

**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 Universal Service) Case No. 17-1377-EL-USF
Fund Rider of Jurisdictional Ohio Electric)
Distribution Utilities.)

**POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Universal Service Fund, or USF, helps Ohioans in need. It is essential for consumers who might otherwise be forced to choose between food and electricity.¹ In this case, Kroger proposes a change to the USF that would reduce the amount that it and other large companies pay to help these most vulnerable consumers. Kroger's proposal would shift the cost of funding the USF among the customer classes, requiring residential consumers—including low-income Ohioans—to pay higher charges for the USF. The Ohio General Assembly prohibited the type of proposal that Kroger has made, under Ohio Revised Code ("R.C.") 4928.52. The Public Utilities Commission of Ohio ("PUCO") should reject Kroger's proposal.

I. THE UNIVERSAL SERVICE FUND

Millions of Ohioans struggle to make ends meet. One in seven lives in poverty.² Many more live just above the poverty line.³ As a result, Ohio has one of the highest rates

¹ OCC Ex. 1 (Williams Reply) at 5:11-13 ("Ohioans face tough financial choices on a daily basis between paying utility bills and being able to purchase sufficient food.").

² OCC Ex. 1 (Williams Reply) at 5:9-10.

³ *Id.* at 5:10-11.

of food insecurity in the country.⁴ And Ohioans already face higher electric rates than consumers in 29 other states, with costs continuing to rise.⁵

The Percentage of Income Payment Plan ("PIPP") is a critical lifeline that helps make electricity more affordable for hundreds of thousands of low-income Ohioans.⁶ Without PIPP, many Ohioans would not have access to affordable electric service.⁷ PIPP is funded through the USF, which also provides low-income weatherization funding through the electric partnership program.⁸

All customers, including low-income residential customers, pay for the USF through a per-kWh charge.⁹ Currently, any customer using less than 833,000 kWh per month pays the same per-kWh charge in a given service territory.¹⁰ Customers that use more than 833,000 kWh per month are provided a discount through a two-tier "declining block" rate structure.¹¹ This means that electric usage above 833,000 kWh per month is charged at a lower rate for very large nonresidential customers.¹² These customers

⁴ *Id.* at 5:15-16 ("Ohio has a higher percentage of residents without reliable, daily access to food than 44 states.").

⁵ *Id.* at 5:6-8.

⁶ OCC Ex. 1 (Williams Reply) at 5:2-4.

⁷ *Id.* at 5:4-6.

⁸ *Id.* at 4:2-4.

⁹ ODSA Ex. 1 (Notice of Intent) at 11; Tr. at 206:6-21 (Williams Cross).

¹⁰ *In re Application of the Ohio Dev. Servs. Agency for an Order Approving Adjustments to the Universal Serv. Fund Rider of Jurisdictional Ohio Elec. Distrib. Utils.*, Case No. 16-1223-EL-USF, Opinion & Order ¶ 22 (Dec. 21, 2016) (the "2016 USF Order").

¹¹ 2016 USF Order ¶¶ 22, 24.

¹² The second block of this structure must be at a rate less than or equal to the first block. *See* ODSA Ex. 1 (Notice of Intent) at 11. Currently, the second block is the same as the first block for several Ohio utilities. *See* Kroger Ex. 1 (Higgins Direct) at 5. Kroger's proposal in this case is based on savings to large nonresidential customers where the second block rate is lower than the first. Thus, the focus of this case, and OCC's brief, is on those service territories where the second block rate is lower.

therefore pay less under the two-tier declining block structure than they would if there were a single block.¹³

II. THE PUCO SHOULD REJECT KROGER'S PROPOSAL TO REDUCE ITS PAYMENT OF USF CHARGES AT THE EXPENSE OF OTHERS.

A. The Ohio General Assembly, in R.C. 4928.52(C), has prohibited the type of proposal that Kroger makes to shift costs from large nonresidential customers to residential and small business customers.

Kroger's proposal violates the law. Under R.C. 4928.52(C), the USF rider "shall be set in such a manner so as not to shift among the customer classes of electric distribution utilities the costs of funding low-income customer assistance programs." But Kroger's proposal results in precisely such a shift.

Under Kroger's proposal, Kroger would pay less under the USF rider. This means that other customers, including residential customers, would pay more. Duke witness Ziolkowski testified that Kroger's proposal "will necessarily shift costs to those customers paying the first block (e.g. residential and small business customers)."¹⁴ OCC's witness made a similar conclusion: "There can be no doubt that Kroger's proposal results in a shifting of costs to other customers, including residential customers, for funding of the USF."¹⁵

Kroger's proposal, by design, shifts costs from Kroger to other customers, including customers in the residential class. This violates the plain language of R.C.

¹³ And again, in those service territories where the first block and second block rate are the same, there is currently no discount for large customers. But this is atypical. Typically, the second block is lower than the first. *See* Tr. at 95:9-15 (Ziolkowski Cross) (stating that the second block was lower than the first block every year until 2017).

¹⁴ EDU Ex. 1 (Ziolkowski Direct) at 6:18-7:2.

¹⁵ OCC Ex. 1 (Williams Reply) at 10:6-7.

4928.52(C), which prohibits any "shift among the customer classes" under the USF. The PUCO should reject Kroger's illegal proposal.

B. Kroger's proposal is fundamentally unfair to low-income customers.

Kroger's proposal would allow it and other large customers to shift costs to the very same low-income Ohioans who rely on the services provided under the USF. All customers—including low-income residential customers—pay the USF rider.¹⁶ And while customers who participate in PIPP pay a percentage of their monthly income (or in the case of PIPP customers with no income, a flat \$10 monthly charge), there are many more Ohioans who struggle to make ends meet but do not participate in PIPP.¹⁷ These customers would pay higher charges for the USF as a result of Kroger's proposal to shift the charges that it currently pays to other customers.

The PUCO should not adopt Kroger's proposal because it would harm residential customers, including the low-income customers that the USF is designed to assist.

C. Kroger's proposal is so lacking in detail that the PUCO cannot meaningfully evaluate it, let alone approve it.

Currently, each Kroger store is a separate customer for purposes of calculating the amount paid towards the USF.¹⁸ Each store pays the first block USF rate for usage up to 833,000 kWh per month and the second block USF rate for usage above 833,000 kWh.¹⁹ Under Kroger's proposal, however, this would change.

Kroger proposes that it be allowed to combine the monthly electricity usage for the separate accounts of all of its stores in a utility's service territory into one customer

¹⁶ ODSA Ex. 1 (Notice of Intent) at 11.

¹⁷ See OCC Ex. 1 (Williams Reply) at 4:10-15; Tr. at 208:8-15 (Williams Cross).

¹⁸ Kroger Ex. 1 (Higgins Direct) at 7:8-10.

¹⁹ *Id.*

account for purposes of calculating what it pays towards the USF. This would reduce the amount that Kroger contributes to support low-income Ohioans under the USF. Other large nonresidential customers would similarly be permitted to aggregate their individual account usage across multiple locations for the purpose of lowering the amount contributed towards the USF.

Kroger provides almost no details about its proposal's impact on other customers.²⁰ Among other omissions, Kroger's proposal does not provide any information about:²¹

- How many nonresidential customers would be eligible to participate in Kroger's proposal.²²
- How much electricity these customers use.
- How much money Kroger and other large customers would save under the proposal and how this cost shift would be recovered.
- How the proposal mitigates shifts in costs among customer classes.
- The amount of the cost that would shift to residential and small business customers as a result of larger nonresidential customers reducing the amount that they pay for the USF.

²⁰ See generally Kroger Ex. 1 (Higgins Direct); Kroger Ex. 2 (Higgins Reply). Tr. at 196:11-15 (Williams Cross) ("Q. ... [Y]ou don't know the impact of Kroger's proposal; is that right? A. I don't believe that Kroger knows the impact of Kroger's proposal from what I've read and seen and heard today.").

²¹ See generally Kroger Ex. 1 (Higgins Direct); Kroger Ex. 2 (Higgins Reply). See also ODSA Ex. 3 (Meadows Reply) at 3-4; OCC Ex. 1 (Williams Reply) at 10:9-20 (identifying the essential details lacking in Kroger's proposal).

²² Tr. at 43:8-12 (Higgins Cross) ("Q. ... [Y]ou are not aware of how many mercantile customers would be eligible to take advantage of Kroger's aggregation proposal, correct? A. Correct.").

- The administrative costs that electric distribution utilities would incur—and pass on to customers²³—to implement Kroger's proposal.²⁴
- The increased administrative costs that ODSA would incur to implement Kroger's proposal.
- The extent to which Kroger's proposal might affect administration of the PIPP program.²⁵

Furthermore, although Kroger makes several suggestions for how its proposal could be implemented, its own expert witness refused to endorse a specific implementation plan. For example, in his pre-filed testimony, Kroger witness Higgins stated that "the first and second blocks of the USF rider rates could be adjusted in the same proportion to accommodate the aggregation of Mercantile Customer loads."²⁶ During cross examination, Mr. Higgins clarified that he is not actually endorsing this plan or any specific mechanism for shifting costs away from Kroger under Kroger's proposal.²⁷ Similarly, Mr. Higgins suggested a mechanism by which each utility would send a check to mercantile customers' corporate entities rather than crediting the individual accounts.²⁸ But again, on cross examination, Mr. Higgins walked back on this testimony, stating that it was only a potential suggestion and was not actually part of Kroger's proposal.²⁹

²³ See Tr. at 147:6 (Ziolkowski Cross) ("generally EDUs like to recover costs").

²⁴ See Tr. at 59:2-4 (Higgins Cross) (confirming that Kroger's proposal would increase administrative costs).

²⁵ Tr. at 29:2-6 (Meadows Cross).

²⁶ Kroger Ex. 1 (Higgins Direct) at 9:14-16.

²⁷ Tr. at 41:20-42:10 (Higgins Cross) (identifying different ways to change USF rates under Kroger's proposal, but ultimately concluding: "I don't propose a specific way to do that.").

²⁸ Kroger Ex. 1 (Higgins Direct) at 10:9-12; Kroger Ex. 2 (Higgins Cross) at 5.

²⁹ Tr. at 50:8-52:5 (discussing Mr. Higgins' proposal, with Mr. Higgins ultimately acknowledging that it is not "a mandatory feature of Kroger's proposal").

The PUCO should not approve any proposal without a thorough understanding of its impact on the amount that other consumers would pay for their electric service. The purpose of the Notice of Intent, after all, is to adopt a methodology for calculating USF rates for each of the electric utilities as accurately as possible.³⁰ Kroger has not provided any of the information necessary to assess the increased costs that residential and other customers will pay if its proposal were implemented. And Kroger itself doesn't seem to know how its own proposal should work. The PUCO should reject it.

III. PROCEDURAL RULINGS

A. The PUCO should reverse several rulings by the Attorney Examiner.

At the hearing in this case, the Attorney Examiner made three procedural rulings that were inconsistent and unfairly prejudiced residential consumers. The PUCO should reverse these rulings, pursuant to OAC 4901-1-15(F).³¹

1. The PUCO should reverse the ruling granting Kroger's motion to strike OCC witness Williams' testimony about the food insecurity suffered by many Ohioans.

In his reply testimony, OCC witness Williams stated: "According to a recent study, Ohio is ranked number 45 in the nation based on the number of people who have insecure access to food on a daily basis."³² Mr. Williams cited and attached to his pre-filed testimony a report prepared by the Health Policy Institute Ohio and the Ohio State

³⁰ OCC Ex. 1 (Williams Reply) at 6: 8-10.

³¹ See OAC 4901-1-15(F) ("Any party that is adversely affected by ... any oral ruling issued during a public hearing ... and that (1) elects not to take an interlocutory appeal from the ruling ... may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.").

³² OCC Ex. 1 (Williams Reply) at 5:13-15.

University supporting this statement.³³ This report is publicly available, includes relevant information on food insecurity, and contains footnotes with source data. Despite this sound basis for evidence, Kroger moved to strike this portion of Mr. Williams' testimony and exhibit, claiming irrelevance and hearsay. The motion was granted.³⁴

It was improper to strike Mr. Williams' testimony based on hearsay because it is based on a publicly-available report that is readily verifiable. There was also no reasonable basis for the Attorney Examiner to conclude that Mr. Williams' testimony on food insecurity is irrelevant. In Ohio, relevance is construed broadly. The Ohio Supreme Court has stated that evidence is relevant "if it has *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence."³⁵ The U.S. District Court for the Southern District of Ohio has similarly concluded that "[w]hether evidence is highly relevant or just a little relevant, it is relevant nonetheless."³⁶

Data on food insecurity is relevant to this case. This case is about low-income Ohioans and the critical need for programs like PIPP. Data on food insecurity provides invaluable insight into this need and highlights the struggles that Ohioans face each day. The PUCO should consider this fact and give it the appropriate weight.

The PUCO should reverse the decision to strike this portion of Mr. Williams' testimony. Mr. Williams' independently-verified and highly relevant facts should be admitted.

³³ OCC Ex. 1 (Williams Reply) at Attachment JDW-2.

³⁴ Tr. at 157:16-17.

³⁵ *State v. Nemeth*, 82 Ohio St.3d 202, 207 (1998).

³⁶ *Nilavar v. Mercy Health Sys. - W. Ohio*, 210 F.R.D. 597, 608-09 (S.D. Ohio 2002).

2. The Attorney Examiner improperly admitted into evidence a portion of Kroger witness Higgins' testimony that was based on speculation.

In his direct testimony, Kroger witness Higgins stated that Ohio's largest electric consumers "are among its largest employers."³⁷ OCC moved to strike this portion of Mr. Higgins's testimony on the grounds that Mr. Higgins lacks personal knowledge of this information under Ohio Rule of Evidence 602.³⁸ The Attorney Examiner denied OCC's motion to strike without explanation.³⁹

The Attorney Examiner erred. Whether large energy users are among the largest employers in the State of Ohio is a question of fact; it is not an expert opinion. Mr. Higgins did not cite any sources for this purported fact. He did not identify any of these employers.⁴⁰ He did not know how many people any of them employed.⁴¹ He did not state how much energy they used.⁴² He did not attach any supporting documentation or data to verify his unsubstantiated employment statistics. He lacks personal knowledge of this statement.

The Attorney Examiner's decision to permit this testimony into evidence is in stark contrast with the decision to strike Mr. Williams' data on food insecurity. While Mr. Williams' testimony is based on a publicly-available and readily-verifiable report that is

³⁷ Kroger Ex. 1 (Higgins Direct) at 6:4-5.

³⁸ Tr. at 38:3-19 (Healey Motion to Strike).

³⁹ Tr. at 41:2-3 (Attorney Examiner See) ("Motion to strike is denied.").

⁴⁰ Tr. at 37:9-10 (Higgins Cross) ("My testimony does not provide any data on who these largest employers are, no, it does not.").

⁴¹ Tr. at 37:23-24 (Higgins Cross) ("I have not identified the number of employees at these other companies.").

⁴² Tr. at 37:18-20 (Higgins Cross) ("I did not identify the specific amount of energy that the largest employers consume.").

sponsored by a state entity, Mr. Higgins' data is based on a guess. The PUCO should grant OCC's motion to strike Mr. Higgins' speculation from the record in this case.

3. Kroger Exhibit 5 is unreliable hearsay.

At hearing, Kroger introduced its Exhibit 5, and the Attorney Examiner admitted it over objection.⁴³ Kroger Exhibit 5 is a large, partially-redacted spreadsheet with headings for customer name, address, tariff codes and description, and monthly dates. No witness sponsored this exhibit. Instead, Kroger introduced it during the cross examination of Duke witness Ziolkowski.⁴⁴

The PUCO should reverse the Attorney Examiner's admission of this exhibit. Under Rule of Evidence 801(C), Kroger Exhibit 5 is hearsay because it contains statements that were not made by a declarant while testifying in this case.⁴⁵ Under Rule of Evidence 802, it is inadmissible.⁴⁶

The record contains no information about (i) who created this document, (ii) when the document was created, (iii) why the document was created, (iv) the source data underlying the information found in the document, or (v) which Ohio utility (if any) it pertains to. The unknown creator of the document was not available for cross-examination and parties had no opportunity to take discovery on this document because it was introduced, for the first time, at the hearing. Duke witness Ziolkowski, on cross-examination, testified only that he had seen similar-looking documents in the past—he

⁴³ Tr. at 147:21-151:13.

⁴⁴ Tr. at 133:5-6.

⁴⁵ Ohio R. Evid. 801(A) ("A 'statement' is (1) an oral or written assertion ..."); Ohio R. Evid. 801(C) ("Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

⁴⁶ Ohio R. Evid. 802 ("Hearsay is not admissible ...").

had not seen this particular document and knew nothing about it.⁴⁷ In short, there is no way to know if the document is authentic, accurate, or reliable.

If Kroger wanted to use this document, or a similar one, it could have submitted the testimony of a Kroger witness with personal knowledge of this document. Kroger chose not to. This document should not be part of the record in this case.

IV. CONCLUSION

The Universal Service Fund is about helping people in need. But Kroger has made this case about itself and its desire to pay less, regardless of the consequences to others. The PUCO should reject Kroger's proposal because it would unlawfully shift costs to other customers, including low-income Ohioans, contrary to R.C. 4828.52(C). The PUCO should reject Kroger's proposal because it is vague and unsupported by the record. And the PUCO should reject Kroger's proposal because it is fundamentally unfair.

Respectfully submitted,

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⁴⁷ Tr. at 138:2-16 (Ziolkowski Redirect) (testifying that he had never seen Kroger Exhibit 5, did not know why it was prepared, did not know who prepared it, and did not know when it was prepared).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Post-Hearing Brief was served on the persons stated below via electronic transmission, this 28th day of August 2017.

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