12

FILE

RECEIVED-DOCKETING DIV
2009 JAN 16 PM 4:26
PUCO

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

THE KROGER CO.'S MEMORANDUM CONTRA THE MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY TO STAY THE EFFECTIVE DATE OF THE COMMISSION ORDER OF JANUARY 7, 2009 PENDING RESOLUTION OF APPEALS AND REQUEST FOR A RULING ON AN EXPEDITED BASIS

I. INTRODUCTION

Pursuant to Ohio Administrative Code ("OAC") 4901-1-12(C), The Kroger Co. files this Memorandum Contra the Motion of Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") (collectively "FirstEnergy") to Stay the Effective Date of the Commission Order of January 7, 2009 Pending Resolution of Appeals and Request for a Ruling on an Expedited Basis ("FirstEnergy Motion to Stay").

On January 12, 2009 The Kroger Co. filed a preliminary response, objecting to the improper procedure by which FirstEnergy requested expedited ruling. On January 14, 2009 the Public Utilities Commission of Ohio ("Commission") issued an order which among other things, found that FirstEnergy's motions would be considered "in due course." On that same date, the Commission issued an Entry in PUCO Case No. 09-0021-EL-ATA, allowing FirstEnergy to increase rates for electric service charged to customers by approximately 2 cents/ kWh in the OE service territory and 3 cents/ kWh in the TE and CEI service territory, through the implementation a fuel rider ("Rider FUEL"). The Kroger Co. now files this Memorandum Contra addressing other issues presented in FirstEnergy's Motion.

On January 13, 2009, the Ohio Consumer and Environmental Advocates ("OCEA") filed a Memorandum Contra the FirstEnergy Motion to Stay ("OCEA Memo Contra"). In the interest of brevity, The Kroger Co. does not address all of the issues in FirstEnergy's Motion to Stay. However, The Kroger Co. notes that it supports the positions taken in the OCEA Memo Contra.

II. ARGUMENT

In its Motion to Stay, FirstEnergy makes several arguments that the Commission should stay the effective date of its January 7, 2009 Order ("Jan. 7 Order"), which *inter alia*, suspended the Regulatory Transition Charge ("RTC") charged to customers in the OE and TE service territories. Particularly, FirstEnergy argued that a stay satisfies the "four-factor test" which is required for a stay to be legally granted by the Commission. The four factors cited by FirstEnergy are:

> (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
>
> (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;

(c) Whether the stay would cause substantial harm to other parties; and

(d) Where the public interest lies. [1]

FirstEnergy also argued that as a practical matter, a stay of the Jan. 7 Order is warranted.

While FirstEnergy has stated the appropriate test to determine if a stay should be granted, as OCEA notes in its Memo Contra, FirstEnergy does not satisfy any of the factors in the four-factor test, much less all four of the factors. Further, there is no practical reason to stay the Jan. 7 Order and subject FirstEnergy customers to pay RTC charges that were set to expire December 31, 2008.

A. Practical Considerations Strongly Support Denying FirstEnergy's Motion to Stay.

FirstEnergy argues that as a practical matter a stay should be granted, because implementing the Jan. 7 Order will subject customers to "unnecessarily volatile rates."[2] "Unnecessarily volatile" apparently refers to the elimination of the RTC rider, which results in *lower rates* for customers. The Kroger Co. has no doubt that customers will be able to overcome any disappointment over increased "volatility" if those customers are charged lower rates. Further, FirstEnergy showed no similar concern for the negative impact of rate volatility in its application to increase rates through implementation of Rider FUEL.[3]

---

[1] FirstEnergy Motion to Stay at p. 6.
[2] FirstEnergy Motion to Stay at p. 7.
[3] See the Commission's Finding and Order in PUCO Case No. 09-0021-EL-ATA (1/14/09) authorizing the implementation of Rider FUEL which increases customer charges by 2 cents/ kWh in the OE service territory and 3 cents/ kWh in the TE and CEI service territory.

FirstEnergy also argues that a stay is justifiable because it would take substantial resources to implement "billing changes."[4] It is curious that FirstEnergy has no similar concerns about the cost of billing changes in implementing Rider FUEL. More importantly, if the Commission does not implement justifiable rate reductions on the basis of vague assertions that the costs of billing changes are too great, then rates would likely never change. Clearly the additional cost to change bills is not a sufficient justification to include otherwise improper RTC charges on customers' bills.

The most important practical consideration, however, is that over this past year, FirstEnergy has generated record profits. This is in contrast to most of FirstEnergy's customers, who have had a rough year. It would be extremely impractical to subject customers to the "double whammy" of a massive rate increase through Rider FUEL and the continuation of the expired Rider RTC, just to allow FirstEnergy to continue its record profits. From a practical standpoint, the Commission must not grant a stay of its Jan. 7 Order and Rider RTC must not be continued.

B. FirstEnergy is Not Likely to Succeed on the Merits.

In its well reasoned Opinion and Order issued on January 7, 2009, the Commission listed the reasons why Rider RTC has lapsed. While The Kroger Co. does not intend to re-state the Commission's grounds for eliminating Rider RTC, it is highly unlikely that the Commission, or any other adjudicative body, will overturn the Commission's decision on this point. This is especially true considering, as noted above, it would be extremely impractical to reinstate Rider RTC since the Commission has already approved the implementation of Rider FUEL.

[4] Id. at 8.

C. Customers Will Suffer Irreparable Harm if a Stay is Granted.

FirstEnergy argues that if a stay is not granted the Commission will be "wrongfully depriving the Companies of hundreds of millions of dollars for operating expenses, especially in the face of economy-wide liquidity issues."[5] Further, FirstEnergy argues that customers will suffer no harm because if it is later determined that RTC charges were wrongfully or over-collected, the Commission can simply later reduce the distribution deferrals for which customers must otherwise pay.[6]

FirstEnergy is not being "wrongfully deprived" of RTC charges. As noted in the OCEA brief and the Jan. 7 Order, FirstEnergy is not rightfully entitled to continue to collect the RTC charges because the RTC charges expired December 31, 2008. However, considering the issue of who will be harmed the most, clearly customers face more potential for harm if a stay is granted, than FirstEnergy faces if a stay is not granted.

While FirstEnergy argues that the Commission can reduce the amount of deferrals customers must pay if RTC charge are wrongfully collected, the inverse is also true. If it is later determined that FirstEnergy is entitled to RTC charges past the date the charges were set to expire, the Commission can simply increase the amount of the deferrals customers must pay. The real issue is, who will suffer more harm if the RTC charges are improperly attached to Rider FUEL and other charges? The Kroger Co. submits the customers will suffer more than FirstEnergy.

Customers are facing the worst economic crisis since the Great Depression. The unemployment rate has recently risen to 7.2%. Home foreclosures and defaults on all

---

[5] Id. at 11.
[6] Id at pp. 11-12.

types of debt have reached record highs. The economic headwinds that customers face are only expected to stiffen.

However, FirstEnergy appears well positioned to weather the gathering storm. Through the first three quarters of 2008, FirstEnergy Corp. earned $1.01 billion.[7] For 2008 FirstEnergy is expected to earn $1.33 billion.[8] This is up from the $1.30 billion FirstEnergy earned in 2007.[9]

FirstEnergy's economic future also looks very promising. The consensus of stock analysts estimate that FirstEnergy will earn *$1.51 billion* in 2009.[10] This is a *7.4% increase* in FirstEnergy's expected earnings from the year 2008. The strong financial performance of FirstEnergy makes it difficult to accept FirstEnergy's unsupported claims of a looming liquidity crisis for the Company.

If a stay is granted, customers will most certainly face direct and immediate harm, *even if* they are later able to reconcile through their deferral balances the "over-recovery" of lapsed RTC charges. Particularly because the Commission has allowed FirstEnergy to collect a wholly new rider, Rider FUEL. FirstEnergy is in a much better position to bear the "risk" of not collecting RTC charges. This is especially true considering, as noted above, FirstEnergy is not actually entitled to continue to collect RTC charges, and it is

---

[7] This information was found on FirstEnergy's Income Statement posted on Google Finance at: http://finance.google.com/finance?fstype=ii&q=NYSE:FE

[8] This information was derived from stock analyst estimates of FirstEnergy's 2008 earnings. An estimate of $4.33/share was multiplied by the 307 million outstanding FirstEnergy shares to arrive at the estimated $1.33 billion earnings projected for FirstEnergy in the year 2008. The analysts estimates can be found on the Market Watch website at:
http://www.marketwatch.com/tools/quotes/estimates.asp?symb=FE&sid=45027

[9] This information was found on FirstEnergy's Income Statement posted on Google Finance at: http://finance.google.com/finance?fstype=ii&q=NYSE:FE

[10] This information was derived from stock analyst estimates of FirstEnergy's 2009 earnings. An estimate of $4.91/share was multiplied by the 307 million outstanding FirstEnergy shares to arrive at the estimated $1.51 billion earnings projected for FirstEnergy in the year 2009. The analysts estimates can be found on the Market Watch website at:
http://www.marketwatch.com/tools/quotes/estimates.asp?symb=FE&sid=45027

highly unlikely the Commission or any other adjudicatory body will side with FirstEnergy on this issue.

D. A Stay is Not in the Public Interest.

FirstEnergy argues that it is in the public interest to have a viable utility.[11] As noted above, the risk to FirstEnergy's viability is likely exaggerated considering its current and projected earnings. More importantly, the public interest is not at all severed by allowing a utility to charge unnecessary and unsupportable rates, even if such rates enhance utility "viability." Therefore, it would not be in the public interest to grant a stay and thus require customers to pay higher electric rates.

III. CONCUSION

FirstEnergy's request for continued RTC charges, especially in the face of the approval of Rider FUEL, should be denied. The Commission was correct in requiring FirstEnergy to discontinue the RTC charges that were set to expire on December 31, 2008. FirstEnergy has not met any, much less all, of the four factors required for the Commission to grant a stay of its Jan. 7 Order. Further, it would be impractical for Commission to stay its Jan. 7 Order and subject customers to RTC charges that they are clearly not required to pay, especially in the face of newly implemented Rider FUEL. For these reasons, the Commission must deny FirstEnergy's Motion to Stay.

[11] FirstEnergy Motion to Stay at pp. 12-13.

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.

ND: 4813-1226-4707, v. 1

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 January 16, 2009.

John W. Bentine

SERVICE LIST

John Jones
William Wright
Christine Pirik
Gregory Price
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

ND: 4818-3568-0771, v. 1