

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

REPLY BRIEF OF THE KROGER CO.

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I. INTRODUCTION

This case is not about the Universal Service Fund (USF), the programs it funds, or the level of funding. It is about the unlawful, discriminatory rate treatment that Kroger receives under the application of the USF Rider's flawed rate design methodology. Kroger's proposal seeks to rectify the discriminatory practice of precluding large multi-site mercantile customers from aggregating their load across multiple accounts for purposes of applying the two-step declining block rate to their total consumption, just as it is applied to large single-site mercantile customers that consume similar quantities of electricity. The original intent of the two-step declining block rate design of the USF Rider was to limit the financial impact of the USF Rider on the state's largest electric customers, which are among its largest employers. However, the current discriminatory practice only limits the financial impact on some large customers. Kroger is seeking to receive equal treatment. Currently, Kroger's financial impact from the USF Rider exceeds that of other large, similarly-sized customers at a single site. Therefore, Kroger is paying more than other large, similarly-sized customers that are subject to the two-step declining block rate design. This is not only unfair, but it is unlawful as it discriminates against Kroger.

Interestingly, some parties to this case argue that Kroger's proposal violates the law as it will shift costs to other customer classes. This is simply wrong. Kroger is seeking the exact same treatment that other large, similarly-sized customers already receive under the current practice and as the law has been applied. Kroger is not creating a new rate design methodology or a new class of customers. Rather, Kroger is asking to be treated in the same manner on an aggregated basis as a customer that consumes similar quantities of electricity at a single site. If Kroger's proposal to be treated equally and for the Commission to apply the two-step declining block rate design to Kroger on an aggregate basis is unlawful, then, under some parties' theory,

the two-step declining block rate design itself would be deemed unlawful, which is contrary to Commission precedent. Those parties ignore that some large customers already pay less under the two-step declining block rate design structure than if those same large customers paid a uniform charge per kWh under the first block.

Through expert testimony, Kroger proposed several options to implement its proposal to receive equal treatment in an attempt to work with the Ohio Development Services Agency (ODSA), the Office of the Ohio Consumers' Counsel (OCC), the Ohio Partners for Affordable Energy (OPAE), Industrial Energy Users-Ohio (IEU),¹ and the six jurisdictional Electric Distribution Utilities (EDUs) to mitigate any alleged administrative and cost burdens of rectifying the discriminatory effect of the USF Rider's current two-step declining block rate design. Rather than working with Kroger to select the best option for implementation, ODSA, OCC, and the EDUs disingenuously argue Kroger's proposal lacks specificity and, therefore, cannot be considered. However, this assertion is based upon the fact that the necessary information is within the EDUs' internal systems and not accessible to Kroger, which is why Kroger invited the EDUs to work together. In any event, Kroger has provided enough essential details and specificity to demonstrate sufficiently that the current application of the two-step declining block rate design is discriminatory and unlawful, favoring some large customers over others. Therefore, the Commission should reject the proposed limited application of the USF Rider's rate design methodology to certain customers as flawed and discriminatory, and, instead, also apply the two-step declining block rate design to multi-site mercantile customers on an aggregated basis.

¹ In its initial brief, IEU does not object to, or oppose, Kroger's proposed remedy to rectify the unlawful and discriminatory treatment of the USF Rider's flawed rate design methodology. See IEU Initial Brief at 3 (August 28, 2017).

Finally, Kroger sufficiently demonstrated that its proposal ensures that single-site and multi-site customers with similar loads in the aggregate are treated in a non-discriminatory manner and that its proposal does not violate Ohio law or the Commission's rules.

Accordingly, in addition to establishing the discriminatory and unlawful nature of the flawed application of the rate design methodology, Kroger also has given sufficient detail for the Commission to approve its proposal to remedy the unlawful discriminatory treatment.

II. LAW AND ARGUMENT

A. As a Matter of Law, Kroger's Proposal to Aggregate the Accounts of Multi-Site Mercantile Customers is in Accordance with R.C. 4928.52(C).

The Commission has broad jurisdiction over electric utilities' rates and service matters, including Title 49 of the Ohio Revised Code, and may consider USF rate design issues within the context of a USF proceeding filed by ODSA.² Accordingly, pursuant to R.C. 4928.02(B), it is the Commission's duty to ensure electric utilities' rates are in accord with state policy to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, *nondiscriminatory*, and reasonably priced retail electric service."³

The current application of the USF Rider's two-step declining block rate design unduly discriminates against large *multi-site* mercantile customers compared to large *single-site* mercantile customers. Kroger's proposal remedies this discriminatory effect. Further, because Kroger's proposal ensures equal treatment of all customer classes, it does not violate R.C. 4928.52(C). Parties alleging Kroger's proposal violates R.C. 4928.52(C) have the burden of

² 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 9 (October 28, 2015) (2015 USF Order).

³ R.C. 4928.02(B) (emphasis added).

proof to demonstrate Kroger's proposal shifts costs among customer classes.⁴ They have not satisfied that burden of proof.

When Kroger proposes fair, equal, and non-discriminatory treatment of large single-site and multi-site electric customers, ODSA, OCC, and the EDUs in their initial briefs all vehemently object, arguing that treating multi-site customers as a single customer for purposes of applying the USF Rider's two-step declining block rate design violates R.C. 4928.52(C) and is somehow "unfair to low-income customers."⁵ Specifically, in its initial brief, ODSA argues that Kroger is attempting to create a "new customer class solely for the purposes of assessing the USF [R]ider" and that "Kroger's proposal would shift costs (that otherwise would be paid under the current rate design) away from mercantile customers."⁶ ODSA also challenges Kroger's proposal because it allegedly did not provide evidence of the costs Kroger's aggregated accounts would avoid if multi-site accounts were aggregated and treated like a single-site customer. OCC and the EDUs make the same argument that Kroger's proposal violates R.C. 4928.52(C).⁷ OCC also suggests that Kroger failed to address a list of arbitrarily selected and self-serving factors related to how Kroger's proposal will impact other customers.⁸ The EDUs allege that "Kroger's proposal has the potential to cause such a 'material shift among customer classes' by shifting costs that would otherwise be owed by Kroger . . . and placing them directly upon other customer classes, including the residential customer class, that would not qualify for the special aggregated

⁴ See 2015 USF Order at 21 (holding that OPAE failed to demonstrate that the two-tier declining block rate design violated R.C. 4928.52(C)).

⁵ See OCC Initial Brief at 4 (August 28, 2017).

⁶ ODSA Initial Brief at 3 (August 28, 2017).

⁷ OCC Initial Brief at 3 (August 28, 2017); EDUs Joint Initial Brief at 12-15 (August 28, 2017).

⁸ Id. at 4-7.

billing Kroger wishes to receive.”⁹ As explained below, ODSA, OCC, and the EDUs’ arguments all lack merit and should be rejected.

1. The Two-Step Declining Block Rate Design has been Deemed Lawful under R.C. 4928.52(C).

Contrary to ODSA, OCC, and the EDUs’ assertions, Kroger is not proposing to change the USF rate design methodology. Moreover, the Commission repeatedly has rejected the argument that a cost shift alone to the first block of the two-step declining block rate design violates R.C. 4928.52(C).¹⁰ The Commission specifically held in the 2015 USF case 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 R.C. 4928.52(C).¹¹

R.C. 4928.52(C) provides: “[t]he universal service rider established under division (A) or (B) of this section 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.” (emphasis added). Although the Revised Codes does not define “customer classes,” the Commission explained that “R.C. 142 provides that, words and phrases shall be read in context and construed according to the rules of grammar and common usage and where words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”¹² It is undisputed that under both the existing and proposed USF Rider two-step declining block rate design methodology, there is some cost shift

⁹ EDU Joint Initial Brief at 12 (August 28, 2017).

¹⁰ See, e.g., 2015 USF Order at 20-21.

¹¹ Id.

¹² 2015 USF Order at 20.

to the first block of the rate design, which includes *all classes of customers*.¹³ In interpreting R.C. 4928.52(C), the Commission has used OPAE's definition that "in the utility industry the term customer class refers to residential, commercial, and industrial customers."¹⁴ Therefore, in determining whether there is a shift among customer classes, the Commission should look to whether there is a shift among residential, commercial, and industrial customers. There is not under Kroger's proposal.

Indeed, by supporting the existing and proposed two-step declining block rate design methodology, ODSA, IEU, and the EDU's all agree that a cost shift alone to the first block does not violate R.C. 4928.52(C).¹⁵ Additionally, OCC did not challenge in this proceeding that a cost shift alone to the first block violates R.C. 4928.52(C). The Commission has repeatedly upheld this two-step declining block rate design,¹⁶ specifically finding that it does not violate R.C. 4928.52(C) because all customer classes pay the same rate under the first block, and

¹³ Id. at 21.

¹⁴ Id.

¹⁵ See ODSA Ex. 3 at 5:3-14 (Meadows Direct Testimony) (rejecting OPAE's argument that the current two-step declining block rate design violates R.C. 4928.52(C)); see also IEU Initial Brief at 2-3 (August 28, 2017); EDU Joint Initial Brief at 2-6 (August 28, 2017).

¹⁶ See 2015 USF Order at 20-21; see also *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. 14-1002-EL-USF, Finding and Order at 7 (September 25, 2014); *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. 13-1296-EL-USF, Finding and Order at 8 (October 2, 2013); *In the Matter of the Application of the Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 12-1719-EL-USF, Finding and Order at 9-10 (September 19, 2012) (2012 USF Order); *In the Matter of the Application of the Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 11-3223-EL-USF, Finding and Order at 9 (October 3, 2011) (2011 USF Order). The Commission has also approved stipulations recommending that the Commission find that the continued use of the declining block rate design did not violate R.C. 4928.52(C) and the Commission approved each of these stipulations without modification. See, e.g., *In the Matter of 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. 16-1223-EL-USF, Opinion and Order at 9-12 (September 7, 2016); *In the Matter of the Application of the Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 10-725-EL-USF, Finding and Order at 10-11 (October 27, 2010).

therefore, there is no “shift among customer classes.”¹⁷

Importantly, Kroger’s proposal does not change the Commission-approved two-step declining block rate design methodology. Kroger is simply asking that the two-step declining block rate design methodology be applied in a non-discriminatory fashion, which would allow multi-site customers to be treated as a single customer for purposes of applying the USF Rider’s two-step declining block rate design similar to the application to similarly-sized single-site customers. Even if a slight cost shift to the first block of the rate design would occur under Kroger’s proposal, there is no violation of R.C. 4928.52(C) because the first block still includes *all customer classes*,¹⁸ including Kroger and other mercantile customers. Indeed, when asked, EDU witness Ziolkowski could not identify a single regulatory principle that Kroger’s proposal violated.¹⁹

OCC’s argument appears to be that because “[u]nder Kroger’s proposal, Kroger would pay less under the USF [R]ider” it means that “other customers, including residential customers, would pay more.”²⁰ This assertion, even if true, has no legal consequence because it in no way establishes, or even alleges, that there is an unlawful shift among residential, commercial, and industrial customers within a single rate block. Because the first block of the rate design includes all customer classes,²¹ Kroger, and all other mercantile customers, would pay the same increase in the first rate block – the same as the other customer classes. OCC ignores the plain language of R.C. 4928.52(C) and the accepted definition of “customer classes.”²²

¹⁷ See 2015 USF Order at 20-21.

¹⁸ See 2015 USF Order at 21.

¹⁹ Tr. 141:8-16 (Ziolkowski Cross).

²⁰ OCC Initial Brief at 3 (August 28, 2017).

²¹ Id.

²² See R.C. 4928.52(C); see also 2015 USF Order at 21.

To establish a violation of R.C. 4928.52(C), ODSA, OCC, OPAE, and the EDUs would have to demonstrate that one customer class would pay a different rate compared to the other customer classes solely within the same rate block. ODSA, OCC, OPAE, and the EDUs have neither alleged such a shift, nor provided any record evidence of the same.²³ They merely point to a potential shift to the first rate block, which includes all customer classes, including Kroger. Furthermore, the cost shift that they complain about already occurs under the current and proposed rate design methodology supported by some of the same parties, and approved by the Commission. The Commission has previously considered this argument made by OPAE in prior USF proceedings and rejected it.²⁴ Notably, no party to this proceeding has offered any record evidence or demonstrated how Kroger's proposal would shift costs between the residential, commercial, and industrial customer classes.

Therefore, ODSA, OCC, OPAE, and EDUs' arguments that Kroger's proposal violates R.C. 4928.52(C) fail because, as the Commission found in its 2015 USF Order, an alleged cost shift to the first block, on its own, is not a "shift among customer classes" in violation of R.C. 4928.52(C).²⁵

2. Kroger's Proposal Does Not Create a New Customer Class.

In its brief, ODSA attempts to argue that Kroger is "proposing the creation of a new customer class solely for the purposes of assessing the USF Rider" and that Kroger's proposal would "shift costs . . . away from mercantile customers."²⁶ ODSA alleges Kroger is attempting

²³ Notably, OPAE failed to introduce any witness testimony at the evidentiary hearing to support its objections.

²⁴ See 2011 USF Order at 9; see also 2012 USF Order at 9; 2015 USF Order at 21.

²⁵ See R.C. 4928.52(C); see also 2015 USF Order at 21 ("While the record reveals that the declining block rate design shifts some costs to the first-tier, it does not demonstrate to what degree costs shift between the customer classes. Such a demonstration is required for the Commission to find that the rate design violates R.C. 4928.52(C).").

²⁶ ODSA Initial Brief at 3 (August 28, 2017).

to add mercantile customers to the ranks of residential, commercial, and industrial customer classes. ODSA, however, misconstrues Kroger's proposal and its assertions are without merit.

From the beginning, Kroger has merely proposed that mercantile customers be able to aggregate their electric loads across multiple facilities within the EDU's service territory to then apply that total aggregated load to the USF Rider kWh rates in order to ensure equal and nondiscriminatory treatment between mercantile customers having similar loads in the aggregate. Kroger's proposal does not create a new customer class. A mercantile customer is, by definition, a commercial or industrial customer.²⁷ Kroger's proposal merely remedies the discriminatory effect of ODSA's proposal on mercantile customers that have multiple facilities within the EDUs' service territory, and seeks for those mercantile customers to be treated equal to similarly-sized, single-site commercial and industrial customers.

Notably, the historic two-step declining block rate design methodology, by design and intent, has the potential to shift costs away from large single-site commercial and industrial customers to all customer classes under the first rate block. ODSA repeatedly has supported and advocated for the two-step declining block rate structure to alleviate the undue burden the USF Rider places on some large electric consumers, without advocating that such treatment to large single-site customers somehow creates a new customer class. ODSA's theory that Kroger's proposal violates R.C. 4928.52(C) because it "would shift costs" is inconsistent with ODSA's support for allowing large single-site commercial and industrial customers to take advantage of the potentially lower second block of the two-step declining rate block rate design. Kroger is seeking similar treatment as those large customers that are able to take advantage of the second block of the two-step declining block rate design. Thus, ODSA's claims that Kroger is somehow

²⁷ See R.C. 4928.01(A)(19).

creating a new customer class when it merely seeks similar application of the two-step declining block rate design are without merit. ODSA cannot demonstrate Kroger's proposal "creates a new customer class" or shifts costs among the customer classes. The Commission should reject ODSA's arguments.

B. Kroger Sufficiently Demonstrated that Prohibiting Aggregation of the Accounts of Multi-Site Mercantile Customers is Discriminatory and Provided Ample Support of its Proposed Remedy for such Discrimination.

In its initial brief, OCC argues that Kroger's proposal lacks "essential details" and lists eight arbitrarily selected and self-serving factors OCC suggests Kroger must address.²⁸ OCC further argues that the Commission cannot approve Kroger's proposal without knowing the impact on other customers.²⁹ Similarly, the EDUs argue that there is insufficient information to determine how the proposal would be structured, how it would be implemented, and the impact it would have on customers.³⁰ However, the answers to OCC's eight factors are irrelevant to the fact that precluding multi-site mercantile customers from aggregating their load across multiple accounts for purposes of applying the two-step declining block rate design is discriminatory in violation of Ohio law. Further, the answers to OCC's factors could only come from the EDUs as Kroger cannot possibly know the customer specific information that OCC seeks. Accordingly, the Commission should give no consideration to OCC's eight arbitrarily selected and self-serving factors.

1. OCC's Arbitrarily Selected and Self-Serving Eight Factors Are Irrelevant to the Commission's Review of the Issues in this Proceeding.

OCC attempts to convince the Commission that Kroger is required at this stage in the

²⁸ OCC Initial Brief at 5 (August 28, 2017).

²⁹ Id. at 7.

³⁰ EDU Joint Initial Brief at 6 (August 28, 2017).

proceeding to specify next year's impact on the amount customers would pay for their electric service and identify every multi-site mercantile customer who is unreasonably paying more under the current two-step declining block rate design for the same amount of electricity on an aggregated basis compared to single-site customers.³¹ OCC cites to *no* statute, rule, or Commission decision wherein the Commission has considered OCC's arbitrarily selected factors or that they are necessary for the Commission to determine that the proposed rate design methodology is unlawfully discriminatory and whether Kroger's proposal reasonably remedies the discriminatory application of the current two-step declining block rate design between large single-site and multi-site customers.

Further, Kroger cannot provide much of the information that OCC seeks. Kroger cannot identify how many multi-site mercantile customer participants would receive equal treatment under Kroger's proposal because (1) some multi-site mercantile customers may not apply to aggregate their load,³² and (2) Kroger does not have access to the EDUs' billing systems wherein customers are flagged as mercantile customers.³³ It would be unreasonable to expect that a customer would have access to other customers' account information. Kroger could not have knowledge of the multi-site mercantile customers identified in Ohio or be privy to their electric

³¹ OCC Initial Brief at 5-7 (August 28, 2017).

³² See Kroger Ex. 2 at 4 (Higgins Reply Testimony).

³³ See R.C. 4928.66(A)(2)(C) (Requires utilities to include the effects of all demand response for mercantile customers as defined by R.C. 4928.01(A)(19) and 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; see also R.C. 4928.20 (Requires the EDUs to exclude mercantile customers from automatic inclusion in opt-out governmental aggregation programs); Rule 4901:1-10-32(A)(3), Ohio Administrative Code (Each electric utility shall upon the request of a certified governmental aggregator or certified electric service company under contract with the governmental aggregator, provide "[o]n a best efforts basis, an identification of mercantile customers."); Tr. 118:9 – 120:4; 121:9-18 (Ziolkowski Cross) (Mr. Ziolkowski recognized that there are statutory provisions in place that require the utilities to aggregate mercantile data).

consumption data on an aggregated basis.³⁴ The EDUs made a similar argument that Kroger should have provided customer aggregation data and presumably other customers’ “[a]ctual load information, number of businesses in each EDU service territory, and other pertinent information”³⁵ Given that the EDUs are the only parties in possession and control of such customer information on a system-wide basis, these arguments are disingenuous and lack merit.³⁶ Additionally, the EDUs have likely already determined the load of these customer accounts,³⁷ including Kroger’s, and could have easily identify these multi-site mercantile customers, but they chose not to.

Contrary to the parties’ assertions,³⁸ Kroger did provide data and information through the discovery process. Further, although the EDUs had full and ample rights to discovery in this case, the EDUs failed to serve any discovery on Kroger and failed to introduce any evidence in support of their arguments. The parties cannot now claim that they lack such data from Kroger. Nonetheless, the EDUs are already in possession of Kroger’s actual load information and the number of Kroger facilities in each EDU service territory – the exact information they claim Kroger failed to provide.

Additionally, Kroger cannot possibly estimate the nominal cost to the EDUs, if any, to implement its proposal. Frankly, neither OCC nor the EDUs introduced any record evidence that the EDUs would in fact incur material administrative costs to implement Kroger’s proposal or

³⁴ See Tr. 43:8-14 (Higgins Cross); see also Kroger Ex. 2 at 7 (Higgins Reply Testimony).

³⁵ EDU Joint Initial Brief at 6 (August 28, 2017) ((quoting OCC Ex. 1 at 10) (Williams Direct Testimony)).

³⁶ EDU witness Ziolkowski testified that EDU account representatives regularly aggregate customer data and Mr. Ziolkowski himself has prepared many aggregation lists for customers. See Tr. 138:17-21. Therefore, the EDUs either already have this aggregated data or have the customer account information to determine how the current discriminatory application of the two-step declining block rate design impacts large multi-site mercantile customers.

³⁷ See Tr. 90:1-4 (Ziolkowski Cross) (“At Duke Energy Ohio we do have some databases that track mostly for marking purposes all the accounts associated with many of the customers.”).

³⁸ See, e.g., OCC Initial Brief at 5 (August 28, 2017); EDU Joint Initial Brief at 6-7 (August 28, 2017).

what those costs would be.³⁹ The record is also devoid of any evidence that such costs, if any, would in fact be passed on to customers.

Therefore, because OCC's arbitrarily selected eight factors are better posed to the EDUs and because they are irrelevant for the Commission to find that the current application of the two-step declining block rate design unreasonably discriminates against large multi-site mercantile customers, the Commission should reject OCC and the EDUs' arguments in this regard.

2. ODSA, OCC, and the EDUs Refuse to Collaborate to Treat Multi-Site and Single-Site Customers Equally and Mitigate Administrative Burdens.

Both OCC and the EDUs challenge Kroger's proposal because Kroger did not proffer one specific plan to implement its proposal.⁴⁰ However, Kroger offered multiple plans or options to implement its proposal. Kroger purposely offered several options to implement its proposal in an attempt to work with the parties to select the best and most feasible option and to mitigate any alleged administrative and cost burdens.

In an attempt to implement Kroger's proposal while mitigating any potential administrative and cost burdens, Kroger explicitly proposed: (1) requiring multi-site mercantile customers to identify and list their accounts to be aggregated, denoting account numbers, facility names, and account locations in an annual application;⁴¹ (2) an annual credit or check paid to a single customer/account in arrears to offset the overcharges paid during the preceding year;⁴² (3) that "the first and second blocks of the USF [R]ider rates could be adjusted in the same

³⁹ EDU witness Ziolkowski testified that EDUs, and specifically Duke, would not file a rate case unless costs were "material." Tr. 146:19 – 147:1 (Ziolkowski Cross). Neither Mr. Ziolkowski, nor any other witness testified that the EDUs would incur "material" costs to implement Kroger's proposal or that they would seek to recover those costs.

⁴⁰ EDU Joint Initial Brief at 6-8; OCC Initial Brief at 4-7.

⁴¹ Kroger Ex. 2 at 4 (Higgins Reply Testimony); Tr. 46:10-14 (Higgins Cross).

⁴² Tr. 49:9-21 (Higgins Cross).

proportion to accommodate the aggregation of [m]ercantile [c]ustomer loads,” mitigating any residential customer impact;⁴³ and (4) to limit the rate change strictly to the second block to accommodate Kroger’s proposal.⁴⁴ Kroger’s expert witness Higgins explained at the hearing that “[i]f there is a better way or a preferred way to do – a simpler way to do it that the EDUs would prefer but would still accomplish the goal of allowing the mercantile customer to aggregate its load for the purpose of the USF, then you know, Kroger is certainly open and amenable to that.”⁴⁵

As explained in its initial brief,⁴⁶ Kroger’s proposal of an annual application by the participating mercantile customer would address the EDUs’ concern of identifying customer accounts and tracking.⁴⁷ Kroger’s proposed annual credit would also address the EDUs’ concern of an unpaid bill in a given month.⁴⁸ Further, considering that an annual credit is a compromise to calculating a participating mercantile customer’s aggregated load on a monthly basis before applying the USF Rider’s two-step declining block rate design, the EDUs would be overpaid by the participating mercantile customer throughout the year until the annual true-up is calculated and the credit or check issued.

In short, OCC and the EDUs have failed to provide any evidence that Kroger’s proposal to remedy the discriminatory effect of the current application of the rate design methodology, including its implementation options, are unworkable or would create unjust and unreasonable administrative and cost burdens to the EDUs. They cannot now be heard to complain that they

⁴³ Kroger Ex. 1 at 9:14-16 (Higgins Direct Testimony).

⁴⁴ Tr. 41:25 – 42:15 (Higgins Cross) (explaining that a change strictly to the second block would not affect residential customers).

⁴⁵ Tr. 51:22 – 52:2 (Higgins Cross).

⁴⁶ Kroger Initial Brief at 9-10 (August 28, 2017).

⁴⁷ See EDU Initial Brief at 10 (August 28, 2017).

⁴⁸ Id.

do not have enough information about Kroger's proposal. Accordingly, the Commission should approve Kroger's proposal to remedy the discriminatory and unlawful treatment.

C. The Commission Should Uphold the Evidentiary Rulings by the Attorney Examiner.

In its initial brief, OCC argues that the Attorney Examiner erred when she on three separate occasions ruled against OCC. In each instance, the Attorney Examiner's rulings were proper. Accordingly, they should be upheld.

1. The Commission Should Uphold the Ruling Striking OCC Witness Williams' Irrelevant and Hearsay Testimony.

During the August 18, 2017 evidentiary hearing in this proceeding, Kroger moved to strike Attachment JDW-2 to OCC witness Williams' testimony on grounds that the attachment and corresponding testimony were irrelevant and hearsay, and therefore, inadmissible evidence.⁴⁹ The Attorney Examiner properly granted Kroger's motion to strike Attachment JDW-2, footnote 6, and the sentence on page 5, lines 13 through 15 of Mr. Williams' reply testimony.⁵⁰

OCC alleges that the Attorney Examiner erred in striking Mr. Williams' testimony and argues that his testimony is relevant.⁵¹ As an initial matter, OCC completely ignores Kroger's hearsay objection. Attachment JDW-2 to Mr. Williams' testimony is textbook hearsay inasmuch as it is a statement made by a declarant other than Mr. Williams, offered into evidence to prove the truth of Mr. Williams' testimony.⁵² The declarant of Attachment JDW-2 did not testify at the hearing nor was he or she made available to testify and be subject to cross-examination. No exception to the hearsay rule applies or was argued by OCC.⁵³ Accordingly, Attachment JDW-2

⁴⁹ Tr. 154:3-23.

⁵⁰ Tr. 157:16-18.

⁵¹ OCC Initial Brief at 8 (August 28, 2017).

⁵² See Evid. R. 801.

⁵³ See Evid. R. 802.

is inadmissible hearsay and was properly stricken by the Attorney Examiner along with the related testimony by OCC witness Williams.

Moreover, such Attachment and related testimony by Mr. Williams is also irrelevant. This NOI proceeding is to determine the rate design methodology of the USF Rider. Attachment JDW-2 and Mr. Williams' related testimony discusses access to food in Ohio. Access to food in Ohio is not a fact that is of consequence to this proceeding.⁵⁴ Thus, it was correctly found to be irrelevant and not admissible.⁵⁵ Reversal of the Attorney Examiner's ruling would set a precedent that OCC could introduce this evidence in every single matter before this Commission that could possibly impact residential customers' rates. Accordingly, the Commission should reject OCC's objection and uphold the Attorney Examiner's ruling to strike the aforementioned portion of OCC witness Williams' reply testimony.

2. The Attorney Examiner Properly Overruled OCC's Objection and Motion to Strike Portions of Kroger Witness Higgins' Testimony.

OCC moved to strike Kroger witness Higgins' testimony where he stated that Ohio's largest electric consumers "are among its largest employers."⁵⁶ The Attorney Examiner properly rejected OCC's motion.⁵⁷ In its initial brief, OCC again argues that the question of whether large energy users are among the largest employers in the state of Ohio is a question of fact and alleges Mr. Higgins did not cite to any sources. OCC also alleges Mr. Higgins did not have personal knowledge of this statement. OCC is mistaken and its arguments lack merit.

The record shows that OCC never questioned Mr. Higgins whether he had personal

⁵⁴ OCC fails to provide any analysis on how Mr. Williams' has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

⁵⁵ Evid. R. 402.

⁵⁶ Kroger Ex. 1 at 6:4-5 (Higgins Direct Testimony).

⁵⁷ Tr. 40:5 – 41:3.

knowledge of who are Ohio's largest employers.⁵⁸ In fact, on redirect, Mr. Higgins explained that he did have such personal knowledge of the largest employers in the state of Ohio by reviewing a list of the 100 largest employers in Ohio that was publically available on Cleveland.com.⁵⁹ Because Mr. Higgins had personal knowledge of the identity of the 100 largest employers in the state of Ohio, OCC's motion to strike the language "are among its largest employers" was properly denied. Accordingly, the Commission should uphold the Attorney Examiner's ruling to reject OCC's motion to strike.

3. The Attorney Examiner Properly Overruled OCC's Objection to Kroger's Exhibit 5.

At the August 18, 2017 evidentiary hearing, Kroger marked as Kroger Ex. 5 and moved to admit a spreadsheet list of Kroger's accounts in an Ohio EDU's service territory.⁶⁰ Notably, OCC failed to object to its admission into evidence or join any other party's objection. OCC, for the first time in its initial brief, raises a new objection based on hearsay.⁶¹ Neither OCC, nor any other party during the hearing, objected to Kroger admitting Kroger Ex. 5 on the grounds that it was inadmissible hearsay. Because no party made or preserved this objection, including OCC, the Commission should reject OCC's argument on this basis alone as OCC waived its right to raise the objection.⁶²

Notwithstanding OCC's waiver of this hearsay objection, Kroger Ex. 5 is not hearsay as defined by Evid. R. 801(C) and (D). Kroger Ex. 5 is a list of Kroger's accounts prepared by an

⁵⁸ Tr. 39:5-22.

⁵⁹ Tr. 67:9-21 (Higgins Redirect).

⁶⁰ Tr. 133:5-11; 147:21-22.

⁶¹ OCC Initial Brief at 10 (August 28, 2017).

⁶² See *In the Matter of the Application of Ohio Utilities Company to amend Certificate of Public Convenience for Sewage Disposal System*, Case No. 75-199-WW-AEM, Opinion and Order (February 1, 1976) ("objections to evidence are waived by failure to timely object . . .").

Ohio EDU and given to Kroger by the EDU's account representative. The exhibit has titled columns listed as "Account Number," "Customer Name," "Service Address," "Location," and "Tariff Description."⁶³ Although Kroger's information regarding its kilowatt-hour usage by month was redacted, EDU witness Ziolkowski did admit that it appeared to be a listing of Kroger's accounts.⁶⁴

Kroger introduced Kroger Ex. 5 to demonstrate that the EDUs already prepare spreadsheets listing multi-site customer accounts on a monthly basis.⁶⁵ Kroger did not introduce Kroger Ex. 5 to prove the actual electric usage of each Kroger account. Therefore, the exhibit is not hearsay because it was not used to prove any specific truth about Kroger's actual electric usage. Rather, it was used to demonstrate that the EDUs regularly prepare similar lists of multi-site customer accounts with minimal burden. Further, Kroger Ex. 5 is not hearsay because it meets the criteria of an admission by a party-opponent pursuant to Evid. R. 801(D)(2). It is a statement from an Ohio EDU in a representative capacity offered against the Ohio EDU and the other five EDUs.⁶⁶ In fact, EDU witness Ziolkowski admitted he prepared many similar spreadsheets.⁶⁷ Accordingly, OCC's arguments are unfounded and should be rejected by the Commission.

⁶³ Kroger Ex. 5; see Tr. 134:2-6 (Ziolkowski Cross).

⁶⁴ Tr. 134:11-14 (Ziolkowski Cross).

⁶⁵ Tr. 133 – 137 (Ziolkowski Cross).

⁶⁶ Under Evid. R. 801(D)(2), a statement is not hearsay if: "The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship"

⁶⁷ Tr. 138:17-21 (Ziolkowski Redirect).

III. CONCLUSION

The Commission should determine that the proposed USF rate design methodology is flawed and is discriminatory in violation of Ohio law. To rectify this discriminatory practice and to implement the original intent of the two-step declining block rate design to limit the total financial impact of the USF rider on the state's largest electric consumers, the Commission should authorize mercantile customers to aggregate their loads across multiple accounts for purposes of applying the two-step declining block rate design. Such an approach would promote fair, equal, and non-discriminatory treatment of large single-site and multi-site electric customers with similar aggregate load.

Through this case, Kroger has established that treating large multi-site mercantile customers equal to large single-site customers for purposes of the application of the two-step declining block rate design does not shift costs among customer classes and, therefore, does not violate R.C. 4928.52(C).

Accordingly, for the reasons set forth herein and set forth in Kroger's Initial Brief, the Commission should find that the proposed USF rate design methodology is discriminatory, and thus, unlawful. The Commission should also adopt 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,

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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 September 8, 2017.

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This foregoing document was electronically filed with the Public Utilities

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9/8/2017 4:57:17 PM

in

Case No(s). 17-1377-EL-USF

Summary: Brief Reply Brief of The Kroger Co. electronically filed by Mr. James D Perko on behalf of The Kroger Co.