

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the	)	
Ohio Development Services Agency	)	
for an Order Approving Adjustments	)	Case No. 17-1377-EL-USF
to the Universal Service Fund Riders of	)	
Jurisdictional Ohio Electric Distribution	)	
Utilities.	)	

---

**INDUSTRIAL ENERGY USERS-OHIO'S  
REPLY BRIEF**

---

Frank P. Darr (Reg. No. 0025469)  
(Counsel of Record)  
Matthew R. Pritchard (Reg. No. 0088070)  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Telecopier: (614) 469-4653  
fdarr@mwncmh.com  
(willing to accept service via e-mail)  
mpritchard@mwncmh.com  
(willing to accept service via e-mail)

**SEPTEMBER 8, 2017**

**ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the	)	
Ohio Development Services Agency	)	
for an Order Approving Adjustments	)	Case No. 17-1377-EL-USF
to the Universal Service Fund Riders of	)	
Jurisdictional Ohio Electric Distribution	)	
Utilities.	)	

---

**INDUSTRIAL ENERGY USERS-OHIO’S  
REPLY BRIEF**

---

Failing to introduce any testimony or other evidence supporting its position, Ohio Partners for Affordable Energy (“OPAE”) has nonetheless resurrected on brief its objection to the two-step declining block rate design that has been approved by the Public Utilities Commission of Ohio (“Commission”) in every Universal Service Fund (“USF”) case dating back to 2001. Rather than advance its own evidence to support its claim that the two-step declining block rate design is unlawful, OPAE attempts to buttress its challenge to the continuation of the existing rate design by asserting that the Ohio Development Services Agency (“ODSA”) failed to carry its burden of proof. OPAE also relies on the unrelated testimony offered to address The Kroger Co.’s (“Kroger”) aggregation proposal, and further advances two collateral attacks of prior Commission orders. OPAE’s claims, however, misstate and ignore the actual record evidence which supports the continuation of the two-step declining block rate design. Accordingly, the Commission should reject OPAE’s arguments and approve the Notice of Intent (“NOI”) recommending the extension of the existing rate design.

## **I. ARGUMENT**

### **A. The evidence offered in support of the continuation of the two-step declining block rate design was uncontested at the hearing and demonstrates the lawfulness and reasonableness of continuing the existing rate design**

Despite being provided an opportunity to establish its position on the record, OPAE elected to forgo that opportunity. Instead, on brief OPAE attempts to resurrect the unsupported claims raised in its objections by attaching its post-hoc challenge to the existing rate design to a claim that ODSA failed to meet its burden of proof.<sup>1</sup> OPAE's argument, however, ignores the uncontested testimony offered by ODSA witness Meadows.

Ms. Meadows' direct testimony was offered in support of the revenue requirement and rate design methodologies ODSA proposed in its NOI. As to the two-step declining block rate design that ODSA has proposed to continue for the 2018 USF riders, she testified that this rate design would "ensure adequate funding for the low-income customer assistance programs and the consumer education programs administered by ODSA, and provide a reasonable contribution by all customer classes to the USF revenue requirement."<sup>2</sup> Ms. Meadows further testified that ODSA's proposed rate design for the 2018 USF riders was the same rate design the Commission has approved in every prior USF proceeding.<sup>3</sup> Finally, Ms. Meadows testified that the Commission has found in each

---

<sup>1</sup> OPAE Initial Brief at 6.

<sup>2</sup> ODSA Ex. 2 at 4.

<sup>3</sup> ODSA Ex. 2 at 4. The statement Ms. Meadows testified to, that the two-step declining block rate design methodology provides a reasonable contribution by all customer classes to the USF revenue requirement, is the same recommended finding presented to the Commission in prior USF proceedings in which the Commission previously determined that the two-step declining block rate design methodology satisfied R.C. 4928.52(C). See, e.g., *In the Matter of the Application of the Ohio Department of Development for an Order*

USF proceeding that the two-step declining block rate design does not violate R.C. 4928.52(C).<sup>4</sup> OPAE conducted no cross-examination of this testimony and offered no evidence to rebut this testimony. Thus, the uncontested evidence demonstrates that the two-step declining block rate design represents a reasonable contribution by all customer classes and therefore does not violate the inter-class cost shift prohibition contained in R.C. 4928.52(C).

On brief, OPAE also challenges Ms. Meadows' factual claim that the Commission has found the existing rate design does not violate R.C. 4928.52(C).<sup>5</sup> OPAE specifically takes issues with the fact that Ms. Meadows' testimony did not include legal citations to support her testimony, and it further asserts that no such citation exists.<sup>6</sup> Contrary to OPAE's arguments, the Commission has explicitly held in most of the 16 prior USF orders that the two-step declining block rate design methodology did not violate R.C. 4928.52(C) (in the remaining cases, the Commission implicitly reached the same result authorizing the continued use of the rate design). For example, in the 2011 USF proceeding, the Commission stated that it "continue[s] to find that OPAE's arguments that the two-step declining block USF rate design violates Section 4928.52(C), Revised Code, to be unpersuasive."<sup>7</sup>

---

*Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 11-3223-EL-USF, Opinion and Order at 8-9 (Oct. 3, 2011) ("2011 USF Order").

<sup>4</sup> ODSA Ex. 2 at 5.

<sup>5</sup> In addition to being incorrect, OPAE's argument should be rejected because there is no requirement for expert witness testimony to contain legal citations.

<sup>6</sup> See OPAE Initial Brief at 4.

<sup>7</sup> 2011 USF Order at 9. For additional pinpoint citations to the Commission's findings that the two-tiered declining block rate design complies with R.C. 4928.52(C), see IEU-Ohio Initial Brief at 3-4, n. 11.

OPAE's post-hoc challenge on brief to the uncontested record evidence is improper and cannot alter the evidence that was offered and went unchallenged. Because this uncontested evidence supports the continuation of the two-step declining block rate design, there is not a failure of proof problem before the Commission.

**B. The record evidence related to Kroger's proposal to aggregate usage under a continuation of the two-step declining block rate design does not support OPAE's conclusion that this rate design is unlawful**

Forgoing the opportunity to introduce its own evidence, OPAE relies on the testimony that was offered to address Kroger's unrelated aggregation proposal in support of its conclusion that the two-step declining block rate design is unlawful.<sup>8</sup> The Commission, however, has already provided direction to OPAE on the type of analysis that OPAE must present to demonstrate a violation of R.C. 4928.52(C) or that an alternative rate design is lawful and reasonable.<sup>9</sup> That is, the Commission directed OPAE to demonstrate to what degree the current or a proposed rate design resulted in a cost shift among the customer classes.<sup>10</sup> The testimony offered to address Kroger's aggregation issue, however, does not meet the requirements the Commission indicated were necessary to support a demonstration of an inter-class cost shift.

Initially, in support of its challenge to the continuation of the existing rate design, OPAE cites to Kroger witness Higgins' hypothetical mercantile customer aggregation analysis.<sup>11</sup> Mr. Higgins' analysis demonstrates that a hypothetical mercantile customer

---

<sup>8</sup> OPAE Initial Brief at 7-8 (*citing* OCC Ex. 1, Joint Ex. 1, Kroger Ex. 1).

<sup>9</sup> 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 21 (Oct. 28, 2015) ("2015 USF Order")

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

<sup>11</sup> OPAE Initial Brief at 7.

that could aggregate usage across multiple accounts would save money if the aggregated usage shifted from the higher first block rate of the USF riders to the lower second block rate.<sup>12</sup> OPAE also cites to OCC witness Williams' testimony that includes the same hypothetical customer example offered by Mr. Higgins.<sup>13</sup> The conclusion drawn by both Mr. Higgins and Mr. Williams is the same; aggregating and shifting usage from the first block to the lower second block USF rate would reduce the mercantile customer's bill and increase the revenue that must be collected through the first block rates.<sup>14</sup> Joint utility witness Ziolkowski also reached the same conclusion in his testimony.<sup>15</sup> But, as the Commission previously determined, an analysis of this type is insufficient to determine if there is an inter-class cost shift, unlawful or otherwise, because all customer classes pay the first block USF rates.<sup>16</sup> Thus, there is no record evidence demonstrating that the existing rate design results in an inter-class cost shift.

Furthermore, even if such evidence did exist, the Commission would still be left without an evidentiary basis to conclude that OPAE's alternative rate design was lawful or reasonable. There is no analysis in the record that identifies the new revenue distribution among the customer classes that would occur under OPAE's proposed

---

<sup>12</sup> Kroger Ex. 1 at 8.

<sup>13</sup> OCC Ex. 1 at 9-10. OPAE's reliance on Mr. Williams' testimony also ignores that OCC did not take issue with the two-step declining block rate design. As Mr. Williams explained in his testimony "OCC does not oppose ODSA's current NOI as filed and supported by the testimony of Megan Meadows. The methodology that ODSA will follow for calculating the USF as outlined in the NOI remains the same as it has been for many years." OCC Ex. 1 at 7.

<sup>14</sup> Kroger Ex. 1 at 9 (Kroger's proposal would increase the first block rate paid by all customers); OCC Ex. 1 at 9 (any reduction in the amount of money that is being collected under Kroger's proposal "must be collected from all customers").

<sup>15</sup> Joint Ex. 1 at 6.

<sup>16</sup> 2015 USF Order at 21.

uniform kWh methodology. Nor is there any evidence in the record demonstrating whether the new revenue distribution that would occur under OPAE's proposed rate design would result in a significant inter-class cost shift.<sup>17</sup> Without this evidence, the Commission cannot conclude that OPAE's alternative rate design satisfies the requirements of R.C. 4928.52(C).

Because OPAE's arguments on brief lack record support, they should be rejected.

**C. OPAE's remaining arguments should be dismissed as collateral attacks on prior Commission orders, incorrect, and irrelevant**

OPAE also presents two additional claims that, even if true, would shed no light on whether the two-step declining block rate design that ODSA proposes be extended to the 2018 USF riders is lawful or reasonable. The first of these extraneous arguments is a collateral attack on the Commission's 2015 USF Order in which the Commission found that OPAE's analysis failed to demonstrate any significant cost shift among the customer classes.<sup>18</sup> OPAE takes issue with the Commission's reference to "significant" in its finding from two years ago. However, any challenge to the Commission's 2015 USF Order was required to have been raised in an application for rehearing filed within 30 days of the order.<sup>19</sup> Moreover, OPAE's belated challenge sheds no light on the issue in this case. Unlike the 2015 USF case, here there is only one rate design methodology in the record, which is supported by uncontested evidence that it will not result in an inter-class cost

---

<sup>17</sup> See *id.* at 23 (OPAE's analysis in the 2015 USF case failed to demonstrate any significant cost shift among the customer classes).

<sup>18</sup> OPAE Initial Brief at 4-5 (*quoting* 2015 USF Order at 23).

<sup>19</sup> R.C. 4903.10; see also *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case Nos. 12-2400-EL-UNC, *et al.*, Opinion and Order at 35-36 (Feb. 13, 2014) (addressing improper collateral attacks in Commission proceedings).

shift. There is no record evidence demonstrating a cost shift, significant or otherwise. Accordingly, OPAE's collateral attack on the Commission's prior order is improper and irrelevant to the case before the Commission.

OPAE also asserts that the NOI procedure creates an undue burden on parties that seek to challenge the existing rate design because the specific revenue requirement and rates for the following year are not known during the NOI phase. As with its prior argument, this extraneous claim is also an improper collateral attack on the Commission's order in the 2016 USF case where it established the NOI procedure for this case.<sup>20</sup> Furthermore, OPAE's issue with the NOI process is misplaced because the issue it complains of was actually resolved in its favor in the 2015 USF case. That is, the Commission held that a party seeking to challenge the rate design in the NOI phase could rely on the current year revenue requirement and rates because the future year's revenue requirement and rates were unavailable.<sup>21</sup> Thus, in addition to being an improper collateral attack on the Commission's prior order, the issue OPAE complains of does not actually exist.

## **II. CONCLUSION**

There is no record basis for the Commission to deviate from the lawful and reasonable two-step declining block rate design. This rate design has been approved in every USF proceeding since 2001, and in both the 2011 and 2015 USF proceedings the

---

<sup>20</sup> *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 14, 19 (Dec. 21, 2016) ("2016 USF Order").

<sup>21</sup> 2015 USF Order at 14.



Commission rejected the arguments OPAE again presents in this case. Thus, the regulatory path has been set.

To chart a new course, the Commission must have a substantively lawful and reasonable basis.<sup>22</sup> However, OPAE has failed to demonstrate that a new course is warranted and has not provided any evidence for the Commission to conclude that the new path OPAE recommends is substantively lawful and reasonable.

Instead, the record evidence demonstrates that the long-standing two-step declining block rate design is lawful and reasonable. Because the existing rate design is lawful and reasonable, and there is no record support for deviating from this rate design to an alternative rate design, the Commission should reject OPAE's arguments and approve ODSA's proposal to continue the two-step declining block rate design for the 2018 USF riders.

Respectfully submitted,

/s/ Matthew R. Pritchard

Frank P. Darr (Reg. No. 0025469)

(Counsel of Record)

Matthew R. Pritchard (Reg. No. 0088070)

MCNEES WALLACE & NURICK LLC

21 East State Street, 17<sup>TH</sup> Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

fdarr@mwncmh.com

mpritchard@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

---

<sup>22</sup> *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, at ¶ 17.

## **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 *Industrial Energy Users-Ohio's Reply Brief* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 8<sup>th</sup> day of September 2017, *via* electronic transmission.

/s/ Matthew R. Pritchard

Matthew R. Pritchard

**Dane Stinson**

BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215-4291  
dstinson@bricker.com

**COUNSEL FOR THE OHIO DEVELOPMENT SERVICES  
AGENCY (ODSA)**

**Amy B. Spiller** (Reg. No. 0047277)

Deputy General Counsel

**Elizabeth H. Watts** (Reg. No. 0031092)

Associate General Counsel  
Duke Energy Business Services LLC  
139 E. Fourth Street, 1303-Main  
PO Box 960  
Cincinnati, OH 45201-0960  
Amy.Spiller@duke-energy.com  
Elizabeth.Watts@duke-energy.com

**COUNSEL FOR DUKE ENERGY OHIO, INC. (DUKE)**

BRUCE WESTON (Reg. No. 0016973)  
OHIO CONSUMERS' COUNSEL

**Christopher Healey** (Reg. No. 0086027)

(Counsel of Record)

Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
Christopher.healey@occ.ohio.gov

**COUNSEL FOR THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

**Carrie M. Dunn** (Reg. No. 0076952)

**Joshua R. Eckert** (Reg. No. 0095715)

FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
cdunn@firstenergycorp.com  
jeckert@firstenergycorp.com

**COUNSEL FOR THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, OHIO EDISON COMPANY  
AND THE TOLEDO EDISON COMPANY  
(FIRSTENERGY)**

**Steven T. Nourse** (Reg. No. 0046705)

Senior Counsel

**Christen M. Blend** (Reg. No. 0086881)

American Electric Power Service Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215-2373  
Snourse@aep.com  
cmblend@aep.com

**L. Bradfield Hughes** (Reg. No. 0070997)

Porter Wright Morris & Arthur, LLP  
Huntington Center  
41 South High Street, Suite 2900  
Columbus, OH 43215  
bhughes@porterwright.com

**COUNSEL FOR OHIO POWER COMPANY  
(AEP OHIO)**

**Michael J. Schuler** (Reg. No. 0082390)

**Randall V. Griffin**

**Judi L. Sobecki**

The Dayton Power and Light Company

1065 Woodman Drive

Dayton, OH 45432

Telephone: (937) 259-7358

Michael.schuler@aes.com

Randall.griffin@dplinc.com

Judi.sobecki@dplinc.com

**COUNSEL FOR THE DAYTON POWER & LIGHT  
COMPANY (DP&L)**

**Angela Paul Whitfield** (Reg. No. 0068774)

**Kimberly J. Bojko** (Reg. No. 0069402)

Carpenter Lipps & Leland LLP

280 North High Street, Suite 1300

Columbus, OH 43215

paul@carpenterlipps.com

Bojko@carpenterlipps.com

**COUNSEL FOR THE KROGER Co.**

**Colleen L. Mooney**

Ohio Partners for Affordable Energy

P.O. Box 12451

Columbus, OH 43212-5739

Cmooney@ohiopartners.org

**COUNSEL FOR OHIO PARTNERS FOR AFFORDABLE  
ENERGY**

**William L. Wright**

Chief, Public Utilities Section

Office of the Ohio Attorney General

30 East Broad Street, 16th Floor

Columbus, OH 43215-3793

william.wright@ohioattorneygeneral.gov

**COUNSEL FOR THE STAFF OF THE PUBLIC UTILITIES  
COMMISSION OF OHIO**

**Greta See**

Attorney Examiner

Public Utilities Commission of Ohio

Legal Department

180 East Broad Street, 12<sup>th</sup> Floor

Columbus, OH 43215

Greta.See@puc.state.oh.us

**ATTORNEY EXAMINER**

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**9/8/2017 2:15:00 PM**

**in**

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

Summary: Brief --Reply Brief of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio