

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of the Ohio</b>	)	
<b>Developmental Services Agency for an Order</b>	)	
<b>Approving Adjustments to the Universal</b>	)	<b>Case No. 17-1377-EL-USF</b>
<b>Service Fund Rider of Jurisdictional Ohio</b>	)	
<b>Electric Distribution Utilities</b>	)	

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**JOINT REPLY POST-HEARING BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY, THE TOLEDO EDISON COMPANY, DUKE  
ENERGY OHIO, INC., OHIO POWER COMPANY, AND  
THE DAYTON POWER AND LIGHT COMPANY**

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**I. Introduction**

The Commission should approve the Ohio Department Services Agency’s (“ODSA”) continued implementation of the Universal Service Fund (“USF”) rate design methodology as proposed in this case. The Kroger Company’s (“Kroger”) unsupported arguments in favor of an alternative rate design that permits aggregation of mercantile accounts are inconsistent with the evidence and testimony that the Ohio jurisdictional electric distribution utilities’ (“EDUs”) witness Mr. Ziolkowski provided at hearing and lack sufficient form for this Commission to place such a burden on the EDUs. The record is replete with evidence demonstrating that Kroger’s proposal would require the EDUs to implement a manual process that is time-consuming and onerous for an undetermined and potentially large and fluctuating amount of customers and accounts. Kroger’s attempt to draw inferences from other utility processes are inapposite, and Kroger’s witness lacks any personal knowledge upon which to refute the time and cost associated with implementing Kroger’s proposal. Kroger’s proposal would actually result in a violation of R.C.

4928.52 by improperly shifting costs from the mercantile class of customers to other customers, such as the residential class. ODSA's proposed rate design, however, does not violate R.C. 4928.52, as it equally applies to all classes of customers and has consistently been found by this Commission not to violate regulatory principles. Therefore, the Commission should reject the modifications proposed by Kroger and Ohio Partners for Affordable Energy ("OPAE") and continue to adopt and approve the time-honored rate design proposed by ODSA.

## **II. The Commission Should Adopt ODSA's Proposed USF Rider Rate Design Methodology and Reject Kroger's Proposed Modification to That Methodology.**

### **A. Kroger's proposal is onerous and burdensome for EDUs to implement.**

Despite evidence to the contrary, Kroger continues to assert that its proposal is feasible and that it would not place any burden on the EDUs. Kroger consistently either misunderstands or misrepresents the testimony of EDU witness James E. Ziolkowski.

Kroger bases much of its argument upon a spreadsheet produced for the first time at the hearing, without any authentication. Mr. Ziolkowski admitted that he had never seen the document before, did not know when it had been prepared, by whom it had been prepared, or for what purpose the spreadsheet had been created.<sup>1</sup> Nevertheless, Kroger's counsel proceeded to ask Mr. Ziolkowski a series of questions designed to establish that the EDUs prepare similar spreadsheets that include information related to the load of affiliated entities, such as Kroger.

Mr. Ziolkowski did testify that he had prepared similar spreadsheets himself. But Kroger ignored certain parts of his testimony; specifically, that such spreadsheets do not include billing quality data/information.<sup>2</sup> And despite Kroger's claims that the expense for preparing such

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<sup>1</sup> Transcript at 137.

<sup>2</sup> *Id.* at 134, 144.

spreadsheets would be negligible,<sup>3</sup> Mr. Ziolkowski explained that preparing a single similar spreadsheet “is hard” and could take hours to complete<sup>4</sup> because it requires “a lot of analytical work each month.”<sup>5</sup> What’s more, a similar manual spreadsheet would have to be completed for *each* mercantile customer on a monthly basis.<sup>6</sup> Kroger’s selective choice of excerpts from the record are significantly misleading and do not accurately reflect the testimony that was given.

Kroger also argues that the EDUs should be able to aggregate data for purposes of the USF by focusing on the EDUs’ abilities to quantify load for the purpose of energy efficiency opt-out programs. Mr. Ziolkowski explained at hearing that even this process was a labor-intensive one, but that the utilities do engage in such efforts in order to comply with the mandated mercantile opt-out program.<sup>7</sup> However, Kroger overlooks the fact that quantifying load for purposes of an energy efficiency mercantile opt-out is entirely different from, and unrelated to, the work that would be required to aggregate load and prepare billing on a monthly basis. Once a mercantile customer has opted out of the energy efficiency programs, it does not require a manual recalculation of the rider each month like Kroger’s proposal would require under the USF.<sup>8</sup>

Mr. Ziolkowski also explained that although “mercantile” is a defined category for purposes of energy efficiency, EDUs do not bill mercantile customers. EDUs bill on an account-by-account basis.<sup>9</sup> As Mr. Ziolkowski pointed out, under the current rate structure, there are

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<sup>3</sup> Kroger Brief at 7.

<sup>4</sup> *Id.* at 139.

<sup>5</sup> *Id.* at 136.

<sup>6</sup> *Id.* at 140.

<sup>7</sup> *Id.* at 120.

<sup>8</sup> *Id.* at 58.

<sup>9</sup> *Id.* at 108.

eligible accounts that are able to take advantage of the second tier.<sup>10</sup> These accounts are not limited to entities that qualify as mercantile, but rather those that qualify on the basis of monthly usage. Kroger seeks to conflate energy efficiency requirements with billing requirements. This unnecessarily adds confusion to the record. As Mr. Ziolkowski explained, and as mentioned above, aggregating usage for purposes of energy efficiency opt-out is not the same as aggregating usage for purposes of billing. And even in the case of aggregating usage for energy efficiency, Mr. Ziolkowski explained that the process entails “lots of manual intervention. The people tracking our programs have to do that manually.”<sup>11</sup>

Kroger fails to consider the impact on EDUs when other mercantile customers potentially avail themselves of the Kroger proposal. And no one knows how many mercantile customers would wish to be included in such a program, but the number of mercantile entities that could do so are numerous.<sup>12</sup> And again, Kroger’s proposal would require time-consuming manual monthly spreadsheet calculations for each of those unknown customers.<sup>13</sup>

Kroger’s witness lacked any personal knowledge to rebut Mr. Ziolkowski’s intimate knowledge of the utility billing systems. Mr. Higgins admitted that he is not involved in EDU billing system operations”<sup>14</sup> Later, however, Mr. Higgins disingenuously claimed to have

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<sup>10</sup> *Id.* at 110.

<sup>11</sup> *Id.* at 120.

<sup>12</sup> *Id.* at 44, 140.

<sup>13</sup> *Id.* at 144.

<sup>14</sup> *Id.* at 53.

“personal knowledge” about the capabilities of the EDU billing systems based upon commitments in stipulations from other proceedings.<sup>15</sup>

In contrast, Mr. Ziolkowski is intimately familiar with utility billing systems and explained in great detail why Kroger’s proposal is burdensome for the EDUs and why the EDUs cannot accommodate the proposal. In direct testimony, Mr. Ziolkowski explained the reasons why the EDUs cannot provide aggregated billing for Kroger and this was set forth in the EDU’s initial brief.<sup>16</sup> However, Mr. Ziolkowski elaborated upon his direct testimony on cross-examination. Mr. Ziolkowski reiterated many of the problems that Kroger’s proposal presents. For example, he explained that although some of the EDUs have some databases that track accounts, none of those tracking systems are used for billing purposes nor is such tracking information billing quality data.<sup>17</sup> He further stated that EDUs do not track mercantile accounts on an aggregated basis within the billing system and never have.<sup>18</sup> He agreed that sometimes EDUs must perform certain manual calculations but explained that “it’s not a desirable circumstance,”<sup>19</sup> and is “less than ideal.”<sup>20</sup>

Finally, although Kroger claims that Mr. Ziolkowski only noted cost as an impediment to the proposal,<sup>21</sup> in fact, Mr. Ziolkowski continued, after mentioning cost, to further explain the burden that Kroger’s proposal would place on the EDUs. Mr. Ziolkowski reiterated in reference to Kroger’s proposal:

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<sup>15</sup> *Id.* at 57-58, 68. Kroger’s reference to those Stipulations directly violates the terms of those stipulations which specifically states that the Stipulation is not “to be offered or relied upon in any other proceedings, except as necessary to enforce the terms of this Stipulation.”

<sup>16</sup> See Joint Initial Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, Duke Energy Ohio, Inc., Ohio Power Company, and The Dayton Power and Light Company (“Initial Post-Hearing Brief”) at 9-12.

<sup>17</sup> Transcript at 144.

<sup>18</sup> *Id.* at 89-90.

<sup>19</sup> *Id.* at 91.

<sup>20</sup> *Id.* at 144.

<sup>21</sup> Kroger Brief at 7, citing Transcript at 130.

It's going to require additional manual intervention, billing via spreadsheets, manual processing of checks, manual verifications, auditing, everything from picking selected accounts, write - - potentially writing computer programs and upkeep and maintained every month to make sure we are collecting the kWh data. And I envision that this will be quite cumbersome and expensive for the utilities, and yet utilities have no skin in the game \* \* \*.<sup>22</sup>

Mr. Ziolkowski could not be more precise in his explanation of why the EDUs are unable to accommodate the request Kroger makes in this proceeding. The EDUs do not have billing systems that have the capability to recognize affiliate mercantile accounts and aggregate billing. All work to accomplish this would necessarily entail manual effort or costly system changes. Kroger has not offered any information with respect to how many other mercantile entities may also wish to avail themselves of the same rate advantage. For the reasons set forth in the EDUs' Joint Initial Post-Hearing Brief and herein, Kroger's proposal cannot be accommodated and should be rejected.

**B. Kroger's proposal violates R.C. 4928.52(C) and would result in cost-shifting from mercantile customers to residential customers.**

Kroger's argument that its proposal does not shift costs amongst customer classes similarly lacks merit. Kroger reasons that "[b]ecause 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."<sup>23</sup> Kroger's assertion that "the first and second block rates are applied consistently to residential, commercial, and industrial customers under Kroger's proposal," however, is simply incorrect. Indeed, the entire purpose of Kroger's proposal is to secure special billing treatment for a defined subset of customers, *i.e.* mercantile customers,

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<sup>22</sup>Transcript at 130.

<sup>23</sup> Kroger Brief at 4.

ensuring that the rate design methodology is not applied consistently to all customers.<sup>24</sup> As discussed in the EDUs' Joint Initial Post-Hearing Brief, this is in stark contrast to ODSA's rate design methodology, which actually does treat all accounts exactly the same, regardless the account holder's customer class, size, or other characteristics.<sup>25</sup>

Moreover, Kroger's two proposals to mitigate cost-shifting into the first block of rates are undeveloped and do not remedy the underlying problem discussed above.<sup>26</sup> First, Kroger proposes that any cost-shifting can be reduced by changing the rate blocks proportionally.<sup>27</sup> Although Mr. Higgins testified that he believes this would "affect residential customers probably very slightly," Kroger provided no evidence to support this claim.<sup>28</sup> Second, Kroger proposes that any deficits caused by Kroger's proposal can be recovered in the second block of rates,<sup>29</sup> thus reducing the impact on residential customers; however, Mr. Higgins expressly refused to give any indication as to how such a change would be implemented, stating: "I don't propose a specific way to do that. I would leave that to the discretion of the Commission if the Commission were to adopt Kroger's proposal."<sup>30</sup> These proposals are simply too undeveloped to provide any guarantees that they will prevent the potential cost-shifting caused by Kroger's proposal.

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<sup>24</sup> By proposing that "mercantile customers" receive the special billing treatment it proposes, Kroger (unsuccessfully) attempts to avoid the most obvious deficiency with its suggested modification to ODSA's rate design methodology. Put simply, if Kroger were to propose that only "commercial customers" receive this special billing treatment, it would be very difficult for it to argue that it is not attempting to shift costs to other customer classes. Accordingly, Kroger has proposed "mercantile customers" as a proxy so that it can be included in a group of customers to receive special billing treatment without having to call that group of customers a "customer class." The Commission should reject Kroger's attempt to side-step R.C. 4928.52(C) here.

<sup>25</sup> See Initial Post-Hearing Brief at 13.

<sup>26</sup> See Kroger Brief at 5-6.

<sup>27</sup> See Transcript at 42.

<sup>28</sup> *Id.*

<sup>29</sup> See Kroger Brief at 6; see also Transcript at 42.

<sup>30</sup> Transcript at 42.

Most importantly, however, these proposals do not remedy the underlying problems with Kroger's proposal, *i.e.* that it provides a defined subset of customers with special billing treatment for the sole purpose of reducing that defined subset of customers' contribution to the universal service fund. As discussed in the EDUs' Joint Initial Post-Hearing Brief, Kroger has provided no justification for why only "mercantile customers" should receive this special treatment, or why a customer's status as a "mercantile customer" should be relevant to its contribution to the USF rider.<sup>31</sup> Kroger's proposals to mitigate cost-shifting into the first block of rates do not address these fundamental flaws in its proposal and should be rejected by the Commission along with the rest of Kroger's proposed modifications to ODSA's rate design methodology.

**C. Contrary to OPAE's position, the Commission's past decisions approving ODSA's proposed rate design were substantive, record-based decisions and are entitled to deference.**

OPAE spends a significant portion of its brief criticizing the Commission's decisions in past USF rider cases.<sup>32</sup> As an initial matter, the time to challenge the Commission's opinions in those cases has long passed. For example, if OPAE believed that the Commission erred in finding that OPAE's cost shifting analysis in the 2015 USF rider case did not "demonstrate[ ] any significant cost shift between the customer classes as required by [R.C. 4928.52(C)],"<sup>33</sup> it should have challenged that finding in January 2016 – not in this proceeding. OPAE did not, however, file an application for rehearing or appeal the decision.

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<sup>31</sup> See Initial Post-Hearing Brief at 13.

<sup>32</sup> See OPAE Brief at 2-6 (criticizing the Commission's October 27, 2010 Finding and Order in Case No. 10-0725-EL-USF and December 16, 2015 Opinion and Order in Case No. 15-1046-EL-USF).

<sup>33</sup> See Case No. 15-1046-EL-USF, Opinion and Order at 23 (Dec. 16, 2015).



Underlying OPAE's criticism of the Commission's previous decisions is OPAE's meritless contention that the Commission "has never once made an evidentiary or legal finding related to ODSA's rate design" because the Commission has approved past USF rider adjustment applications "pursuant only to the Commission's three-part test for the reasonableness of stipulations."<sup>34</sup> OPAE tellingly, does not cite any authority to support its position that the Commission, in ruling on a stipulation, somehow does not also rule on the lawfulness of the stipulation's terms. OPAE's position is belied by the very terms of the three-part test the Commission applies for stipulations.

Inherent in the Commission's evaluation of a stipulation is whether the stipulation violates any important regulatory principle or practice.<sup>35</sup> As OPAE concedes, the Commission has repeatedly found that the rate design at issue here, and included in each of the stipulations in previous USF cases, does not violate any important regulatory principle or practice.<sup>36</sup> The Commission made those findings based upon the evidentiary records and testimony presented in those proceedings. If the USF rate design violated 4928.52(C), the Commission would not have made those legal findings. Accordingly, the Commission has repeatedly found that ODSA's rate design is lawful.

Finally, as set forth in the EDUs' Joint Initial Post-Hearing Brief, ODSA presented ample evidence in this proceeding to demonstrate that its time-tested and repeatedly-approved rate design proposal is reasonable and lawful.<sup>37</sup> OPAE has offered no evidence or testimony to refute

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<sup>34</sup> OPAE Brief at 2.

<sup>35</sup> See, e.g., *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561 (1994).

<sup>36</sup> See OPAE Brief at 2-3 (citing past USF decisions).

<sup>37</sup> Initial Post-Hearing Brief at 2-6.

ODSA. Thus, in addition to being appropriate for the Commission to defer to and rely upon its prior decisions approving the USF rate design methodology, the record in this case also independently supports approval of ODSA's proposal as well.

### **III. Conclusion**

For the foregoing reasons, the six intervening EDUs jointly and respectfully request that the Commission adopt ODSA's time-tested and reasonable proposed USF rider rate design methodology and reject Kroger's proposed modification to that methodology.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing Joint Reply Post-Hearing Brief was sent by, or on behalf of, the undersigned counsel to the following parties of record this 8th day of September, 2017, via electronic transmission.

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