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 Fund Riders of Jurisdictional Ohio Electric Distribution Utilities.	)))))	Case No. 17-1377-EL-USF

INITIAL BRIEF OF THE KROGER CO.

Angela Paul Whitfield (0068774)
(Counsel of Record)
Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
bojko@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Co.

TABLE OF CONTENTS

I. INTRODUCTION

This case is about a flawed rate design methodology and a discriminatory practice that unfairly provides different rate treatment for a large mercantile customer[1] with a single site load versus a large mercantile customer with the same aggregate load consisting of multiple sites. The Kroger Co. (Kroger) seeks to rectify this discriminatory practice and implement the original intent of the two-step declining block rate design. As explained by Kroger's witness: the "[a]doption of the two-step declining rate design implements a policy that limits the total financial impact of the [Universal Service Fund (USF)] rider on the state's largest electric consumers, which are among its largest employers, compared to what otherwise would occur if the rider's revenue requirements were to be recovered through a single per kWh rate."[2] Instead of limiting the total financial impact of the USF Rider on all of the state's largest electric consumers, it only limits the financial impact on some large consumers, those with a single site. By precluding mercantile customers from aggregating their electric loads across multiple facilities within the EDU's service territory and applying that aggregated load to the USF Rider kWh rates proposed by the Ohio Development Services Agency (ODSA), the two-step declining block rate design methodology is discriminatory and fails to fulfill the rate design's intended purpose.

In this proceeding, Kroger seeks to ensure that single-site and multi-site mercantile customers with similar total loads are treated in a non-discriminatory manner. In effect, Kroger

[1] Section 4928.01(A)(19), Revised Code, defines mercantile customer as a "commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states." No party to this proceeding has challenged that Kroger qualifies as a mercantile customer under this definition as Kroger's facilities are nonresidential and are part of a national account involving multiple facilities in Ohio and elsewhere.

[2] Kroger Ex. 1 at 6 (Higgins Direct Testimony); see Tr. 176:15-25.

requests that a mercantile customer's multiple accounts be treated as a single customer for purposes of determining its USF revenue responsibility.

II. **PROCEDURAL BACKGROUND**

On June 1, 2017, ODSA submitted its Notice of Intent to file an Application to adjust the USF Rider of all Ohio jurisdictional electric distribution utilities (NOI).[3] The USF provides funding for low-income customer assistance programs, including consumer education programs and for payment of the administrative costs to those programs.[4] The USF is funded primarily by the establishment of the USF Rider on the retail electric distribution service rates of jurisdictional electric utilities. Although the USF programs are only available to residential customers, all customers pay the USF Rider, including commercial and industrial consumers.[5]

On June 7, 2017, the Commission established a procedural schedule for this proceeding. On June 30, 2017, Kroger, Ohio Partners for Affordable Energy (OPAE), and Duke Energy Ohio, Inc. filed objections to ODSA's NOI. On July 28, 2017, Kroger was granted intervention.

Kroger filed objections and comments in an attempt to rectify the discriminatory practice of precluding mercantile customers from aggregating their electric consumption across multiple facilities within an EDU's service territory and apply that aggregated load to the USF Rider kWh rates proposed by ODSA in its NOI.[6] Kroger's objections and comments were met with unsubstantiated criticism regarding the alleged administrative burdens of implementing Kroger's

[3] ODSA Ex. 1 at 1 (NOI).

[4] See *In The Matter of the Application of the Ohio Development Services Agency for an Order Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 15-1046-EL-USF, Opinion and Order at 2 (October 28, 2015).

[5] See Tr. 205:25 – 206:11; see also ODSA Exhibit 2 at 4:5-6 (Meadows Direct Testimony).

[6] Kroger's Motion to Intervene and Objections and Comments at 5-10 (June 30, 2017) (Kroger's Comments).

proposal by the Ohio Consumers' Counsel (OCC) and the Ohio jurisdictional electric distribution utilities[7] who were joined as indispensable parties to this proceeding.

On July 10, 2017, ODSA, OCC, and the EDUs jointly filed reply comments in response to Kroger's initial objections and comments. On July 24, 2017 and August 11, 2017, Kroger filed the direct testimony and reply testimony of Kevin C. Higgins, respectively. An evidentiary hearing was held on August 18, 2017.

III. LAW AND ARGUMENT

A. Kroger's Proposed Application of the Two-Step Declining Block Rate Design Promotes Equitable Treatment Among Mercantile Customers.

In its NOI, ODSA proposes to recover the annual USF revenue requirement from each customer account through the USF Rider. The Rider charge is levied against each customer account under a two-step declining block rate design based on monthly consumption. Thus, each account or facility would be assessed a kWh rate consistent with the EDU's first block rate for all monthly consumption up to and including 833,000 kWh and an equal or reduced kWh rate for all consumption in excess of 833,000 kWh.[8] If an account or facility does not exceed the 833,000 kWh threshold, the account or facility is charged solely per the first block rate. As explained previously, the rationale for the implementation of a two-step declining block rate design was to limit the financial impact of the USF Rider on large electric consumers in the state when the universal service fund was established in Am. Sub. S.B. 3.[9] Notably, Kroger is not challenging the two-step declining block rate design in this proceeding. Rather, Kroger is

[7] The indispensable EDUs consist of Cleveland Electric Illuminating Company (CEI), Dayton Power and Light Company (DP&L), Duke Energy Ohio Inc. (Duke), Ohio Edison Company (OE), Ohio Power Company (OP), and Toledo Edison Company (TE) (collectively, EDUs). See Entry at ¶ 1 (June 7, 2017).

[8] ODSA Ex. 1 at 11 (NOI).

[9] Section 4928.52, Revised Code.

challenging the application of the rate design to those mercantile customers that consume large quantities of electricity through numerous facilities and accounts.

As Kroger witness Kevin C. Higgins explained, "[t]he USF rider does not recover costs incurred by the customer paying the charge, but rather is a funding mechanism for a program to support other customers."[10] Kroger, like many other mercantile customers, pays significant amounts in USF Rider costs but receives no benefit or services from the funded programs in return.

B. Kroger's Proposed Application of the Two-Step Declining Block Rate Design Does Not Unlawfully Shift Costs to Other Customer Classes.

As Kroger witness Higgins explained, Kroger's proposal does not change the USF rate design methodology.[11] Mr. Higgins also explained that "the USF [R]ider declining block rates are energy based charges that are applied consistently to residential, commercial, and industrial customers" and although "[a]ggregating a Mercantile Customer's load will impact the billing determinants used in the rate design and will require an adjustment to the rates themselves, [] this can be accomplished without shifting costs among customer classes."[12]

Because the first and second block rates are applied consistently to residential, commercial, and industrial customers under Kroger's proposal, there is no unlawful shift among customer classes. Mr. Higgins highlighted that the Commission in its Opinion and Order in the 2015 USF case held that even though the declining block rate design may result in increases to the first block relative to the second block, since all customer classes pay the first energy block rate, such an increase would not constitute a cost shift among customer classes in violation of

[10] Kroger Ex. 1 at 6 (Higgins Direct Testimony).

[11] Id. at 8.

[12] Id. at 9.

Section 4928.52(C), Revised Code.[13] By extension, even if aggregation would cause an increase in rates under the first block, all customer classes (i.e., residential, commercial, and industrial) would be equally affected given that each customer class under Kroger's proposal would pay the same rates for monthly consumption up to and including 833,000 kWh. Notably, because Kroger pays the same rate as all of the other customer classes under the first block rate, Kroger itself would also pay its share of any potential increased costs in the first rate block contrary to OCC's assertion.[14]

Furthermore, EDU witness James A. Ziolkowski agreed that the USF revenue requirements fluctuate based upon increases in customer usage and loss of customers.[15] Mr. Ziolkowski also agreed that as customers come and go, there may be an impact on the rates such that the first block customers consuming up to and including 833,000 kWh may pay more or less depending on what happened and how much revenue was collected in the previous year.[16] It was undisputed that these changes in rates would occur regardless of whether Kroger's proposal was implemented.[17]

Notwithstanding the above, Mr. Higgins also proposed other options for mitigating an increase in the first block rates. First, Mr. Higgins explained that "the first and second blocks of the USF [R]ider rates could be adjusted equally in the same proportion to accommodate the

---

[13] *In the Matter of the Application of the Ohio Development Services Agency for an Order Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 15-1046-EL-USF, Opinion and Order at 20-21 (October 28, 2015).

[14] Referring to the EDUs' joint comments in the 2016 USF case (Case No. 16-1223-EL-USF), OCC asserts that "increased costs would likely be borne by customers *other* than Kroger." OCC Reply Comments at 4 (July 10, 2017) (emphasis added). This assertion is patently false because Kroger will also be charged any increase in rates under the first block.

[15] Tr. 97:2 – 98:16.

[16] Tr. 98:9-25.

[17] Tr. 99:1-4.

aggregation of Mercantile Customer loads."[18] Mr. Higgins also explained during the evidentiary hearing that it is possible to recover any deficit from aggregating mercantile customer accounts strictly in the second block.[19] Under this option, rates under the first block would not change and residential customers, for example, would see no alleged impact from aggregating mercantile customer loads.

C. Kroger's Proposed Application of the Two-Step Declining Block Rate Design is Not Onerous to EDUs.

The EDUs claim that Kroger's proposal is "costly and complex."[20] The EDUs' arguments lack merit considering (1) the EDUs already aggregate numerous customer accounts for a host of reasons, and (2) Kroger's proposal would put the burden on the mercantile customer to identify their accounts and would not require real-time tracking of accounts.

1. Ohio EDUs Already Aggregate Customer Loads.

EDU witness Ziolkowski testified that Kroger's proposal "would require substantial manual intervention in the monthly EDU billing process by EDU employees" and "the aggregation process would require additional Company Labor."[21] Mr. Ziolkowski's assertions are meritless considering that (1) Mr. Ziolkowski admitted he and other EDUs manually aggregate customer loads on a regular basis, and (2) the EDUs are already required to identify the portion of an account's load that exceeds 833,000 kWh in any given month.

First, although the EDUs initially appear to allege that Kroger's proposal is too difficult

---

[18] Kroger Ex. 1 at 9 (Higgins Direct Testimony).

[19] Tr. 41:16 – 42:14.

[20] See Joint Ex. 1 at 10:20-21 (Ziolkowski Direct Testimony). Notably, the EDUs' assertion that Kroger's proposal is allegedly "costly and complex" seems to contradict previous statements that the EDUs "are *unable* to implement" Kroger's proposal. See Joint Ex. 1 at 3:7-9 (Ziolkowski Direct Testimony) (emphasis added).

[21] Joint Ex. 1 at 7-9 (Ziolkowski Direct Testimony).

or time consuming to implement,[22] Mr. Ziolkowski disagreed at the hearing. When asked if Kroger's proposal would be too difficult or hard to aggregate all mercantile customer data, Mr. Ziolkowski responded that his testimony was that it may be "expensive."[23] He did not say it was difficult.

Further, the record evidence establishes that EDUs regularly aggregate customer data within an EDU's billing systems, and as such, any additional "expense" would be negligible. At the hearing, Kroger witness Higgins explained that utilities typically aggregate data and that he had personal knowledge of Ohio EDUs engaging in such aggregation activities.[24] Moreover, on cross-examination, Mr. Ziolkowski admitted that Duke[25] has databases that track "all the accounts associated with many of [Duke's] customers."[26] Mr. Ziolkowski also admitted that he was aware that customer account representatives often provide their customers with aggregated data.[27] Further, Mr. Ziolkowski explained that Duke, and likely the other five EDU's, already manually compile mercantile data for energy efficiency billing purposes and for "customer relation purposes."[28] With regard to energy efficiency, Mr. Ziolkowski recognized that there are statutory provisions in place that require the utilities to aggregate mercantile data.[29] In fact

---

[22] Id.

[23] Tr. 130:3-8. ODSA witness Megan Meadows testified that she did not know if there were any additional costs to accommodate Kroger's proposal. See Tr. 18:12-15.

[24] Tr. 45:25 – 46:14; 57:16 – 58:1; 67:22 – 68:7.

[25] Mr. Ziolkowski filed testimony on behalf of the six EDUs in this proceeding and stated that he is representing all of them. See Tr. 89:15-22. To the extent Mr. Ziolkowski is only personally aware of Duke's billing systems, there is no other record evidence as to the other five EDUs' capabilities to implement Kroger's proposal or what burden it would have on them. Therefore, because the five EDUs (excluding Duke) have failed to offer a witness who could testify as to the capabilities of each respective EDU's billing system, the Commission cannot consider any alleged claims of burden by the other five EDUs, if any, to implement Kroger's proposal to aggregate mercantile customer loads for purposes of applying the two-step declining block rate design.

[26] Tr. 90:1-4.

[27] Tr. 90:10-13.

[28] Tr. 142:14 – 143:14.

[29] Tr. 112:10 – 114:11; Tr. 118:9 – 120:4.

Section 4928.66, Revised Code, requires utilities to include the effects of all demand response for mercantile customers as defined by Section 4928.01(A)(19), Revised Code. See Section 4928.66(A)(2)(C), Revised Code. Section 4928.66(A)(2)(C), Revised Code, also exempts mercantile customers that commit their demand-response or other customer-sited capabilities for integration into the EDUs' demand-response, energy efficiency, or peak demand reduction programs from paying the cost recovery mechanism. Similarly, Section 4928.20, Revised Code, requires the EDUs to exclude mercantile customers from automatic inclusion in opt-out governmental aggregation programs. See Section 4928.20; see also Rule 4901:1-27-17(D)(1)(c), Ohio Administrative Code. Therefore, in order for the EDUs to fulfill their obligations under Ohio law, the EDUs are already required to identify which customers are mercantile customers as defined by the statute.

Additionally, when presented with an aggregation listing of Kroger's accounts, Mr. Ziolkowski agreed that it looked like something an EDU would prepare and that it looked like something that would come from an EDU's billing system.[30] Mr. Ziolkowski stated that he would not be surprised if the aggregation spreadsheet came from a utility account representative and was prepared on a monthly basis.[31] In fact, Mr. Ziolkowski's own counsel asked him whether he had ever prepared a similar spreadsheet for Duke. Mr. Ziolkowski answered "Yes. Over the past 20 years, I've done many spreadsheets similar to this."[32] Mr. Ziolkowski's testimony that aggregation would be "expensive" is inconsistent with his testimony that Duke, for example, already aggregates customer data for energy efficiency billing and customer

[30] Kroger Ex. 5 (Kroger Account Aggregation Sheet); Tr. 133:23 – 135:21.

[31] Tr. 136:20 – 137:2.

[32] Tr. 138:17-21.

relation purposes and the fact that EDUs are already required to identify and track large customers that satisfy the definition of mercantile customers.

Second, when asked whether utilities have to look at each account to determine whether they fall under the first or second rate block on a monthly basis, Kroger witness Higgins testified that "for a utility that has a two-tier USF rate, it obviously has to identify what portion of an account's load falls within 833,000 kilowatt-hours in a month because any amount over that is subject to a different rate."[33] EDU witness Ziolkowski agreed.[34] As such, it is axiomatic that the EDUs are already performing some review of every customer account to determine what amount of monthly electric consumption exceeds 833,000 kWh.

Accordingly, because the EDUs already aggregate mercantile customer loads on a monthly basis, and because EDUs already must determine what amount of a customer's monthly load exceeds 833,000 kWh, Kroger's proposal is not overly burdensome to the EDUs.

2. Kroger's Proposal Places the Burden on Mercantile Customers to Identify their Accounts and Would Not Require Real-Time Tracking.

Contrary to the EDUs claims, under Kroger's proposal, the burden of notifying the EDUs of a mercantile customer's accounts would rest solely with the mercantile customer – not the EDU. In his direct testimony, Kroger witness Higgins proposed that, in order for a mercantile customer to be eligible to aggregate its accounts for purposes of calculating its USF Rider costs, each mercantile customer would be required to complete an annual application by September 1 with the EDU in which the mercantile customer has accounts in a given EDU's service territory.[35] This September 1 deadline would afford ODSA sufficient time to develop its USF Rider rate adjustment application and would allow the EDUs to easily and quickly determine

[33] Tr. 67:4-9

[34] See Tr. 101:19 – 102:1.

[35] Kroger Ex. 1 at 9-10 (Higgins Direct Testimony).

which account loads to aggregate for the mercantile customer applicant.[36] Mr. Higgins clarified and further proposed that "[e]ach Mercantile Customer's application with each EDU would be required to include a list of the accounts within each EDU's service territory to be aggregated for the Mercantile Customer, denoting the accounts numbers, facilities' names, and account locations."[37] Additionally, "the Mercantile Customer would be prohibited from amending, modifying, or supplementing its account list during each year of the USF Rider."[38]

Kroger's proposed September 1 annual application would allow mercantile customers to add and remove accounts without affecting the EDUs' tracking of those accounts or affect the under/over USF collection from the mercantile customer. EDU witness Ziolkowski expressed concern with Kroger's proposal of an annual September 1 application.[39] Specifically, Mr. Ziolkowski was concerned that it may require ongoing tracking to account for the possibility that an aggregated account (i.e., facility) may be sold after the September 1 application date. Mr. Ziolkowski's concern is without merit.

First, because Kroger has proposed that mercantile customers would be prohibited from amending, modifying, or supplementing its account list during each year of the USF Rider, there is no concern with adding new accounts. Mr. Ziolkowski agreed.[40]

Second, the sale of a facility that may be part of a mercantile customer's aggregated accounts also does not pose a problem or concern contrary to Mr. Ziolkowski's assertion. When a mercantile customer sells one of its facilities, it must already instruct the servicing EDU to terminate the account to allow the EDU to issue a final bill and for the mercantile customer to

---

[36] Id.

[37] Kroger Ex. 2 at 4 (Higgins Reply Testimony).

[38] Id.

[39] Tr. 92:3-19.

[40] Tr. 92:3-10.

avoid paying costs for a facility that it no longer owns. Regardless of Kroger's proposal, this notification and change in the EDU's billing system must already occur. In the event a mercantile customer sells a given facility, and that facility was among the accounts aggregated under Kroger's proposal, the mercantile customer would notify the EDU as they already do today. If a facility is no longer an account of a mercantile customer, the load for such facility would be zero. Accordingly, the account would not need to be formally removed from the list of aggregated accounts because its monthly kWh usage would be zero and would therefore not affect the mercantile customer's payment under the USF Rider. Similarly, if a facility goes out of business, the load for that facility would be zero. In both situations, the load of the sold or closed facility would not be included in any calculation aggregating the load for purposes of applying the two-step declining block rate design of the USF Rider.

IV. CONCLUSION

Authorizing mercantile customers to aggregate their loads across multiple accounts promotes fair, equal, and non-discriminatory treatment of large single-site and multi-site electric consumers. For this reason and for the reasons discussed above, the Commission should issue an order adopting Kroger's proposal to authorize mercantile customers to aggregate their electric loads across multiple accounts/facilities within an EDU's service territory and then apply that aggregated load to the two-step declining block rate design methodology for the purpose of determining Kroger's responsibility for the funding of the USF Rider.

Respectfully submitted,

/s/ Angela Paul Whitfield

Angela Paul Whitfield (0068774)
(Counsel of Record)
Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
bojko@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on August 28, 2017.

/s/ Angela Paul Whitfield
Angela Paul Whitfield

dstinson@bricker.com
mjsatterwhite@aep.com
stnourse@aep.com
Elizabeth.watts@duke-energy.com
Amy.Spiller@duke-energy.com
cdunn@firstenergycorp.com
randall.griffin@dplinc.com
judi.sobecki@dplinc.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cdunn@firstenergycorp.com
william.wright@ohioattorneygeneral.gov
ajay.kumar@occ.ohio.gov
cmooney@ohiopartners.org

Attorney Examiner:
Greta.See@puc.state.oh.us