

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 09-21-EL-ATA
Illuminating Company and The Toledo)	Case No. 09-22-EL-AEM
Edison Company for Approval of Rider)	Case No. 09-23-EL-AAM
FUEL and Related Accounting Authority)	

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF
THE KROGER CO.**

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I. APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code ("RC") § 4903.10 and Ohio Administrative Code ("OAC") 4901-1-35, The Kroger Co. respectfully submits this Application for Rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio ("Commission") on January 14, 2009 ("January 14 Order"). As explained more fully in the Memorandum in Support below:

- The January 14 Order is unreasonable and unlawful because it allows The Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "FirstEnergy") to recover purchase power costs through Rider FUEL, in violation of the Ohio Revised Code.
- The January 14 Order is unreasonable and unlawful because it fails to properly allocate costs recovered through Rider FUEL among customer classes.
- The January 14 Order is unreasonable and unlawful because it was issued without a proper hearing.

The Kroger Co. also requests that upon granting The Kroger Co.'s Application for Rehearing, The Commission set the matter of FirstEnergy's request for approval of Rider FUEL for hearing and issue a procedural schedule.

II. MEMORANDUM IN SUPPORT

Following the issuance of the Commission Opinion and Order on January 7, 2009 in Case No. 08-935-EL-SSO, FirstEnergy filed its application in this docket requesting approval of Rider FUEL ("Rider FUEL Application"). On January 14, 2009, just five days after FirstEnergy filed the Rider FUEL Application, the Commission issued an Order authorizing FirstEnergy to implement Rider FUEL on a temporary basis until March 31, 2009.

Several parties in this proceeding have already filed applications for rehearing setting forth the grounds in which the January 14 Order is unreasonable and unlawful. While The Kroger Co. does not want to unnecessarily burden the Commission by reiterating many of the well reasoned arguments made by other parties in their applications for rehearing, The Kroger Co. submits that the January 14 Order was unlawful and unreasonable on the following grounds.

A. Purchase Power Costs are Not Fuel Costs.

The Kroger Co. agrees with the Ohio Consumer and Environmental Advocates ("OCEA") that the Commission erred in authorizing FirstEnergy to implement Rider FUEL based on R.C. 4928.143(C)(2)(b) which requires a utility that withdraws its ESP Application to continue its most recent SSO, adjusted for any expected increase or decrease in *fuel costs*. The Commission granted implementation of Rider FUEL as an adjustment based on purchase power costs, *not* fuel

costs. The OCEA is correct that the doctrine of “expressio unius est exclusio alterius” applies in this circumstance.¹ If the General Assembly wished to adjust rates based on purchase power costs under R.C. 4928.143(C)(2)(b), it would have explicitly drafted an adjustment for purchase power costs into the statute. The General Assembly is aware of the distinction between fuel costs and purchase power costs and has made this distinction drafting numerous statutes including R.C. 4928.143(B)(2)(a) and R.C. 4928.142(D) which were enacted out of SB 221. However, it did not make such a distinction when drafting R.C. 4928.143(C)(2)(b).²

B. Load Factor Differentiation Should be Considered in Rates.

While it was unlawful and unreasonable for the Commission to authorize Rider FUEL, the Commission also erred in its implementation of Rider FUEL. The Kroger Co. agrees with Nucor Steel Marion, Inc. (“Nucor”)³ that the Commission acted in an unreasonable and unlawful manner by failing to properly allocate costs recovered through Rider FUEL among customers in the same class and customer classes. By passing wholesale power costs to customers through a near uniform per/kWh charge, Rider FUEL inappropriately fails to account for the cost differences of serving customers with different load factors. Failing to allocate costs recovered through Rider FUEL based on load factor differences violates R.C. 4928.02 which requires “nondiscriminatory and reasonably priced retail electric service,” and also is contrary to the Commission’s well established precedent of aligning charges to customers with the cost of serving those customers. Further, it violates the regulatory principles of gradualism and rate continuity.

¹ OCEA Application for Rehearing at 4-6.

² OCEA Application for Rehearing at 4-6.

³ Nucor Application for Rehearing at 3-6.

C. A Proper Hearing Should Be Held For FirstEnergy's Rider FUEL Application.

Just five days after FirstEnergy filed its Rider FUEL Application, the Commission authorized an approximately 2 ¢ per kWh increase in electric rates in the Toledo Edison and Ohio Edison service territories and a 3 ¢ per kWh increase in the CEI service territory.⁴ These rate increases will cost FirstEnergy customers substantial sums of money. The Commission erred in authorizing these massive rate increases without a proper hearing to allow all interested parties, including the Commission's Staff, to investigate FirstEnergy's auction process.

At the auction held on January 2, 2009 ("Jan. 2 Auction"), FirstEnergy's paid over \$66/ mwh to purchase power to supply its customers electricity for less than a three month period.⁵ A substantial portion of that electricity was purchased from FirstEnergy Solutions Corp. ("FES"), an affiliate of FirstEnergy. The *highest* MISO day-ahead price at the Cinergy Hub was \$52/ mwh⁶ on January 2, 2009. FirstEnergy paid a 27% premium over the *highest* MISO day ahead price at the Jan 2, 2009 auction.

The Commission must hold a proper hearing to examine the Rider FUEL Application. A proper hearing is even more necessary considering the massive sums of money at stake for customers, and the apparent steep premium above market prices that FirstEnergy paid its affiliate to supply electricity for less than three months. While the Jan. 2, 2009 auction may have been entirely proper, a thorough examination must be conducted to determine that a fair auction was held and that FES did not abuse its apparent market power by driving up the auction prices. An

⁴ See Attachments A 1-3 of the Rider FUEL Application.

⁵ See Attachment D, ES-2. of the Rider FUEL Application

⁶ The MISO day-ahead price at the Cinergy Hub reached \$52.26 / mwh at 7:00 PM Eastern time on January 2, 2009, the highest it reached all day. The day-ahead price went as low as \$20.77 /mwh during January 2, 2009. The information was obtained from the January 2, 2009 MISO daily report on day-ahead prices. The MISO daily report can be found at the FERC website at:

<http://www.ferc.gov/market-oversight/mkt-electric/midwest/2009/01-2009-elec-mw-miso-dly-rpt.pdf>

The January 2, 2009 MISO daily report is also attached as Exhibit A to this Application.

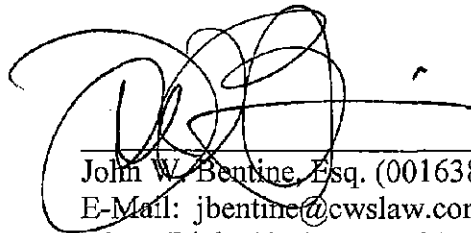
after the fact “prudence review” of FirstEnergy’s energy purchases is not sufficient to determine whether customers are paying unjust, unreasonable and excessive rates for electricity.

Along with the order granting this Application for Rehearing the Commission should issue an order establishing the procedural schedule for a full hearing on FirstEnergy’s Rider Fuel Application.

III. CONCLUSION

For the reasons set forth above, The Kroger Co. respectfully requests the Commission grant The Kroger Co.’s Application for Rehearing. Upon granting its Application for Rehearing, The Kroger Co. requests that the Commission set the matter of FirstEnergy’s request for approval of Rider Fuel for hearing and set a procedural schedule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Bentine", is written over a horizontal line.

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MISO Daily Report

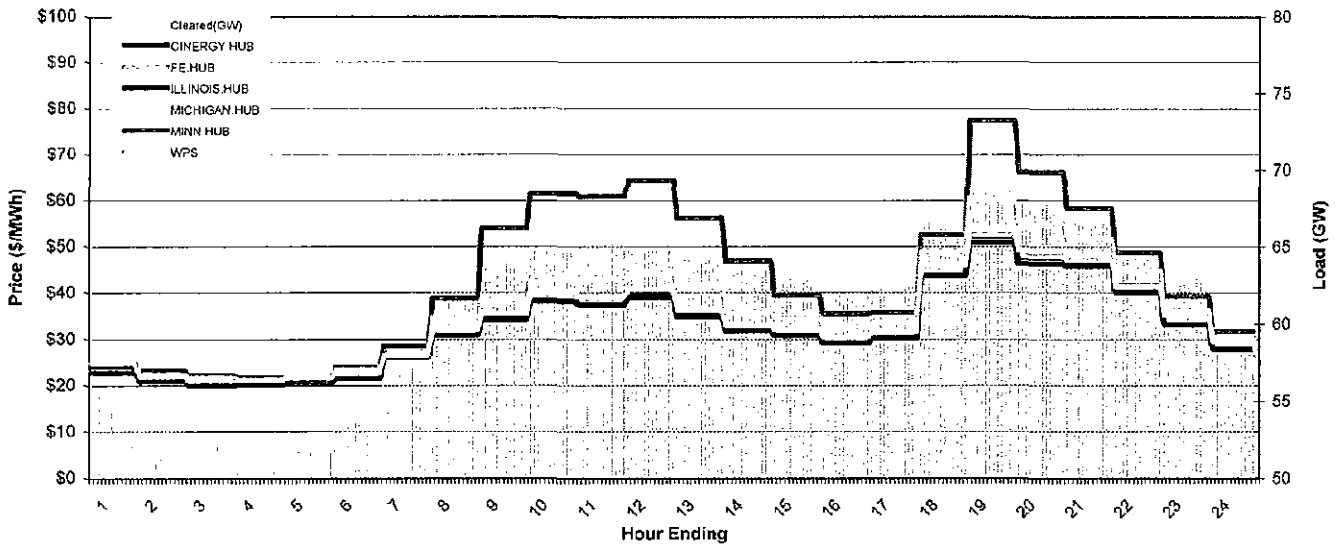
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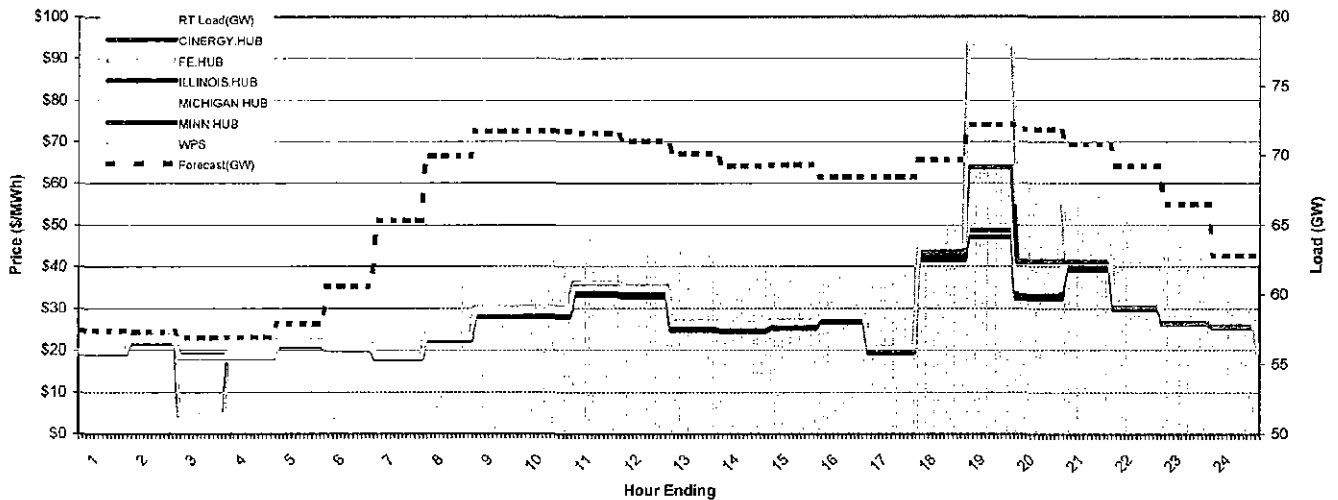
Day-Ahead Prices and Cleared Load

	HE1	HE2	HE3	HE4	HE5	HE6	HE7	HE8	HE9	HE10	HE11	HE12	HE13	HE14	HE15	HE16	HE17	HE18	HE19	HE20	HE21	HE22	HE23	HE24
CINERGY HUB	23.40	21.48	20.68	20.77	21.06	22.14	26.70	31.55	34.88	39.05	38.15	39.99	35.69	32.51	31.25	29.65	30.79	44.50	52.26	47.62	46.80	40.82	34.07	28.64
FE HUB	23.50	21.75	20.97	21.06	21.22	21.66	27.38	32.08	35.51	39.44	38.62	40.70	36.37	33.10	31.71	29.87	30.69	44.78	52.62	47.95	47.14	41.67	34.25	28.78
ILLINOIS HUB	22.80	20.93	20.15	20.25	20.53	21.57	26.23	30.97	34.21	38.19	37.37	39.13	34.94	31.90	30.78	29.12	30.24	43.73	50.87	46.36	45.77	40.08	33.18	27.90
MICHIGAN HUB	24.18	22.00	21.12	21.20	21.67	22.75	29.84	32.14	35.55	40.19	39.33	40.79	36.41	33.12	32.16	30.58	31.75	45.91	54.06	49.24	48.23	41.39	35.20	29.62
MINN HUB	24.12	23.39	22.20	21.79	20.65	23.95	28.64	38.91	53.98	61.61	60.99	64.45	56.19	46.90	39.47	35.59	35.79	52.60	77.50	66.24	58.35	48.71	39.31	31.72
WPS	24.92	22.38	21.65	21.28	21.74	23.47	26.64	34.73	38.61	43.34	43.42	44.38	41.25	35.94	34.54	32.64	33.87	48.96	60.51	55.00	51.68	44.92	36.34	30.54
Cleared(GW)	55.4	53.4	52.2	51.9	52.1	53.6	57.1	62.1	64.0	64.7	65.2	64.6	64.2	63.5	62.9	62.0	62.4	66.7	68.6	67.8	68.5	64.9	63.0	59.2



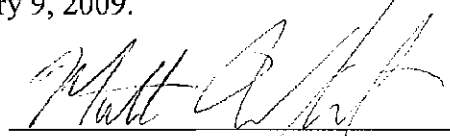
Preliminary Real-Time Prices with Forecasted and Actual System Load

	HE1	HE2	HE3	HE4	HE5	HE6	HE7	HE8	HE9	HE10	HE11	HE12	HE13	HE14	HE15	HE16	HE17	HE18	HE19	HE20	HE21	HE22	HE23	HE24
CINERGY HUB	19.77	22.66	18.94	18.91	21.77	20.88	18.50	22.93	28.57	28.45	33.73	33.27	25.14	24.97	26.71	27.18	19.82	42.13	48.70	33.84	39.69	30.06	26.55	26.17
FE HUB	20.13	23.84	4.49	19.68	22.35	21.33	18.80	23.65	30.17	30.44	36.22	35.19	26.80	26.38	26.98	27.83	20.60	44.20	49.93	34.28	40.93	30.98	27.22	26.76
ILLINOIS HUB	19.11	21.93	18.34	18.29	21.05	20.18	17.84	22.27	27.95	27.96	33.18	32.72	24.78	24.56	25.26	26.65	19.48	41.61	47.08	32.47	39.29	29.67	26.23	25.60
MICHIGAN HUB	20.18	23.22	17.73	19.29	22.09	21.19	18.81	23.40	29.24	29.35	35.04	34.50	26.17	25.92	26.58	27.95	20.49	43.77	50.99	34.89	41.01	31.10	27.48	26.98
MINN HUB	19.11	21.51	18.18	18.23	20.94	20.20	17.83	22.25	28.61	29.47	35.06	34.34	26.24	26.02	26.59	27.58	20.07	43.35	63.67	41.17	41.47	30.58	26.40	25.77
WPS	19.68	22.37	18.53	18.60	21.38	20.56	18.35	23.07	29.17	29.37	34.93	34.49	26.27	26.09	26.75	28.13	20.08	45.07	53.58	55.53	42.35	31.63	27.89	27.00
Forecasted(GW)	57.4	57.4	56.9	57.0	57.9	60.5	65.3	70.0	71.8	71.8	71.6	71.0	70.2	69.3	69.4	68.5	68.5	69.7	72.2	71.9	70.8	69.2	68.5	62.8
(RT) - (DA Load)	-0.45	-0.49	-0.51	-0.56	-0.45	-0.68	-1.19	-2.58	-1.82	-1.48	-0.85	-0.38	-0.46	-0.70	-1.03	-0.71	-1.11	-2.12	0.38	0.79	1.04	1.08	0.81	1.60



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 U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission on February 9, 2009.



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