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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| **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 Section 4928.143, Revised Code in the Form of an Electric Security Plan** | ) | **Case No. 08- 935-EL-SSO** |



**REPLY BRIEF OF THE KROGER CO.**

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## 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"). On September 16, 2008, the Commission granted The Kroger Co.'s Motion to Intervene in the above captioned proceeding. The Kroger Co. has been an active participant throughout this proceeding.

An evidentiary hearing was held to consider FE's ESP Application beginning on October 16, 2008. As part of the evidentiary hearing, The Kroger Co. submitted direct testimony by Kevin C. Higgins ("Higgins"). On November 21, 2008, following the evidentiary hearing, The Kroger Co. submitted its Initial Post Hearing Brief ("Initial Brief") suggesting several modifications to FE's ESP proposal. The Kroger Co. now submits this Reply Brief in response to the Initial Post Hearing Briefs filed in the above captioned proceeding.

## II. SUMMARY

In its Initial Brief, The Kroger Co. asked that the Public Utilities Commission of Ohio ("Commission") deny FE's ESP Application as filed, and proposed several modifications to FE's ESP proposal. A summary of The Kroger Co.'s proposed modifications to FE's ESP proposal are listed as follows:

(1) The Kroger Co. urged that the Commission not accept the generation deferral provisions of the ESP as proposed by FE. The Kroger Co further proposed that the Commission should modify the ESP to keep the overall rate increase attributable to increased generation

charges as close as possible to the levels of 0.06% in 2009, 4.01% in 2010, and 5.79% in 2011, as indicated by FE on page 5 of its Application.[1]

(2) The Kroger Co. argued that FE's proposed generation rate design would eliminate, without justification, all rate differentiation within customer classes based on load factor. As a result, FE's new rate design would cause substantial negative impacts on higher-load-factor, non-residential customers. The Kroger Co. proposed that in order to remedy this problem, the Commission should modify the generation charge rate design for any rate schedule that currently has load-factor-differentiated generation rates. For affected rate schedules, the existing generation-related rate components should be amalgamated into a single generation charge. To this charge, a rate-schedule-specific percentage rider may be applied to recover the change in generation revenue authorized by the ESP.[2]

(3) The Kroger Co. recommended that the Commission seek ways to encourage the introduction of some cost-based generation in the FE service territories. The Kroger Co. argued that cost-based generation service would provide a hedge for customers against sole reliance on volatile market purchases.[3]

(4) The Kroger Co. argued that FE's proposed distribution rate freeze through 2013 and deferral of additional distribution cost is an unwise application of single-issue ratemaking. The Kroger Co. proposed that the Commission dispense with the distribution rate freeze and the accompanying deferral of costs associated with new distribution investment and allow FE to apply to the Commission to recover distribution costs as appropriate.[4]

[1] The Kroger Co. Initial Brief at 5-7.
[2] Id. at 7-10.
[3] Id. at 10-11.
[4] Id. at 11-12.

(5) The Kroger Co. argued that FE's proposed Delivery Service Improvement ("DSI") Rider is simply an additional award to FE for fulfilling its responsibilities to provide safe and reliable service. The Kroger Co. proposed that the Commission eliminate the DSI Rider from FE's ESP proposal.[5]

With these proposed modifications in mind, the Kroger Co. now submits its reply to the initial briefs of FirstEnergy and the other intervening parties in this proceeding. The Kroger Co. notes that it has not addressed many of the positions addressed in the initial briefs filed in this proceeding. Absence of comment on the positions in a particular brief does not in any way convey support of or objection to any of those positions.

## III. ARGUMENTS

In its Initial Brief, FE contends that its ESP proposal is more favorable in the aggregate than a market rate offer ("MRO"). FE argues, *inter alia*, that its proposed ESP will benefit customers,[6] help achieve important energy policy goals,[7] balance customer benefits with risk mitigation measures,[8] and allow the Commission to manage important provisions of the ESP.[9] For several reasons, FE's ESP proposal fails to adequately promote these stated goals.

FE argues in its Initial Brief that its plan will produce stable generation rates and mitigate rate increases for customers.[10] While these contentions may at first appear to be true, closer scrutiny reveals that FE accomplishes most of its claimed rate "stabilization" and "mitigation" through nothing more complex than a widespread use of deferrals in both its generation rates and

[5] Id. at 12-13.
[6] FE Initial Brief at 6.
[7] Id. at 40.
[8] Id. at 46.
[9] Id. at 64.
[10] Id. at 24; see also, id at 31 (FE argues the plan mitigates increases in generation rates).

its distribution rates.[11] As The Kroger Co.'s witness Higgins notes in his direct testimony, deferrals raise serious concerns with respect to intergenerational equity and trade small rate increases in the near term for much larger rate increases in the long term.[12] The appearance of mitigation and stabilization is merely a façade.

Further, while FE argues in its Initial Brief that its ESP proposal mitigates overall rate increases, FE does not mention that under its proposed rate plan, higher load factor customers will be fettered with onerous and disproportionate increases in rates. FE notes in its Initial Brief several measures it utilizes to promote energy efficiency and fairly allocate the costs of providing electricity to customers, including the use of time of day pricing for generation rates[13] and the use of credits for interruptible customers.[14] What is conspicuously missing from FE's ESP proposal is the use of load-factor-differentiated generation rates. In its Initial Brief and ESP Application, FE fails to justify the exclusion of load-factor-differentiated generation rates from its proposed rate design.

In its Initial Brief FE cites significant electric price volatility in the open market as a rationale for it's claim that its ESP proposal is more favorable in the aggregate than an MRO. However, FE has done little in its ESP to protect against market volatility. While FE's ESP may "stabilize" rates to be charged during the actual three year ESP period, presumably any increased costs to provide customers with electricity will be passed on to those customers through future true-ups and deferrals.[15] FE's ESP proposal fails to incorporate any appropriate and available measures to protect customers from market price volatility, such as to provide for cost-based electric generation to satisfy customer's load requirements. Without some move to provide for

[11] Id at 32 (FE discusses its plan to defer generation rates); id at 60 (FE discusses its plan to defer distribution rates).
[12] Kroger Ex. No. 1, Direct Testimony of Kevin Higgins at p. 8 (lines 1-7).
[13] FE Initial Brief at at 37.
[14] Id. at 40.
[15] Id. at 11.

cost-based generation to hedge against market volatility, FE's statement that its ESP is more favorable than its MRO is not adequately supported.

FE also claims in its Initial Brief that a DSI Rider is necessary to recover costs associated with improving its aging distribution infrastructure and work force.[16] FE contends that the DSI Rider will incent FE to maintain a reliable distribution network.[17] However, FE provides no specifics to adequately justify this additional charge to address issues surrounding an aging infrastructure and work force when such costs may already be appropriately recovered through normal distribution charges. It appears that the DSI Rider is nothing more than a gratuitous payment to FE for fulfilling its existing and well established responsibilities to provide safe and reliable service.

**A. Deferrals Do Not Stabilize Rates.**

In its ESP Application, FE proposes a series of generation and distribution rate deferrals. In its Initial Brief FE claims that these deferrals help to "stabilize" rates and "mitigate" rate increases.[18] While these deferrals may appear to lessen rate increases in the near term, they will certainly increase rates in the long term. Therefore, FE's claim that its ESP would create "stable" rates is highly misleading.

First Energy states that customers will experience minimal generation rate increases of .06% in 2009, 4.01% in 2010 and 5.79% in 2011. While these increases may appear reasonable at first glance, the rate increases FE cites do not include generation charges to be deferred for payment in the future.[19] When the generation deferrals proposed by FE are included in

[16] Id. at 55.
[17] Id.
[18] Id at 24-32.
[19] Id. at 25.

calculating the increases, the actual generation rate increases amounts to an 11% increase in 2009, a 7% increase in 2010 and a 6 % increase in 2011.[20] These deferred generation charges must be repaid by customers in the future which will have the effect of increasing and destabilizing rates beyond 2011. It is disingenuous for FE to claim a relatively modest proposed rate increase in 2009-2011 as evidence of rate stabilization, when this short term rate stabilization will have occurred if deferrals to be paid beyond 2011 are completely ignored.

FE also proposes deferrals of distribution charges. For instance FE proposes to defer certain costs associated with the repair of storm damage during the ESP period until 2014.[21] FE proposes this distribution rate freeze through the year 2013, with additional distribution costs to be deferred beyond 2013.[22] The distribution charge deferrals are unsupportable for the same reason as the generation charge deferrals are unsupportable; rather than stabilize rates, in the long run, these deferrals destabilize rates. While appearing to "stabilize," "moderate," or "freeze" some component of the rate increase, the deferrals merely disguise large rate increases by postponing payment. This "credit card" approach is not desirable, necessary, or fair. Additionally, since customers must pay carrying costs on the deferrals, customers may actually pay more for electricity than they would pay if the charges were due when the costs were incurred.

Not only do deferrals destabilize rates but they also do not fairly allocate the cost of electricity between customers. Customers who sign up for electric service after 2011 will be forced to pay for electricity consumed in the past. Large mounting deferrals could also potentially thwart economic development efforts in Ohio. It is reasonable to assume that some

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[20] The rate increase including the deferred charges was calculated by adding the deferred costs cited in FE's Application at page 10 to the generation rate increase that FE cites in its Application at page 10.
[21] Id. at 61.
[22] FE Application at 19-23.

businesses would be reluctant to relocate to Ohio knowing they must pay costs attributable to the provision of electricity consumed by others in previous years.

The Commission should modify FE's ESP proposal to eliminate the generation related deferrals. The Commission should keep the overall generation rate increase as close as possible to the levels of 0.06% in 2009, 4.01% in 2010, and 5.79% in 2011. This increase would be more than adequate for FE to cover the costs of procuring power, especially considering the dramatic decrease in energy costs since FE filed its ESP Application in July, 2008.

Further, as Witness Higgins recommends in his direct testimony, the Commission should dispense with the distribution rate freeze and the accompanying deferral of costs associated with new distribution investment. If FE finds it necessary to file a distribution rate case, FE should be free to do so. At the same time, customers should not be responsible for a massive mounting deferral to be paid to FE with interest.[23]

Such open ended deferrals are "...an unwise application of single issue ratemaking."[24] The deferrals should be rejected.

**B. The ESP Should Include Load-Factor Differentiated Rates.**

As noted, FE argues that FE's ESP proposal mitigates rate increases to customers.[25] While this is arguably true[26] for the <u>overall</u> average rate increase to all customers, some specific rate classes see a disproportionately large and unjustified increase in rates. When examined closely, it is clear that FE's proposed rate design will have a dramatic negative impact on higher-load-factor customers within each rate schedule. For example, as found by Witness Higgins,

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[23] Kroger Ex. No. 1, Direct Testimony of Kevin Higgins at p. 14 (lines 14-18).
[24] Id. at p. 14 (lines 13-14).
[25] FE Initial Brief at 32.
[26] See discussion of deferrals in section III(A) of this brief as to why FE's overall rate impact to customers is not as moderate as FE claims.

FE's Typical Bill Comparison shows that a 500 kW customer with monthly use of 300,000 kWh (load factor of 83 percent) would experience a rate increase of 38 percent in summer and a further increase of 23 percent in winter.[27] This is clearly not the "moderate" rate impact that FE claims in its Initial Brief. This disproportionate rate increase is due to the absence of load-factor differentiated rates.

Throughout its Initial Brief FE discusses how its proposed rate plan encourages customers to use energy efficiently and to reduce peak demand. Particularly, FE cites its proposed time of day pricing and interruptible credit proposals as evidence that FE's ESP proposal is aimed at achieving these goals.[28] However, if FE is truly concerned with achieving energy efficiency and peak demand reduction, it should clearly include load-factor differentiated rates in its proposal. This is because, as explained by Witness Higgins, FE's proposed time of day rates do not remedy the problem because the rates are designed using FE's proposed generation charge as a baseline. In Witness Higgins' words, "...after the damage is done..." to the high load factor customers.[29]

Load-factor differentiated rates recognize that higher-load-factor customers use fixed assets more efficiently through relatively constant energy usage over time, and consequently should pay lower average generation rates on a per kWh basis than lower load factor customers.[30] Load-factor differentiated rates also send appropriate price signals to customers and encourage customers to use electricity more efficiently and reduce peak demand. Further, rates differentiated by load factor more appropriately allocate the costs of generating electricity

[27] FE's Typical Bill Comparison was provided in FE's Response to OCC l-RPD; Kroger Ex. No. 1, Direct Testimony of Kevin Higgins at p. 10 (lines 12-15).
[28] FE Brief at 37(arguing that time of day pricing will send price signals to customers); see also Id. at 40-43(discussing FE's interruptible service credit proposal).
[29] Kroger Ex. No. 1, Direct Testimony of Kevin Higgins at p. 11 (lines 4-9).
[30] Transcript Vol. I, Warvell, at pp 76-77 (October 17, 2008).

to those using the electricity. FE does not even attempt in its Initial Brief to address why load-factor differentiated rates, which are included in its current rate stabilization plan ("RSP"), are not included in its ESP proposal.

The Commission should modify FE's proposed generation charge rate design for any rate schedule that incorporates load-factor-differentiated generation rates in FE's current RSP. As previously noted in The Kroger Co.'s Initial Brief, for affected rate schedules the existing generation-related rate components (Rate Stabilization Charges, Generation Charges, and RTC[31]) could be combined into a single base generation charge. To this combined charge, a rate-schedule-specific percentage rider should be applied to recover the requisite change in generation revenue authorized by the ESP.[32] As explained by The Kroger Co.'s Witness Higgins:

> This approach would ensure that each customer in the affected rate schedules would experience the same percentage change in generation rates. Such approach is essential for protecting customers from the potentially disastrous impacts of FE's generation rate design proposal.[33]

FE's proposal is also clearly not equitable and should be rejected.

### C. FE Does Not Sufficiently Mitigate the Risk of Market Volatility.

In its Initial Brief, FE includes electric price volatility as a major consideration in comparing a projected MRO aggregate cost to customers against FE's ESP proposal.[34] More specifically, FE states that increased market volatility inherent in an MRO offering necessarily

[31] The Kroger Co. recognizes that RTC is a non-bypassable charge, and on those grounds, could be construed as not being generation-related. However, its origins are tied primarily to generation-related costs. Inclusion of RTC in this calculation would minimize the rate impact differences among customers based on load factor and would have no bearing on the total generation revenue recovered. The sole purpose of including RTC in the calculation is to determine the percentage change in generation revenue needed to meet the ESP authorized generation revenue requirement for each affected rate schedule. In any event, the efficacy of this recommendation is not dependent on whether RTC is included or excluded from this calculation.

[32] The requisite change in generation revenue would be determined by taking the difference between generation revenue authorized by the ESP and the generation revenue recovered by the amalgamated base generation charge.

[33] Kroger Ex. No. 1, Higgins Direct Testimony at p. 11 (lines 17-18) p. 12 (lines 1-3)

[34] FE Initial Brief at 11.

increases the projected MRO cost to customers.[35] FE cites decreased volatility in prices over the next three years as one of the principal advantages of FE's ESP.[36] Despite FE's concerns about the dangers of electric market volatility in an MRO, FE has actually done very little in its ESP to protect customers against the risks of volatile electric market rates.

In its ESP proposal, FE does not include <u>any</u> cost-based generation to meet the expanding capacity needs of customers. FE does propose to require FirstEnergy Solutions ("FES"), as part of a generation supply contract, to add an additional 1000 MW of capacity from January 1, 2007 through December 31, 2011 to help ensure FE's capacity needs are met.[37] But, none of this additional capacity is apparently earmarked for providing cost-based generation to FE's customers.

While The Kroger Co. takes no position on whether FES needs to add an additional 1000 MWs of capacity, under FE's proposal the additional capacity of FES does <u>nothing</u> to reduce customers' exposure to volatile market rates. Presumably the cost of power purchased under the generation supply contract with FES will be based on these volatile market rates. Any electricity FE must purchase from the market to meet customer's needs will also necessarily be susceptible to electric market volatility risk. Other than FE's ability to defer certain charges to be paid at a future date[38], FE's ESP proposal does nothing to protect customers against the same market volatility that FE claims makes an MRO such an unattractive option.

Additionally, as noted by The Kroger Co.'s Witness Higgins:

> … FE's recommended approach strikes me as a missed opportunity, in that the Company could have proposed to meet capacity expansion needs by re-introducing cost-based generation service for the benefit of its

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[35] Id. at 16-17.
[36] Id. at 17.
[37] FE Application at 17.
[38] See Section III(A) of this brief for a more detail discussion as to why deferrals are not the "magic solution" to all rate stabilization and rate increase mitigation concerns.

customers. Cost-based generation service could provide a hedge for customers against sole reliance on market (or affiliate) purchases.[39]

If FE is unwilling or unable to take advantage of this opportunity, perhaps the Commission should solicit interest from other parties to provide cost-based generation service in an appropriate venue, e.g., in an MRO competitive bidding solicitation.

**D. The DSI Rider Should Not Be Included in the ESP.**

FE explains in its Initial Brief that a DSI Rider is necessary to address the risks associated with an aging infrastructure and workforce. Also, FE claims that the DSI Rider was designed as an incentive for FE to improve its distribution reliability.[40]

FE's arguments justifying the DSI Rider in its rate plan are confusing for several reasons. First, FE contends that the DSI Rider is not a cost based recovery,[41] but it argues that a DSI Rider is needed because of the additional costs of replacing aging infrastructure and an aging workforce.[42] Second, FE argues that the DSI Rider is designed as an incentive for FE to improve distribution reliability,[43] yet FE also maintains that the DSI Rider is necessary to recover costs FE will incur due to replacing aging infrastructure and workforce.[44] FE's confused and contradictory rationales describing the purpose and effect of the DSI Rider are insufficient to justify inclusion of the proposed DSI Rider in FE's rate plan.

While FE provides no adequate reason for the inclusion of a DSI Rider in its rate plan, it appears to the Kroger Co., as noted by Witness Higgins, that the real purpose of FE's proposed DSI Rider is to award FE a sort of "gratuitous payment" to FE for fulfilling its existing and well

[39] Kroger Ex. No. 1, Higgins Direct Testimony at p. 12 (lines 25-26) and p. 13 (lines 1-3)..
[40] FE Initial Brief at 55.
[41] Id. at 56-57.
[42] Id. at 55-56.
[43] Id. at 57.
[44] Id. at 56-57.

established responsibilities to maintain safe and reliable electric distribution service.[45] For example, FE fails to explain why the costs incurred to deal with aging infrastructure and an aging work force are not more appropriately recovered through normal distribution charges. While FE maintains that it should receive an "incentive" to maintain a high level of distribution service reliability, FE does not propose returning any of its profits in the event FE's distribution service reliability is low.[46] For these reasons, the Commission should not include a DSI Rider in FE's ESP.

## IV. CONCLUSION

The Kroger Co. strongly disagrees with several of the positions FE takes in its Initial Brief and ESP Application. FE's proposal to simply defer payment of the costs of distribution and generation to be paid in future years does not really "solve" any problems, including rate instability, rate increases and market volatility. While these deferral mechanisms may appeal to customers in the near term, in reality they amount to no more than a "credit card" approach that merely postpones the resolution of the issues instead of resolving them.

FE's elimination of load-differentiated rates in its proposal causes a severe disproportionate impact on rates paid by high load factor customers. The removal of load-differentiated rates from FE's rate plan is not explained or justified in FE's ESP Application or its Initial Brief. Load-differentiated rates should be included in any ESP approved by the Commission.

[45] Kroger Ex. No. 1, Direct Testimony of Kevin Higgins at p. 15 (lines 9-10).

[46] While, FE proposes that recovery under the DSI Rider will decrease as FE's reliability measurements decline, there is nothing in FE's proposal that would economically disadvantage FE for maintaining an inferior level of system reliability. Id at 57-58.

FE contends that its ESP is more favorable than an MRO. However, FE's failure to provide for cost-based generation leaves FE's ESP susceptible to the same market volatility risk implicit in an MRO.

Finally, FE's proposed DSI rider serves no purpose other than to reward FE for maintaining a safe and reliable electric distribution system, and therefore should not be included in FE's ESP.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading was served upon the following parties of record or as a courtesy, via electronic transmission, on December 12, 2008.

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