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 REPLY BRIEF

I. Introduction

Ohio Partners for Affordable Energy ("OPAE") herein submits to the Public Utilities Commission of Ohio ("Commission") this reply 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 for the riders 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, at which time the PIPP riders were per kWh charges for all customers. 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". Given that the purpose of ODSA's two-block rate design is to shift among the customer classes the costs of funding the USF, the two-block rate design violates R.C. 4928.52(C).

II. The Commission has Never Found ODSA's Unlawful Rate Design to be Lawful.

The Industrial Energy-Users-Ohio ("IEU-O") claims that the Commission has repeatedly found ODSA's rate design to be lawful. IEU-O Brief at 3. This is not true. The Commission has never found ODSA's rate design to be lawful; the Commission has only approved Stipulations and Recommendations signed by some of the parties to the USF cases. The Commission has explicitly approved only Stipulations and Recommendations pursuant only to the Commission's three-part test for the reasonableness of stipulations. The Commission has never once made an evidentiary or legal finding about 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'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 is wrong. The Commission has never found ODSA's rate design to 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 nothing to support ODSA's claim.

ODSA's witness referred to a Commission discussion of a Stipulation and Recommendation presented in Case No. 15-1046-EL-USF, Opinion and Order (October 28, 2015) at 23. The Commission was considering whether the Stipulation violated the Commission's test for the reasonableness of stipulations. The Stipulation referred to significant or de minimis cost shifts among the customer classes. The Stipulation in Case No. 10-725-EL-USF also referred to a de minimis cost shift. Opinion and Order (October 27, 2010) at 6.

R.C. 4928.52(C) makes no reference to "any significant" or "de minimis" cost shift among customer classes. The Commission's reference to a "significant" cost shift was not to the statute but to the Stipulation and Recommendation before it. Id. The stipulations referred to *de minimis* cost shifts, not the statute. Id. There is no stipulation in this case. 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.

III. There is no Requirement that OPAE Support its Objection with Testimony at the Evidentiary Hearing.

IEU-O states that no party objected to the continuation of ODSA's rate design methodology. IEU-O Brief at 1. IEU-O states that OPAE filed an objection to the continuation of the existing rate design but "OPAE elected to not support its objection with testimony at the evidentiary hearing. Accordingly, the objection is not before the Commission." Id. The Electric Utilities make the same argument. Electric Utilities Brief at 5.

The Commission has the authority to find an application before it in violation of a statute regardless of whether there was a hearing, an intervention, an objection, or testimony in support of the application or in support of an objection. In this proceeding, the Commission is to determine whether ODSA's application complies with R.C. 4928.52(C). The Commission can make this finding without any objection or testimony at all. No expert can testify whether an application violates a law.

There is also no requirement that a party file testimony to support its objections. Pursuant to R.C. 4928.52(B), the Commission, after reasonable notice and opportunity for hearing, is to adjust the USF rider by the minimum amount necessary to provide additional revenues when needed. This is the extent of the statutory and administrative requirements for hearings in USF proceedings.

In practice, the Commission puts forth an Entry in the "rate design" phase of USF proceedings and calls for objections to ODSA's rate design. OPAE timely filed an objection. There is no requirement that testimony be filed in support of an objection. A party does not lose its objection by opting not to file testimony.

Although there are no statutory or administrative requirements for procedures in USF proceedings, an analogy may be drawn to other proceedings. In a rate case proceeding, pursuant to Ohio Administrative Code ("O.A.C.") Rule 4901-1-28, the Staff of the Commission issues a Staff Report to which parties may file objections. O.A.C. Rule 4901-1-28(B). At the hearing, a party may present, but is not required to present, evidence in support of its objections. O.A.C. Rule 4901-1-28(C). The objection is withdrawn if a party fails to address the objection **in its initial brief.** O.A.C. Rule 4901-1-28(D). Thus, even in a rate case where there are administrative

rules for objections, there is no requirement of testimony in support of an objection. The objection is only withdrawn if the party does not address it in its initial brief.

The complaint that OPAE does not file testimony is not based on law or regulation. The Commission does not discourage intervention if intervenors do not have the resources to file expert testimony. Under the Commission's rules, the testimony of expert witnesses is not the only way an intervenor may make its views known to the Commission. O.A.C. Rule 4901-1-31 describes the statement of issues that may be included in briefs. The rule states that a party's brief may request the Commission to address issues when the Commission issues its Opinion and Order. O.A.C. Rule 4901-1-31(B). There is no requirement for expert testimony to support issues raised on brief. This is especially true in the rate design phase of a USF proceeding where the issue raised on brief by OPAE is a legal issue, not an evidentiary matter. The issue is that the rate design violates R.C. 4928.52(C) because it is not a per kWh charge; there is no basis for "expert" testimony.

Finally, OSDA has the burden to demonstrate that its rate design does not shift costs among the customer classes in compliance with R.C. 4928.52(C). 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 because its application does not comply with the law.

The Commission must deny this application because it violates Ohio law. R.C. 4928.52(C). Whether OPAE files objections or presents testimony does not

change the statutory requirement that the USF rider be set so as not to shift among the customer classes the costs of funding the USF. The Commission is not dependent on an objection or testimony from OPAE to find that ODSA's rate design violates R.C. 4928.52(C). The Commission can find that the rate design shifts costs, which is what the rate design does. The application on its face is an application to shift costs among the customer classes. The purpose of ODSA's rate design is to shift costs.

IV. The Commission has Sole Jurisdiction over Rates Charged by Utilities.

Both IEU-O and the Electric Utilities provide information in their briefs about the activities of the Public Benefits Advisory Board ("PBAB"). According to these briefs, ODSA has received the support of PBAB for its proposed rate design methodology. Electric Utilities Brief at 4; IEU-O Brief at 4. This is irrelevant.

The Commission has found that there is no conflict in jurisdiction among the state agencies in setting the USF rider rates. The Commission has broad authority granted pursuant to R.C. Chapter 49 to set utility rates. The Commission has found that R.C. 4928.52(B) does nothing to limit the Commission's authority. Case No. 15-1046-EL-USF, Opinion and Order (October 28, 2015) at 8-9. Pursuant to R.C. 4928.52(B), it is the Commission that considers the USF rate design in the USF proceeding filed by ODSA. Id. It is the Commission that will determine if the rate design shifts costs among the customer classes.

V. The Evidence in this Case Demonstrates the Unlawful Cost Shift among Customer Classes to Fund the USF; therefore, the Commission Cannot Approve the Rate Design.

ODSA's application on its face is an application to shift costs among customer classes, and there is evidence of the cost shift in the testimony filed by all witnesses. The Electric Utilities argue that Kroger's proposal is likely to result in cost shifting to other customer classes and has the potential to cause a material shift among the classes by shifting costs that would otherwise be owed by Kroger and other mercantile customers and placing the costs on other customer classes. Electric Utilities Brief at 12. Kroger has not proposed to change the rate design, only to join the customers who are able to shift their costs. The Electric Utilities are complaining that Kroger's proposal will result in more customers being able to shift costs, not just the customers who are currently able to shift costs.

The Office of the Consumers' Counsel's ("OCC") witness states that it is obvious 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. OCC Exhibit 1 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. The Electric Utilities agree that Kroger's proposal will shift costs to other customers if Kroger joins other large customers in shifting costs. Ziolkowski at 6. If Kroger pays less because some of its usage is 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 from customers in the second block. Id.

at 6-7. ODSA's rate design shifts costs among the customer classes, and Kroger's proposal would shift more costs.

The evidence demonstrates that ODSA's rate design shifts costs among the customer classes in violation of R.C. 4928.52(C). Kroger seeks to join those customers who are shifting their USF costs onto all other customers. The second block exists to shift costs from extremely high users (users over 833,000 kWh monthly) onto all other customer classes. ODSA's rate design 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, which violates R.C. 4928.52(C).

The Electric Utilities also complain that Kroger's proposal would result in additional costs and is overly burdensome for the utilities. Electric Utilities Brief at 9-12. It makes no sense that the Electric Utilities would support a rate design that already results in additional costs and burdens when the alternative, a per kWh charge for all customers, creates no costs or burdens for the utilities at all. The ODSA 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 return to the lawful per kWh rate for all customer classes is the least burdensome and most efficient alternative. The rate design phase of USF proceedings will be eliminated, making the annual USF rate process straightforward and simple.

The Electric Utilities also complain that Kroger's proposal lacks sufficient clarity and fails to consider the number of mercantile customers that would be

eligible to take advantage of the proposal or how many accounts would be aggregated. Electric Utilities Brief at 6. This vagueness argument is similar to the argument that OPAE did not file expert testimony to support its objection. The rate design phase of USF proceedings commences by May 31 of each year when ODSA proposes its same rate design methodology, which is nothing more than a boilerplate paragraph describing the proposed cost shift from customers using more than 833,000 kWh monthly. Application at 11. ODSA does not file data for the USF rider rates to be effective in the following year until October 31, after the rate design process has concluded. Thus, the only time to challenge the rate design with clarity as to the details of the cost shift among customer classes for the coming year occurs before any data for the coming year are available. Id. For practical purposes, as the criticism of Kroger's proposal makes obvious, there is no evidence for the detail of the cost shift in the coming year because no data is available until ODSA files its application by October 31. Thus, in the rate design phase of the proceeding, it is the violation of R.C. 4928.52 that is considered.

In this case, there is no stipulation addressing a de minimis or insignificant cost shift so that the detail as to the extent of the cost shift is irrelevant. In this case, there is only the illegal cost shift. Eliminating ODSA's two-block rate design will end the unlawful cost shift that forces certain customer classes to pay the share of other customers to fund the USF. There is no place in Ohio law for a USF rate design that shifts costs from the among the 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 not demonstrated that its rate design complies with R.C. 4928.52(C). ODSA's rate design shifts costs among customer classes. Therefore, the Commission must deny the application.

Respectfully submitted,

Colleen L. Mooney
Colleen L. Mooney
Ohio Partners for Affordable Energy
PO Box 12451
Columbus, OH 43212-2451
Telephone: (614) 488-5739
cmooney@ohiopartners.org
(electronically subscribed)

CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief will be served electronically by the Commission's Docketing Division on parties who are electronically subscribed to this case on this 8th day of September 2017.

/s/Colleen L. Mooney
Colleen L. Mooney

SERVICE LIST

dstinson@bricker.com
jeckert@firstenergycorp.com
stnourse@aep.com
cmblend@aep.com
bhughes@porterwright.com
michael.schuler@aes.com
Elizabeth.Watts@duke-energy.com
bojko@carpenterlipps.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
christopher.healey@occ.ohio.gov
Thomas.McNamee@ohioattorneygeneral.gov

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