

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the	:	
Ohio Development Services Agency for	:	
an Order Approving Adjustments to the	:	Case No. 17-1377-EL-USF
Universal Service Fund Riders of	:	
Jurisdictional Ohio Electric Distribution	:	
Utilities.	:	

**OHIO DEVELOPMENT SERVICES AGENCY'S
REPLY BRIEF**

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I. INTRODUCTION

The only issue presented for consideration in this proceeding is whether the two-step declining block rate design, approved by this Commission annually since 2001, should be applicable to aggregated mercantile accounts for the first time, as proposed by The Kroger Co. (“Kroger”). Significantly, none of the other parties to this proceeding, which represent a variety of diverse interests, supports Kroger’s proposal:

- **The Ohio Development Services Agency (“ODSA”)** cannot support Kroger’s proposal because it lacks necessary detail as to the degree of the cost shift that may occur among customer classes. The record shows the cost shift could be “dramatic.”¹ Thus, the proposal could violate R.C. 4928.52(C).
- **Ohio’s Six Electric Distribution Utilities² (“EDUs”)** oppose Kroger’s proposal because it is not supported by sufficient detail,³ it is too costly and burdensome to implement,⁴ and because the potential magnitude of the cost shift among customers classes could violate R.C. 4928.52(C).⁵

¹ ODSA Initial Br. at 3; Tr. 94-96 (Ziolkowski Cross Examination).

² The six EDUs opposing Kroger’s proposal are Ohio Power Company; Duke Energy Ohio, Inc.; The Dayton Power and Light Company; Ohio Edison Company; The Cleveland Electric Illuminating Company; and The Toledo Edison Company.

³ EDUs Initial Br. at 6.

⁴ *Id.* at 9.

⁵ *Id.* at 12.

- **The Office of the Ohio Consumers' Counsel ("OCC")** opposes Kroger's proposal claiming that it unlawfully shifts costs among customer classes in violation of R.C. 4928.52(C),⁶ is fundamentally unfair to low-income customers,⁷ and is lacking in sufficient detail.⁸
- **Industrial Energy Users-Ohio ("IEU")** supports only the continued use of the two-step declining block rate design.⁹
- **Ohio Partners for Affordable Energy ("OPAE")** opposes the continued use of the two-step declining block rate design altogether.¹⁰
- **Public Utilities Commission of Ohio Staff ("Staff")** takes no position and filed a letter stating it would not file a brief.¹¹

Kroger's initial brief does not persuade ODSA that the record in this proceeding supports Kroger's proposal. Kroger claims that (1) the traditional application of the two-step rate structure is discriminatory, (2) its proposal does not shift costs among customer classes, and (3) its proposal is not onerous to the EDUs. Each of Kroger's claims should be rejected.

II. ARGUMENT

A. The Traditional Application of the Two-Step Declining Block Rate Design is Not Unduly Discriminatory.

The Universal Service Fund ("USF") rate is a usage-based rider charged to customers' accounts at single locations. A customer account at a single location with usage over 833,000 kWh per month is charged at a lower rate for usage over that threshold. Kroger claims that the rider is discriminatory because a corporate entity with accounts at multiple locations cannot aggregate usage from all locations to take advantage of the lower second tier rate.¹² Basing the

⁶ OCC Initial Br. at 3.

⁷ *Id.* at 4.

⁸ *Id.* at 4.

⁹ IEU Initial Br. at 4.

¹⁰ OPAE Initial Br. at 10.

¹¹ Staff Correspondence filed August 28, 2017.

¹² Kroger Initial Br. at 3-4.

USF rider rate upon usage of a single account is not discriminatory, as the following example demonstrates.

Consider Companies A and B, each of which has five non-residential accounts with a single EDU. Company A has one account with usage of 1,000,000 kWh per month, and four accounts with usage of 200,000 kWh per month. The monthly usage of each of Company B's accounts is 200,000 kWh.

Under the current application of the USF rate design, only the largest account for Company A would qualify for the second tier of the current USF rate design. Company A's remaining four accounts, and Company B's five accounts would be charged under the higher first tier rate. The rate design is not unduly discriminatory¹³ to Company B because both companies are treated equally based upon each account's usage – accounts for each company with monthly usage under 833,000 kWh would pay the higher first tier rate.¹⁴ See *County Comm'rs Assoc. v. Pub. Utilities Comm.*, 63 Ohio St. 2d 243, 246, 407 N.E.2d 534 (1980) (Differences in rates may be “based upon the *quantity used*, the time when used, the purpose for which used, the duration of use, and other reasonable considerations.” Emphasis supplied.).

B. Kroger's Proposal Fails to Demonstrate the Degree to Which it Would Shift Costs Among Customer Classes.

Kroger claims that its proposal would not result in an unlawful cost shift among customer classes in violation of R.C. 4928.52(C). It asserts that the delta revenue realized by permitting mercantile customers to aggregate their load for purposes of the USF rider rate would be collected in first tier rates. It reasons that, because mercantile customers also pay first tier rates,

¹³ See R.C. 4905.35, which prohibits only “undue” discrimination in rates.

¹⁴ Of course, a consequence of Kroger's proposal is that four of Company A's accounts would qualify for the second tier rate because one account had monthly usage exceeding 833,000 kWh. .

its proposal would not cause a cost shift.¹⁵

ODSA explained in its initial brief that the issue now before the Commission is whether Kroger's proposal shifts costs that otherwise would be paid under the current rate design. R.C. 4928.52(C). The aggregation of mercantile customers, for the first time for purposes of the USF rider rate, would shift costs as evidenced by the fact that mercantile customers would pay less under Kroger's proposal, and perhaps dramatically less.¹⁶ Lacking in the record is the number of mercantile customers that would be eligible under Kroger's proposal and their monthly consumption.¹⁷ Kroger did not provide for the record the costs its aggregated accounts would avoid if its proposal were accepted. Nor did it provide, or apparently attempt even to discover, the costs other eligible mercantile customers would avoid under its proposal.¹⁸ ODSA, and the Commission, simply cannot conclude on this record that Kroger's proposal would satisfy R.C. 4928.52(C).

Kroger also offers two alternative proposals on brief: ¹⁹ (1) to adjust the first and second rider rates equally in the same proportion²⁰ and (2) to recover only in the second block the delta revenues caused by aggregating mercantile customers.²¹ However, Kroger provided no analysis as to how the proposals would be developed or implemented,²² admittedly leaving that task to the Commission.²³ The record supports neither alternative and the Commission, accordingly, must

¹⁵ Kroger Initial Br. at 4

¹⁶ ODSA Initial Br. at 3; Tr. 94-96 (Ziolkowski Cross Examination).

¹⁷ ODSA Ex. 3 (Meadows Reply Testimony) at 3.

¹⁸ Tr. 43 (Higgins Cross Examination); Tr. 85-88 (Ziolkowski Cross Examination).

¹⁹ Kroger Initial Br. at 5-6.

²⁰ Kroger Ex. 1 (Higgins Direct Testimony) at 9.

²¹ Tr. 41-42 (Higgins Cross Examination).

²² ODSA Ex. 3 (Meadows Reply Testimony) at 4.

²³ Tr. 42(Higgins Cross Examination).

reject them.

C. The EDUs Could Incur Significant Costs and Burdens to Implement Kroger's Proposal.

ODSA witness Meadows testified that ODSA could not accept Kroger's proposal, in part, because it contained no information regarding its effect on the EDUs.²⁴ In testimony and on brief, the EDUs establish that aggregating mercantile customers for purposes of the USF rider rate would cause additional costs and burdens if changes had to be made to their billing systems or if the billing calculations were done manually.²⁵ The record contains no evidence as to the amount of these costs, which would be difficult to ascertain considering that Kroger presented no information as to the number of mercantile accounts that would be involved if its proposal were adopted. As explained above, Kroger's failure to sufficiently support its proposal with the costs mercantile customers would avoid is determinative of this proceeding. The Commission need not reach the issue of whether the costs and burdens to the EDUs to implement Kroger's proposal are reasonable. In that vein, ODSA notes that the costs associated with the EDUs' billing systems would not be recovered through USF rider rates, but through other Commission rate-setting proceedings. ODSA defers to the Commission as to the reasonableness of those costs and demands on the EDUs' operations.

D. OPAE's Proposal that the Two-Step Declining Block Rate Structure Should be Eliminated Must be Rejected.

1. The lawfulness of the current two-step declining block rate design has not been placed at issue in this proceeding and is not supported by the record.

OPAE filed objections and comments in this proceeding on June 30, 2017. It did not file testimony or present evidence to support its position at the evidentiary hearing held August 18,

²⁴ ODSA Ex. 2 (Meadows Direct Testimony) at 5-6.

²⁵ EDUs Initial Br. at 9-10.

2017. Indeed, the Attorney Examiner refused to admit OPAE's objections and comments as evidence in this proceeding.²⁶ Yet, on brief, OPAE claims (based on the non-record comments it provided) that the two-step declining block rate structure is unlawful because it shifts costs "from the very largest customer class to all other customer classes."²⁷ OPAE proposes a single block rate design.²⁸ The Commission should summarily reject OPAE's proposal because (1) the lawfulness of the two-step declining block rate structure is not at issue, and (2) OPAE's proposal is not supported by the record.

No other party contests the lawfulness of the current two-step declining block rate design. In fact, Kroger explicitly states that it is not challenging the rate design.²⁹ Because OPAE's objections and comments were not admitted into the record, and because OPAE choose not to file testimony, the issue of the lawfulness of a two-block rate design has not been placed at issue. The Commission should reject OPAE's position on this basis alone.

Even if the Commission were to consider OPAE's position, the record does not support that the current rate design is unlawful. The issue in this case is whether Kroger's proposal to aggregate mercantile customers for the first time would unlawfully shift costs among customers for purposes of the 2018 USF rider vis-à-vis the manner in which the current rate design traditionally has been applied. OPAE attempts to bootstrap other parties' testimony on this issue to support its position that the current rate design is unlawful, and allegedly has been since 2001. No testimony or evidence of record was offered to support OPAE's position, which should be rejected.

²⁶ Tr. 26.

²⁷ OPAE Initial Br. at 10.

²⁸ OPAE Initial Br. at 9.

²⁹ Kroger Initial Br. at 3 ("Notably, Kroger is not challenging the two-step declining block rate design in this proceeding.")

Further, OPAE attempts to confuse the issues in this proceeding by reciting the history of USF proceedings and, specifically, that the rate design has been approved only pursuant to stipulation since 2001. Notably, OPAE was a signatory to that initial, unanimous stipulation and should not be heard to complain about the rate design.³⁰ Further, in approving the stipulations under the three-prong standard, the Commission consistently and explicitly found in each case that the stipulation did not violate a regulatory principle or practice. Thus, the Commission necessarily found that the rate design was lawful.

Finally, OPAE improperly criticizes the Commission's decision rendered in Case No. 15-1046-EL-USF, in which OPAE actually litigated this issue. Notably, OPAE did not seek rehearing or appeal that decision. Its criticisms in this proceeding amount to nothing more than an improper and untimely request for rehearing.³¹ Indeed, that decision serves as important precedential value. The Commission was not persuaded by OPAE's position in the former litigated proceeding that the two-step rate structure was unlawful, and OPAE has offered nothing in this case to cause the Commission to find otherwise.

2. ODSA sustained its burden of proof.

OPAE alleges that ODSA failed to sustain its burden of proof in support of its Notice of Intent. ODSA witness Meadows testified that the two-step declining block rate structure provided "a reasonable contribution by all customer classes to the USF revenue requirement."³² OPAE has presented absolutely no evidence to refute this evidence.

³⁰ *In re Ohio Dept. of Development*, Case No. 01-2411-EL-UNC at 2 (noting OPAE's appearance as a party) and 6 (noting the parties' unanimous stipulation).

³¹ R.C. 4903.10.

³² ODSA Ex. 2 (Meadows Direct Testimony) at 4.

III. CONCLUSION & RECOMMENDATION

For the foregoing reasons, ODSA respectfully requests that the Commission reject Kroger's and OPAC's proposals and approve the rate design and revenue requirement methodologies it proposed in the Notice of Intent filed May 31, 2017.

Respectfully submitted,

A handwritten signature in cursive script that reads "Dane Stinson".

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief has been served upon the following parties by first class mail, postage prepaid, and/or electronic mail this 8th day of September 2017.



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