik
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com
miresnick@aep.com
Attorneys for Columbus Southern Power
Company and Ohio Power Company

Terrence O'Donnell
Sally W. Bloomfield
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
sbloomfield@bricker.com
mwarnock@bricker.com
Attorneys for the American Wind Energy
Association, Ohio Advanced Energy, Wind on the
Wires, and Environment Ohio

M. Howard Petricoff
Vorys, Sater, Seymour and Pease, LLP
52 East Gay St.
P.O. Box 1008
Columbus, OH 43216
mhpetricoff@vorys.com
Attorney for Constellation NewEnergy, Inc.,
Direct Energy Services, LLC, and Integrus
Energy Services, Inc.

Neil Sater, CEO
Greenfield Steam & Electric
6618 Morningside Drive
Brecksville, OH 44141

Linda Sekura
Conservation Committee Chan-
Northeast Ohio Sierra Club
20508 Watson Road
Maple Heights, OH 44137
LSekura@aol.com

Jeffrey L. Small, Counsel of Record
Office of the Ohio Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215
small@occ.state.oh.us

Robert J. Triozzi
Steven L. Beeler
City of Cleveland
Cleveland City Hall
601 Lakeside Avenue, Room 206
Cleveland, OH 44114
RTriozzi@city.cleveland.oh.us
SBeeler@city.cleveland.oh.us
Attorneys for the City of Cleveland

Charles S. Young, Acting City Manager
City of Hamilton, Ohio
345 High Street
Hamilton, OH 45011
younge@ci.hamilton.oh.us

Judi L. Sobecki
Randall V. Griffin
Dayton Power and Light Company
1065 Woodman Dr.
Dayton, OH 45432
judi.sobecki@DPLinc.com
randall.griffin@DPLinc.com

Mark A. Whitt
Andrew J. Campbell
Jones Day
325 John H. McConnell Blvd, Suite 600
P.O. Box 165017
Columbus, OH 43216
mawhitt@jonesday.com
ajcampbell@jonesday.com
Attorneys for East Ohio Gas Company d/b/a
Dominion East Ohio

Thomas E. Lodge
Carolyn S. Flahive
Kurt P. Helfrich
Sarah P. Chambers
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215-6101
Carolyn.Flahive@thompsonhine.com
Attorneys for Buckeye Power, Inc.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/28/2009 2:03:32 PM

in

Case No(s). 08-0888-EL-ORD

Summary: Memorandum Memorandum Contra Application for Rehearing electronically filed by Mr. Matt S White on behalf of The Kroger Co.