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Craig I. Smith
Attorney at Law
2824 Coventry Road
Cleveland, Ohio 44120
216-561-9410
wis29@yahoo.com

Via Next Day Delivery

August 5, 2008

Public Utilities Commission of Ohio
PUCO Docketing
180 East Broad Street, 10th Floor
Columbus, Ohio 43215

In Re: Case No. 08-0777-EL-ORD

Greetings:

Please find an original and ten copies of the Reply Comments by Kraft Foods Global, Inc in this proceeding for filing in this docket on August 6, 2008.

Regards

Craig I. Smith
Counsel for Kraft Foods Global, Inc.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221.	**Case No. 08-777-EL-ORD**

REPLY COMMENTS BY KRAFT FOODS GLOBAL, INC

Craig I. Smith (0019207)
Attorney at Law
2824 Coventry Road
Cleveland, Ohio 44120
216-561-9410
wis29@yahoo.com

Counsel for Kraft Foods Global, Inc.

August 6, 2008

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I. Introduction

Kraft Foods Global, Inc. submits reply comments for the rules proposed to specifically address the filing of unique arrangements, the criteria for customers to receive service under economic development rates to create or retain jobs, the reporting requirements for customers to show continuous compliance, and repayment of incentives.[1]

Initial comments by the FirstEnergy companies were premised on the purported change in rationale for providing special arrangements and recovery of delta revenues because those companies no longer owned generating plants. FirstEnergy wants delta revenues currently recovered. It no longer wants to administer special arrangements, leaving that responsibility to the Commission and its staff. Further, First Energy wants to avoid

[1] Kraft Foods submit these comments as an interested person pursuant to the Entry dated July 28, 2008.

forced negotiations of special arrangements under a rule change that its refusal to consent to those arrangements require Commission rejection of the application. (FE Comments at pgs. 28, 29, 31, 32)

I. Rules to approve unique arrangements fail to expressly recognize that RC 4905.31 allows customers to enter into special arrangements with any electric utility including, as provided for by RC 4928.146, those electric utilities providing service outside of their certified territories.

Provisions of RC 4905.31 (A) through (D) allow a public utility to file a schedule or establish, or enter into, any reasonable arrangement with one or more of its customers. The statute also allows mercantile customers or a group of mercantile customers to establish reasonable arrangements with their electric distribution utility ("EDU") or another public utility electric light company. Reasonable arrangements may provide for service classifications based upon quantity used, time of use, purpose of use, duration of use, and any other consideration. Reasonable arrangements may include "[a]ny other financial device that may be practicable or advantageous" to the interested parties. (RC 4905.31 (E)) Finally:

> "such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program; [and] any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code****." id.

While all special arrangements are provided for by RC 4905.31, the rules[2] distinguish between economic development schedules for new/expanding customers or to retain existing customers; energy efficiency schedules applicable to energy efficiency production facilities or to recognize customer efforts to reduce electric consumption per unit of use; and finally, "unique arrangements" between electric utilities and their customers.

Use of the term "unique arrangements" under OAC 4901:1-38-05, however, should not prevent mercantile customers of an EDU from entering into reasonable arrangements with that EDU or another EDU for economic development and job retention purposes and energy efficiency programs. Likewise, reasonable arrangements should be entered into by mercantile customers of an EDU, or with another EDU, for those purposes and programs, in addition to the incentives listed at OAC 4901:1-38-07.

OAC 4901:1-38-05 (A) sets forth the well-established requirements of RC 4905.31 that electric utilities bear the burden of showing that their verified applications, and the attached special arrangements, provide reasonable and lawful rates, terms, and conditions for service. The Commission may order hearings if the filings appear unjust or unreasonable. Approved arrangements are subject to changes, alterations, or modifications by the Commission.

[2] OAC 4901:1-38-03, Economic Development Schedule; 4901:1-38-04, Energy Efficiency Schedule; and 4901:1-38-5, Unique Arrangements

OAC 4901:1-38-05 (B) sets forth the same requirements of RC 4905.31 for verified applications filed by mercantile customers for approval of their reasonable arrangements entered into with electric utilities.

However, the proposed rule under OAC 4901:1-38-03 (B) makes no reference to RC 4905.31. Further, the rule limits its application to reasonable arrangements between a "mercantile customer, or group of mercantile customers, of an electric utility" with <u>that</u> electric utility. In fact the statutes allow for mercantile customers, or group of mercantile customers, to enter into reasonable arrangements with any public utility electric light company besides their own EDUs. Provisions of RC 4928.141 to RC 4928.145 do not preclude or prohibit an EDU from providing competitive retail electric service to customers within another EDU's certified territory. (RC 4928.146)

FirstEnergy requests an amendment to OAC 4901-38-05 (B) to expressly put the burden of proof on mercantile customers. This becomes unnecessary by simply referring to RC 4905.31 in that subpart. (See FE Comments at pg. 31)

Also, it appears unnecessary for written notice from mercantile customers of their requests for Commission established reasonable arrangements. (See FE Comments at pg. 31) The Commission should provide notice to FirstEnergy operating companies of those filings. As for other proposed changes to OAC 4901:1-38-05 (B), FirstEnergy refusal to contract should not constitute Commission rejection of applied for reasonable arrangements by mercantile customers. There is no requirement in the rule that customers negotiate with their EDUs before making the filings, or that the EDUs must agree to the reasonable arrangement filed.

However, FirstEnergy's comments highlight the proposed rules fall short of implementing the expanded provisions of RC 4905.31. Mercantile customers may enter into arrangements with either their EDU or another public utility electric light company. RC 4905.31 also allows mercantile customers to apply for Commission approval of their reasonable arrangements with any electric light company.

Necessary amendments to OAC 4901:1-38-05 (B) are needed to expand its scope to include the reasonable arrangements that mercantile customers, or a group of mercantile customers, may enter into with any EDU, as allowed for by RC 4905.31. Also, amendments to the proposed rules are needed to adequately describe the requirements for approval of such reasonable arrangements between mercantile customers and electric distribution utilities serving outside of their certified territories. The rules need to inform mercantile customers of their rights to contract with electric distribution utilities other than their current EDUs.

II. Rules for economic development schedules unfairly favor job creation over job retention

Commercial and Industrial customers may receive service under approved economic development schedules upon submitting verifiable and verified information to their electric utilities establishing compliance with the criteria of OAC 4901:1-38-03.

It appears the criteria favors job creation over job retention. New or expanding customers applying for service under the economic development schedule must create at least 25 new jobs paying at least 150% of the federal minimum wage within three years of initial operations. Customers must make at least $500,000 in fixed asset investments in land, building, machinery / equipment, and infrastructure, while demonstrating the project's financially viability. Also, customers must list governmental supported tax abatements or credits, jobs programs, or other incentives; and describe the secondary and tertiary benefits resulting from their new or expanded facilities, such as in the payment of local or state taxes or by other firms increasing their employment or business opportunities. Finally, customers commit to continual operations at the site for at least two times the term length of provided for incentives. (OAC 4901:1-38-03 (A))

Customers likely to end or reduce operations at its current Ohio location, or relocate those operations out of state, also may apply for service under the economic development schedules. These customers must retain at least 25 full time jobs paying at least 150% of the federal minimum wage, and a billing demand of at least 250 kW. Their present in-state location must incur at least 10% of its total operating expenses for electricity. Electric costs must be a "major factor" in their decisions to cease or reduce in-state operations, or relocate their facilities out of state.[3] The "major factor" test requires identification of out of state relocation sites, their applicable electric costs, and other significant expenses including labor and taxes. Further, these customers must identify received or sought after governmental assistance to maintain current operations, and agree to continued operations at the in-state site for at least the term length of provided incentives. (OAC 4901:1-38-03 (B))

The disparate treatment between customers creating new jobs or retaining to the extent possible old jobs makes little sense. Job creation customers essentially receive lower economic development rates by adding no more than 25 new jobs paying 1.5 times the federal minimum wage over three years, with a minimum investment of $500,000 in fixed assets, for a financially viable undertaking. The 10% electric cost to total operating cost threshold requirement is inapplicable. Further, job creation customers need not show that electric costs were a major factor in their decisions to create jobs by building new or expanded in-state operations.

Job creation and retention similarly benefits Ohio's economy. The retention of 95 jobs at a plant purchasing approximately $17 million annually in services from local vendors should stand on equal, or better footing, when requesting service under economic development rates as for new or expanded facilities creating at least 25 jobs over three years with $500,000 of initial fixed investments.

[3] Economic development schedules are unavailable for in-state relocations under the proposed rules.

The distinctions drawn between new and retained jobs lack a rational basis for use in Ohio other than that, perhaps, the proposed rules model such states as New York, or guard against perceptions that customers leverage the prospects of out of state relocations to receive lower cost electricity for their in-state facilities.

In fact, national manufacturers more than likely shift production to out of state facilities rather than relocate out of state their existing Ohio facilities. While New York, and other states, may apply the major factor test to manufacturers with multi state facilities, Ohio should not do it for job retention. Further, Ohio should not require that job retention customers show their electricity costs make up at least 10% of total operating costs. As other comments noted already, larger industrial users would not meet that 10% test while trying to retain Ohio jobs.

The proposed rules for job retention must be drafted within the over all structure of Ohio utility regulation and the Ohio Department of Development's role in creating and retaining jobs. The rules appear to elevate electric utilities on par with the Commission and the Ohio Department of Development. The rules allow electric utilities to deny economic development rates for job retention if those customers' operating costs are not at least 10% for electricity, and electricity is not a "major factor" in their decisions to cease or reduce operations in Ohio, or relocate out of state. FirstEnergy from a different prospective contends the "major factor" test produces highly subjective results, and need not be used. (FE Comments at pg. 30)

Rejection of applied for special contract rates based on the 10% threshold or "major factor" test leaves customers in the difficult situation of moving forward with a different business plan, or complaining about that decision to the Commission. Formal complaints filed under RC 4905.26 consume time, perhaps more than six months for adjudication.

Even if electric utilities approve the applications, the Commission may later hold hearings upon finding reasonable grounds that the criteria to retain customers were not met. Again, customers' job retention efforts remain on hold during these Commission proceedings.

Also significant, the proposed rules fail to define the role of ODOD in this process, other than require that customers identify governmental incentives received. It is unclear whether receipts of governmental incentives to add or retain jobs are needed to qualify for, or even weigh in the decision, to receive service under the economic development schedules. Situations may arise where the applicants never requested governmental incentives; were denied governmental incentives, or received some but not all of the governmental incentives requested. Also, an ambiguity exists over the requirement to maintain operations based on the term of incentives received under OAC 4901:1-38-03 (A) (2) (h) and (B) (2) (g). Those incentives may refer to governmental incentives or rate incentives provided under the economic development schedules.

The rules need to define and provide a role for the ODOD in this process. RC 4928.02 and OAC 4901:1-38-01 provides for the Commission to initiate energy polices, in part, for the state to remain effective in the global economy, and promote job growth and retention within Ohio. The ODOD also has a major statewide role in job growth and retention separate from that of the Commission.

The rules need to provide for ODOD involvement in the approval process of economic development rates. Otherwise, actions by electric utilities and the Commission could effectively preempt state and local governmental provided incentives to retain those jobs. This is especially troublesome because electric utilities act as gatekeepers[4] on whether to even provide service under economic development rates. The overlapping dual roles of the Commission and Ohio' Department of Development in job creation or retention require clarity and definition in these proposed rules.

III. Reporting Requirements

Customers receiving service under special schedules or reasonable arrangements need to submit annually on forms approved by the electric utilities and Commission staff demonstrating on-going compliance with the eligibility requirements, as required by OAC 4901:1-38-06. Customers bear the burden of proof for demonstrating compliance. Within 45 days, the electric utilities must submit those reports to the Commission staff for review and audit.

[4] FirstEnergy comments believe the Commission should solely assume that role. (FirstEnergy Comments at 29)

OAC 4901:1-38-09 provides for termination and reimbursement of incentives previously received for failure by customers to substantially comply with eligibility requirements. Revenue recovery riders will recover those incentives from non-compliant customers.

These rules set unreasonable reporting requirements by placing the burden on industrial customers to show continuous compliance with the criteria for approving special rates and arrangements based upon forms established by, and reviewed by, the electric utilities and the PUCO staff. Industrial customers are not regulated by the PUCO. (OAC 4901:1-38-06 and 09)

Further, the repayment of all incentives received for failure to substantially comply with the eligibility requirements regardless of when that substantial failure occurred, results in penalty payments instead of refunds of the delta differences in applicable rates charged. FirstEnergy comments exacerbate the situation by recommending strict compliance rather than "substantial" compliance. (FE Comments at 34)

IV. Conclusion

In conclusion, Kraft Foods propose changes to the rules covering unique arrangements to expand their scope to recognize that mercantile customers may enter into arrangements with electric distribution utilities besides those presently providing them with service. Changes to the rules on job retention are also needed to eliminate the threshold that electric costs must be at least 10% of total operating costs, and that customers must show electricity is a major factor in their decisions to relocate. Finally, customers need relief from the burdensome reporting requirements, and possible penalty payments, rather than compensatory refunds for failure to meet the criteria requirements for service under reasonable arrangements.

Respectfully submitted

By: ____________________

Craig I. Smith (0019207)
Attorney at Law
2824 Coventry Road
Cleveland, Ohio 44120
216-561-9410
wis29@yahoo.com

Counsel for Kraft Foods Global, Inc.