**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

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# REPLY BRIEF OF THE KROGER CO.

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Angela Paul Whitfield (0068774)
Stephen E. Dutton (0096064)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
dutton@carpenterlipps.com
(willing to accept service by email)

*Counsel for The Kroger Co.*

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## I. INTRODUCTION.

In its initial brief,[1] The Kroger Co. (Kroger) articulated several reasons that the Stipulation[2] and Supplemental Stipulation[3] (collectively, Stipulations) were not a product of serious bargaining among all knowledgeable parties, do not benefit ratepayers and the public interest, and violate important regulatory principles and practices. Specifically, the rushed and flawed process that resulted in the Stipulations pending before the Public Utilities Commission of Ohio (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[4] for what appears to be duplicative grid modernization efforts under Rider AMI and the Distribution Modernization Rider (Rider DMR) established in the most recent electric security plan case of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (herein referred to collectively as the Companies);[5] (ii) a rate design that does not fairly distribute the tax savings under the TCJA among the classes; and (iii) inadequate refund language that fails to fully protect customers.

Nothing in the briefs of the Companies or any other supporting parties changes this conclusion. In fact, many of the flaws Kroger cited, including relating to the potential of duplicative grid modernization charges to customers, rate design, and refund/reconciliation

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1 *See* Initial Post-Hearing Brief Of The Kroger Co. (March 1, 2019) (Kroger's Brief).

2 *See* Companies Ex. 1, Stipulation (November 9, 2018).

3 *See* Companies Ex. 3, Supplemental Stipulation (January 25, 2019).

4 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).

5 *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).

language were not even addressed by the Companies and supporting parties. Rather, the Companies and supporting parties rely heavily upon the purported benefit of the return to customers of the tax savings from the Tax Cuts and Job Acts of 2017 (TCJA). However, as a matter of well-established law,[6] the Companies' purported "agreement" to refund the TCJA tax savings to customers is not a sufficient benefit to ratepayers and the public interest to support the Stipulations because the Companies were already legally required to refund those tax savings.[7]

Therefore, as set forth more fully below, the Companies and supporting parties, who shoulder the burden of proof, have not satisfied the Commission's criteria for approving settlements. Accordingly, the Stipulations should not be approved as submitted or, at a minimum, should be modified to ensure Ohio customers are protected and are only charged just and reasonable rates, including a credit or offset for any Rider DMR dollars collected from customers to support grid modernization. The Stipulations also should be modified to ensure that the rate design implemented by the 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.

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[6] *See, e.g., Shannon v. Universal Mtge. & Discount Co.,* 116 Ohio St. 609, 622, 157 N.E. 478, 482, 5 Ohio Law Abs. 366 (1927) ("Where a legal obligation exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. A promise cannot be conditioned on a promise to do a thing to which a party is already legally bound"); *Fawcett v. Freshwater,* 31 Ohio St. 637, 638 (1877) ("A valid subsisting legal obligation is no consideration of a contract."); *Wells Fargo Bank, N.A. v. Baldwin,* 12th Dist. Butler No. CA2011-12-227, 2012-Ohio-3424, ¶ 16 ("A promise to do what the promisor is already bound to do cannot be a consideration, for, if a person gets nothing in return for his promise but that to which he is already legally entitled, 'the consideration is unreal.' As a general rule, therefore, the performance of, or promise to form, an existing legal obligation is not a valid consideration.").

[7] *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); Findings and Order at ¶ 27 (October 24, 2018).

In accordance with the Attorney Examiners' directive,[8] Kroger hereby submits its reply brief urging the Commission not to approve the Stipulations as filed, or at a minimum, modify the Stipulations as set forth herein and in Kroger's initial brief.

## II. STANDARD OF REVIEW.

It is well-established law that the signatory parties shoulder the burden of satisfying the three criterion used to review stipulations:[9]

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?[10]

For the reasons set forth in Kroger's Brief, as well as herein, the signatory parties have not, and cannot, satisfy this burden of proof for the Stipulations. As such, the Commission cannot merely rubber-stamp the Stipulations, "but must determine what is just and reasonable from the evidence presented at the hearing."[11]

In determining whether the Stipulations are just and reasonable, the Commission should find that the Stipulations are *not* the product of serious bargaining, do *not* benefit ratepayers or the public interest, and do *not* comply with important regulatory principles. Thus, absent modifications, the Stipulations should not be approved as submitted.

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8 Tr. Vol. II at 321.

9 *See In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR, et al., Opinion and Order at 18 (March 31, 2016).

10 *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).

11 *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").

## III. LAW AND ARGUMENT.

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

As Kroger and others explained in the initial briefs, the Stipulations fail to satisfy 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.

Specifically, in order to determine whether "serious bargaining" occurred, the Commission must investigate the context and circumstances of the settlement discussions to ensure the "integrity and openness of the negotiation process."[12] "Serious bargaining" requires that all parties have a meaningful opportunity to participate in that bargaining. Significantly, 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.[13] In their brief, the Companies make admissions that prove Kroger's exact point – there was no "serious bargaining" here. For example, the Companies *admit* that:

- They began meeting with only Staff in June 2018, some four months before the initial all party settlement meeting;[14]
- A resolution was discussed and negotiated between the Companies and Staff before the initial all party settlement meeting on November 1, 2018;[15]
- An all-party settlement meeting occurred for the first time on November 1, 2018;[16]

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[12] *Ohio Consumers' Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 300, 320 (2006); *see also* Initial Brief of the Environmental Law & Policy Center, Natural Resources Defense Council, and Ohio Environmental Counsel at 10 (March 1, 2019) (Environmental Group's Brief).

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

[14] *See* Post-Hearing Brief of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company at 5-9 (March 1, 2019) (Companies' Brief); *see also* Tr. Vol. I at 34-35; Companies Ex. 2, Fanelli Direct Testimony, at 7.

[15] *See* Companies' Brief at 7; *see also* Tr. Vol. I at 34-35; Companies Ex. 2, Fanelli Direct Testimony, at 7.

[16] *See id.*; *see also* Tr. Vol. I at 35.

- At the initial all-party settlement meeting, the Companies and Staff presented their terms of agreement to the rest of the stakeholders;[17] and

- The initial Stipulation was filed a mere six-business days later, on November 9, 2018;[18]

In short, the 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.[19] Rather, the other interested parties were afforded only six-business days to consider, analyze, and evaluate the Companies and Staff's joint settlement.

In an attempt to obfuscate the clear evidence that the parties were afforded only six-business days to consider and evaluate the settlement, the Companies try to artificially lengthen the evaluation period by relying upon the fact that the grid modernization proceedings had been pending since 2016 and 2017.[20] However, there are two fatal flaws to the Companies' efforts in this regard. First, no settlement discussions with all parties occurred in the three-year period the grid modernization proceedings were pending. Second, those grid modernization proceedings were not even combined with the Tax Application until October 30, 2018, which was after the Companies and Staff had reached agreement. Thus, the Companies' argument that the grid modernization proceedings pending for three years somehow artificially lengthened the "serious bargaining" time period rings hollow and is without merit. In reality, this argument actually supports Kroger's position that those grid modernization cases involve complex and detailed issues that would require more than a week to seriously bargain and to be knowledgeable about

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17 *See id.*; *see also* Companies Ex. 2, Fanelli Direct Testimony at 7.

18 *Id*.

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

20 *See* Companies' Brief at 5-6.

the specific terms in the Stipulation addressing those multitude of issues and the impact of such terms on customers.[21]

In perhaps a more desperate attempt to avoid the fact that parties were afforded only six-business days to consider the settlement, the Companies rely upon the period of negotiation in which some of the parties participated in *another* proceeding for *another* utility. Specifically, the Companies argue that the parties "gained valuable experience negotiating a similar TCJA-relating stipulation involving AEP Ohio . . ."[22] The Companies essentially assert that the parties did not need more than mere days to consider the settlement because they had already negotiated a tax settlement with AEP Ohio. This argument is preposterous. First, *unlike* the AEP Ohio tax proceeding, the Companies did not file their tax proceeding until October 30, 2018, at which time the Companies had already reached agreement in principle with Staff. Second, *unlike* the AEP Ohio tax proceeding, given the rushed process here, the parties were not afforded an opportunity to conduct any discovery on the Companies' Tax Application. Third, *unlike* the AEP Ohio tax proceeding, the Companies sought and obtained consolidation of their Tax Application with two completely unrelated grid modernization proceedings as a way to hold the TCJA tax savings hostage 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. This list of differences could go on and on.

Suffice to say, the time period of negotiations with another utility in another proceeding and the knowledge gained about that other utility in another proceeding with a different application has no bearing whatsoever on whether "serious bargaining" occurred in this proceeding here. Despite the Companies' desperate attempts to muddle the issue, a mere six-

[21] Kroger's Brief at 8-12.

[22] Companies' Brief at 6.

business days to consider and evaluate a settlement reached here between the Companies and Staff does not allow for "serious bargaining among capable, knowledgeable parties."

Interestingly, the Office of the Ohio Consumers' Counsel (OCC), which signed onto the Supplemental Stipulation, did not support, or even address, this first criterion of whether there was "serious bargaining among capable, knowledgeable parties."[23] That silence is telling: while OCC ultimately supports the Supplemental Stipulation after $125 million of tax credits were shifted away from commercial customers and to residential customers, it clearly decided not to support the bargaining process that led to the Stipulations. When a signatory party cannot argue in good faith that the bargaining process used for the Stipulations met the first criterion in evaluating settlements, the Commission should take note. It is evidence that even a signatory party finds "grave concern" with the settlement negotiation process here.

So too should this Commission. The Commission should not endorse a process whereby the utilities present essentially a finalized settlement to interested stakeholders at the last minute, pressure those parties to join the settlement in a few days, and then argue that because the utility held a perfunctory settlement meeting with all parties, the "serious bargaining" criterion has been met. Such an endorsement would be a slippery slope to essentially eviscerating the "serious bargaining" requirement, which would not further the "integrity and openness of the negotiation process" that the Commission is charged with protecting.[24] Accordingly, the Commission should have "grave concern"[25] over the negotiation process here and conclude that "serious bargaining among capable, knowledge parties" did not in fact occur.

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[23] *See* Brief in Support of the Supplemental Settlement by the Office of the Ohio Consumers' Counsel (March 1, 2019) (OCC's Brief).

[24] *Ohio Consumers' Counsel v. Pub. Util. Comm*., 111 Ohio St.3d at 320.

[25] *See Time Warner,* 75 Ohio St.3d at 233, fn.2 (citations omitted).

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

The hasty process used to reach the Stipulations, as discussed above, did not result in a settlement that benefits ratepayers and the public interest. To the contrary, the Stipulations resulted in unjust and unreasonable rates for customers, a flawed rate design, and insufficient protections for customers. It cannot be a benefit to ratepayers and the public interest for the Companies to do what they were already legally required to do. As such, the Commission should modify the Stipulations to ensure just and reasonable charges are established, that a fair rate design is used to avoid shifting benefits to one class of customers to the detriment of another class of customers, and customers are fully protected by requiring refunds in the event charges are deemed to be unjust, unreasonable, or unlawful.

#### 1. The Companies' Purported "Agreement" To Refund The TCJA Tax Savings To Customers Is Not A Benefit To Ratepayers And The Public Interest Because They Were Already Legally Required To Do So.

In their brief, the Companies tout that ratepayers and the public interest are benefitted by the Stipulations because customers will receive approximately $900 million in TCJA tax savings.[26] However, that is not a benefit bargained for as part of the negotiations of this settlement. Indeed, agreeing to do something that a party is already required to do cannot constitute a benefit to ratepayers and the public interest. The Supreme Court of Ohio has long held that such an agreement amounts to nothing more than a nullity:

[26] Companies' Brief at 10-12.

> Where a legal obligation exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. A promise cannot be conditioned on a promise to do a thing to which a party is already legally bound.[27]

Here, it cannot be disputed that the Commission legally required utilities to return, in full, all TCJA tax savings to customers. That legal requirement was established by the Commission in its commission-ordered investigation (COI) initiated on January 10, 2018.[28] Throughout the Commission Tax Investigation, the Commission made it abundantly clear that the savings resulting from the TCJA must be returned, in full, to customers.[29] 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."[30] 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*."[31]

Therefore, the Companies cannot espouse the fact that they are returning the TCJA tax savings to customers as a bargained for benefit when the Commission already ordered the Companies to return the TCJA tax savings to customers. Taking those tax savings out of the analysis then, the Commission is left with customers being required to pay $516 million in

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[27] *Shannon,* 116 Ohio St. at 622; *Fawcett,* 31 Ohio St. at 638 ("A valid subsisting legal obligation is no consideration of a contract."); *Wells Fargo Bank, N.A.,* 2012-Ohio-3424, ¶ 16 ("A promise to do what the promisor is already bound to do cannot be a consideration, for, if a person gets nothing in return for his promise but that to which he is already legally entitled, 'the consideration is unreal.' As a general rule, therefore, the performance of, or promise to form, an existing legal obligation is not a valid consideration.").

[28] *See* Commission Tax Investigation, Entry (January 10, 2018).

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

[30] *Id*.

[31] *Id*. at ¶ 29 (emphasis added).

additional grid modernization charges. The Companies have not established that those charges are just and reasonable, and thus, cannot benefit customers and the public interest.

### 2. The Companies And Supporting Parties Fail To Show That The Charges For Grid Modernization Are Just, Reasonable, And Not Duplicative.

Despite the fact that Kroger raised the issue of the potentially duplicative grid modernization charges under the Stipulations and the previously-approved Rider DMR on cross-examination of Companies witness Fanelli, the Companies and supporting parties failed to address the resulting unjust and unreasonable rates.

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.[32] 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."[33]

Nonetheless, the Companies have not shown that the $516 million in additional grid modernizations charges are just and reasonable. Nor have the Companies, which hold the burden of proof, established on the record sufficient evidence that the charges for grid modernization in the Stipulations are just and reasonable.

First, it is again telling that three of the signatory parties to the Supplemental Stipulation, OCC, the Northeast Ohio Public Energy Council (NOPEC), and the Ohio Partners for Affordable

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[32] R.C. 4905.22.

[33] *Id*.

Energy (OPAE) expressly disavow and do not support the grid modernization provisions in the Supplemental Stipulation:

> This party is a Signatory Party to all terms and conditions of the Stipulation except the terms and conditions of Sections V.B. through V.I. related to grid modernization. In the interests of reaching a global settlement on a variety of issues . . . this party agrees not to oppose Sections V.B through V.I. of the Original Stipulation.[34]

If Signatory Parties cannot support the grid modernization plans and charges, then the Commission should weigh carefully whether the Companies and supporting parties have met their burden of proof that the Stipulations benefit the ratepayers and the public interest.

Moreover, as set forth in Kroger's Brief,[35] the Stipulations allow the Companies to recover from customers up to $516 million for capital investments as part of Grid Mod I. Yet, contrary to the Companies' assertion,[36] this is not the first time that the Companies have cited speculative customer benefits as a basis to receive grid modernization funds. In support of Rider DMR under which customers have already paid millions of dollars, the Companies relied upon the same generalized and speculative customer benefits as here.[37] 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. 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.

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34 Supplemental Stipulation at 10.

35 Kroger's Brief at 13-18.

36 Companies Ex. 2, Fanelli Direct Testimony at 6 ("The Stipulation provides a significant *first step* towards modernizing the Companies' grid . . .") (emphasis added).

37 *See* Kroger's Brief at 13-18.

In total, under the Stipulations, Rider DMR, and assuming an extension of Rider DMR,[38] Ohio customers could be required to pay approximately $1.1 billion[39] 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 absent modification 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. As they did at the hearing, the Companies argue in their initial brief that improved customer savings and eventual cost savings will result from the grid modernization investments that will be made (or should purportedly already have been made).[40] However, the record does not demonstrate that costs recovered from customers are just and reasonable or that the magnitude of that cost recovery ($516 million[41]) is justified by the benefits that customers will actually receive from the Companies' grid modernization efforts. Nor are the purported benefits or savings supported by record evidence at the hearing to establish that the speculative benefits will be a reality. To the contrary, as explained more fully in the

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38 *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).

39 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).

40 Companies Brief at 12-15.

41 Stipulation at 25.

Environmental Group's Brief, the Companies' cost-benefit analysis was flawed. The assumptions used to find that the benefits would occur were invalid, and a proper analysis reveals that the grid modernization proposal is not cost effective on a net present value basis.[42] 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.[43] 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.[44]

### 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.

As set forth in Kroger's Brief,[45] 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.[46]

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42 *See* Environmental Group's Brief at 20-23.

43 R.C. 4909.18.

44 *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).

45 *See* Kroger's Brief at 20-21.

46 *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).

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

As Kroger and OMAEG noted, the rate design used in the initial Stipulation had been used in prior proceedings and contained reasonable provisions to fairly allocate the tax savings dispersed as a result of the settlement.[47] However, the 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.[48] Thus, the Supplemental Stipulation shifted more of the rate reduction from commercial customer classes to the residential class. OCC – the beneficiary of the cost shifting here – confirmed that this cost shifting was the reason it signed onto the Supplemental Stipulation.[49] Significantly, OCC does not argue or assert that the reallocation of the tax savings to one customer class to the detriment of another customer class is just or reasonable under ratemaking principles, Commission precedent, or any other controlling law. Simply stated, the rate design in the Supplemental Stipulation disproportionately benefits the residential rate class at the expense of the commercial rate classes.[50] Because the Stipulations may be beneficial to one class of customers does not mean it benefits all ratepayers and the public interest. As such, the rate design in the Supplemental Stipulation is not just and reasonable. Accordingly, the Commission should modify the Stipulations to reflect rate designs

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47 *See* Kroger's Brief at 20-22; OMAEG's Brief at 17-19.

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

49 OCC's Brief at 4.

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

that have previously been determined to spread out equitably the costs and benefits to make it just and reasonable.

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

Despite the fact that Companies witness Fanelli was cross-examined on the issue of the inadequate refund and reconciliation language of the Rider AMI tariff,[51] the Companies and supporting parties to the Stipulations failed to address this concern in their briefing. Nor has any party in its briefing defended the proposed language included in the Rider AMI tariff.

As both Kroger and OMAEG noted, 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.[52] Although the Supplemental Stipulation attempted to address this deficiency, it still falls woefully short in providing adequate and complete protection for customers.[53] 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. 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.

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

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[51] *See* Tr. Vol. I at 123-132.

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

[53] Supplemental Stipulation at 3-4.

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.

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.

In its initial brief, Kroger enumerated several important regulatory practices and principles being violated by the Stipulations. Kroger reiterates and incorporates by reference herein those violations. The Companies and supporting parties have not pointed to any record evidence that contradict the facts underlying those principle violations or overcomes the failures of the Stipulations. Rather, the record evidence established that:

- The Stipulations fail to ensure reasonably priced electric service by imposing above-market, duplicative charges;
- The Stipulations fail to ensure cost-effective access to information;
- The Stipulations fail to facilitate Ohio's effectiveness in the global economy; and
- The Stipulations fail to protect all customers.

In addition, the Stipulations ignore principles of fundamental fairness by unjustly and unreasonably requiring customers to pay twice for grid modernization and providing disproportionate benefits to one class of customers at the expense of other classes. As such, without modifications, the Stipulations do not satisfy the third criterion in evaluating whether settlements should be approved.

## IV. CONCLUSION.

In its initial brief, Kroger enumerated the multiple flaws in the Stipulations. Nothing in the Companies' and supporting parties' brief changes the facts of this case: 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. This is the result of a hasty process to address multiple distinct and unrelated issues at one time. Instead of a mere six-business day required turn-around, the Companies should have afforded the parties time to consider fully all the unrelated issues in this consolidated proceeding. Accordingly, for the foregoing reasons and for the reasons set forth in Kroger's initial brief, Kroger respectfully requests that the Commission reject the Stipulations, or at a minimum, modify the Stipulations as set forth herein as they were not a product of serious bargaining among all knowledgeable parties, do not benefit ratepayers and the public interest, and violate important regulatory principles and practices.

Respectfully submitted,

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Stephen E. Dutton (0096064)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
dutton@carpenterlipps.com
(willing to accept service by email)

*Counsel for The Kroger Co.*

## 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 12, 2019.

/s/ Angela Paul Whitfield
Angela Paul Whitfield

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Summary: Brief REPLY BRIEF OF THE KROGER CO. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.