BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the form of an Electric Security Plan	)	Case No. 08-935-EL-SSO

INITIAL BRIEF OF THE KROGER CO.

I. INTRODUCTION

On July 31, 2008 the Ohio Edison Company ("Ohio Edison"), Cleveland Electric Illuminating Company ("CEI") and the Toledo Edison Company ("Toledo Edison") (collectively referred to herein as "FirstEnergy" or "FE") filed an application for authority to establish a standard service offer ("Application") pursuant to Ohio Revised Code ("R.C.") 4928.143 in the form of an electric security plan ("ESP"). As part of the Application, FirstEnergy proposed a temporary electric security plan ("Short Term ESP") which, if approved, will be effective until FirstEnergy's long term electric security plan ("Long Term ESP") is approved by the Public Utilities Commission of Ohio ("Commission").

The Kroger Co. is one of the largest grocers in the United States. The Kroger Co. has 15 facilities served by Ohio Edison that collectively consume over 40 million kWh per year, and 18 facilities served by Toledo Edison that collectively consume over 50 million kWh per year. The Kroger Co. does not have significant load in the service territory of CEI.

On September 16, 2008, the Commission granted The Kroger Co.'s Motion to Intervene in the above captioned proceeding, and The Kroger Co. has been an active participant in all relevant proceedings.

II. SUMMARY

The Kroger Co. urges the Commission not to adopt FirstEnergy's Short Term ESP proposal. Ohio statute allows customers to be served under the existing rate plan if an ESP is not approved by the December 31, 2008 statutory deadline. Therefore, there is no need for the implementation of a Short Term ESP in the event the statutory deadline is not met. A Short Term ESP will delay the implementation of a Long Term ESP, create additional administrative expense and further confuse customers regarding the implementation of new rates.

Further, FirstEnergy proposes a greater rate increase for customers in its Short Term ESP than in its Long Term ESP. While The Kroger Co. does not support the approval of any Short Term ESP, if the Commission should approve a Short Term ESP, The Kroger Co. urges that at the very least the Commission approve a rate increase that is lesser than or equal to the rate increase FirstEnergy will receive in a Long Term ESP.

Lastly, FirstEnergy proposes a similar rate design for both its Short Term ESP and its Long Term ESP and therefore the Short Term ESP proposal has many of the same rate design defects as the Long Term ESP proposal. If the Commission adopts FirstEnergy's Short Term ESP, the Commission should remedy the defects in the Short Term ESP that also afflict FirstEnergy's Long Term ESP proposal.

III. ARGUMENT

A. A Short Term ESP Should Not Be Adopted.

In its proposed Short Term ESP, FirstEnergy argues that the Commission should approve a Short Term ESP for the following reasons:

- It will allow customers to obtain early price certainty for January 1, 2009;
- It will give additional time for the Commission to consider the long term ESP proposal;
- It will allow adequate time for a competitive bid process if the MRO is selected for the standard service offer;
- It will give FirstEnergy adequate time to fully consider the Commission ordered modifications to its Long Term ESP.

FirstEnergy Application pp. 35-36. While these may be worthy objectives, what FirstEnergy fails to note is that all of these objectives can be achieved without the imposition of a Short Term ESP.

R.C. 4928.141(A) states that beginning January 1, 2009, an electric utility shall provide customers with "a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." However, the statute also states:

> "the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized . . . any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term."

R.C. 4928.141(A) (emphasis added).

R.C. 4928.141(A) requires FirstEnergy's customers to be served under the current rate plan even if a Long Term ESP is not approved before December 31, 2008. Therefore, FirstEnergy's stated concerns about not having adequate time to consider a Long Term ESP proposal have no merit. Rather than implementing a Short Term ESP, FirstEnergy can make prudent arrangements to provide generation supply under its current rate plan and apply for deferred accounting treatment if the Long Term ESP is not resolved by December 31, 2008.

Further, If a Short Term ESP is adopted, customers will actually have less price certainty because customers' rates will change twice instead of changing just once if only a Long Term ESP is adopted.

Not only is the adoption of a Short Term ESP unnecessary, it is also inefficient. Significant costs will be incurred to implement and administer an additional rate plan that may only be in effect for a few months. This additional expense will surely be passed on to customers. Also, the approval of a Short Term ESP will require additional debate and consideration by the Commission and parties to this proceeding. These additional proceedings will prolong the process for approving a Long Term ESP. Imposition of a Short Term ESP will only frustrate the goals of a just, orderly, expedient and cost effective Application proceeding and therefore the Short Term ESP should not be adopted.

B. The Short Term ESP Rate Increase Should Not Exceed the Long Term ESP Rate Increase.

As explained above, The Kroger Co. strongly recommends that the Commission not approve FirstEnergy's Short Term ESP proposal; however, if the Commission were to approve a short term proposal, the rate increase in the Short Term ESP should not exceed the rate increase FirstEnergy would receive in its Long Term ESP.

In its Application, FirstEnergy proposes a base generation rate of 7.75 cents/kWh for its Short Term ESP. *FirstEnergy Application p. 37.* For the first year of its Long Term ESP, FirstEnergy proposes a base generation rate of 7.5 cents/kWh. *FirstEnergy Application p. 5.* It is not clear to The Kroger Co., and nothing in the Application explains why FirstEnergy is proposing to charge over 3% more for electricity consumed under the Short Term ESP. By granting a greater rate increase in the Short Term ESP proposal, the Commission will give FirstEnergy an incentive to delay the Long Term ESP resolution because FirstEnergy will receive greater revenue under the Short Term ESP.

By opposing the Short Term ESP proposal, The Kroger Co. is not agreeing that FirstEnergy's proposed Long Term ESP base generation charge is reasonable. The Kroger Co. specifically reserves the right to challenge the reasonableness of the Long Term ESP base generation charges, and such challenges will be addressed in its Initial Brief regarding the Long Term ESP. However, The Kroger Co. simply notes that there is no reason that FirstEnergy's base generation charge in its Short Term ESP should be greater than the generation charge in its Long Term ESP.

The Kroger Co. recommends that if the Commission were to approve FirstEnergy's Short Term ESP proposal, the base generation rate for the Short Term ESP should be reduced, at the very least, to a rate lesser or equal to what the Commission would grant in FirstEnergy's Long Term ESP.

C. The Short Term ESP Should Not Contain the Same Rate Design Defects as FirstEnergy's Long Term ESP Proposal.

There are several deficiencies in FirstEnergy's Long Term rate design proposal. Because FirstEnergy's Short Term ESP rate design proposes to adopt much of the rate design proposed for the Long Term ESP, the proposed Short Term ESP has the same rate design defects as the Long Term proposal. While The Kroger Co. will address its concerns with FirstEnergy's generation rate design proposal in more detail in its initial brief regarding FirstEnergy's Long Term ESP, The Kroger Co. urges the Commission not adopt these same defects in FirstEnergy's Short Term ESP.

FirstEnergy proposes a rate design in both its Short Term and Long Term ESPs that would eliminate, without justification, any generation rate differentiation based on load factor. As a result, FirstEnergy's new generation rate design would cause very substantial negative impacts on higher-load-factor, non-residential customers. *Higgins Testimony pp. 9-11.* This rate design is inequitable to high load factor customers and should not be implemented in either FirstEnergy's Short Term ESP or its Long Term ESP.

Further, FirstEnergy proposes a non-bypassable Delivery Service Improvement ("DSI") rider which FirstEnergy claims it needs to help manage the increasing costs of providing distribution service. However, the proposed rider has no connection with recovery of actual costs but instead, appears to be little more than a gratuitous payment to the utility for fulfilling its responsibilities to provide safe and reliable service. *Higgins Testimony pp.14-15.* Even if FirstEnergy could legitimately claim some amount for a DSI rider over the long-term, such a rider has no application to a Short Term ESP proposal. Therefore, The Kroger Co. urges that the Commission not adopt the proposed DSI rider for either the Short Term or Long Term ESP.

Finally, in the Short Term ESP, FirstEnergy's proposes to defer 1 cent/kWh of the generation rate charge for future recovery in the same manner as the proposed generation rate deferrals in the Long Term ESP. A deferral of charges for future recovery in the Short Term ESP would only exacerbate the effects of the already problematic deferrals proposed on the Long Term ESP. While deferrals may be appropriate in certain rare circumstances, wide spread practice of deferring current generation expense for later recovery raises serious concerns with respect to inter-generational equity. *Higgins Testimony pp. 7-8.* This is especially true when applied to a short term proposal. Therefore, The Kroger Co. recommends if a Short Term ESP is adopted, no charges be deferred for future recovery.

IV. Conclusion

The Kroger Co. notes that the problems with the Short Term ESP's rates and rate design would be of no concern if the Commission simply chose not to adopt the Short Term ESP. Many of the issues The Kroger Co. mentions in this brief as well other complex issues raised in this proceeding, require careful consideration to come to a just and adequate outcome. By proposing a Short Term ESP and requiring that a Commission make an expedited ruling by November 14, 2008, FirstEnergy puts the Commission and all of the parties to this proceeding in the untenable position of resolving a complicated ESP proposal in an inadequate period of time.

Further, it is not necessary for the Commission to be in the precarious position of adopting an ESP in a rushed time frame. FirstEnergy's current rate plan will still remain in effect even if there is no resolution on the Long Term ESP before the December 31, 2008 statutory deadline. Therefore, the Commission should simply reject FirstEnergy's Short Term ESP proposal and avoid all of the problems that would arise from adopting and implementing a Short Term ESP in an inadequate time frame.

If the Commission were to adopt a Short Term ESP, at the very least, the base generation rate paid by customers should be lesser than or equal to the base generation rate customers would pay in the Long Term ESP. Additionally, the Commission should not adopt in the Short Term ESP the unfair and inequitable rate design proposals FirstEnergy has made for its Long Term ESP.

Respectfully submitted,

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.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Brief of The Kroger Co.* was served upon the following parties of record or as a courtesy, via U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission, on October 31, 2008.

Mark S. Yurick

SERVICE LIST

John Jones
William Wright
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

Arthur Korkosz
FirstEnergy, Senior Attorney
76 South Main Street
Legal Department, 18th Floor
Akron, Ohio 44308-1890

James Burk
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308

Mark Hayden
FirstEnergy Corporation
76 South Main Street
Akron, Ohio 44308

Ebony L. Miller
FirstEnergy Corporation
76 South Main Street
Akron, OH 44038

Gregory Poulos
Jacqueline Roberts
Jeffrey Small
Office of the Ohio Consumers Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215

David F. Boehm
Michael Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OH 45202

Joseph Clark
Lisa McAlister
D. Neilsen
McNees Wallace & Nurick
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215

Samuel Randazzo
McNees Wallace & Nurick
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215

Garrett Stone
Michael Lavanga
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N. W.
8th Floor, West Tower
Washington D.C. 20007

Colleen Mooney
David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839

Barth E. Royer
Langdon Bell
Bell & Royer LPA
33 S. Grant Avenue
Columbus, OH 43215

Nolan Moser
Trent Dougherty
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449

Leslie A. Kovacik
Senior Attorney
City of Toledo
420 Madison Ave., Suite 100
Toledo, OH 43604-1219

Lance M. Keiffer
Assistant Prosecuting Attorney
711 Adams St., 2nd Floor
Toledo, OH 43624-1680

Joseph P. Meissner
Legal Aid Society of Cleveland
1223 West 6th St.
Cleveland, OH 44113

M. Howard Petricoff
Stephen M. Howard
Vorys Sater Seymour and Pease, LLP
52 East Gay Street
P. O. Box 1008
Columbus, Ohio 43216-1008

Richard L. Sites
General Counsel and Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620

Henry W. Eckhart
The Natural Resource Defense Council
50 West Broad Street #2117
Columbus Ohio 43215

Sean W. Vollman
David A. Muntean
Assistant Directors of Law
161 S. High Street, Suite 202
Akron, OH 44308

Stephen M. Howard
Craig G. Goodman
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007

F. Mitchell Dutton
FPL Energy Power Marketing, Inc.
700 Universe Blvd.
Juno Beach, FL 33408

Bobby Singh
Integrys Energy Services, Inc.
300 West Wilson Bridge Road, Suite 350
Worthington, Ohio 43085

C. Todd Jones
Gregory H. Dunn
Christopher L. Miller
Andre T. Porter
Schottenstein Zox & Dunn Co., LPA
250 West St.
Columbus, OH 43215

Glenn S. Krassen
E. Brett Breitschwerdt
Bricker & Eckler, LLP
1375 E. Ninth St., Suite 1500
Cleveland, OH 44114

Larry Gearhardt
Ohio Farm Bureau Federation
280 N. High St.
P.O. Box 182383
Columbus, OH 43218-2383

Theodore S. Robinson
Citizen Power
2121 Murray Ave.
Pittsburgh, PA 15217

Damon E. Xenopoulos
Shaun C. Mohler
Brickfield, Burchette, Ritts & Stone, PC
1025 Thomas Jefferson St., NW
Eighth Floor, West Tower
Washington, DC 20007

Craig I. Smith
2824 Coventry Rd.
Cleveland, OH 44120

Steve Millard
The Council on Small Enterprises
The Higbee Building
100 Public Square, Suite 201
Cleveland, OH 44113

Douglas Mancino
McDermott, Will & Emery LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067

Nicholas C. York
Tucker Ellis & West LLP
1225 Huntington Center
41 South High Street
Columbus, OH 43215

Eric D. Weldele
Tucker Ellis & West LLP
1225 Huntington Center
41 South High Street
Columbus, OH 43215

Dane Stinson, Esq.
Bailey Cavalieri LLC
One Columbus
10 West Broad Street, Suite 2100
Columbus, Ohio 43215

Grace C. Wung
McDermott Will & Emery LLP
600 Thirteenth Stteet, N.W,
Washington, DC 20005

Cynthia A. Fonner
David I. Fein
Constellation Energy Group, Inc.
550 West Washington Street, Suite 300
Chicago, IL 60661

Gary Jeffries
Dominion Retail
501 Martindale Street, Suite 400
Pittsburgh, PA 15212

Kevin Schmidt
The Ohio Manufacturers Association
33 North High Street
Columbus, OH 43215

Craig Goodman
National Energy Marketers Association
3333 K Street, N.W., Suite 110
Washington, D.C. 20007

Gregory Lawrence
McDermott, Will and Emery LLP
28 East State Street
Boston, MA 02109

Sally Bloomfield
Terrence O'Donnell
Bricker and Eckler LLP
100 South Third Street
Columbus, OH 43215

Mark A. Whitt
Andrew J. Campbell
Jones Day
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673

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