BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Recovery of Program Costs, Lost Distribution Revenue and Performance Incentives Related to its Energy Efficiency and Demand Response Programs.	))))))	Case Nos. 14-457-EL-RDR 15-534-EL-RDR

INITIAL BRIEF OF THE KROGER COMPANY

Danielle M. Ghiloni (0085245)
Carpenter, Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
Fax: 614.365.9145
ghiloni@carpenterlipps.com

Counsel for The Kroger Company

I. Introduction

The proposed settlement entered into between Duke Energy Ohio, Inc. (Duke) and staff of the Public Utilities Commission of Ohio (PUCO) (Staff) fails to satisfy the criteria established by the PUCO when evaluating the reasonableness of a settlement. Duke's attempt to use energy efficiency savings achieved during prior years (e.g., banked savings) to maximize the incentives earned through its shared savings mechanism, without independently meeting the applicable annual benchmark through annual savings, undermines the purpose of shared savings mechanisms to motivate and reward electric distribution utilities for exceeding energy efficiency standards.[1] Further, specific provisions contained in the settlement agreement include a number of exceptions and loopholes, resulting in a settlement package that saddles customers with significant payments and provides Duke with an unreasonable windfall. Moreover, the settlement contains several provisions that are inconsistent with PUCO precedent and represent a clear disregard for important regulatory principles and common PUCO practices regarding audits of regulated utilities' costs, which provide protection to customers from imprudently incurred regulated utility expenses.

For the reasons discussed herein, Kroger respectfully requests that the PUCO reject the proposed settlement given it was not the product of serious bargaining, is not in the public interest, violates several important regulatory principles and practices, and violates PUCO orders. As a whole, the settlement does not satisfy the PUCO's established criteria for evaluating settlements and is unreasonable. It should be rejected.

[1] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs,* Case No. 14-457-EL-RDR, Finding and Order at 5. (May 20, 2015) (2013 Rider Order).

II. Background

On March 28, 2014, as revised April 17, 2014, Duke filed an application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs (2013 Rider Case).[2] After consideration of comments and reply comments filed by intervening parties, the PUCO approved Duke's application for recovery with the modification that Duke is prohibited from using its banked savings to claim a shared savings incentive.[3] Both Duke and Ohio Partners for Affordable Energy (OPAE) subsequently filed motions for rehearing, which were granted by the PUCO on July 8, 2015 to further consider the matters specified in the rehearing requests. Prior to a decision regarding the 2013 Application, Duke filed another application for recovery of program costs, lost distribution revenue and performance incentives related to its energy efficiency and demand response programs for 2014 (2014 Rider Case) on March 30, 2015.[4] That case is currently pending before the PUCO.

On January 6, 2016, Duke and Staff filed a stipulation to address the issues raised in the 2013 Rider Case and the shared savings mechanism in the 2014 Rider Case (Stipulation).[5] Pursuant to an Attorney Examiner entry dated February 2, 2016, an evidentiary hearing commenced on March 10, 2016 and concluded March 15, 2016. Kroger actively participated in this evidentiary hearing regarding the Stipulation as an intervening party.

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[2] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs,* Case No. 14-457-EL-RDR, Application (March 28, 2014).

[3] 2013 Rider Order at 5.

[4] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs,* Case No. 15-534-EL-RDR, Application (March 30, 2015).

[5] Joint Ex. 1 at 2 (Stipulation) (hereinafter, Stipulation).

III. Standard of Review

Rule 4901-1-30, Ohio Administrative Code (O.A.C.), permits parties to enter into stipulations for review by the PUCO. In numerous cases, the PUCO has adopted the following criteria to evaluate whether a stipulation is reasonable and warrants acceptance:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?[6]

As explained in detail below, the settlement proposed in this proceeding does not "embod[y] considerable time and effort by the signatory parties,"[7] is unreasonable, fails each part of the PUCO-established test, and should be rejected.

IV. Argument

A. The Stipulation is not the product of serious bargaining among capable, knowledgeable parties.

1. The Stipulation Intentionally Excluded From Negotiations Entire Classes of Customers In Violation of PUCO Precedent and the *Time Warner* Footnote.[8]

The Stipulation falls far short of meeting the first criterion of the settlement analysis, which requires serious bargaining among the parties. Duke did not include intervening parties in the settlement discussions or negotiations regarding the terms of the Stipulation.[9] Additionally,

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[6] See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 39 (March 31, 2016).

[7] Id.

[8] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 53 (March 31, 2016) (citing *Time Warner Axs v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n.2).

[9] Id. at 52.

the evidence does not support Duke's attempts to characterize the Stipulation as a product of "lengthy" negotiations.[10] First, the signatory parties to the Stipulation (e.g., Duke and Staff) were involved in a total of only four meetings, with the first meeting occurring October 20, 2015 and the last meeting occurring December 30, 2015. Not only were intervening parties not invited to participate in these meetings,[11] but intervening parties were not informed that two of the four meetings *even occurred* until late in the discovery process when discovery responses were supplemented following the deposition of Duke's witness on March 1, 2016.[12] There was no transparency of the settlement process; therefore, no serious bargaining could have occurred among the parties. Intervening parties were excluded from participating in the settlement negotiations and were provided incomplete information regarding how the terms of the Stipulation came to fruition.

On December 30, 2015, Staff and Duke circulated a copy of the negotiated agreement to intervening parties, requesting that the intervenors inform them by noon on January 6, 2016 as to "whether your client has an interest in being a signatory party."[13] This provided intervening parties only three business days to review and provide their support for the settlement by becoming a signatory party.[14] The intervening parties were not asked to participate in negotiating the terms of the Stipulation or provide feedback regarding the already negotiated terms prior to its circulation and filing with the PUCO.[15] In fact, the Stipulation was not modified from the time it was distributed to the intervening parties on December 30, 2015 to the

[10] Stipulation at 2.

[11] OMA Ex. 15; Tr. Vol I at 104 and 267 and 296.

[12] OMA Ex. 14.

[13] OMA Ex. 21.

[14] Tr. Vol. I at 119.

[15] Id. at 62 and 314.

time it was filed with the PUCO on January 6, 2016.[16] The only meeting in which the intervening parties were invited to participate in discussions related to the Stipulation occurred 21 days after the Stipulation was executed and filed. As explained at the hearing, at that one meeting, intervening parties were informed that the provision providing Duke with $19.75 million in shared savings for 2013 and 2014 would be "hard to move off," thereby removing complete discussion among all intervening parties of a substantive provision of the Stipulation that would cost customers $19.75 million.[17]

Duke witness Duff testified that he was only involved in two discussions between Duke and Staff on December 29 and 30, 2015 via telephone,[18] was not involved directly in finalizing the settlement document,[19] and was not aware of any intervenor's involvement in the settlement negotiations prior to the agreement being reached between Duke and Staff.[20] Duke witness Duff testified that by the time he participated in the settlement meetings between Staff and Duke, the $19.75 million provision for the 2013 and 2014 shared savings incentive "had already been determined."[21]

As previously discussed, no intervening parties were involved in drafting the Stipulation,[22] negotiating the terms of the Stipulation,[23] or participating in settlement

[16] Id. at 116-117.

[17] Specifically, Staff witness Donlon testified that intervening parties were told it "would be hard to move off that number" given there existed a signed stipulation between Staff and Duke. Tr. Vol. I at 309-310.

[18] Tr. Vol. I at 102 and 117-118.

[19] Id. at 117-118.

[20] Id. at 62.

[21] Id. at 22

[22] Id. at 62.

[23] Id.

discussions.[24] Based on the evidence presented, Duke has failed to show that the Stipulation is the product of serious bargaining among parties as set forth in the first criterion of the settlement test.

2. The Stipulation does not represent a wide variety of interests among the parties.

In addition to the lack of serious bargaining, the Stipulation also does not represent a wide variety of interests among the parties.[25] The signatory parties to the Stipulation include Duke and Staff. Neither customer representatives nor their interests are represented in the Stipulation. Thus, Duke's reference to the "comprehensive compromise of issues" that are purported to exist in the Stipulation,[26] is a reference to a compromise of the issues that might have existed between the Company and Staff.[27] It does not include a compromise of all issues raised by the intervening parties.[28] Staff witness Donlon admitted in his testimony that all intervening parties in the case that purport to represent commercial and industrial customers oppose the proposed Stipulation.[29] Further, none of the intervening parties support the Stipulation, which includes representatives from each customer class.[30] The Supreme Court of Ohio has previously commented on stipulations that exclude an entire customer class stating:

> We feel compelled to note our grave concern regarding the partial stipulation adopted in the case at bar. The partial stipulation arose from settlement talks from which an entire customer class was intentionally

[24] Id. at 104

[25] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 52 (March 31, 2016).

[26] Stipulation at 3.

[27] Tr. Vol. I at 156-157.

[28] Id. at 136-137.

[29] Id. at 251.

[30] See e.g., OCC Ex. 3 at 10 (Gonzalez Direct); See also, Motion to Intervene by the Office of the Ohio Consumers' Counsel and Memorandum in Support in PUCO Case No. 14-457-EL-RDR (April 30, 2014).

> excluded. This was contrary to the commission's negotiations standard in *In re Application of Ohio Edison to Change Filed Schedules for Electric Service,* case No. 87–689–EL–AIR (Jan. 26, 1988), at 7, and the partial settlement standard endorsed in *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 125–126, 592 N.E.2d 1370, 1373.[31]

As presented, the Stipulation cannot be deemed a product of serious bargaining and falls far short of representing a wide variety of interests, notably excluding all customer classes. Therefore, it fails to meet the first prong of the three-part test.

B. The Stipulation does not benefit ratepayers and is not in the public interest.

The Stipulation fails to satisfy the second prong of the three-part settlement test as it does not benefit ratepayers and is not in the public interest. It provides benefits to Duke with no corresponding benefits to customers. In an attempt to provide some value to customers, Duke inflates the risk of litigation and the amounts it purports to obtain if successful in those various facets of that litigation.[32] Duke also minimizes the regulatory out classes embedded in the Stipulation that render any purported value or benefit of the Stipulation meaningless.[33]

According to the Stipulation, if Duke is successful in reversing the PUCO's decision on rehearing, Duke could be entitled to a shared savings incentive of as much as $55 million in pre-tax dollars for calendar years 2013, 2014, 2015, and 2016 combined.[34] However, in the PUCO's 2013 Rider Order, which prohibited the use of banked savings to claim a shared savings incentive, the PUCO held that Duke could not collect shared savings for 2013.[35] Similarly, per that 2013 Rider Order, Duke cannot collect shared savings for 2014 because Duke failed to meet

[31] See *Time Warner Axs v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n. 2.

[32] Duke Ex. 1 at 6 (Duff Direct).

[33] Stipulation at 6-7.

[34] Id. at 6.

[35] 2013 Rider Order at 5.

the annual statutory benchmarks for energy efficiency absent the use of banked savings during that year.[36] Thus, pursuant to PUCO precedent, the actual cost to customers during 2013 and 2014 is zero. Further, Duke attributed $15 million of the purported $55 million in potential costs to customers to the year 2016, even though the shared savings mechanism expired at the end of 2015.[37] Therefore, the $55 million in estimated costs does not accurately reflect the actual potential costs to customers absent the Stipulation.

Further, the additional purported benefits of the Stipulation and claimed concessions made by Duke are illusory. The provisions in the Stipulation include language that contains a "number of holes,"[38] and results in little risk for Duke to the detriment of customers.

Provision 3(a) of the Stipulation permits Duke to recover a total of $19.75 million in shared savings for calendar years 2013 and 2014 and forego recovery of shared savings in calendar years 2015 and 2016.[39] Although Duke agrees to forego recovering a shared savings incentive in 2016, this term is not a concession as the shared savings incentive mechanism expired at the end of 2015.[40]

Additionally, provision 3(a) states that beginning in calendar year 2017, Duke will not file for recovery of a shared savings mechanism in any year after 2014 in which banked savings have been used to meet the annual benchmark standards.[41] However, this provision includes an exception, which permits Duke to seek a shared savings incentive consistent with any change in

[36] Tr. Vol. I at 141.

[37] Id. at 60-61.

[38] Tr. Vol. II at 343.

[39] Id.

[40] Id. at 60-61.

[41] Stipulation at 6-7.

law, regulation, or order regarding shared savings.[42] Thus, if a PUCO order in another case is issued changing a regulation or modifying a PUCO order, including the instant case, Duke's pending shared savings recovery case (Case No. 15-534-EL-RDR) and Duke's shared savings extension case (Case No. 14-1580-EL-RDR), Duke could still file for recovery of a shared savings incentive or establishment of a shared savings incentive for 2015 and 2016.[43] This exception effectively nullifies any concession Duke claims to have made related to forgoing receipt of a shared savings incentive in the future.

The purported benefits of provision 3(b) of the Stipulation are also illusory given that the signatory parties agreed to accept the rider rates set forth in Duke's application for 2013 costs without the benefit of an audit and true-up. Although Duke witness Duff testified that the 2013 audit is "still open" and Duke has not yet received findings from Staff regarding the audit,[44] Staff witness Donlon testified that the 2013 audit has been completed and Staff is accepting Duke's as-filed 2013 cost recovery rates, regardless of whether the application included errors in the costs or expenses associated with the filing.[45] It appears from the testimony that the terms of the Stipulation relieve Duke of an audit and the disallowance of costs through the rider rate typically associated with accounting errors or the inadvertent inclusion of expenses associated with non-energy efficiency program expenses, non-jurisdictional activities, or non-jurisdictional affiliates. This is clearly not in the interest of ratepayers who will be forced to pay for any unreasonable or imprudent expenses incurred by Duke.

[42] Id. at 7.

[43] Tr. Vol. II at 367-368.

[44] Tr. Vol. I at 81-82.

[45] Donlon Direct at 284-286.

Provision 3(c) of the Stipulation is also not a concession by Duke given that the Company's energy efficiency programs are already subject to the PUCO's Evaluation, Measurement and Verification process.[46] The inclusion of this term provides nothing additional to customers besides what is already required in Rule 4901:1-39-05, Ohio Administrative Code (O.A.C.).

Duke and Staff assert that the Stipulation provides an additional benefit to customers by providing finality on the issue of banked savings and thereby reducing the risk of protracted litigation and appeals on the issue of calculating shared savings for energy efficiency and demand response programs in the future.[47] However, regardless of whether a case is resolved through a Stipulation or by a PUCO order, there is always a risk of additional litigation either through litigating the Stipulation or through the appeals process.[48] Further, the Stipulation includes a regulatory out clause that could permit Duke to file for a shared savings mechanism consistent with a new law, regulation or order, providing no real finality to the issue of using banked savings to calculate shared savings.[49] This does not reduce the risk of litigation.

C. The Stipulation violates several important regulatory principles.

1. The Stipulation is contrary to PUCO negotiation standards, violates prior PUCO orders, and is inconsistent with pending PUCO proceedings.

The final prong regarding the reasonableness of a proposed settlement involves an analysis of whether the proposed Stipulation violates any important regulatory principles or practices. Not only does the Stipulation fail to satisfy PUCO negotiation standards, as discussed previously, the Stipulation is also contrary to prior PUCO orders.

[46] Tr. Vol. I at 133.

[47] Duff Direct at 4; Staff Ex. 1 at 5 (Donlon Direct).

[48] Tr. Vol. I at 166-168.

[49] Stipulation at 6-7.

As previously noted, the Supreme Court of Ohio has determined that intentional exclusion of an entire settlement class from settlement negotiations is of grave concern and not in alignment with the partial settlement standard endorsed by the Court in previous cases.[50] Here, none of the intervening parties support the Stipulation. Moreover, none of the intervening parties were invited to participate in settlement discussion and therefore were intentionally excluded from such discussions.[51] This clearly violates an important regulatory principle established by the PUCO and the Supreme Court of Ohio regarding negotiations.

The Stipulation also violates the previous PUCO order issued in Duke's 2013 Rider Case. In that case, Duke filed an application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs.[52] Specifically, Duke claimed entitlement to a shared savings incentive based on the use of banked savings from prior years. The PUCO stated:

> As to Duke's use of banked savings, the PUCO agrees with OMA and finds the Company may only use the banked savings to reach its mandated benchmark. Therefore, the PUCO finds Duke's use of banked savings to claim an incentive is improper.[53]

Duke is required to follow a PUCO order until it is modified or overruled by the Supreme Court.[54] Therefore, the Stipulation provision that provides Duke with $19.75 million for its shared savings incentive mechanism for 2013 and 2014[55] is inconsistent with PUCO precedent.[56]

[50] See *Time Warner Axs v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n.2.

[51] OMA Ex. 15; Tr. Vol I at 104 and 267 and 296.

[52] 2013 Rider Order at 2.

[53] Id. at 5.

[54] Tr. Vol. I at 65 and 264.

[55] Stipulation at 6.

[56] Tr. Vol. I at 132 and 141.

Further, Duke's attempt to argue that it is entitled to use banked savings to claim a shared savings incentive based on the stipulation in PUCO Case No. 11-4393-EL-RDR is flawed.[57] As stated by OPAE witness Rinebolt, "I don't think there's any vagueness in those stipulations. I think that you have – that Duke has, for whatever reason, decided to reinterpret those stipulations in manners inconsistent with the intent of parties."[58]

In addition to violating the PUCO's 2013 Rider Order, the Stipulation is also inconsistent with pending proceedings, including Case No. 14-1580, Duke's 2016 shared savings extension request. In that case, which is currently pending before the PUCO, Duke requested approval to continue its cost recovery mechanism for energy efficiency programs through 2016.[59] However, provision (3)(a) of the Stipulation states that Duke will forego and not recover a shared savings incentive for the calendar years 2015 and 2016.[60] Even though Case No. 14-1580 was not included in the Stipulation, the Stipulation addresses whether Duke will collect shared savings through a shared savings incentive mechanism for 2016, which is the subject of that proceeding.[61] Thus, the Stipulation is clearly inconsistent with a pending request before the PUCO, and Duke could use any decision in the pending case regarding 2016 to invoke the regulatory out clause contained in the Stipulation.

Thus, the Stipulation violates several regulatory principles, including prior PUCO orders, and is inconsistent with pending PUCO proceedings.

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[57] Id. at 26.

[58] Tr. Vol. II at 346.

[59] OMA Ex. 5 at 1 (Attorney Examiner Entry in Case No. 14-1580-EL-RDR).

[60] Stipulation at 6.

[61] OMA Ex. 7 (Duke Response to OCC-INT-02-001).

2. The terms of the Stipulation are not in alignment with PUCO regulatory practices.

As stated by Ohio Energy Group (OEG) witness Baron, "Incentive payments are not an entitlement for the Company."[62] Shared savings incentive mechanisms were designed to align a utility company's interests with its customers regarding energy efficiency and demand response programs, which produce cost-savings benefits for ratepayers by reducing costs associated with generation, transmission and distribution.[63] Shared savings payments encourage and reward utility companies for running effective energy efficiency programs that produce savings.[64]

The PUCO agreed that the purpose of the shared savings incentive structure is to motivate utility companies to exceed energy efficiency standards on an annual basis even in light of rising mandated benchmarks.[65]

Without the use of banked savings, Duke failed to meet its mandated energy efficiency benchmarks in 2013 and 2014.[66] Duke incorrectly relied on prior banked savings from 2009, that were relatively easy to obtain, and converted those into shared savings dollars that would have been harder to obtain on an actual dollar basis in 2013 and 2014 in order to both achieve its annual benchmarks and claim a shared savings incentive.[67] Allowing Duke to claim and earn shared savings incentive payments when it did not even meet the minimum annual statutory benchmarks only requires customers to reward Duke with $19.75 million.[68] Permitting the use of banked savings to achieve a shared savings incentive fails to incent the Company to engage in

[62] OEG Ex. 2 at 8 (Baron Direct).

[63] OMA Ex. 1 at 2 (Seryak Direct).

[64] Id.

[65] 2013 Rider Order at 5.

[66] Tr. Vol. I at 141.

[67] Id. at 230-231.

[68] OPAE Ex. 3 at 11 (Rinebolt Direct)

long-term energy savings programs and does not meet the intent of the sharing savings mechanism to align the utility's interests with customers' interests in energy efficiency and reduced costs.[69]

As previously discussed, the Stipulation states that Staff will accept Duke's as-filed application and 2013 cost recovery.[70] Staff witness Donlon explained that the acceptance of Duke's application was subject to any modifications included in the Stipulation, but was not subject to the results of the 2013 audit of Duke's costs performed by Staff.[71] Staff audits of the regulated utilities' rider rates and annual or quarterly true-ups of those costs is a common regulatory practice before the PUCO. If the Staff finds an expense or cost that was incorrectly recorded or imprudently incurred and included in the rider rate, Staff would recommend a disallowance of the cost. Thus, the audit process serves as a protection for customers from paying for imprudent expenses incurred by the regulated utility company or accounting errors.

In this case, Staff completed the 2013 audit, but did not file an audit report noting its findings and recommendations. Instead, Staff has agreed to accept Duke's as-filed 2013 cost recovery, including any errors or incorrect inclusion of costs in the rider rate.[72] This Stipulation provision clearly deviates from the PUCO's practice and eliminates necessary protections afforded to customers to prevent unreasonable and imprudent costs from being passed through to customers.

V. Conclusion

The proposed Stipulation submitted by Duke and Staff is unjust, unreasonable, and not in the public interest. It also fails to satisfy all three criteria of the PUCO's analysis for approving

[69] Seryak Direct at 4-5.

[70] Stipulation at 7.

[71] Tr. Vol. I at 283.

[72] Id. at 285-286.

settlements as it is not the product of serious bargaining among the parties, will create significant costs for customers instead of benefits, is not in the public interest, violates numerous regulatory principles and practices, and violates PUCO precedent. Kroger respectfully requests that the PUCO reject the Stipulation as proposed.

Respectfully submitted,

/s/ Danielle M. Ghiloni
Danielle M. Ghiloni (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Ghiloni@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Company

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on April 28, 2016.

/s/ Danielle M. Ghiloni
Danielle M. Ghiloni

Natalia.messenger@puc.state.oh.us
John.jones@puc.state.oh.us
bojko@carpenterlipps.com
cmooney@ohiopartners.org
jvickers@elpc.org
Amy.Spiller@duke-energy.com
Elizabeth.Watts@duke-energy.com
dboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
mfleisher@elpc.org
callwein@keglerbrown.com
cmooney@ohiopartners.org
Terry.etter@occ.ohio.gov
kyle.kern@occ.ohio.gov

Summary: Brief Initial Brief of The Kroger Company electronically filed by Ms. Cheryl A Smith on behalf of The Kroger Co.