BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Establishing the Nonbypassable Recovery Mechanism For Net Legacy Generation Resource Costs Pursuant to R.C. 4928.148.	: : :	Case No. 19-1808-EL-UNC

JOINT MEMORANDUM CONTRA OF THE DAYTON POWER AND LIGHT COMPANY, DUKE ENERGY OHIO, INC., AND OHIO POWER COMPANY TO THE JOINT APPLICATION FOR REHEARING OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP AND THE KROGER COMPANY

I. INTRODUCTION AND BACKGROUND

The Public Utilities Commission of Ohio ("PUCO" or "the Commission") opened this docket "to receive comments regarding establishing the nonbypassable recovery mechanism for net legacy generation resource costs pursuant to R.C. 4928.148." In its Staff Report, Staff recommended that "the combination of Part A and Part B rates will be capped at . . . $1,500 per month for non-residential customers on a per account/premise basis."[1] Certain commercial and industrial customers claimed that the Staff proposal was ambiguous because it used the term "account/premise," which should be interpreted to mean that multiple accounts can be aggregated for purpose of triggering the cap. The commercial and industrial customers had varying views on how the term "customer" should be defined or interpreted; none of which are consistent with what is already contained in the Commission's rules. Kroger advocated for the most extreme view in this regard, suggesting consolidation of multiple accounts for multiple facilities at multiple locations throughout the EDU's service territory, as well as a consolidated application

[1] Comments of the Staff of the Public Utilities Commission of Ohio at p. 4 (Sept. 25, 2019).

of the 833,000 kWh per month rate design.[2] This would apparently allow Kroger to pay a single LGR fee each month to cover all usage at all Kroger locations. In its November 21, 2019 Entry, the Commission correctly rejected these arguments, finding that the Commission's rules already defined the term "customer" such that the Legacy Generation Resource Rider would be billed in connection with each account established in accordance with the respective utility's tariffs.[3] The Ohio Manufacturers' Association Energy Group and The Kroger Company (collectively referred to as "Joint Applicants") filed a Joint Application for Rehearing with a single assignment of error – that the Commission erred by finding that "customer" is an entity with one account for purposes of determining the maximum legacy generation resource charge that can be assessed on a non-residential customer.[4] The Dayton Power and Light Company, Duke Energy Ohio, Inc., and Ohio Power Company jointly oppose the Joint Application for Rehearing.

II. LAW AND ARGUMENT

The Commission correctly found that the term "customer" is unambiguous and should not be read in a way to aggregate accounts for purposes of the calculating the cap set forth in R.C. 4928.148(A)(2). As they did in their Comments, Joint Applicants argue that by using the term "customer" the legislature intended to exclude a cap that was on a "per account" basis.[5] To support this argument, Joint Applicants once again cite to legislative history to make the case that changes from "per account" to "per customer" between legislative drafts indicate a legislative intent to allow aggregation of accounts.[6] Throughout the legislative process that led to enactment of

[2] Comments of The Kroger Co. at pp. 3-5 (October 17, 2019).

[3] Entry at pp. 8-9 (November 21, 2019).

[4] Ohio Manufacturers' Association Energy Group ("OMAEG Comments") at pp. 4-6 (Oct. 17, 2019).

[5] Joint Application for Rehearing at p. 8.

[6] Joint Application for Rehearing of The Ohio Manufacturers' Association Energy Group and The Kroger Company ("Joint Application for Rehearing") at p. 7 (December 23, 2019).

Amended Sub H.B. 6, there were a myriad of amendments and language changes through replacement, amendment and additions/deletions. That one of those net changes ended up replacing language that initially included the phrase "per account" with the final phrase "per customer" does not suggest an ambiguity exists or support a mandatory requirement that is impractical, unprecedented or unreasonable.

It has been consistently held in Ohio that unless there is first "a determination that the language of the statute is capable of more than one meaning, it is inappropriate to examine legislative history, legislative intent, public policy, or any other factors to determine the meaning of a statute."[7] Thus, Joint Applicants' argument is entirely contingent upon a finding that R.C. 4928.148 is ambiguous. In an attempt to establish ambiguity, Joint Applicants accuse the Commission of reading words into the statute that do not exist.[8] This argument hangs entirely upon the proposition that the word "customer" does not have a plain meaning. But the Commission correctly found that the legislative use of the word "customer" is "clear and unambiguous."[9]

Prior to the enactment of R.C. 4928.148, Ohio Adm. Code 4901:1-10-01 already defined "customer" to mean "any person who has an agreement, by contract and/or tariff with an electric utility or by contract with a competitive retail electric service provider, to receive service."[10] Each account receives services pursuant to a contract and/or a tariff; therefore, each account is a customer under the Commission's Rules. The Rules, therefore, do not ponder aggregating multiple accounts under the guise of being a single "customer." One must assume that the

[7] *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16.

[8] Joint Application for Rehearing at p. 5.

[9] Entry at p. 8.

[10] Entry at p. 8 (citing Ohio Adm. Code 4901:1-10-01(I)).

legislature was aware of the Commission's rules when it passed R.C. 4928.148, reflecting that "customer" already has a plain meaning in Ohio.

Joint Applicants acknowledge the definition of "customer" as cited by the Commission, but point to the lack of a definition of "account" in an apparent attempt to create ambiguity.[11] Employing circular logic, Joint Applicants argue that multiple customers may have accounts, therefore, an account cannot be synonymous with customer.[12] But as firmly established in the Commission's rules, "customer" is a defined term of art that is linked to a specific contract and/or tariff through an account. Ergo, a customer is synonymous with an account under the Ohio's regulatory construct set forth Title 49.

The plain meaning of customer is also apparent from many years of practice where electric distribution utilities ("EDUs") have historically treated each account as a customer. To bill in the manner suggested by the commercial customers is not a regular utility billing practice that can be implemented without significant difficulty and the Joint Applicants' approach would up-end the billing system that has operated for over a century. It is unclear how the EDUs would even aggregate accounts for this one single charge.

Utility billing systems are set up to include a code for each rate included in the utilities Commission approved tariff. These codes are applied to the billing determinants of each tariff number. The customers of the utilities are assessed a bill based on the tariff schedules and all codes and rates are charged appropriately to the billing determinants related to that tariff. The change in definition of per customer that impacts how billing determinants are calculated and brought over to the billing system indicate that the LGR would be the only charge for each Ohio

[11] Joint Application for Rehearing at p. 6.

[12] Id.

utility that is applied to a different set of billing determinants than all other charges. The approach has generally been shown to be infeasible and impractical, at best. Moreover, not all accounts are even on the same billing cycle, which increases the billing difficulties associated with aggregation of accounts. To further complicate matters, by arguing for departure from the Administrative Code definition of "customer" that refers to company-specific tariffs, the Joint Applicants' proposals lack specificity on whether load should be aggregated across the entire state, which could exponentially complicate the billing of the LGR Rider. All of these issues make it unclear how to implement the Joint Applicants' proposal and whether it would work when it has been unproven. It is clear, however, that implementation would be very expensive and would shifts costs to other customers.

Aggregation would also require EDUs to individually track all existing and new non-residential electric accounts in Ohio to see if they are part of a single entity. Such an approach would involve a burdensome and highly difficult (and expensive) investigation and invasive interactions between the EDU and its customers. In fact, some (if not all) of the EDUs do not even possess the requisite information to make such a determination and would have to rely solely upon the representations of those respective customers. This process would likely require applications by mercantile customers and some form of verification by the Ohio EDUs. It is unreasonable and unnecessary to place EDUs in the position of policing whether multiple accounts at multiple locations are owned by the same legal entity. All of this would require a manual process to administer the billing of the LGR Rider, adding more complexity and costs to an already complex rider. Even if that were possible and appropriate, applying the caps to each of those individual customers has the potential to wildly swing the costs to other customers in Ohio.

By combining accounts, the non-residential customers would reach their statutory cap faster, leaving only two results: (1) pushing costs onto other customers, or (2) leaving a large deferral for recovery post-2030. This Commission has previously rejected attempts to aggregate accounts that results in shifting costs onto other customers. Kroger previously sought to aggregate multiple accounts for purposes of charging the Universal Service Fund ("USF") rider. Among other reasons for rejecting the concept, the Commission recognized in that case, that allowing aggregation of accounts, it would likely amount in those that cannot aggregate to incur significantly greater charges.[13] The proposal to aggregate accounts for purposes of this one rider is a slippery slope that would allow cost of service to be completely up-upended. Taken to an extreme position (such as Kroger's advocated position), such an approach also unreasonably upsets the careful balance of cost allocation designed by the General Assembly; any customer that gets to consolidate bills and pay less will result in other customers paying more.

Even if there were any sort of ambiguity, there is no evidence that the legislature intended for "customer" to mean something different than how it is defined in the Ohio Administrative Code and interpreted by the Commission. Joint Applicants draw the conclusion that changing from the as introduced language of "per meter" to "per customer," the legislature somehow "explicitly turn[ed] away from . . . adoption of a 'per account' cap."[14] To the contrary, throughout the legislative process that led to enactment of HB 6, there were a myriad of amendments and language changes through replacement, amendment and additions/deletions. That one of those net changes ended up replacing language that initially included the phrase "per meter" with the final phrase

[13] *In Re the Application of The Ohio Development Services Agency for an Order Approving Adjustments to the Universal Service Fund Rider of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 17-1377-EL-UNC, Opinion and Order at ¶53 (Oct. 11, 2017).

[14] Joint Application for Rehearing at p. 7.

"per customer" does not suggest that "customer" should be read in an extraordinary and unreasonable manner that would produce an absurd result. As explained in the Commission's Entry, "the legislative use of the word "customer" in H.B. 6 is clear and unambiguous."[15] Nonetheless, the plain meaning of a "customer" for utility billing purposes is a customer account, and there is no evidence to suggest a different result was intended by the General Assembly. Joint Applicants' interpretation would produce an absurd result that would insulate customers that have multiple premises that consume significant amounts of electricity, on separate accounts throughout the utilities' service territories, from paying their fair apportionment of the LGR Rider costs. Such cost shifting would result in all other customers, particularly residential and smaller commercial customers who do not have multiple service locations, to bear a disproportional share of costs. Joint Applicants' interpretation of the monthly statutory cap based upon the customer's name/legal entity would produce such an absurd result that was never intended by the General Assembly.

It is just as possible, if not likely, that the legislature changed to a "customer" definition due to acquiring knowledge and understanding of the existing Administrative Code provisions that already defined the term. And while there was some legislative intent to limit costs to customers – by capping the costs at $1.50 per residential customer and $1,500 per non-residential customers – there is no evidence indicating intent to implement unprecedented billing practices to shift those costs onto residential customers. Just because an early draft of the legislation used the term "account" and the final version used the term "customer" does not change the meaning of customer in the context of utility billing – it still equals an account.

For this myriad of reasons, it was not unreasonable or unlawful for the Commission to reject the Joint Applicants' argument requesting to aggregate accounts for purposes of the LGR.

[15] Entry at p. 8.

III. CONCLUSION

For the reasons explained above, the Commission should affirm its ruling set forth in the November 21, 2019 Entry and deny the Joint Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Joint Memorandum Contra of The Dayton Power and Light Company, Duke Energy Ohio, Inc., and Ohio Power Company to the Joint Application for Rehearing of The Ohio Manufacturers' Association Energy Group and The Kroger Company has been served via electronic mail upon the following counsel of record, this 2nd day of January, 2020:

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Summary: Memorandum Contra of The Dayton Power and Light Company, Duke Energy Ohio, Inc., and Ohio Power Company to the Joint Application for Rehearing of the Ohio Manufacturers' Association Energy Group and The Kroger Company electronically filed by Mr. Michael J Schuler on behalf of The Dayton Power and Light Company and Duke Energy Ohio, Inc. and Ohio Power Company