BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan	))))))	Case No. 16-481-EL-UNC
In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan	))))))	Case No. 17-2436-EL-UNC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017	))))))	Case No. 18-1604-EL-UNC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change	)))))	Case No. 18-1656-EL-ATA

INITIAL POST-HEARING BRIEF OF THE KROGER CO.

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I. INTRODUCTION.

Since instituting a commission-ordered investigation (COI) on January 10, 2018,[1] the Public Utilities Commission of Ohio (Commission) has made it abundantly clear that the savings resulting from the Tax Cuts And Jobs Act of 2017 (TCJA) must be returned, in full, to customers.[2] To effectuate the return of the tax savings to customers, the Commission ordered all rate-regulated utilities that had not already done so to file an application "'not for an increase in rates,' pursuant to R.C. 4909.18, in a newly initiated proceeding, *to pass along to consumers the tax savings resulting from the TCJA*."[3] In so ordering, the Commission directed utilities to follow the example of Ohio Power Company (AEP Ohio) in filing an application to address the impacts of the TCJA.[4]

While the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (herein referred to collectively as the Companies) filed an application to pass tax savings on to customers on October 30, 2018, the Companies did *not* follow the example of AEP Ohio.[5] Instead, the Companies sought to hold hostage the TCJA tax savings in hopes of having the above-captioned cases resolved quickly together to obtain additional benefits for the Companies that would offset some of the tax savings to be returned to customers. Specifically, the Companies attempted to obtain a quick resolution to the four

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1 *See In The Matter Of The Commission's Investigation of the Financial Impact of the Tax Cuts And Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-0047-AU-COI (Commission Tax Investigation), Entry (January 10, 2018).

2 Commission Tax Investigation, Finding and Order at ¶ 27 (October 24, 2018) ("As an initial matter, we once again find it necessary to note that we intend all benefits resulting from the TCJA will be returned to customers.").

3 *Id*. at ¶ 29 (emphasis added).

4 *Id*. at ¶ 30 ("These [AEP Ohio] proceedings aptly demonstrate the Commission's intent for all tax savings to be returned to customers and address specific concerns raised by interested stakeholders in this COI . . .").

5 *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017*, Case No. 18-1604-EL-UNC, Application (October 30, 2018) (Tax Application).

separate cases listed in the above caption. As is evident above, those cases began in three different years and involve completely unrelated subjects. Indeed, the Companies have admitted that the *only* connection between these cases is that they "*are part of the same Stipulation resolving each of the proceedings*."[6] Notwithstanding the foregoing, the Companies moved to consolidate them into a single proceeding on November 13, 2018.[7] Then, only two days later, without affording parties an opportunity to respond and without good cause, the Commission unjustly and unreasonably granted the Motion to Consolidate.[8]

Immediately after filing their Tax Application, on November 1, 2018, the Companies and Staff held the first settlement meeting with interested intervenors in the tax and grid modernization cases, at which time the Companies and Staff presented their joint proposal for a global resolution of those unrelated and then unconsolidated cases.[9] Then, a mere six business days later, on November 9, 2018, without affording the parties a meaningful opportunity for "serious bargaining" or even a chance to evaluate and analyze the complex issues involved in the settlement, the Companies filed a Stipulation.[10] After agreeing to amend the rate design for the tax savings credits to the detriment of the commercial customer classes by transferring tax savings properly allocated to those classes to the residential class in an effort to get certain

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6 *See* ELPC Ex. 5 (Companies' Response to ELPC Set 3-INT-001) (asking the Companies to "identify any substantive connection between FirstEnergy's Grid Mod I proposal and FirstEnergy's refund of tax savings under the Tax Cuts and Jobs Act of 2017").

7 Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion to Consolidate (November 13, 2018) (Motion to Consolidate).

8 *See* Entry (November 15, 2018); *see also* Ohio Adm. Code 4901-1-12.

9 Companies Ex. 2, Fanelli Direct Testimony at 7.

10 *See* Companies Ex. 1, Stipulation and Recommendation (November 9, 2018) (Stipulation).

parties on the settlement,[11] the Companies filed a Supplemental Stipulation on January 25, 2019.[12]

In sum, the rushed and flawed process that resulted in the Stipulation and Supplemental Stipulation (collectively, the Stipulations) pending before the Commission has unjust, and unreasonable consequences for Ohio ratepayers. For example, the Stipulations result in: (i) unjust and unreasonable charges to customers, including, but not limited to, requiring customers to pay nearly $1 billion[13] for what appears to be duplicative grid modernization efforts under Rider AMI and the Distribution Modernization Rider (Rider DMR) established in the Companies' most recent electric security plan case;[14] and (ii) a rate design that does not fairly distribute the tax savings under the TCJA amongst the classes. Additionally, the refund language proposed in the Supplemental Stipulation should be modified to provide adequate and full protections to customers. Therefore, the Stipulations should not be approved as submitted or, at a minimum, should be modified to ensure Ohio customers are protected, are only charged just and reasonable rates, including a credit or offset for any Rider DMR dollars collected from customers to support grid modernization, and that the rate design implemented by the

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[11] The parties who signed onto the Supplemental Stipulation are: The Office of the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), and The Northeast Ohio Public Energy Council (NOPEC). Significantly, these new parties to the settlement expressly stated that they are Signatory Parties "to all terms and conditions of the Stipulation *except* the terms and conditions of Sections V.B through V.I. related to grid modernization." *See* Supplemental Stipulation at 10 (emphasis added). In other words, those parties do not support the Grid Mod I provisions.

[12] *See* Companies Ex. 3, Supplemental Stipulation and Recommendation (January 25, 2019) (Supplemental Stipulation).

[13] This approximation was calculated as follows: The Rider DMR funds for 2017-2019 ($132,500,000 x 3) + Grid Mod I amount ($516,000,000).

[14] *See 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 (ESP IV Case), Fifth Entry on Rehearing (October 12, 2016).

Stipulations does not unjustly and unreasonably allocate the tax savings to the detriment of one group of customer classes for the benefit of other customer classes.

In accordance with the Attorney Examiners' directive at the conclusion of the evidentiary hearing,[15] The Kroger Co. (Kroger) hereby submits its initial post-hearing brief urging the Commission not to approve the Stipulations, or at a minimum, modify the Stipulations as set forth herein.

[15] Tr. Vol. II at 321.

II. PROCEDURAL HISTORY.

By enacting the TCJA on December 20, 2017, the United States Congress made the most significant modifications to the federal tax system since the Tax Reform Act of 1986. The intent and purpose of the TCJA, which became effective on January 1, 2018, was to revitalize the country's economy by putting more money in the hands of companies doing business in America. To do so, the TCJA lowered the federal corporate income tax rate from 35% to 21%, resulting in tax relief to American companies that could then translate into benefits and savings to American consumers.[16]

Further, as a matter of well-established Ohio law, the regulated utilities are required to collect only rates from customers that are just and reasonable and not more than the charges allowed by law.[17] Specifically, R.C. 4905.22 states:

> [a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission."[18]

To ensure that rates charged to Ohio customers are just and reasonable in light of the utilities reduced tax liabilities, on January 10, 2018, the Commission initiated the COI proceeding.[19] In doing so, the Commission ordered all rate-regulated utilities to record on their books a deferred liability to account for the reduction in the utilities' federal income tax obligation resulting from

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[16] In addition to lowering the federal corporate income tax rate, the TCJA also effects certain tax calculations applicable to regulated public utilities, such as accumulated deferred income taxes.

[17] R.C. 4905.22.

[18] *Id*.

[19] *See* Commission Tax Investigation, Entry at ¶ 7 (January 10, 2018).

the TCJA to ensure that the tax relief received by Ohio utilities under the TCJA would be passed on to Ohio ratepayers in accordance with Ohio law.[20]

Since issuing that Entry and for the past year, the Commission has been clear that the savings resulting from the TCJA must be returned, in full, to customers. For example, on October 24, 2018, the Commission stated that, "[a]s an initial matter, we once again find it necessary to note that we intend all benefits resulting from the TCJA will be returned to customers."[21] To fulfill that intention, the Commission directed all rate-regulated utilities that had not already done so to file an application to pass tax savings resulting from the TCJA on to customers.[22] Thereafter, on October 30, 2018, the Companies filed an application to pass tax savings on to customers.[23]

While the Companies filed their Tax Application, they did not commit to returning all benefits resulting from the TCJA to their customers. Instead, the Companies tied their Tax Application to two long-pending, but inactive applications to obtain additional funds from customers in order to fund unsupported grid modernization projects.[24] These Grid Modernization Applications are wholly unrelated to the TCJA, and thus, have no connection whatsoever to the Tax Application. In essence, the Companies sought to hold captive the TCJA tax savings in hopes of having the cases resolved together. Despite the unrelated subject matters

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20 *Id*.

21 Commission Tax Investigation, Finding and Order at ¶ 27 (October 24, 2018).

22 *Id*. at ¶ 29.

23 *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017*, Case No. 18-1604-EL-UNC, Application (October 30, 2018) (Tax Application).

24 *See In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan*, Case No. 16-481-EL-UNC (February 29, 2016); *In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan*, Case No. 17-2436-EL-UNC (December 1, 2017) (collectively, Grid Modernization Applications).

of those cases, the Companies moved to consolidate them into a single proceeding on November 13, 2018.[25] Then, only two days later, without affording parties an opportunity to oppose the Companies' Motion,[26] the Commission granted the Motion to Consolidate.[27]

On October 30, 2018, the same day they filed their Tax Application, the Companies and Staff invited any interested intervenors in the tax or grid modernization cases to attend an initial settlement meeting on November 1, 2018, at which time the Companies and Staff would present their joint proposal for a global resolution of those unrelated and then unconsolidated cases:

> Following a series of extended discussions between the Companies and Staff, stakeholders were invited to a group settlement meeting regarding the potential settlement of the Grid Modernization Cases and TCJA Cases in one consolidated proceeding. At the initial group meeting, *Staff and the Companies* reviewed potential terms of agreement . . .[28]

Prior to the inclusion of any stakeholders, it was clear that the Companies and Staff already reached a settlement that they intended to document and file in the near future.[29] And, six business days later, on November 9, 2018, the initial Stipulation was filed.[30] Unlike the settlement filed in AEP Ohio's tax proceeding,[31] the Companies' settlement was not unanimous.[32] A Supplemental Stipulation was filed on January 25, 2019, which was also not unanimous.[33]

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25 *See* Motion to Consolidate.

26 *See* Ohio Adm. Code 4901-1-12.

27 *See* Entry (November 15, 2018).

28 Companies Ex. 2, Fanelli Direct Testimony at 7 (emphasis added).

29 *Id.*; *see also* Tr. Vol. I at 34-35.

30 Stipulation.

31 *See In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, Joint Stipulation and Recommendation (September 26, 2018).

32 Stipulation.

33 Supplemental Stipulation; *see also* Tr. Vol. I-II.

The Commission conducted a hearing regarding the settlement in February and established a March 1, 2019 deadline for the filing of initial post-hearing briefs.[34] Accordingly, Kroger hereby files its initial post-hearing brief.

III. STANDARD OF REVIEW.

It is well-established law that a stipulation is merely a recommendation that is "in no sense legally binding upon the commission."[35] Rather, the Commission "may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing."[36] In making such a determination, the Commission has established and used the following criteria:

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?[37]

In evaluating the foregoing criteria, the Commission must exercise independent judgment and not simply rubber-stamp a stipulation:

> When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes

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[34] Tr. Vol. II at 321.

[35] *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379 (1978); *see also* Ohio Adm. Code 4901-1-30(E) ("No stipulation shall be considered binding upon the commission").

[36] *Id*.

[37] *See, e.g., 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 48-49 (March 31, 2016); *see also Consumers' Counsel v. Pub. Util. Com.*, 64 Ohio St.3d 123, 125 (1992).

> that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.[38]

As set forth below, the Stipulations proposed in this proceeding are *not* the product of serious bargaining, do *not* benefit ratepayers or the public interest, and do *not* comply with important regulatory principles. Accordingly, the Stipulations should not be approved as submitted.

IV. LAW AND ARGUMENT.

A. The Stipulations Are Not The Product Of Serious Bargaining Among Capable, Knowledgeable Parties.

The Stipulations fail the first criterion that the Commission uses to determine whether a settlement should be approved. This settlement is not the product of serious bargaining among capable, knowledgeable parties for several reasons.

1. A Mere Six Business Days To Consider And Evaluate A Settlement Reached Between The Companies And Staff Does Not Allow For "Serious Bargaining Among Capable, Knowledgeable Parties."

There was not "serious bargaining" among all the parties because a settlement structure was discussed, negotiated, and agreed to between the Companies and Staff before the first all-party settlement meeting was even scheduled. "Serious bargaining" requires that all parties have a meaningful opportunity to participate in that bargaining. Specifically, the Supreme Court of Ohio has held that the exclusion of parties from settlement negotiations is of "grave concern" and that such exclusion violates the Commission's own standards for settlement negotiation.[39] "Serious bargaining" did not happen here. As Companies witness Fanelli acknowledged, a resolution was discussed and negotiated between the Companies and Staff some four months

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[38] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part at 1-2 (March 25, 2009) (citations omitted).

[39] *See Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, fn.2 (1996) (citations omitted).

before the initial all party settlement meeting on November 1, 2018.[40] Indeed, those negotiations with Staff were done before the Companies had even filed their Tax Application.[41]

That four-month period of working with Staff (to the exclusion of other parties) was not matched when the Companies offered to negotiate with the other parties.[42] Rather, the other intervening parties were afforded only six business days to consider, analyze, and evaluate the Companies' and Staff's joint settlement. Specifically, as Companies witness Fanelli testified, the first all-party meeting occurred on November 1, 2018.[43] The initial Stipulation was filed six business days later, on November 9, 2018.[44] Thus, by the Companies own admission, the parties were allowed mere days to consider, evaluate, and negotiate a global settlement of four separate, unrelated cases. That simply is not a reasonable and sufficient amount of time to evaluate a settlement agreement before being asked to sign onto the initial Stipulation.

In addition to not satisfying the "serious bargaining" element of this factor, the Stipulation also does not satisfy the "knowledgeable parties" element due to the rushed process and limited evaluation the parties were afforded over a mere six business days before the Stipulation was filed. While the parties are represented by capable counsel knowledgeable about the energy industry, the depth and complexity of these issues requires more than a week to seriously bargain and to be knowledgeable about the specific terms in the Stipulation addressing those multitude of issues and the impact of such terms on customers. For example, the Stipulation concerned not only the full implementation of the effects of the TCJA but also the

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40 Tr. Vol. I at 34-35; *see also* Companies Ex. 2, Fanelli Direct Testimony, at 7.

41 *Id*.; *see also* Tax Application.

42 Companies Ex. 2, Fanelli Direct Testimony at 7.

43 Tr. Vol. I at 35.

44 *Id*.; *see also* Supplemental Stipulation.

deployment of 700,000 advanced meters[45] and authorized up to $516 million in capital investment.[46] The Stipulations authorized the collection from customers of up to $516 million for capital investments in grid modernization projects without any consideration or offset of Rider DMR under which the Companies are allowed to recover from customers millions of dollars for purported grid modernization.[47] The differences, if any at all, between the purported grid modernization authorized under Rider DMR and the grid modernization requested under the Stipulations are complex issues that warranted more than a mere six business days of evaluation and consideration. Indeed, requiring Ohio customers to pay twice for the same or similar grid modernization efforts to the tune of nearly $1 billion under both the Stipulations and the pre-existing Rider DMR should not have been rushed through without thorough and knowledgeable analysis by all parties.

In sum, considering the number of parties involved in this case, it is not feasible to expect that all of the issues contained in the Stipulations could be seriously bargained in such a short timeframe, especially considering that the parties would be required to weigh issues related to grid modernization alongside unrelated issues in the tax proceeding. Moreover, due to the extremely limited timeframe between the time when the Companies filed its Tax Application and filed the initial Stipulation, the parties were required to conduct this bargaining without the opportunity to serve and receive discovery under the Commission rules.[48] The rushed process used to file the Stipulations precluded both the "serious bargaining" and the "knowledgeable parties" requirements of the Commission's first prong of its stipulation analysis.

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45 Stipulation at 14.

46 *Id*. at 25.

47 *See* ESP IV Case, Fifth Entry on Rehearing, at 87, 90, 96.

48 *See* Ohio Adm. Code 4901-1-17.

Accordingly, the Commission should find that the settlement fails the first prong of the analysis, as it is not the product of serious bargaining by capable, knowledgeable parties.

2. The Attorney Examiners Erred When They Precluded Cross-Examination Directly Related To The Issue Of "Serious Bargaining."

Under Rule 401 of Ohio Rules of Evidence, relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. Information regarding the timing of the settlement reached with Staff and the Companies' intentions to seriously bargain with the other parties given that agreement with Staff is directly relevant to the first prong of the Commission's analysis of settlements. Indeed, at the Supreme Court of Ohio noted, it is a "grave concern" to have certain parties excluded from the "serious bargaining."[49] Thus, evidence regarding whether the Companies essentially excluded parties from the "serious bargaining" and did not meaningfully consider the positions of other parties (without disclosing the substance of those positions) because of the agreement with Staff is in fact relevant.

Notwithstanding the foregoing, the Attorney Examiners erred and abused their discretion when they precluded further cross-examination of Companies witness Fanelli on these relevant issues.[50] Specifically, the Attorney Examiners shut down questioning of Companies witness Fanelli regarding the fact that an agreement was reached with Staff before the intervening parties were even invited to an initial settlement meeting, which then resulted in a lack of "serious bargaining" by the Companies with the intervenors because the Companies already had Staff's agreement.[51] Contrary to the Attorney Examiners' ruling, this line of questioning was *not* about the substance of those negotiations, or which party said what, but rather about the timing of the

[49] *See Time Warner AxS*, 75 Ohio St.3d at 233, fn.2.

[50] *See* Ohio Adm. Code 4901-1-15(F).

[51] Tr. Vol. I at 41-42.

deal reached with Staff, which thereby precluded serious bargaining by the Companies with the intervenors. This ruling was an error that should be reconsidered pursuant to Ohio Adm. Code 4901-1-15(F). The questioning should have been allowed at the evidentiary hearing to allow the parties to dispute effectively the Companies' claim that this first prong was satisfied.

B. The Stipulations Do Not Benefit Ratepayers Or The Public Interest.

The Stipulations fail the second criterion that the Commission uses to determine whether a settlement should be approved. This settlement does not benefit ratepayers or the public interest.

1. The Stipulations Result In Unjust And Unreasonable Rates For Customers Because They Must Pay A Second Time For Grid Modernization Without Any Offset Or Credit For The Grid Modernization Funds Already Paid By Customers Under Rider DMR.

As a matter of well-established Ohio law, regulated utilities are required to collect only rates from customers that are just and reasonable and not more than the charges allowed by law.[52] Specifically, R.C. 4905.22 states:

> [a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission."[53]

Here, the rates being charged to customers as a result of the Stipulations are not just and reasonable.

Specifically, the Stipulations allow the Companies to recover from customers up to $516 million for capital investments as part of Grid Mod I. In support thereof, Companies witness Fanelli testified that "[t]he Stipulation provides a significant *first step* towards modernizing the

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[52] R.C. 4905.22.

[53] *Id*.

Companies' grid . . ."[54] However, that "first step" was supposed to have happened with the millions of dollars that the Companies have already received, or will receive in 2019, from customers under Rider DMR. Thus, by the Companies own admission, the $516 million for Grid Mod I in the Stipulations may be duplicative and redundant of the millions of dollars already being recovered from customers under Rider DMR, the "Distribution Modernization Rider." Such double recovery, without any offset or credit for amounts already paid or any evidence as to how the grid modernization initiatives under both riders differ, does not benefit ratepayers or the public interest.

In the Companies' ESP IV case, on rehearing, Staff recommended the implementation of Rider DMR to "provide FirstEnergy Corp., through the Companies, with funds to assure continued access to credit on reasonable terms in order to allow the borrowing of adequate capital to support its grid modernization initiatives."[55] In the Fifth Entry on Rehearing in ESP IV, the Commission noted:

> Staff and FirstEnergy contend that *Rider DMR will not only further grid modernization technologies* throughout the state of Ohio, it will also bolster the several policies set forth in R.C. 4928.02, specifically *by improving reliability by reducing the number and length of outages, provide new options to customers, and allow new suppliers to enter the market*. Moreover, FirstEnergy states that RESA witness Crockett-McNew agreed that encouraging the deployment of the SmartGrid would be an important policy objective for the Commission and would help foster the competitive market and additional product offerings in Ohio.[56]
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[54] Companies Ex. 2, Fanelli Direct Testimony, at 6 (emphasis added).

[55] *See* ESP IV Case, Fifth Entry on Rehearing, at 51; *see also* ESP IV Case, Eighth Entry on Rehearing at 25-26 (August 16, 2017).

[56] ESP IV Case, Fifth Entry on Rehearing, at 52 (emphasis added); *see also id.* at 56 (noting that the Companies "have indicated it is their intent to use the funds for [grid modernization] purposes").

> FirstEnergy witness Mikkelsen testified that the Companies *intend to use* the capital obtained through the credit support [Rider DMR] provided by such revenues *for distribution grid modernization* and other necessary business operations.[57]
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> As a final point, Staff indicates that Rider DMR will enable the Companies to access capital markets on more favorable borrowing terms, thus, *ensuring that they have sufficient resources to dedicate toward reliability through their grid modernization initiative*.[58]
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> FirstEnergy asserts that Rider DMR may be the appropriate method to *ensure that the Companies have the necessary capital for investments in grid modernization*.[59]
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> * * * *
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> Staff states that the proposed $131 million per year, a 22 percent portion of FirstEnergy Corp.'s energy operating revenue, represents a fair proportional share to be provided by Ohio ratepayers *in order to allow the Companies to retain access to financial markets and support the grid modernization initiative*.[60]

Clearly, the ESP IV Case is replete with assertions and stated intentions from the Companies and Staff that Rider DMR would go towards or be used to support grid modernization efforts.

Likewise, in the ESP IV Case, the Commission held that Rider DMR shall be approved and revenues should be dedicated to credit support in order for the Companies to invest in grid modernization:

> Rider DMR will provide a needed incentive to the Companies *to focus innovation and resources on grid modernization*. Further, Rider DMR will address a demonstrated need for credit support for the Companies in order to ensure the Companies have access to

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[57] *Id*. at 59 (emphasis added).

[58] *Id*. at 60 (emphasis added).

[59] *Id*. at 62 (emphasis added).

[60] *Id*. at 80 (emphasis added) ($131 million proposed by Staff was increased by the Commission to $132.5 million annually pre-tax. *See* ESP IV Case, Fifth Entry on Rehearing, at 94).

> capital markets in order to make investments in their distribution system.[61]
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> * * * *
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> Rider DMR is a distribution modernization incentive for the Companies. The testimony in the record makes it clear that Rider DMR is related to distribution . . . Accordingly, we find that the record demonstrates that Rider DMR is intended to stimulate the Companies to *focus their innovation and resources on modernizing their distribution systems*. Therefore, Rider DMR is a distribution modernization incentive . . . [62]
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> The Commission finds that recovery of revenue under Rider DMR should be conditioned upon: . . . (3) *a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission*.[63]

As a result, the Commission awarded the Companies Rider DMR to allow for recovery of millions of dollars from ratepayers over a three-year period, with the option of an extension for an additional two years.[64]

Notwithstanding that Rider DMR was alleged and touted as being dedicated, at least in part, to grid modernization, the Companies sought in these proceedings to recover up to an additional $516 million for capital investments in grid modernization. In doing so, the Companies relied upon nearly identical rationale and benefits to support Grid Mod I as they did to support Rider DMR.[65] As Companies witness Fanelli asserted:

> As part of the Stipulation, Grid Mod I will benefit customers and the public interest through various grid modernization investments . . . These investments will *improve system reliability, facilitate*

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61 ESP IV Case, Fifth Entry on Rehearing, at 87 (emphasis added).

62 *Id*. at 90 (emphasis added).

63 *Id*. at 96 (emphasis added).

64 *Id*. at 97.

65 *See* Tr. Vol. I at 158-160; ESP IV Case, Fifth Entry on Rehearing, at 52.

> *faster restoration, reduce end-use energy consumption, allow customers to make more informed choices about energy usage, and better enable the Companies to make future grid modernization investments*. Specifically, the Stipulation authorizes the Companies to recover the costs of capital investments in grid modernization of up to $516 million . . .[66]

The Stipulations simply turn a blind eye to the millions of dollars already recovered or to be recovered under Rider DMR from 2017 through 2019.[67] There is no provision for an offset or credit for Rider DMR funds paid by customers for apparently the same or similar grid modernization initiatives at issue here. Nor do the Stipulations make any reference to, or put any limitation on, the Companies' right to apply to extend Rider DMR for an additional two years or include any offset mechanism to Grid Mod I for the Rider DMR extension dollars that the Companies may request to be recovered from customers.[68] And, on February 1, 2019, the Companies did in fact file their application to extend Rider DMR, seeking to recover from customers an additional $265 million pre-tax.[69]

In total, under the Stipulations, Rider DMR, and assuming an extension of Rider DMR, Ohio customers could be required to pay approximately $1.1 billion[70] pre-tax for grid modernization initiatives or activities in support of grid modernization. It is unjust and unreasonable for customers to be burdened with duplicative payments for the same or similar grid modernization efforts. Accordingly, the Stipulations are not in the best interest of ratepayers and the public interest and should not be approved. In the event the Stipulations are approved,

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66 Companies Ex. 2, Fannelli Direct Testimony, at 9-10 (emphasis added); *see also* Tr. Vol. I at 156-157.

67 *See* Tr. Vol. I at 162-163.

68 *See* Stipulation and Supplemental Stipulation.

69 *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for an Extension of Their Distribution Modernization Rider*, Case No. 19-361-EL-RDR, Application (February 1, 2019).

70 This amount was calculated by totaling the following amounts: (i) Rider DMR for 2017-2019 ($132,500,000 x 3) + (i) Rider DMR extension dollars requested ($265,000,000) + Grid Mod I dollars ($516,000,000).

they should be modified to allow for a set-off or credit to Rider AMI in these cases for any Rider DMR dollars collected from customers to support grid modernization.

Finally, in addition to the potential duplication of charges already collected under Rider DMR, the Companies also have failed to demonstrate that the excessive grid modernization charges in an amount up to $516 million are just and reasonable and not duplicative of similar charges already being collected from customers. The record does not demonstrate that costs recovered from customers are just and reasonable or that the magnitude of that cost recovery ($516 million[71]) is justified by the benefits that customers will actually receive from the Companies' grid modernization efforts. Environmental Law and Policy Center (ELPC) Witness Volkmann explained how the purported benefits of the grid modernization efforts at issue in this case are overstated and based upon flawed data.[72] He also explains that the Companies' cost-benefit analysis is flawed.[73] The abundant lack of clarity regarding the benefits that this massive investment will provide demonstrates that the Companies have not sustained their burden and proven that the increase in charges to customers for grid modernization through the Rider AMI are just and reasonable as required by Ohio law.[74] The Commission has held that the utility has the burden of proof in cases such as these, and that when the burden of showing that rates would be just and reasonable is not met, the application is rejected.[75]

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71 Stipulation at 25.

72 *See* ELPC Ex. 32, Direct Testimony of Curt Volkmann, Public Redacted Version at 9-18; ELPC Ex. 33C, Direct Testimony of Curt Volkmann, Confidential Version at 9-18.

73 *Id*. at 5-22.

74 R.C. 4909.18.

75 *See In the Matter of the Application of Duke Energy Ohio for a Charge Pursuant to Section 4909.18, Revised Code, et al.*, Case No. 12-2400-EL-UNC, et al., Opinion and Order at 49 (February 13, 2014).

2. The Attorney Examiners Erred When They Precluded Full Cross-Examination Of Companies Witness Fanelli Regarding Rider DMR As Such Information Is Relevant To Whether The Stipulations Are In The Best Interest Of Ratepayers And The Public Interest.

Under Rule 401 of Ohio Rules of Evidence, relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. Information about Rider DMR, the duplication between how customers' monies collected through Rider AMI in the Stipulations for Grid Mod I and Rider DMR, and the nearly identical rationale offered by the Companies in support of both riders is directly relevant to whether the Stipulations benefit ratepayers and the public interest and testimony should have been allowed on the issue.[76] It would not benefit ratepayers and the public interest to pay another $516 million for grid modernization to obtain the same or similar benefits that the Companies touted as justification to receive the millions of dollars under Rider DMR in the ESP IV Case. Customers should not have to pay twice to reap the claimed benefits of the same or similar grid modernization initiatives or support. The Companies have not been demonstrated that the funds that they have collected through Rider DMR from customers are not or will not be used to support the same grid modernization initiatives as those proposed in the Stipulations.

As purported justification for their ruling, the Attorney Examiners claimed that this questioning and evidence was precluded on the basis of relevancy and a claim by the Attorney Examiners that "[y]ou are going to have similar benefits across different cases."[77] However, that assertion is not part of the record in this case and should not be relied upon. In fact, the Attorney Examiners shut the door on questioning about whether the benefits were "similar" or the same,

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[76] Tr. Vol. I at 155-165; *see* Ohio Adm. Code 4901-1-15(F).

[77] *Id*. at 161.

and whether there were even any benefits achieved to grid modernization under Rider DMR in the ESP IV Case. Because if there were no such benefits, then the Commission should also consider whether it is just and reasonable to require customers to pay an additional $516 million for grid modernization when no such grid modernization was conducted or the purported benefits achieved with the hundreds of millions of Rider DMR dollars already paid by customers and whether the customers should receive an off-set or credit for those dollars or any future Rider DMR dollars.

Accordingly, the Attorney Examiners' ruling was an error that should be reconsidered pursuant to Ohio Adm. Code 4901-1-15(F) because it excluded relevant and material evidence from the record during the evidentiary hearing of this matter.

3. The Shifting Of Benefits Across Customer Classes To The Detriment Of Certain Classes In Order To Entice A Customer Class To Join The Stipulations Does Not Benefit Ratepayers And Is Not In The Public Interest.

Commission precedent warns that direct benefits given to certain parties in exchange for signatures to the settlement are disfavored and a reason to reject a settlement:

> [T]he Signatory Parties to this Stipulation and parties to future stipulations should be forewarned that such provisions are strongly disfavored by this Commission and are highly likely to be stricken from any future stipulation submitted to the Commission for approval.[78]

After a review of the Supplemental Stipulation here, it is clear that the Companies are not interested in using a rate design that fairly benefits all of their customer classes and is just and reasonable. Instead, they are more interested in increasing the number of signatory parties to the

[78] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand at 12 (February 11, 2015).

Stipulations even if it means unfairly shifting benefits between customer classes to entice certain signatures.

The rate design in the Supplemental Stipulation disproportionately benefits the residential class at the expense of commercial classes.[79] This change was done solely to entice OCC and OPAE to be signatory parties to the Supplemental Stipulation. Absent that enticement, OCC admits it would not have signed onto the settlement:

> Q. And is it fair to say that if not for the tax benefits provided in the Supplemental Stipulation, OCC would not have signed on?
>
> A. That's correct.[80]

Specifically, OCC Witness Willis explained that this modification to the rate design in the Supplemental Stipulation would result in residential customers receiving $125.9 million *more* of an $808 million rate reduction.[81] Thus, the Supplemental Stipulation shifted more of the rate reduction from commercial customer classes to the residential class. OCC Witness Willis admitted on cross-examination that this substantial increase of the residential customers' share of the total benefits of the settlement means a reduction in the share of the benefits received by other customer classes:

> Q. And receiving a larger share of the rate reduction means that residential customers will receive more of the benefit or rate reduction and other customer classes would receive less of a share of that rate reduction, correct?
>
> A. Yes.[82]

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79 *See* Supplemental Stipulation at 2, Supplemental Attachment E; *see also* Stipulation at 9.

80 Tr. Vol. II at 320.

81 OCC Ex. 1, Willis Direct Testimony at 5.

82 Tr. Vol. II at 315.

This sort of benefit-shifting from one customer class to another in an attempt to lure parties into agreeing to the settlement is the type of manipulations that the Commission previously stated are disfavored and may be a reason to reject a settlement. Simply put, with the modification by the Supplemental Stipulation, the settlement fails to allocate fairly the benefits resulting from the TCJA to the Companies' customers. The Commission should modify the settlement such that it uses a rate design that is just and reasonable. Until those revisions are made, the settlement fails to satisfy the requirement that it benefit ratepayers and the public interest.

4. The Stipulations Fail To Ensure That The Refund Language Adequately And Fully Protects Customers.

The Stipulations fail to comply with the second-prong of the Commission's criteria in evaluating settlements because the refund language contained therein is woefully inadequate to protect customers. Absent a modification to this language, the Stipulations do not benefit ratepayers and the public interest.

Specifically, the initial Stipulation provided for the recovery of capital costs associated with grid modernization through Rider AMI, but did not provide for tariff language for Rider AMI that would adequately and fully protect customers in the event a Commission audit or the Supreme Court of Ohio determined that charges collected under Rider AMI were imprudent, unreasonable, or unlawful.[83] Although the Supplemental Stipulation attempted to address this deficiency, it still falls woefully short in providing adequate and complete protection for customers.[84] A modification to improve the language contained in the Supplemental Stipulation would be to explicitly provide that refunds can result from orders of the Supreme Court of Ohio.

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[83] *See* Stipulation at 10-14.

[84] Supplemental Stipulation at 3-4.

As the language is currently written, it is unclear whether a determination by the Supreme Court of Court that the Companies had unlawfully collected from customers could actually result in a refund to those customers.

Significantly, several utilities in Ohio have filed tariffs that address this concern by explicitly contemplating reconciliation or refunds as a result of Court decisions.[85] The language used by those utilities, and approved by the Commission, contemplates the possibility that the Supreme Court of Ohio could determine that the charge is unlawful, unreasonable, or included imprudent amounts. The language here should be modified to provide such protections to customers.

In addition, the Supplemental Stipulation's use of the word "solely" in the Companies' reconciliation and refund language is unjust and unreasonable and inconsistent with other utilities' tariff language. In addition to precluding refunds as the result of Supreme Court of Ohio decisions as discussed above, the word "solely" unnecessarily limits which Commission proceedings can in fact result in refunds of unreasonable or unlawfully collected charges to customers.

Finally, the enumeration of specific cases in the language of the Supplemental Stipulation that can result in a refund forecloses the possibility that the Commission could issue a refund were it to decide that one was appropriate in a docket not listed in the Supplemental Stipulation's language.[86] For instance, the Commission could order an audit in a new proceeding in future years, or open a new docket in the event that the Supreme Court of Ohio issues a decision on

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[85] *See* Vectren Energy Delivery of Ohio, Inc. Tariffs, P.U.C.O. No. 3, Sheet No. 39, Tenth Revised Page 1 of 1, Uncollectible Expense Rider (effective August 9, 2018); Columbia Gas of Ohio, Inc. Tariffs, P.U.C.O. No. 2, Seventh Revised Sheet No. 30c, Infrastructure Development Rider ("IDR") (effective with meter readings on or after October 17, 2018); Ohio Gas Company Tariffs, P.U.C.O. No. 2, First Revised Sheet No. 13, Page 1 of 1, Uncollectible Expense Rider (effective August 1, 2018); .

[86] Supplemental Stipulation at 3-4.

appeal and remands to the Commission. In this event, an audit or related proceeding could be conducted in a docket that is not explicitly listed in the language provided in the Settlement, the Companies could then argue that the Commission would be precluded from ordering a refund by a combination of this language and the Supreme Court of Ohio's decision in *Keco Indus. V. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). That does not benefit ratepayers or the public interest.

In sum, the Commission should not settle for a mere possibility that customers will be protected by the proposed language. Instead, to eliminate all doubt about the applicability of the refund language and the Commission's ability to issue refunds when charges were over collected or were deemed to be unlawful, the Commission should modify the language and remove the list of specific cases and the word "solely."

C. The Stipulations Violate Important Regulatory Practices and Principles.

The Stipulations do not satisfy the third prong of the Commission's criteria in determining whether to approve a settlement. They violate several important state policies and regulatory principles long enforced by the Commission. R.C. 4928.02 codifies numerous state policies that shall guide the regulation of electric utilities in Ohio. These policies include, for example, ensuring the availability of reasonably priced retail electric service and encouraging cost-effective and efficient access to information regarding the operation of the transmission and distribution systems.[87]

Here, the Stipulations violate the foregoing principles while also ignoring principles of fundamental fairness by unjustly and unreasonably requiring customers to pay twice for grid

[87] R.C. 4928.02(A) and (E).

modernization and providing disproportionate benefits to one class of customers at the expense of other classes.

1. The Stipulations Fail To Ensure Just And Reasonably Priced Electric Service For Customers Without Discrimination Across The Classes.[88]

When the Commission directed rate-regulated utilities to file applications to ensure that customers received the benefits of the TCJA, it surely intended to adhere to this principle by ensuring that utility customers are not paying for tax obligations that no longer exist. Had the Companies simply filed their Tax Application as directed and followed the lead of AEP Ohio also as directed, without trying to hold hostage those tax savings to extract additional funds from customers under the Grid Modernization Applications, the Companies could have furthered the state policy by reducing customers' rates consistent with the change in federal law.

But the Companies did not. First, it is unjust and unreasonable to require customers to pay an additional amount up to $516 million for grid modernization[89] after already having to pay millions of dollars for purported grid modernization under Rider DMR.[90] This is unjust and unreasonable because there has been no showing that these funds are not being used for the same grid modernization projects. For example, in support of the Stipulations, Companies witness Fanelli testified that the grid modernization investments will:

> improve system reliability, facilitate faster restoration, reduce end-use energy consumption, allow customers to make more informed choices about energy usage, and better enable the Companies to make future grid modernization investments. [91]

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88 R.C. 4928.02(A).

89 Stipulation at 10.

90 ESP IV Case, Fifth Entry on Rehearing.

91 Companies Ex. 2, Fannelli Direct Testimony, at 9-10; *see also* Tr. Vol. I at 156-157.

However, in the ESP IV Case, the Companies and Staff supported the implementation of Rider DMR with nearly identical reasons, claiming that the grid modernization investments under Rider DMR would:

> improve[e] reliability by reducing the number and length of outages, provide new options to customers, and allow new suppliers to enter the market. . . . and would help foster the competitive market and additional product offerings in Ohio.[92]

In short, collecting money for the same or to support the same grid modernization investments through duplicative avenues essentially forcing customers to pay twice deny customers of their right to reasonably priced electric service.

While Kroger, and many other customers of the Companies, understand and recognize the importance of grid modernization, that does not grant the Companies carte blanche to charge customers around $1 billion for what appears to be the same or very similar grid modernization projects under both Rider DMR and Rider AMI. As this settlement continues to subject customers to hundreds of millions of dollars for grid modernization efforts, particularly in light of the Companies' recent DMR Extension Application, it violates the important regulatory principle of ensuring reasonably priced electric service.

In addition, the rate design for the tax savings credit rider modified in the Supplemental Stipulation to entice certain parties to become signatory parties is discriminatory. That modification unfairly shifts benefits to the residential class to the detriment of other classes. As discussed above, the Companies agreed to modify the initial Stipulation to shift additional benefits to residential customers at the expense of other customers. This unjust and unreasonable maneuver should be rejected because in addition to causing commercial customers to unjustly and unreasonably pay more for electric service, it demonstrates a desire on behalf of the

[92] ESP IV Case, Fifth Entry on Rehearing at 52.

Companies and other signatory parties to disregard fairness and reasonableness in establishing rates, riders, charges, and credits in order to obtain a longer list of signatory parties.

Through the Supplemental Stipulation, the Companies agreed to abandon its rate design methodology in favor of a benefit shift to residential customers to obtain signatures. This unfair cost shift is discriminatory and an arbitrary method of ratemaking that the Commission should reject in favor of more sound ratemaking principles. Finally, the rate design for Rider AMI is discriminatory and unfair. It allows for cross-subsidies among customers.[93] Accordingly, it should also be modified to align rate design with underlying cost causation in order to improve efficiency and ensure equity among customers.

2. The Stipulations Fail To Ensure Cost-Effective And Efficient Access To Information.[94]

As noted above, the Companies are already collecting millions of dollars for grid modernization under Rider DMR, with a possible two-year extension for an additional $265 million. This settlement increases that collection, in part, to allow the Companies to implement advanced meters and supporting communications networks.[95] Given that customers have already been paying for purported distribution modernization and the claimed benefits, the settlement is not ensuring cost-effective and efficient access to information regarding the operation of the distribution system in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers as envisioned by the state policy.[96] Finally, as noted above, the Companies refuse to allow

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93 See Stipulation.

94 R.C. 4928.02(E).

95 *See* Stipulation.

96 R.C. 4928.02(E).

customers to exit the endless cycle of repeatedly financing modernization efforts, each time making the same promises of benefits to customers.

V. CONCLUSION.

The Stipulations before the Commission for consideration are the result of a hasty process to address multiple distinct and unrelated issues at one time. The Companies should have followed AEP Ohio's example as directed by the Commission and focused the Tax Application proceeding on returning the tax savings to customers. Instead of a mere six business day required turn-around, the Companies should have afforded the parties time to fully consider all the unrelated issues in this consolidated proceeding. The Stipulations fail to establish just and reasonable rates, utilize an unjust and unreasonable rate design for the allocation of tax savings, and fail to ensure that customers are not facing duplicative charges for grid modernization initiatives. Accordingly, for the foregoing reasons, Kroger respectfully requests that the Commission reject the Stipulations, or at a minimum, modify the Stipulations as set forth herein as it was not a product of serious bargaining among all knowledgeable parties, does not benefit ratepayers and the public interest, and violates important regulatory principles and practices.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail March 1, 2019.

/s/ Angela Paul Whitfield
Angela Paul Whitfield

Summary: Brief Initial Post-Hearing Brief Of The Kroger Co. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.