BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider	**))))**	**Case No. 14-1186-EL-RDR**

THE KROGER CO.'S APPLICATION FOR REHEARING

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, The Kroger Company ("Kroger") submits this application for rehearing regarding the Public Utilities Commission of Ohio's ("Commission") April 2, 2015 Finding and Order in Case No. 14-1186-EL-RDR (the "*RSR Rider Case*"). The Commission refused to consider or adopt Kroger's comments in the *RSR Rider Case* based on the incorrect conclusion that Kroger's comments constitute a "collateral attack" on the Commission's prior order. This unlawful conclusion resulted in the Commission summarily denying Kroger's rate design recommendation even though AEP-Ohio does not oppose Kroger's recommendation, no other party in this proceeding opposed Kroger's recommendation, and there is no record evidence supporting a continuance of the RSR Rider's current rate design.

The Finding and Order from the *RSR Rider Case* is unlawful and unreasonable for the following reasons:

1. **The Commission's refusal to consider Kroger's recommendation was unreasonable and unlawful because Kroger's proposed rate design for the capacity deferral balance did not constitute a "collateral attack" on the ESP II Order.**

2. **The Commission's Finding and Order is unreasonable and unlawful because the Commission's determination that Kroger's rate design recommendation is a "collateral attack" on prior orders is inconsistent with the Commission's decision in *In re Columbus Southern Power*, Case No. 11-4920-EL-RDR.**

3. **The Commission's Finding and Order is unlawful because it is not supported by record evidence and, thus, violates R.C. 4903.09.**

Kroger respectfully requests that the Commission grant rehearing to remedy the above errors in the Finding and Order. A memorandum in support of this application for rehearing is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. BACKGROUND

In *In re Columbus Southern Power Co. and Ohio Power Co*., Case No. 11-346-EL-SSO ("*ESP II Case*"), the Commission granted AEP-Ohio's request to implement the Rate Stability Rider ("RSR Rider"). In its Opinion and Order, the Commission indicated that the RSR Rider would be implemented in two separate phases. *ESP II Case*, Opinion and Order ("ESP II Order") at 36 (August 8, 2012). During the first phase, AEP-Ohio would recover $388 million during the term of ESP II.[1] According to the Commission, recovery during the first phase of the RSR Rider was intended to help AEP-Ohio move towards competitive market pricing and allow AEP-Ohio to freeze base generation rates. *ESP II Order* at *36.* In the second phase of the RSR Rider, AEP-Ohio would recover the balance of the capacity deferral that was created in *In re Ohio Power Co. and Columbus Southern Power Co*., Case No. 10-2929-EL-UNC (July 2, 2012) ("Capacity Case"). *ESP II Order* at 36-37. This second phase would begin after the term of ESP II. The ESP II Order stated that "all determinations for future recovery of the capacity deferral balance would occur following the Company's filing of its actual shopping statistics." *ESP II Order* at 36.

In its *ESP III Case* (*In re Ohio Power Co*., Case No. 13-2385-EL-SSO ("*ESP III Case*")), AEP-Ohio filed its application and supporting testimony. Because the ESP III application and AEP-Ohio's testimony addressed the RSR Rider, Kroger filed testimony

[1] The Commission indicated that the $388 million is calculated by taking the $508 million RSR recovery amount and subtracting $144 million devoted to the capacity deferral, and then adding $24 million to account for the increase to $4/MWh in the final year of the ESP II.

regarding the proposed rate design for the capacity deferral balance for the RSR Rider.[2] AEP-Ohio filed a motion to strike portions of Kroger's testimony.[3] AEP-Ohio claimed that issues regarding the RSR Rider deferral should be addressed in a "separate proceeding," and not in the *ESP III Case*.[4] The ALJ granted AEP-Ohio's motion to strike and stated that "the company has made it clear that it is the company's intention to file through a separate proceeding an application addressing the RSR." *ESP III Case*, Tr. Vol. VIII, 1882. This *RSR Rider Case* is that "separate proceeding."

In the *RSR Rider Case*, Kroger filed comments in which Kroger recommended that the Commission change the rate design of RSR Rider from an energy charge to a demand charge for demand metered customers beginning on June 1, 2015.[5] Kroger's recommendation pertained strictly to the capacity deferral phase of the RSR Rider. Kroger did not challenge the validity of the RSR Rider in its comments. Kroger did not recommend that the RSR Rider be modified in any manner that would affect recovery during the ESP II term. Significantly, AEP-Ohio did not challenge Kroger's rate design rider recommendation.[6] In fact, AEP-Ohio stated that it is not opposed to Kroger's rate design recommendation if the recommendation is implemented in a manner that is revenue neutral. Finding and Order at 10.

The Commission refused to consider Kroger's recommendation. Finding and Order at 14. Despite the fact AEP-Ohio did not oppose Kroger's recommendation, and despite the fact the *RSR Rider Case* is a completely "separate proceeding" than the

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[2] *ESP III Case*, Direct Testimony of Kevin Higgins submitted on the Behalf The Kroger Company (May 6, 2014).
[3] *ESP III Case*, Ohio Power's Motion to Strike Testimony and Request for Expedited Ruling (May 23, 2014).
[4] *Id.* at 5-6.
[5] *RSR Rider Case*, Initial Comments of the Kroger Co. (December 1, 2014).
[6] *RSR Rider Case*, Reply Comments of Ohio Power, pg. 11 (December 26, 2014).

Capacity Case or the *ESP II Case*, the Commission concluded that Kroger's recommendation "constitute[d] a collateral attack on the Commission's final orders in the *Capacity Case* and the *ESP 2 Case*." Finding and Order at 14. This is particularly unfair since Kroger's testimony regarding this issue was stricken in the *ESP III Case* on the basis that the testimony would only become relevant in this case.

II. ARGUMENT

1. The Commission's refusal to consider Kroger's recommendation was unreasonable and unlawful because Kroger's proposed rate design for the capacity deferral balance did not constitute a "collateral attack" on the ESP II Order.

The Commission's rationale for denying Kroger's proposed rate design is that Kroger's recommendation constitutes a collateral attack on the ESP II Order. Kroger's rate design recommendation is not a collateral attack on a prior Commission order. The Ohio Supreme Court has defined a "collateral attack" as "an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved." *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St. 3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶¶ 16-17. A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective." *Id*. at ¶17.

Kroger's rate design recommendation did not constitute a "collateral attack" because Kroger's recommendation did not attempt to "undermine" the ESP II Order. Although Kroger recommended the same rate design in the *ESP II Case*, the ESP II Order stated that "all determinations for future recovery of the capacity deferral balance would occur following the Company's filing of its actual shopping statistics." ESP II

Order at 36. After striking portions of Kroger's testimony in the *ESP III Case*, the ALJ stated that issues addressing the capacity deferral balance would be addressed in a subsequent proceeding. This *RSR Rider Case* is that subsequent proceeding. It is unreasonable for the Commission to dismiss Kroger's comments on the basis of collateral attack when the Commission previously indicated on two occasions that comments regarding the capacity deferral would be considered in this proceeding. The *RSR Rider Case* is the proper proceeding to address issues regarding the recovery of the capacity deferral, such as the proper rate design for the rider.

Kroger's recommendation in the *RSR Rider Case* was narrowly tailored to address "future recovery of the capacity deferral balance." Kroger's comments did not address the legality of the RSR Rider, and did not address the rate design for the RSR Rider during the ESP II term. The Commission erred by concluding that Kroger's comments constituted a collateral attack on prior orders.

2. The Commission's Finding and Order is unreasonable and unlawful because the Commission's determination that Kroger's rate design recommendation is a "collateral attack" on prior orders is inconsistent with the Commission's decision in *In re Columbus Southern Power*, Case No. 11-4920-EL-RDR ("*PIRR Rider Case*").

The *ESP II Case* and the *RSR Rider Case* are separate and distinct proceedings. In the *ESP II Case*, the Commission allowed AEP-Ohio to create the RSR Rider and authorized the creation of the capacity deferral balance. The purpose of this *RSR Rider Case* is to determine the appropriate structure of recovery of the capacity deferral balance. A party should not be precluded from making a recommendation in a rider case simply because the party made the same or similar recommendation in the ESP case that established the rider.

The Commission has allowed parties to make recommendations regarding the structure of a rider in a rider case even though these same recommendations were previously denied by the Commission in a prior ESP case. In fact, the Commission recently adopted OCC's arguments regarding AEP-Ohio's phase-in recovery rider ("PIRR") and modified the structure of recovery of this rider even though these same arguments were previously denied in AEP-Ohio's *ESP I Case*. In the *PIRR Rider Case*, OCC recommended that the Commission modify AEP-Ohio's PIRR Rider to reduce the amount of carrying charges for the rider.[7] Because OCC raised essentially the same argument in AEP-Ohio's *ESP I Case* (the case that established PIRR Rider), AEP-Ohio argued that OCC should be estopped from raising these same arguments again.[8] The Commission adopted OCC's recommendation, and concluded that it was free to modify the PIRR recovery mechanism so long as it explained the reason for the change. *PIRR Rider Case*, Finding and Order, at 17-19 (August 1, 2012); and Fifth Entry on Rehearing, at 13-14 (October 3, 2012).

In this case, Kroger is not asking to Commission to modify a prior order. Kroger requests that the Commission apply its rate design recommendation to the capacity deferral balance, for which recovery does not begin until after the ESP II term. Although Kroger made the same recommendation in the *ESP II Case*, Commission precedent indicates that this practice is accepted, and that such comments are not automatically barred simply because they were also raised in the ESP case that established the rider. The Commission's refusal to consider Kroger's comments based on the theory of "collateral attack" is inconsistent with the *PIRR Rider Case*.

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[7] *PIRR Rider Case*, Comment by The Office of Ohio Consumer's Counsel, at 18-19 (April 2, 2012).
[8] *PIRR Rider Case*, AEP Reply Comments 3-4, and 6-10 (April 17, 2012); and Application for Rehearing of Ohio Power Company, at 5-14 (August 31, 2012).

3. **The Commission's Finding and Order is unlawful because it is not supported by record evidence and, thus, violates R.C. 4903.09.**

In its Finding and Order, the Commission failed to cite any evidence to support denial of Kroger's rate design recommendation. This is violates R.C. 4903.09, which states:

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

The record in this case supports Kroger's rate design recommendation. Kroger set forth its recommendation in its comments. AEP-Ohio indicated that it is not opposed to Kroger's recommendation. No party to this proceeding objected to Kroger's recommendation. Despite this evidence, the Commission rejected Kroger's recommendation for recovery of the capacity deferral, citing its prior orders as the basis for this decision. Finding and Order at 14.

The Commission failed to cite any facts or evidence supporting its denial of Kroger's recommendation. "[A] commission order must provide 'in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.'" *Tongren v. Pub. Util. Comm*., 85 Ohio St. 3d 87, 89-90, 706 N.E.2d 1255, 1257 (1999). While the Commission is not required to strictly comply with the terms of R.C. 4903.09, "some factual support for commission determinations must exist in the record…." *Id.*

In *Tongren*, the Commission made a number of findings in its Finding and Order, but there was "nothing in the record containing those findings, much less the factual bases for them." *Id*. The Court held that the Commission violated R.C. 4903.09 because there was no record support for the Commission's Finding and Order. See also *Ideal Transp. Co. v. Pub. Utilities Comm'n*, 42 Ohio St. 2d 195, 199, 326 N.E.2d 861, 863(1975) (The Commission's order was not supported by the record and the Commission failed to state reasons supporting its conclusions); and *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co*., 140 Ohio St. 3d 352, 2014-Ohio-3764, 18 N.E.3d 1157, ¶ 66 (the Court found that the Commission's failure to cite any evidence in its entries on rehearing violated R.C. 4903.09, but affirmed the Commission on jurisdictional grounds).

The Commission did not cite any evidence supporting denial of Kroger's recommendation. Rather, the Commission cited a portion of its ESP II Order, where the Commission states that Kroger's proposed rate design would subject smaller commercial and industrial customers to an "undue burden." There is no evidence in the record from the *ESP II Case* that supports this conclusion. Further, the Commission refused to consider the evidence that supports changing the rate design of the RSR Rider because of its incorrect finding that Kroger's comments constituted a "collateral attack" on prior Commission orders. The Commission should grant Kroger's application for rehearing and adopt Kroger's uncontested rate design recommendation.

III. CONCLUSION

Based on the foregoing, Kroger respectfully requests that the Commission grant rehearing in this case and adopt Kroger's unopposed recommendation for the rate design of the RSR Rider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *The Kroger Co.'s Application for Rehearing* was served this 4th day of May, 2015 upon the following via electronic mail.

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