

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2018 Under the Electric Security Plan of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. )  
)  
) Case No. 19-1338-EL-UNC  
)  
)

In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2019 Under the Electric Security Plan of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. )  
)  
) Case No. 20-1034-EL-UNC  
)  
)

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**MOTION TO INTERVENE OF  
THE KROGER CO.**

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Pursuant to R.C. 4903.221 and Ohio Adm. Code 4901-1-11, The Kroger Co. (Kroger) respectfully moves the Public Utilities Commission of Ohio (Commission) to intervene in this matter with the full powers and rights granted to intervening parties. As demonstrated in the attached Memorandum in Support, Kroger has a real and substantial interest in this proceeding that may be adversely affected by the outcome herein, and which cannot be adequately represented by any other party. Accordingly, Kroger satisfies the standard for intervention set forth in Ohio statutes and regulations.

Therefore, Kroger respectfully requests that the Commission grant this motion to intervene for the reasons stated herein and as more fully set forth in the attached Memorandum in Support. Kroger also requests that it be made a full party of record in these proceedings.

Respectfully submitted,

/s/ Angela Paul Whitfield

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**MEMORANDUM IN SUPPORT**

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Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) filed an Application on July 15, 2019 in Case No. 19-1338-EL-UNC, for administration of the significantly excessive earnings test (SEET) under R.C. 4928.143(F) for calendar year 2018, asking the Public Utilities Commission of Ohio (Commission) to determine that it did not have significantly excessive earnings.<sup>1</sup> On May 15, 2020, FirstEnergy filed an Application in Case No. 20-1034-EL-UNC for administration of the SEET, requesting a Commission determination that its 2019 earnings also were not significantly excessive. Subsequently, the Commission consolidated the two cases and ordered stakeholders to intervene no later than September 29, 2020.<sup>2</sup> On August 3, 2020, the Office of the Ohio Consumers' Counsel (OCC) filed an interlocutory appeal asserting that the current procedural schedule of the consolidated proceeding may result in undue prejudice.<sup>3</sup> OCC cited FirstEnergy's 2017 SEET

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<sup>1</sup> Applications at 1.

<sup>2</sup> Entry at ¶ 8 (July 29, 2020).

<sup>3</sup> OCC's Interlocutory Appeal at 4 (August 3, 2020).

Case which is pending before the Supreme Court of Ohio and explained the potential for prejudice should parties be required to litigate the above-captioned proceeding without the benefit of the Court's ruling in the 2017 SEET Case.<sup>4</sup>

As part of its Applications, FirstEnergy stated that its calculation excluded distribution modernization rider (DMR) revenues for calendar years 2018 and 2019.<sup>5</sup> As a customer of FirstEnergy, Kroger has a real and substantial interest in the outcome of this proceeding.

R.C. 4903.221 and Ohio Adm. Code 4901-1-11 permit Kroger's intervention in the above-captioned proceedings. R.C. 4903.221 provides, in part, that any person "who may be adversely affected" by a Commission proceeding is entitled to seek intervention in that proceeding. R.C. 4903.221(B) further requires the Commission to consider the nature and extent of the prospective intervenor's interest, the legal position advanced by the prospective intervenor and its probable relation to the merits of the case, whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding, and the prospective intervenor's potential contribution to a just and expeditious resolution of the issues involved.

Kroger is one of the largest grocers in the United States, with numerous facilities served by FirstEnergy. The facilities operated by Kroger use electricity for food storage, lighting, cooling, and distribution, often 24 hours a day, 7 days a week. Kroger's electric and energy needs associated with its facilities in FirstEnergy's service territory are considerable, and its electric service and the costs associated with obtaining such service from FirstEnergy will be impacted by the outcome of this proceeding. By improperly excluding DMR revenues from its SEET

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<sup>4</sup> Id. (citing *In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2017 Under the Electric Security Plans of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Supreme Court Case No. 2019-961 ("2017 SEET Case")).

<sup>5</sup> Direct Testimony of Tracy M. Ashton, at 6 (July 15, 2019); Direct Testimony of Tracy M. Ashton, at 6 (May 15, 2020).

calculations, FirstEnergy seeks to prevent Kroger from collecting refunds for excessive charges. As a consumer of significant amounts of energy in FirstEnergy's service territory, Kroger has been involved in numerous FirstEnergy cases previously.<sup>6</sup> Kroger also has participated in previous proceedings involving FirstEnergy's DMR.<sup>7</sup>

For these reasons, Kroger has a direct, real, and substantial interest in the issues raised in this proceeding and is so situated that the disposition of this proceeding may, as a practical matter, impair or impede its ability to protect that interest. Kroger has regularly participated in Commission proceedings, and will be able to provide input that will contribute to an equitable outcome in this proceeding. Kroger's interest will not be adequately represented by other parties and its timely intervention will not unduly delay or prolong these proceedings.

Because Kroger satisfies the requisite criteria, R.C. 4903.221 and Ohio Adm. Code 4901-1-11 authorize Kroger to intervene in this proceeding with the full powers and rights granted by the Commission to intervening parties. Kroger respectfully requests that the Commission grant this motion to intervene and make Kroger a full party of record.

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<sup>6</sup> See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Decoupling Mechanism*, Case Nos. 19-2080-EL-ATA, et al.; *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 Nos. 16-481-EL-UNC, et al.; *In The Matter Of The 2014 Review Of The Demand Side Management And Energy Efficiency Rider Of Ohio Edison Company, The Cleveland Electric Illuminating Company, And The Toledo Edison Company*, Case Nos. 13-2173-EL-RDR.

<sup>7</sup> *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; *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.

Respectfully submitted,

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*Counsel for The Kroger Co.*

**CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on August 12, 2020 upon the parties listed below.

/s/ Angela Paul Whitfield  
Angela Paul Whitfield

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**This foregoing document was electronically filed with the Public Utilities**

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**in**

**Case No(s). 19-1338-EL-UNC, 20-1034-EL-UNC**

Summary: Motion MOTION TO INTERVENE OF THE KROGER CO. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.