

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

Consolidated Duke Energy Ohio, Inc., Rate)	Case Nos. 03-93-EL-ATA
Stabilization Plan Remand and Rider)	03-2079-EL-AAM
Adjustment Cases)	03-2081-EL-AAM
)	03-2080-EL-ATA
)	05-724-EL-UNC
)	05-725-EL-UNC
)	06-1068-EL-UNC
)	06-1069-EL-UNC
)	06-1085-EL-UNC
In the Matter of the Application of)	
Duke Energy Ohio To Modify Its)	Case No. 06-986-EL-UNC
Market-Based Standard Service Offer.)	

**MEMORANDUM CONTRA KROGER'S
MOTION TO LIMIT SCOPE OF DEPOSITION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to Ohio Adm. Code 4901-1-12(B), the Office of the Ohio Consumers' Counsel ("OCC") submits this memorandum contra ("Memo Contra") to Kroger's Motion to Limit Scope of OCC Deposition ("Motion") filed by The Kroger Company ("Kroger") on February 8, 2007.

The OCC files this Memorandum Contra on behalf of the 600,000 residential customers of Duke Energy.

I. FACTS RELATED TO THE NOTICE OF DEPOSITION IN DISPUTE

On December 22, 2006, the OCC issued interrogatories and requests for the production of documents upon Kroger. On or around January 15, 2007, Kroger

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responded to the OCC's discovery requests. On February 5, 2007, the OCC noticed the deposition of persons who could explain the electric service agreements for Kroger in the Cincinnati area. The deposition was originally noticed for February 15, 2007 at the offices of the OCC. By the agreement of counsel, the deposition was rescheduled for February 21, 2007 at the offices of counsel for Kroger. All parties were notified of the rescheduled deposition.

On February 8, 2007, Kroger filed a pleading styled as a Motion to Limit Scope of OCC deposition. In that pleading, Kroger objects to inquiries into electric service agreements from a starting date of January 1, 2000.¹ The Motion fails to state a period that Kroger believes would be proper, but notes that it responded to an earlier discovery request concerning documents dated on or after January 1, 2003.² The Motion is accompanied by a Memorandum in Support, but does not attach a copy of the OCC Notice of Deposition and does not attach an affidavit.

II. ARGUMENT

A. Kroger's Pleading is Procedurally Deficient.

Kroger's Motion, regardless of the name given to the pleading, is a motion for a protective order that does not comply with the requirements for such a pleading. Those rules state that a motion for a protective order is one that seeks "to protect a party or person from annoyance, embarrassment, oppression, or undue expense" and that the Commission may order that "[d]iscovery . . . be had only on specified terms and

¹ Motion at 1 and 4.

² Motion at 4.

conditions.”³ Kroger seeks such protection regarding the time period inquired into by the OCC in a deposition that is scheduled for February 21, 2007.⁴ However, Kroger has not fulfilled the requirements for such a motion:

(B) *No motion for a protective order shall be filed* under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order filed pursuant to paragraph (A) of this rule shall be accompanied by:

* * *

(2) Copies of any specific discovery request which are the subject of the request for a protective order; and

(3) An affidavit of counsel . . . setting forth the efforts which have been made to resolve any differences with the party seeking discovery.⁵

Kroger’s Motion failed to provide the copies and affidavit required pursuant to the Commission’s rules, and it should therefore be ignored or denied.

B. If Kroger’s Deficient Motion for Protective Order is Considered by the Commission, then the Commission Should Deny It Because Kroger Seeks Protection that Contravenes the PUCO’s Rules and Ohio Law.

Even though Kroger did not properly present what is, in effect, a motion for protection, the PUCO should deny Kroger’s request because it fails to meet the PUCO’s requirements for such protection and it contravenes law and rule regarding discovery. Ohio Adm. Code 4901-1-24(A) allows the PUCO to grant protection in certain instances; however, protection is not intended to defeat, as Kroger would have it, proper discovery under Ohio Adm. Code 4901-1-16(B).⁶ That discovery rule provides parties (such as

³ Ohio Adm. Code 4901-1-24(A).

⁴ Motion at 2 and 4.

⁵ Ohio Adm. Code 4901-1-24(B) (emphasis added).

⁶ Protection also cannot be used to defeat the broad scope of discovery under R.C. 4903.221.

OCC) with the right to “obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding.” The Supreme Court of Ohio recently remanded this case, and stated that the Commission “abused its discretion when it denied discovery regarding alleged side agreements.”⁷

It is entirely “relevant,” under Ohio Adm. Code 4901-1-16(B), for the OCC to determine the extent to which certain agreements are connected with or dependent upon earlier agreements. Kroger misleadingly argues that agreements prior to January 1, 2003 “could not possibly impact the reasonableness on an RSP developed by the Commission on November 23, 2004.”⁸ Such agreements could be important, and therefore are properly directed to Kroger as well as being “calculated to lead to the discovery of admissible evidence”⁹ because such agreements could constitute “base” documents that were subsequently modified or amended to set rates and/or terms of service. If such is the case, the OCC’s access to modifications or amendments without the underlying agreement could be meaningless for purposes of understanding and interpretation.¹⁰ The date chosen for discovery in the OCC’s Notice of Deposition was not capriciously chosen, and should not be limited based upon the Motion that contains no detailed analysis of the agreements entered into by Kroger for electric service.

Kroger appears to argue that the limitations previously placed by the OCC in a discovery request directed to Kroger is meaningful for the issue of a proper time period

⁷ *Ohio Consumers’ Counsel v. Public Util. Comm. of Ohio*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶95..

⁸ Motion at 4.

⁹ Ohio Adm. Code 4901-1-16.

¹⁰ The Attorney Examiners have previously dealt with this issue.

for the deposition.¹¹ Discovery is progressive, each inquiry based upon the information at hand -- such as the information gained in a previous round of discovery -- at the time of the inquiry. The timeframe set for these proceedings by the Commission on remand does not permit multiple depositions of the same persons regarding closely related information. Instead of providing the Commission with the details of its agreements for electric service in the Cincinnati area in connection with its Motion, Kroger apparently seeks to “run out the clock” on the OCC’s discovery inquiries. Ohio Adm. Code 4901-1-16(A) is intended to preclude parties from interposing delay by “encourage[ing] the prompt and expeditious use of prehearing discovery....” Kroger seeks delay to deny the OCC the information that the OCC has properly sought, which is contrary to law and rule, prejudicial to the OCC’s case, and should be rejected by the Commission.

The PUCO’s rules are intended to “facilitate thorough and adequate preparation for participation in commission proceedings.”¹² Kroger seeks to foreclose OCC from the discovery of potentially admissible evidence that is needed for such preparation, the very sort of evidence that is one of the bases for the Court’s remand. Kroger wants the PUCO to prejudge that evidence without the PUCO ever seeing it or hearing arguments about it.

The PUCO determines, at hearing, whether or not information should be admitted into evidence based on informed arguments and judgment.”¹³ If there is some basis -- despite the dispositive ruling of the Supreme Court of Ohio -- for Kroger to argue against the admissibility of evidence, then it can do so at hearing. In any event, there is no basis

¹¹ Motion at 3-4.

¹² Ohio Adm. Code 4901-1-16(A).

¹³ Ohio Adm. Code 4901-1-27(B)(7)(b).

for Kroger to argue now against the very discovery that would present the moment at hearing for the PUCO to rule on admissibility.

III. CONCLUSION

The OCC respectfully requests that the Commission deny Kroger's Motion. The Motion is procedurally deficient and is not supported in its Memorandum in Support. The Commission's hearing in these proceedings should permit the OCC the fair chance under law and rule to present its case, a case that can only inform the Commission if the OCC is provided the ample discovery¹⁴ that is provided for in the Ohio Revised Code and PUCO's rules.

Respectfully submitted,

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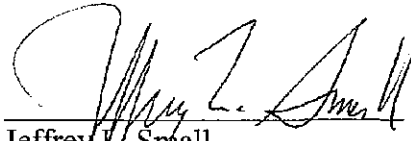
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¹⁴ R.C. 4903.082.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Memorandum Contra Kroger's Motion to Limit Scope of Deposition was served electronically on the persons listed on the electronic service list, provided by the Attorney Examiner (as supplemented), this 15th day of February 2007.


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