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

OHIO PARTNERS FOR AFFORDABLE ENERGY'S INITIAL BRIEF

I. Introduction

Ohio Partners for Affordable Energy ("OPAE") herein submits to the Public Utilities Commission of Ohio ("Commission") this initial brief in the proceeding to consider the application of the Ohio Development Services Agency ("ODSA") to use the October 1999 Percentage of Income Payment Plan ("PIPP") riders of Ohio's 1999 electric utilities as the second blocks of a two-block rate design to collect revenues for the Universal Service Fund ("USF"). ODSA's use of the October 1999 PIPP rates of the 1999 Ohio electric utilities for the second blocks of the USF rate design results in an unlawful cost shift among customer classes.

Revised Code ("R.C.") Section 4928.52 created the Universal Service Rider effective October 5, 1999. The USF rider replaced the PIPP rider for electric utilities. The USF rider was to provide adequate funding for low-income assistance programs. The Commission, after reasonable notice and opportunity for hearing, was to adjust the USF rider by the minimum amount necessary to provide additional revenues when needed. Pursuant to R.C. 4928.52(C): The USF rider is to "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". The October 1999 PIPP rider was a per kWh charge to recover all PIPP costs. Given that the purpose of the two-block rate design is to shift among the customer classes the costs of funding low-income customer assistance programs, the two-block rate design violates R.C. 4928.52(C).

II. There is no Stipulation and Recommendation in this Case upon which ODSA May Rely.

The Commission has approved applications for adjustments to the USF riders every year pursuant to Stipulations and Recommendations signed by some of the parties to the cases. Every year, the Commission has explicitly approved the Stipulations and Recommendations pursuant only to the Commission's three-part test for the reasonableness of stipulations. Case No. 01-2411-EL-UNC, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (December 20, 2001) at 6-8; Case No. 02-2868-EL-UNC, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (January 23, 2003) at 6-9; Case No. 03-2049-EL-UNC, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (December 3, 2003) at 6-9; Case No. 04-1616-EL-UNC, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (December 8, 2004) at 7-9; Case No. 05-717-EL-UNC, Finding and Order approving the Stipulation and Recommendation pursuant to the three-part test (June 6, 2006) at 3-7; Case No. 06-751-EL-UNC, Opinion and Order approving the Stipulation and Recommendation

pursuant to the three-part test (December 20, 2006) at 10-14; Case No. 07-661-EL-UNC, Finding and Order approving the Stipulation and Recommendation pursuant to the three-part test (May 28, 2008) at 8-12; Case No. 08-658-EL-UNC, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (December 17, 2008) at 10-14; Case No. 09-463-EL-UNC, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (December 16, 2009) at 11-16; Case No. 10-725-EL-USF, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (October 27, 2010) at 10-11; Case No. 11-3223-EL-USF, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (December 14, 2011) at 12-13; Case No. 12-1719-EL-USF, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (September 19, 2012) at 7-10; Case No. 13-1296-EL-USF, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (October 2, 2013) at 5-8; Case No. 15-1046-EL-USF, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (October 28, 2015) at 9-23; Case No. 16-1223-EL-USF, Opinion and Order approving the Stipulation and Recommendation pursuant to the three-part test (September 7, 2016) at 9-12.

The Commission has never once made an evidentiary or legal finding related to ODSA's rate design outside the context of a Stipulation and Recommendation pursuant to the Commission's three-part test for the reasonableness of stipulations.

There is only the approval of sixteen Stipulations and Recommendations pursuant only to the three-part test for reasonableness of stipulations.

ODSA presented testimony in this case to support its rate design. ODSA's witness testified that the Commission has always approved ODSA's rate design. She claimed: "In each proceeding, the Commission has found that the rate design does not violate R.C. 4928.52(C), which requires that the USF rider rate not shift among customer classes the cost of funding low-income customer assistance programs." ODSA Ex. 2 at 5. ODSA's witness provided no citation to support its claim that the Commission has found its rate design does not violate R.C. 4928.52(C). Given that the Commission has only considered the rate design in the context of its three-part test for stipulations, there is no citation to support ODSA's claim.

ODSA's witness stated that OPAE litigated the rate design issue in the 2015 USF proceeding and the Commission found that OPAE's analysis failed to demonstrate any significant cost shift between customer classes as required by the statute. OSDA Ex. 2 at 5. ODSA's witness cites Case No. 15-1046-EL-USF, Opinion and Order at 23. The paragraph from the Order states:

> Finally, the Commission finds that the 2015 NOI Stipulation does not violate any important regulatory principles or practices. The Commission finds that R.C. 4928.52(C) dictates that the USF rider 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. The Commission is not persuaded that OPAE's analysis demonstrates any significant cost shift between the customer classes as required by the statute. Nonetheless, the Commission directs the jurisdictional electric utilities to

> provide to ODSA the information necessary to determine compliance with R.C. 4928.52(C).

Case No. 15-1046-EL-USF, Opinion and Order at 23.

The Commission was wrong about the statute, which makes no reference to "any significant cost shift" among customer classes. Neither the word "significant" nor any similar adjective appears in the statute. The Commission's mistake was made in the context of determining whether the 2015 Stipulation violated any important regulatory principles or practices, the third part of the Commission's three-part test for the reasonableness of stipulations. The Commission's reference to a "significant" cost shift was not to the statute but to the Stipulation and Recommendation before it. Id. The Commission has no authority to violate a statute.

In Case No. 10-725-EL-USF, the Opinion and Order discusses the Industrial Energy Users-Ohio's ("IEU-O") argument that the Commission had rejected the "repeated claim" of the Office of the Consumers' Counsel ("OCC") and OPAE that the two-block rate design violates Section 4928.52(C), which requires that the USF rider not shift among the customer classes the cost of funding low-income assistance programs. IEU-O argued, as ODSA does here, that the two-block rate design had been approved in all prior proceedings. Case No. 10-725-EL-USF, Opinion and Order (October 27, 2010) at 6. In its Opinion and Order, the Commission summarized IEU-O's argument:

> "as documented in the stipulations accepted in each of the previous USF rider adjustment cases, the impact of using the two-step declining block rider, as opposed to a single per kilowatt hour (kWh) rate, is *de minimis* and results in a revenue distribution that is well within the range of estimation error inherent in any inter-customer class cost-of-service

> analysis and does not negatively impact the principle of revenue distribution continuity."

Case No. 10-725-EL-USF, Opinion and Order (October 27, 2010) at 6. The stipulations referred to *de minimis* cost shifts, not the statute. Id. R.C. 4928.52(C) specifies that there should be no cost shift among the customer classes at all. A cost shift that is "*de minimis*" and "within the range of estimation error" is still an unlawful cost shift.

The Commission approved the Stipulations and Recommendations without any affirmative decision on the issue raised by OCC and OPAE and with reference to nothing but its three-part test for approval of stipulations. For example, Case No. 10-725-EL-USF, Opinion and order at 10-13. There is no Commission evidentiary or legal finding on the issue whether ODSA's rate design violates R.C. 4928.52(C).

ODSA also states: OPAE's objection fails to support a shift in costs among customer classes, and ODSA cannot accept it." ODSA Ex. 2 at 5. OPAE has no burden in this case to support a shift in costs. ODSA has the burden in this case to demonstrate that its application complies with R.C. 4928.52(C). ODSA has the burden to convince the Commission that its rate design does not shift costs among the customer classes. In Case No. 15-1046-EL-USF, the Commission directed the electric utilities to provide ODSA with the information necessary to determine compliance with R.C. 4928.52(C). Opinion and Order at 23. ODSA is to demonstrate that its rate design complies with R.C. 4928.52(C). Id. ODSA has not done so. The Commission must deny this application because it violates Ohio law. R.C. 4928.52(C).

III. The Evidence in this Case Demonstrates the Unlawful Cost Shift among Customer Classes to Fund the USF.

The Kroger Company filed testimony in this case complaining that if a mercantile customer has ten sites within an electric utility's service territory, each of which consumes 200,000 kWh per month, each site would have all usage in the first block of ODSA's rate design. Kroger Ex. 1 at 7. But if the ten sites could aggregate their loads, they would collectively have 2,000,000 kWh per month and "would receive the benefit of the reduced kWh rate in the second block of the rate design." Id. According to Kroger, precluding mercantile customers from aggregating their loads across multiple facilities within an electric utility's service area so as to take advantage of the second block rates "is unduly discriminatory." Id. It results in different rate treatment for a large customer with a single site than for a mercantile customer with the same aggregate load at multiple sites, which is not allowed to receive the benefit of the second block rate for its energy usage above 833,000 kWh per month. Id.

In response, OCC filed testimony that Kroger's recommendation would shift the costs of funding the USF to other customer classes. OCC Ex. 1 at 8. OCC's witness stated that "any reduction in the amount of money that is being collected for the USF from one or more customers must be collected from all customers". Id. at 9. If Kroger's proposal allows the aggregated mercantile customer to achieve usage in the second block and to pay less of the USF revenue requirement, all customers would have to pay additional charges to make up for the revenue shortfall. Id. at 10. OCC's witness concluded that "(t)here can be no doubt that Kroger's proposal

results in a shifting of costs to other customers, including residential customers, for funding of the USF." Id.

OCC also complained that Kroger's proposal violates R.C. 4928.02(A), which requires that retail electric service be nondiscriminatory because all customers are not able to aggregate their distribution load for the purpose of reducing the amount of money that they pay toward funding the USF. Individual customers who are unable to aggregate their consumption would pay higher per kWh charges toward the USF than aggregated distribution customers. OCC testified that Kroger's proposal results in unreasonably priced retail electric service for customers who would have to make up the revenue shortfall in the USF revenue requirement that would occur when certain mercantile and other similarly sized customers pay less funding toward the USF. Requiring residential customers to pay more for the USF because mercantile customers pay less is fundamentally unfair. Id. at 11.

The electric utilities presented the testimony of James E. Ziolkowski against the Kroger proposal as well. He testified that Kroger's proposal violates the principles of fairness and nondiscriminatory rates by creating a sub-set of customers that will be advantaged based on their ability to combine separate individual accounts to take advantage of the second rate block. Ziolkowski at 5. He testified that Kroger's proposal will shift costs to other customers. Id. at 6. If Kroger pays less because some of its usage in billed under the second rate block, it will require additional costs to be recovered from the first rate block. This will shift costs to customers in the first block. Id. at 6-7.

The evidence demonstrates that the two step rate design shifts costs among the customer classes in violation of R.C. 4928.52(C). After all, Kroger just wants to join the lucky few who are shifting their USF costs onto all other customers. As Mr. Ziolkowski points out, by achieving some usage in the second block, Kroger's proposal will shift costs to other customers. "That is why (Kroger) is making the proposal." Id. at 6. That is also why the second block exists in the first place, to shift costs from extremely high users onto all other customer classes. OPAE objected to ODSA's two block rate design because it shifts USF rider payments from the very largest industrial customers to all other customers." Tr. at 27. This is an unlawful cost shift among the customer classes. ODSA's rate design violates R.C. 4928.52(C).

Mr. Ziolkowski also complained about the practical billing problems the utilities would encounter trying to implement the Kroger proposal. Id. at 7-10. However, the elimination of the second block creates no billing problems for the utilities at all. The OSDA rate design already eliminates the second block whenever it is higher than the per kWh charge, which ODSA determines every year in order to determine the first block. The utilities and ODSA should be delighted to return to the per kWh rate for all customer classes. The rate design issue will be eliminated, making the annual USF rate process straightforward and simple.

Eliminating the rate design process will also eliminate the problem of challenging the rate design in the current year for following year. It was the 2004 USF case Stipulation that set up the process by which the NOI application would be filed by May 31 of each year and ODSA would propose its rate design methodology

for the following year. Case No. 15-1046-EL-USF, Opinion and Order, at 14. Under the process, ODSA does not file data for the USF rates to be effective in the following year until October 31, after the rate design process has concluded. Id. Thus, the proper time to challenge the rate design for the coming year occurs before any data for the coming year are available. Id. In addition, challenging the USF rate design whenever a stipulation allows *de minimis* cost shifts and a three-part reasonableness test is unduly burdensome because there are six electric utilities and at least six customer classes, residential, commercial, industrial, transmission voltage, primary voltage, and secondary voltage. Ziolkowski at 6.

Eliminating ODSA's two-block rate design will end the unlawful cost shift that forces nearly all customer classes to pay more to fund the USF. Residential and small commercial customers will all pay less whenever there is no second block. Even if Kroger were able to aggregate and have some usage in the second block, Kroger would likely not have enough usage in the second block to counter-act the increase in the first block from any shortfall in the revenue requirement. There is no place in Ohio law for a USF rate design that shifts costs from the very largest customer class to all other customer classes.

Conclusion

This application is for an unlawful cost shift among customer classes in violation of R.C. 4928.52(C). ODSA, which has the burden of proof in this proceeding, has presented no evidence to support a finding that its application does not violate R.C. 4928.52(C). Therefore, the Commission must deny the application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Initial Brief will be served electronically by the Commission's Docketing Division on parties who are electronically subscribed to this case on this 28th day of August 2017.

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Summary: Brief electronically filed by Colleen L Mooney on behalf of Ohio Partners for Affordable Energy