BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company For Approval of Its Electric Security Plan.	))))	Case No. 16-395-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	))))	Case No. 16-396-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	))))	Case No. 16-397-EL-AAM

THE KROGER COMPANY'S MEMORANDUM CONTRA APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

On March 14, 2017, the Dayton Power and Light Company (DP&L), Staff of the Public Utilities Commission of Ohio (Staff), and thirteen additional Signatory Parties or Non-Opposing Parties filed with the Public Utilities Commission of Ohio (Commission) an Amended Stipulation (Stipulation), between diverse parties having substantial experience before the Commission. The Kroger Company (Kroger) agreed to be a Non-Opposing Party to the Stipulation.

On October 20, 2017, the Commission issued an Opinion and Order adopting and modifying the Stipulation.[1] In response to a hypothetical concern that may or may not occur, the Commission improperly modified an expressly negotiated term of the Stipulation providing that the Reconciliation Rider be nonbypassable instead of bypassable.[2]

[1] Opinion and Order at ¶ 1 (October 20, 2017) (Order).

[2] Id. at ¶ 63.

On November 17, 2017 and November 20, 2017, several parties, including the Office of the Ohio Consumers' Counsel (OCC), filed applications for rehearing that raised assignments of error that addressed whether the Stipulation was the product of serious bargaining among capable and knowledgeable parties, whether the settlement package sufficiently benefits ratepayers and the public interest, and whether the settlement package violates any important regulatory principle.

II. ARGUMENT

A. The Commission's Modification of the Reconciliation Rider to Make it Nonbypassable made it an Unlawful Transition Charge.

In its second assignment of error,[3] OCC argues that the nonbypassable Reconciliation Rider is an unlawful transition charge in violation of R.C. 4928.38.[4] To the extent OCC challenges the nonbypassable Reconciliation Rider, Kroger agrees that the Rider is an unlawful transition charge, or any equivalent revenue.[5]

Further, contrary to OCC's arguments,[6] several other parties agreed with Kroger that the Commission's stated reasoning for modifying the Stipulation and making the Reconciliation Rider nonbypassable was unsupported by the record and against the manifest weight of evidence. In fact, with the Reconciliation Rider being bypassable, the parties explain that DP&L projected that monthly rates would decrease for DP&L's residential standard service offer (SSO) customers.[7] The parties also argued that the Commission failed to discuss the basis for its

[3] Although this Memorandum Contra addresses only OCC's second and third assignments of error, the decision not to respond to OCC's other assignments of error does not indicate Kroger's acceptance or support of them.

[4] Id. at 5.

[5] See Kroger Application for Rehearing at 9 (November 20, 2017) (Kroger AFR).

[6] OCC Initial Brief at 43 (May 5,2017).

[7] See Interstate Gas Supply, Inc. (IGS) Application for Rehearing at 13 (November 20, 2017) (IGS AFR).

concern in violation of RC 4903.09.[8] Some parties also discussed alternatives to address the Commission's stated concern, such as imposing a condition to safeguard against rate shock (i.e., a cap on the bypassable cost recovery).[9] IGS proposes that if the ongoing costs and previously unrecovered costs are greater than 10 percent of the initially forecasted Reconciliation Rider rate, that surplus would be collected through a nonbypassable portion of the Reconciliation Rider.[10] Similarly, Retail Energy Supply Association (RESA) proposed establishing a "trigger point" of 10 percent above the baseline to provide protections for non-shopping customers.[11] RESA proposes that there be a bypassable and nonbypassable component to the Reconciliation Rider. The nonbypassable component would only be used to collect the revenue requirements in excess of a set trigger point.[12] As RESA notes, the Commission has previously established a similar structure to protect customers from recovery of certain deferred costs associated with bypassable riders when those deferred costs exceed ten percent of a baseline amount.[13] Lastly, IEU proposed that the Commission initiate a new proceeding or conduct a review in the context of the Reconciliation Rider's annual updates and order any modifications to the Reconciliation Riders rates at that time if the Commission determined that the bypassable Reconciliation Rider rates materially increased over the ESP term, causing the Reconciliation Rider rates to become unreasonable.[14] In light of the Commission's modification, Kroger also proposed an alternative

[8] IGS AFR at 12; Kroger AFR at 7-9; Industrial Energy Users-Ohio (IEU) Application for Rehearing at 2-5 (November 20, 2017) (IEU AFR).

[9] IGS AFR at 13-14.

[10] IGS AFR at 14.

[11] RESA Application for Rehearing at 9-12 (November 20, 2017) (RESA AFR).

[12] Id.

[13] Id. at 10-11, citing *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, Opinion and Order at 35 (September 4, 2013), Entry Nunc Pro Tunc (September 6, 2013), and Entry on Rehearing at ¶ 33 (March 19, 2014).

[14] IEU AFR at 5.

"circuit breaker" provision that would allow the Reconciliation Rider to be conditionally bypassable when a threshold is met.[15] Although Kroger did not suggest a specific threshold amount, Kroger finds the levels proposed by IGS and RESA to be reasonable. Kroger also finds IEU's approach to retain the bypassability of the Reconciliation Rider today and then revisit the issue through a new proceeding or the annual audit proceedings, if the Reconciliation Rider rates become unjust and unreasonable to be a logical alternative.

B. OCC's Third Assignment of Error Fails to State a Basis Upon Which the Commission Should Reverse or Modify its Order.

1. The Commission's Finding Regarding Economic Development Incentives is Supported by the Record.

In its third assignment of error, OCC argues that the Commission approved various economic development incentives without demonstrating a need or specific commitments by those receiving the incentives.[16] In its broad claims that the Commission lacked record support, OCC did not offer any supporting evidence to substantiate its claims that the economic incentives are not needed or are improper. OCC also did not offer any of its own evidence that contradicted the record cited to and relied upon by the Commission.

The Supreme Court of Ohio has held that a Commission order complies with R.C. 4903.09 so as long as there is a basic rationale and record supporting the order.[17] First, the Commission cited to the statutory provisions that directly authorizes economic incentives.[18] Second, the Commission's Order approving the economic development incentives was supported by ample record support. In discussing the criteria to be evaluated under stipulations, the Commission identified specific provisions in the Stipulation and discussed the specific benefits

[15] Kroger AFR at 9.

[16] OCC AFR at 6 (November 20, 2017).

[17] *Indus. Energy Users-Ohio*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30.

[18] Order at ¶ 123 (citing R.C. 4928.143(B)(2)(i)).

derived from the incentives that were provided, such as job retention, energy efficiency, and economic development payments to offset costs associated with rate design modifications.[19]

Additionally, OCC's claim that the incentives were improper because the Commission did not demonstrate need or specific commitments lacks merit.[20] Nowhere in R.C. 4928.143(B)(2)(i) is there a requirement for the Commission to demonstrate need or that specific commitments exist prior to approving and implementing economic development incentives. In construing a statute, the Commission may not add or delete words. *See In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, 20 N.E.3d 699, ¶ 24.

Based upon the record evidence, as well as the statutory language, the Commission concluded that the economic development incentives were expressly authorized by statute, that the statute does not require a demonstration of need or specific commitments, that the incentives are in the public interest, and that the economic development programs support the policy of the state to facilitate the state's effectiveness in the global economy.[21]

Contrary to OCC's cursory claims,[22] the Commission's findings were lawful and reasonable, as they were supported by the record. Accordingly, the Commission should deny OCC's third assignment of error and affirm its Order approving the economic incentives.

2. R.C. 4928.143(B)(2)(i) Provides for Provisions Permitting Economic Incentives in an Electric Security Plan, but it Does Not Require A Demonstration of Customer "Need" or "Commitments" to Support Such A Provision.

In its supporting memorandum urging rehearing of the EDR credits, OCC alleges that approval of the credits was "improper" because the Commission approved the credits "without

[19] Order at ¶¶ 81, 120-123.

[20] OCC AFR at 6.

[21] Id. at ¶¶ 8, 123.

[22] OCC AFR at 6.

any demonstration of need or specific commitments." *Id.* at 6. Ohio law, however, does not require proponents of the EDR credits to make such a showing. R.C. 4928.143(B)(2)(i) provides the governing language for a term of an electric security plan addressing economic development. Thereunder, the Commission may authorize as a term of an electric security plan provisions "under which the electric distribution utility may implement economic development [and] job retention." Further, the "provisions may allocate program costs across all classes of customers of the utility." Contrary to OCC's claim, R.C. 4928.143(B)(2)(i) does not contain any requirement for the proponent of a provision authorized by that subdivision to demonstrate either "need" or "commitments." The Commission's rule concerning the filing requirements applicable to R.C. 4928.143(B)(2)(i) also does not provide OCC any support for its claim. Thus, the failure to find that the proponents needed the EDR credits or had made commitments for them is not a basis for granting rehearing.

C. OCC's Sixth Assignment of Error Fails to State a Basis Upon Which the Commission Should Reverse or Modify its Order.

In its sixth assignment of error, OCC challenges the cost allocation of the Distribution Modernization Rider (DMR) as negotiated in the Stipulation as being harmful to residential customers and not in the public interest.[23] Although OCC disagrees with the cost allocation method of the DMR, OCC fails to articulate how this allocation is not in the public interest considering that the Stipulation, as a whole, was found to result in overall lower rates for residential customers.[24] Because the Stipulation as a whole will benefit customers, including residential customers, the Stipulation is in the public interest. Thus, OCC's sixth assignment of error should be denied, as it fails to state a basis upon which the Commission should reverse or

[23] OCC AFR at 8.

[24] Order at ¶ 112.

modify its order.

III. CONCLUSION

Other than the Commission's modification rendering the Reconciliation Rider bypassable, the Stipulation meets the Commission's three-part test. Accordingly, OCC's application for rehearing should be denied in part and granted in part. The Commission should grant OCC's application for rehearing regarding its second assignment of error that the nonbypassable Reconciliation Rider is unlawful and adopt the terms and provisions of the Stipulation in their entirety and without modification. Alternatively, the Commission should consider adopting a provision whereby the Reconciliation Rider would initially be bypassable but include conditions to safeguard customers and address rate shock concerns as discussed herein. The Commission should deny OCC's remaining assignments of error.

Respectfully submitted,

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Carpenter, Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
Fax: 614.365.9145
paul@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Company

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via electronic mail on the following parties on December 4, 2017.

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)

thomas.mcnamee@ohioattorneygeneral.gov
jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com
william.michael@occ.ohio.gov
andrew.garver@occ.ohio.gov
kevin.moore@occ.ohio.gov
fdarr@mwncmh.com
mpritchard@mwncmh.com
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
joliker@igsenergy.com
mswhite@igsenergy.com
Ebetterton@igsenergy.com
schmidt@sppgrp.com
jeffrey.mayes@monitoringanalytics.com
evelyn.robinson@pjm.com
sechler@carpenterlipps.com
paul@carpenterlipps.com
cmooney@ohiopartners.org
mdortch@kravitzllc.com
rparsons@kravitzllc.com
rsahli@columbus.rr.com
chris@envlaw.com
tony.mendoza@sierraclub.org
kristin.henry@sierraclub.org
greg.wannier@sierraclub.org
michelle.d.grant@dynegy.com
mfleisher@elpc.org
kfield@elpc.org
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
charris@spilmanlaw.com
Stephen.Chriss@walmart.com
Greg.Tillman@walmart.com
mjsettineri@vorys.com
smhoward@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com
wasieck@vorys.corn
gthomas@gtpowergroup.com
stheodore@epsa.org
laurac@chappelleconsulting.net
ejacobs@ablelaw.org
slesser@calfee.com
jlang@calfee.com
talexander@calfee.com
mkeaney@calfee.com
jdoll@djflawfirm.com
mcrawford@djflawfirm.com
rick.sites@ohiohospitals.org
mwarnock@bricker.com
dborchers@bricker.com
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com
crtamm@classicconnectors.com
jstock@beneschlaw.com
ocollier@beneschlaw.com
mlandes@isaacwiles.com
bzets@isaacwiles.com
todonnell@dickinsonwright.com
rseiler@dickinsonwright.com
cpirik@dickinsonwright.com
wvorys@dickinsonwright.com
prosecutorkelley@usa.com
dana.whalen@adamscountyoh.gov
dparram@bricker.com
eppla@theOEC.org

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/4/2017 5:29:41 PM

in

Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM

Summary: Memorandum The Kroger Company's Memorandum Contra Application For Rehearing By The Office Of The Ohio Consumers' Counsel electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.