

ORIGINAL

IN THE SUPREME COURT OF OHIO

The Kroger Co., et al.,	:	Ohio Supreme Court Case No. 13-0521
	:	
Appellants,	:	Appeal from the Public Utilities Commission
	:	of Ohio
v.	:	
	:	Public Utilities Commission of Ohio Case
The Public Utilities Commission of Ohio,	:	Nos. 11-346-EL-SSO, 11-348-EL-SSO, 11-
	:	349-EL-AAM, 11-350-EL-AAM
Appellee,	:	
	:	
and	:	
	:	
Ohio Power Company,	:	
	:	
Cross-Appellant.	:	

THIRD MERIT BRIEF OF APPELLANT THE KROGER CO.

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FILED
 DEC 10 2013
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THIRD MERIT BRIEF OF APPELLANT THE KROGER CO.

I. INTRODUCTION.

In the Kroger Co.’s (“Kroger”) First Merit Brief, Kroger asked this Court to instruct the Public Utilities Commission of Ohio (the “Commission”) to modify an unreasonable and unlawful electric rate approved by the Commission. Specifically, the rate design for the Retail Stability Rider (“RSR”), which is unjustifiably discriminatory, should be modified so that the method in which demand related costs are determined and allocated match AEP-Ohio’s recovery method. Otherwise, customers with high load factors (customers with energy usage that closely aligns with their peak demand) will subsidize low load factor customers. To correct this obvious flaw in the rate design, adopted by the Commission, Kroger’s proposal for the RSR rate design guarantees that all customers will pay their fair share of the RSR, consistent with a customer’s contribution to peak demand.

The Commission and AEP-Ohio have failed to adequately dispute Kroger’s positions that the RSR is unreasonable and unlawful; the cost allocation and recovery mechanisms are

mismatched; and that the Commission’s finding that the RSR “spreads costs among all customers” is wholly inapt. Instead, they have told this Court that it cannot “second-guess” the Commission’s approved rate designs. Kroger respectfully submits that this Court is the proper forum to evaluate the unreasonableness and unlawfulness of the rate design for RSR.

Accordingly, Kroger respectfully requests this Court to find that the RSR rate design is unreasonable and unlawful, and remand this case to the Commission with instructions to modify the RSR rate design.

II. LAW AND ARGUMENT.

Proposition of Law No. 1.

By permitting AEP-Ohio to properly allocate costs for the Retail Stability Rider to customer classes on a demand basis, then improperly recover those costs through an energy charge, the Commission has unreasonably and unlawfully mismatched cost allocation and revenue recovery, resulting in improper subsidies among customers in violation of Ohio law.

A. Appellees’ Positions Improperly Attempt to Strip this Court of its Authority to Review Rate Designs.

AEP-Ohio and the Commission have improperly argued that this Court should not review the Commission’s decision on rate design. The Commission has pointedly instructed this Court not to “second-guess” the Commission’s decision in the context of the Commission’s rate-making expertise. (Comm. Br. at 31; AEP-Ohio Br. at 24). While this Court may consider the Commission’s expertise, the ultimate question for the Court to answer is: whether the rate design is unlawful or unreasonable. *Consumers’ Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, ¶ 73. In this regard, the Commission’s and AEP-Ohio’s arguments that the Court should not review the rate design of the RSR lack merit and improperly attempt to divest this Court of its appellate power in an important area. Accordingly, Kroger respectfully requests this Court find that the Commission’s rate design of the RSR is unlawful and unreasonable.

B. The RSR rate design unlawfully and unreasonably results in intra-class subsidies.

The Commission's modified and approved version of the RSR is unlawful and unreasonable pursuant to R.C. 4928.02 because the RSR results in discriminatory and unreasonably priced retail electric service. R.C. 4928.02. In their merit briefs, AEP-Ohio and the Commission did not dispute that the rate design of the RSR violated cost-causation principles. Under the RSR's current rate design, the RSR unreasonably subsidizes low load factor customers within each customer class who contribute equally to peak demand. Unreasonable subsidization occurs because the RSR allocates (or assigns) measured costs to customer classes on one basis (demand), but then recovers such costs from those customers on an entirely different basis (energy), which is unrelated to peak demand contribution. A rate-design that unequivocally fails to assign costs to appropriate cost-causers in a proportioned manner is an inherently flawed mechanism that must be rejected. (Kroger Br. at 7).

The Commission argued that recovering the RSR on an energy basis is appropriate because it "spreads costs among all customers, as all customers would benefit from the charge." (Comm. Br. at 31). There are two serious flaws with this argument. First, implicit in this argument is the Commission's recognition that the RSR subsidizes some customers by "spreading" the costs. Using the method adopted by the Commission, customers will not pay their fair share of those costs. High load factor customers in each customer class will pay more than their fair share, while low load factor customers will pay less than their fair share. Second, the Commission states that it spread the costs *because* "all customers benefit from the charge." However, under either the Commission-approved RSR or Kroger's proposed RSR, all of AEP-Ohio's customers will be charged, regardless of whether the RSR is considered a "benefit." Thus, with respect to the rate design of the RSR, it is irrelevant to consider whether all the customers benefit from the RSR. Low load factor customers should not additionally receive a

benefit from a subsidy paid for by high load factor customers. Conversely, high load factor customers should pay their fair share and no more. The rate design should match cost allocation to cost recovery for all customers on a fair and proportional basis, which the Commission failed to do.

By approving the patently discriminatory RSR rate design, the Commission cannot provide adequate support in the law or record for this Court to affirm the RSR adopted in the Order. The Commission's decision to approve this particular rate design is arbitrary and capricious. For the reasons set forth herein and in Kroger's First Merit Brief, Kroger respectfully requests that this Court remand the August 8, 2012 Order of the PUCO with instructions to modify the rate design of the RSR consistent with Kroger's proposal, and properly recover costs measured and allocated on a demand basis through a demand charge.

C. The Record Does not Support the Commission's Determination that Small Commercial and Industrial Customers Would Face an Undue Burden Under Kroger's Rate Design Proposal.

The Commission and AEP-Ohio failed to respond to Kroger's argument that the Commission based its determination of the rate design of the RSR on facts not in the record. In explaining the reason for its decision to allocate the costs of the RSR based on customer demand (or capacity) while recovering the RSR through an energy charge, the Commission found that "smaller commercial and industrial customers would face an undue burden of the RSR" under a rate design that matched cost allocation with cost recovery. (January 30, 2012 Entry on Rehearing, Finding 27, p. 25; App. 121). However, as Kroger's merit brief explained, the size of the customer is irrelevant to the issue of rate design. (Kroger Br. at 9-10). Rather, the customer's load factor determines the RSR charges in a demand based rate design, which means that customers with high load factors will contribute equally to peak demand on AEP-Ohio's

system as compared to customers in their rate class whose average consumption is much greater. (*Id.*).

Instead of addressing the deficiency in the Commission's rationale for the rate design, the Commission repeated the same faulty conclusion that it made in the Commission's Entry on Rehearing. (Comm. Br. at 31). This Court should not accept the Commission's response because there is no evidence in the record that supports the Commission's conclusion that Kroger's RSR rate design would impact customers based on their size. Rather, Kroger's suggested rate design recovers costs solely on the basis of contribution to demand, in the same manner that costs are determined and allocated. Additionally, AEP-Ohio failed to address in its merit brief the deficient explanation for the Commission's decision. Accordingly, the Court should reverse the Commission's finding because it is unsupported by any evidence.

III. CONCLUSION.

Wherefore, Appellant Kroger respectfully submit that the PUCO's August 8, 2012 Opinion and Order and January 30, 2013 Entry on Rehearing in PUCO Case. Nos. 11-346-EL-SSO, 11-348-EL-SSO, 11-349-EL-AAM, 11-350-EL-AAM are unlawful to the extent that they unreasonably and unjustly set the Retail Stability Rider rates in a discriminatory manner. Accordingly, the Court should direct Appellee PUCO to correct the error complain of herein by requiring AEP-Ohio to recover the revenue of the RSR in Kroger's rate class based on a demand charge.

Respectfully submitted,



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