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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 ) Case No. 08- 935-EL-SSO  
Company for Authority to Establish a )  
Standard Service Offer Pursuant to )  
Section 4928.143, Revised Code in the )  
Form of an Electric Security Plan )

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THE KROGER CO.'S RESPONSE TO THE APPLICATION FOR REHEARING  
OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY AND  
REQUEST FOR EXPEDITED RULING

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Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-35(B), The Kroger Co. files this response to The Application for Rehearing of Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively "FirstEnergy") and Request for Expedited Ruling ("Application for Rehearing").

I. INTRODUCTION

FirstEnergy's Application for Rehearing arises from its withdrawal of its application to establish an Electric Security Plan ("ESP") in the above captioned proceeding ("ESP Withdrawal") on December 22, 2008. Upon FirstEnergy's ESP Withdrawal, the Public Utilities Commission of Ohio ("Commission") issued a Finding and Order which required that FirstEnergy continue its current standard service offer

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(“SSO”) and ordered that the regulatory transition charge (“RTC”) which expired on December 31, 2008 on its own terms under OE’s and TE’s SSO, be excluded from OE and TE rate schedules after December 31, 2008 (“Commission Order”).

On January 9, 2009, FirstEnergy submitted its Application for Rehearing arguing that the Commission Order was unreasonable and unlawful. On January 12, 2009, The Kroger Co. submitted a preliminary response to the Application for Rehearing, objecting to the improper procedure by which FirstEnergy requested expedited ruling. On January 13, 2009, the Ohio Consumer and Environmental Advocates (“OCEA”) submitted a response requesting that the Commission deny FirstEnergy’s Application for Rehearing (“OCEA Response”). The Kroger Co. now submits this response also asking the Commission to deny FirstEnergy’s Application for Rehearing.

FirstEnergy argues two main points in its Application for Rehearing; (1) that the Commission unlawfully and unreasonably excluded the RTC Rider in the SSO authorized by the Commission Order in the TE and OE service territory after December 31, 2008, and (2) that the Commission unreasonably and unlawfully did not include a provision to allow FirstEnergy to recover the costs of purchased power after December 31, 2008. In light of the Commission’s recent Finding and Order in PUCO Case No. 09-0021-EL-ATA allowing FirstEnergy to recover the cost of purchased power from December 31, 2008 through March 31, 2009 by the implementation of Rider FUEL, FirstEnergy’s arguments on its second point are moot.

The Kroger Co. disagrees with the Commission’s decision to allow FirstEnergy to recover the costs of purchased power through Rider FUEL; after all purchase power is not fuel. However, The Kroger Co. will not address the issue of recovering power

purchase costs at length, because this issue will be adjudicated in PUCO Case No. 09-0021-EL-ATA. Instead, The Kroger Co. will focus this brief on the Commission's proper exclusion of the RTC charges that expired on December 31, 2008.

The Kroger Co. notes its general support of the arguments made in the OCEA Response. Failure of The Kroger Co. to comment on certain points made in FirstEnergy's Application for Rehearing does not indicate support of those points.

## **II. ARGUMENT**

O.A.C. 4901-1-35(A) requires that "an application for rehearing must set forth the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful." In its Application for Rehearing, FirstEnergy argues that the Commission Order unlawfully and unreasonably (1) violated Ohio Revised Code ("R.C.") 4928.141(A) by excluding RTC charges from its existing SSO, (2) wrongly interpreted R.C. 4928.143(C)(2)(b) to exclude RTC charges, and (3) relied on an incorrect premise that FirstEnergy's RTC charges were expressly terminated as to two FirstEnergy Companies.

For the reasons more fully set forth below, FirstEnergy fails to adequately demonstrate that the Commission's Order was unreasonable or unlawful; therefore FirstEnergy's Application for Rehearing should be denied.

### **A. The Commission Order Did Not Violate R.C. 4928.141(A).**

R.C. 4928.141(A) requires that:

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 under section 4928.142 or 4928.143 of the Revised Code . A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

4928.143(C)(2)(b) requires that :

If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer.

After the Commission's modification and approval of FirstEnergy's ESP, FirstEnergy withdrew its ESP application. Subsequently, in accordance with R.C. 4928.143(C)(2)(b) the Commission ordered that FirstEnergy's current SSO would continue. The Commission also properly excluded previously authorized allowance of transition costs that were set to expire on December 31, 2008.<sup>1</sup>

R.C. 4928.141(A) is simply inapplicable. The Commission Order continuing FirstEnergy's current SSO is specifically permitted under R.C. 4928.143(C)(2)(b). Prior to FirstEnergy's withdrawal of its ESP application, the Commission authorized an ESP under section 4928.143 of the Ohio Revised Code. Once a SSO is "authorized" under R.C. 4928.143, R.C. 4928.141(A) no longer applies. The "rate plan" only continues "until a standard service offer is first authorized." FirstEnergy's ESP was "authorized" on December 19, 2008. The fact that FirstEnergy withdrew its ESP application after it was "authorized" is irrelevant. The RTC Rider was clearly set to expire in the TE and

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<sup>1</sup> The RTC Rider in TE and OE service territory expired under TE and OE's current SSO after December 31, 2008. RCP Stipulation at p. 6 (September 9, 2005).

OE service territory on December 31, 2008; therefore these transition charges are not part of the “provisions, terms and conditions” of FirstEnergy’s most recent SSO.

Furthermore, FirstEnergy’s most recent SSO is set forth in FirstEnergy’s RCP, approved by the Commission in Case No. 05-1125-EL-ATA, et al., and incorporates provisions of the RSP approved in Case No. 03-2144-EL-ATA. The provisions of the RCP specifically provide that the RCP would end on December 31, 2008. Further, the RCP specifically provides that the RCTs for TE and OE will end on December 31, 2008.

The RCTs must be terminated in accordance with the terms and conditions of the RCP. This is especially true since the purpose of the RCP was to adjust the RCT recovery provisions and the RCT date so that FirstEnergy fully recovered all amount previously authorized by the Commission. The authorized amounts have been fully recovered and there is no justifiable basis to allow FirstEnergy to double-recover through the continuation of the RCT charges in the OE and TE service territory into the future.

#### **B. The Commission Properly Applied R.C. 4928.143(C)(2)(B).**

In its Application for Rehearing, FirstEnergy argues that the Commission unlawfully and unreasonably interpreted R.C. 4928.143(C)(2)(B) to exclude RTC charges.<sup>2</sup> FirstEnergy argues that R.C. 4928.143(C)(2)(B) requires the continuation of its current rate plan until an SSO is authorized under R.C. 4928.142 or 4928.143. Further, FirstEnergy argues that “it is undisputed that the Companies' existing rate plan includes a rate component for regulatory transition charges.”<sup>3</sup>

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<sup>2</sup> FirstEnergy Application for Rehearing at p. 7.

<sup>3</sup> Id

FirstEnergy's arguments are wrong for several reasons. It is *not* undisputed that FirstEnergy's rate plan includes transition charges. FirstEnergy's tariffs included RTC charges that were collectible until December 31, 2008. However, at the time FirstEnergy applied for rehearing on January 9, 2009, those RTC charges in the OE and TE service territory had expired by their own terms. Further, it is undisputed that OE and TE, through the RTC permitted through December 31, 2008, fully recovered all amounts upon which these charges were based. As the Commission Order notes, the RTC charges established in PUCO Case No. 05-1125-EL-ATA and 03-2144-EL-ATA expired December 31, 2008 for customers in the OE and TE service territory.<sup>4</sup> "Given that those authorized amounts have been fully recovered, there is no basis for continuing such charges."<sup>5</sup>

Simply because FirstEnergy failed to properly change its tariffs to reflect that RTC charges have expired, does not lead to the conclusion that the existing rate plan contains a rate component including RTCs. Therefore, in accordance with R.C. 4928.143(C)(2)(B), FirstEnergy's rate plan must continue without the RTC charges that expired on December 31, 2008. The Commission did not unlawfully and unreasonably apply R.C. 4928.143(C)(2)(B) to exclude transition charges, and thus no grounds for rehearing are warranted.

### **C. The RTC Charges Were Expressly Set to Terminate on December 31, 2008.**

In its Application for Rehearing, FirstEnergy argues that the Commission unlawfully and unreasonably concluded that the RTC charges were expressly set to

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<sup>4</sup> Commission Order paragraph 16 at p. 8.

<sup>5</sup> *Id.*

terminate on December 31, 2008. FirstEnergy ignores clear and unambiguous language in the Stipulation entered into in PUCO Case No. 05-1125-EL-ATA. The RCP Stipulation specifically states that the RTC recovery period and the RTC rate level “will be adjusted so that full recovery of all amounts authorized by the Commission to be collected through the RTC rate components (RTC and extended RTC) will occur through usage as of December 31, 2008” for OE and TE, and through usage as of December 31, 2010, for CEI.<sup>6</sup>

The plain language of the RCP Stipulation clearly states that RTC charges are set to expire December 31, 2008 for OE and TE. As noted above, it would be unlawful and unreasonable to allow more than “full recovery.” The Commission lawfully and reasonably interpreted the plain language of the RCP Stipulation to conclude that RTC charges expired in the TE and OE service territories and thus FirstEnergy has not demonstrated grounds for rehearing.

**D. The Commission Has Not Unlawfully or Unreasonably Confiscated FirstEnergy’s Property.**

FirstEnergy argues that due to the elimination of RTC charges and the Commission’s failure to include a recovery mechanism for FirstEnergy’s increased “fuel costs” in the Commission Order, FirstEnergy’s rates are set so low that the Commission is illegally taking FirstEnergy’s property under the Fifth Amendment of the Constitution.<sup>7</sup> As noted above, the Commission has allowed FirstEnergy to increase rates to recover the cost of purchased power through Rider FUEL, so this argument moot.

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<sup>6</sup> RCP stipulation at 6 (September 9, 2005).

<sup>7</sup> FirstEnergy Application for Rehearing at 17.

Moreover, FirstEnergy argues that “without approving new rates reflecting the Companies' current costs and investments and without evidence that a rate reduction is necessary, the Commission has set rates so low as to confiscate the Companies' property.”<sup>8</sup> The flaw in this argument is that FirstEnergy has made no showing that its current costs and investments are not already being recovered in the Commission approved rates.

The assertion by FirstEnergy that it is losing \$2,000,000 cash per day is not adequate to show the Commission violated the Constitution by confiscating FirstEnergy's property. FirstEnergy does not explain how it is not recovering its costs. The fact that FirstEnergy may make more money through RTC charges if the Commission allowed FirstEnergy to charge RTCs long after FirstEnergy has “fully recovered” the amounts permitted under the RCP, is not enough to show that the Commission has unlawfully “confiscated” FirstEnergy's property. For these reasons, FirstEnergy has not established that the Commission unlawfully and unreasonable confiscated FirstEnergy's property and thus FirstEnergy's Application for Rehearing should be denied.

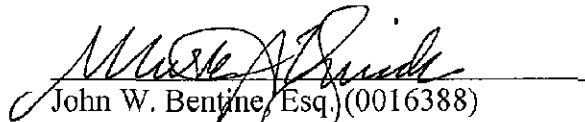
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<sup>8</sup> Id.

### III. CONCLUSION

For the reasons set forth above, FirstEnergy has not shown the Commission Order was unlawful or unreasonable; therefore, the Commission must deny FirstEnergy's Application for Rehearing.

Respectfully submitted,



John W. Bentine, Esq. (0016388)

E-Mail: [jbentine@cwslaw.com](mailto:jbentine@cwslaw.com)

Direct Dial: (614) 334-6121

Mark S. Yurick, Esq. (0039176)

E-mail: [myurick@cwslaw.com](mailto:myurick@cwslaw.com)

Direct Dial: (614) 334-7197

Matthew S. White, Esq. (0082859)

E-mail: [mwhite@cwslaw.com](mailto:mwhite@cwslaw.com)

Direct Dial: (614) 334-6172

Chester, Willcox & Saxbe LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215-4213

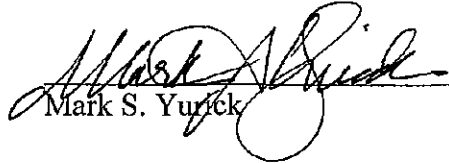
(614) 221-4000 (Main Number)

(614) 221-4012 (Facsimile)

**Attorneys for The Kroger Co.**

## CERTIFICATE OF SERVICE

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 20, 2009.

  
Mark S. Yurick

### SERVICE LIST

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nicholas C. York  
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

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

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

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

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

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

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