**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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. 22-556-EL-USF |

**REPLY BRIEF FOR CONSUMER PROTECTION**

**BY**

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# I. INTRODUCTION

The USF rider rate increases for 2023 reflected in the Settlement adversely impact all consumers who are billed the USF. The USF rate increases do not benefit consumers or the public interest, as explained in OCC’s post-hearing brief.[[1]](#footnote-3) In this phase two Settlement, Ohio Department of Development (“ODOD”), the utilities and the industrials recommend an unconscionable and unlawful result. Under their agreement, the aggregated 2023 USF revenue requirement is increased to $358,924,849,[[2]](#footnote-4) up from the 2022 aggregated USF revenue requirement of $187,258,690.[[3]](#footnote-5) This represents a *92% increase* over the 2022 revenue requirement.[[4]](#footnote-6) A significantly larger USF revenue requirement means that all Ohio EDU consumers (who are funding the USF) are paying significantly higher rates.

OCC has expressed concerns throughout this proceeding that the substantially higher PIPP rates over and above the standard service offer would lead to this result.[[5]](#footnote-7) But the full magnitude of these increases was not known until ODOD filed its amended application on November 21, 2022. As ODOD’s testimony supporting this November application points out, the 2023 increased revenue requirement that is reflected in November’s amended application is a $29.6 million increase from the original rate application filed just a month earlier, in October.[[6]](#footnote-8)

ODOD states in its brief that the “ultimate issue for the PUCO’s consideration is whether the Application Stipulation is reasonable and should be adopted.”[[7]](#footnote-9) It is not and it should not. What should be of paramount concern to the PUCO and ODOD is the impact on Ohio consumers, especially the low-income consumers who are the most vulnerable of all and will be devastated by this increase.

As described in OCC’s post-hearing brief, the Settlement is not reasonable and fails criteria for considering settlements. The parties’ briefs[[8]](#footnote-10) are not persuasive. The substantial cost increases to the USF rider rates (*see* Table 2 in OCC’s brief) are cause for the PUCO to reject the USF rates proposed by ODOD.

# II. REPLY

## A. Despite the parties’ claims to the contrary, the Settlement does not benefit consumers or the public interest because of the harm to all consumers if the rates identified in the Settlement (adopting the amended application) are adopted.

ODOD,[[9]](#footnote-11) Duke[[10]](#footnote-12) and AEP[[11]](#footnote-13) assert that that the Settlement benefits consumers and the public interest. These Signatory Parties claim it ensures adequate funding for low-income customers assistance programs. Additionally, they claim the Settlement reflects rates necessary to collect the EDUs’ USF rider revenue requirements according to the methodology in the NOI Order.

But significantly higher USF rider rates, paid by all consumers, do not benefit consumers or is in the public interest.[[12]](#footnote-14) Even AES Ohio “shares OCC’s concern about the magnitude of the USF rider increases in 2023, and the impact on all consumers.”[[13]](#footnote-15) The Settlement is passing such large USF Rider rate increases to consumers because PIPP consumers are being charged higher than standard service offer PIPP rates in violation of the statute.[[14]](#footnote-16)

As OCC pointed out in its brief, the percentage increase from 2022 to 2023 is staggering.[[15]](#footnote-17) Contrary to AES’ assertion,[[16]](#footnote-18) OCC Witness Williams showed that the Settlement is unreasonable. He testified that the proposed Joint Settlement results in unreasonably high USF rates that contradict Ohio policy supporting reasonably priced retail electric service.[[17]](#footnote-19) He gave examples showing how customers’ USF rider rates will increase beginning January 2023 for each EDU (discussed in OCC’s initial brief).[[18]](#footnote-20)

OCC demonstrated that the data in the amended application is incorrect and/or misapplied, contrary to AES’ claim.[[19]](#footnote-21) Cross-examination demonstrated that the annual bill impacts of the USF rider were not adequately considered by ODOD and greatly understate the actual bill impact.[[20]](#footnote-22) The estimated annual USF rider rate cost for average residential consumers is based on monthly and annual usage information filed by ODOD to support November’s amended application.

**Table 1: Annual USF Cost to Consumers**

|  |  |  |
| --- | --- | --- |
| EDU | ODOD Estimate of Annual Cost[[21]](#footnote-23) | OCC Estimate of Annual Cost[[22]](#footnote-24) |
| AEP | $15.78 | $62.79 |
| AES | $6.97 | $42.55 |
| Duke | $3.96 | $26.70 |
| CEI | $2.49 | $17.24 |
| OE | $3.17 | $30.43 |
| TE | $9.56 | $26.00 |

ODOD’s November amended application demonstrates that there are major flaws in ODOD’s calculations because they do not adequately estimate the cost for months that are not included in the test year (October-December 2022). Despite Duke’s argument[[23]](#footnote-25) to the contrary, OCC raised issues and inaccuracies regarding November’s amended application at hearing.[[24]](#footnote-26) The inclusion of September 2022 actual data in the amended application caused an increase of $29 million in the aggregate revenue requirement. ODOD’s calculations should have included more accurate estimates for October-December to establish the anticipated revenue requirement increases. In any event, consumers are left with very high USF rider rates in the Settlement (that are greatly caused by the high PIPP rates) that do not benefit them or the public interest.

## B. Contrary to the claims of ODOD and the EDUs, the Settlement violates regulatory principles and policies because under R.C. 4905.22, rates must be just and reasonable.

ODOD,[[25]](#footnote-27) Duke[[26]](#footnote-28) and AEP[[27]](#footnote-29) assert that because the USF rider revenue requirement and rider rate were determined in accordance with the NOI methodology approved by the NOI Order, no regulatory principles were violated. But here is the rest of the story.

 R.C. 4905.22 requires that rates be just and reasonable. It is not just and reasonable to charge PIPP consumers higher rates than the rates charged to standard service offer consumers. And it is not just and reasonable to charge all consumers excessive USF rider rates as a result of over-charging PIPP consumers.

R.C. 4928.02(A) is an Ohio policy (and regulatory principle) that requires that consumers be provided with adequate, reliable, safe, efficient, not discriminatory, and reasonably priced retail electric service. The high PIPP rates cannot meet this standard. They are discriminatory considering the lower rates that non-PIPP residential consumers are charged under the standard service offer. And they are per se unreasonable. Additionally, other consumers paying for the USF will be charged the significant rate increases. Ohio regulatory policy and principles are thus violated.

AEP Ohio in its initial brief[[28]](#footnote-30) brings up the *2016 RFP Auction Order*.[[29]](#footnote-31) AEP states that OCC’s issues regarding the PIPP SSO auction process should have been raised over six years ago after the PUCO issued its March 2, 2016 Finding and Order establishing the PIPP SSO auction process.[[30]](#footnote-32) AEP Ohio opines that because OCC did not file an application for rehearing then, OCC’s arguments in this case represent a collateral attack on that order.[[31]](#footnote-33)

 AEP Ohio is wrong. At the time that order was entered six years ago, facts were not disputed and there was no need to seek review of any adverse findings.[[32]](#footnote-34) The *2016 RFR Auction Order*[[33]](#footnote-35)regarding the PIPP auction process was reasonable at the time it was entered. But times change and circumstances change, and the process of procuring PIPP generation needs to be revisited in order to comply with the law.[[34]](#footnote-36) The PUCO Staff itself recognized that possibility in its September 2, 2016 Staff Report filed in that case:

Staff recommends that the PIPP RFP Auction continues as a separate auction from the SSO as ordered by the Commission, but that the process should be closely monitored and evaluated by Staff. While the initial auctions resulted in lower initial prices for PIPP customers, the additional factors discussed in the report, and the limited sample size, leads Staff to question if the results are simply a consequence of timing. *The low participation rate is a significant concern for Staff and should be monitored closely in future auctions. Staff will continue to work with parties to allow the PIPP auction process to improve. If at any point through Staff’s monitoring and evaluation efforts, Staff identifies a concern that should be brought before the Commission, Staff will at that time provide its analysis to the Commission*.[[35]](#footnote-37) (emphasis added)

PIPP consumers of each of the six EDUs are paying significantly more than standard service offer consumers for the same service, which wasn’t the case in 2016 when the *RFP Auction Order* was entered.[[36]](#footnote-38) Not only are higher charges unthinkable for these at-risk Ohioans who cannot afford to pay more, but there is nothing they can do to avoid these increased charges. And what PIPP consumers don’t pay is charged to all other consumers through the USF Rider. As ODOD’s witness testified, “an increase in an EDU rate element widens the gap between the cost of electricity delivered to PIPP customers and the amount paid by PIPP customers, thereby increasing the cost of PIPP.”[[37]](#footnote-39)

Higher PIPP rates cause higher rates to all consumers who pay the USF rider. This is not just nor is it reasonable. Thus, R.C. 4905.22 is violated and the state policy under R.C. 4928.02(A) is violated as well. The PUCO should reject the Settlement.

## C. Despite ODOD’s claim, the Settlement did not involve serious bargaining.

ODOD’s initial brief spends some time on the timeline of this case since the filing of its original application on October 31, 2022.[[38]](#footnote-40) But the fact is, the relevant period, which is the time frame of filing of the amended application (November 21) through the filed Settlement (November 23), occurred over a 48-hour period, as PUCO DIS records show.[[39]](#footnote-41)

On November 21, 2022, ODOD amended its application by using actual September 2022 data causing a $29.6 million increase from the October filing. This represents a significant rate increase applied to each utility’s USF rider over one month.

Within a half hour of ODOD’s filing of the amended application, ODOD circulated a draft Settlement. Some of the parties immediately signed on. Some EDUs sent emails correcting numbers. But the bargaining was certainly limited, and swift. Within two days of ODOD’s filing of the amended application, supporting testimony and charts and a draft settlement, the executed Settlement was filed. There was no lengthy or serious bargaining given this abbreviated time frame. And serious bargaining is required for the Settlement to satisfy the first prong of the Settlement standard.

ODOD claims in its initial brief that it “represents the interests of all customers (residential, commercial and industrial) who must pay the USF rider; as well as residential PIPP Plus customers,”[[40]](#footnote-42) and that thus, the Signatory Parties represent a diversity of interests. That is flat out wrong. ODOD is charged with administering low-income programs,[[41]](#footnote-43) not representing the interests of customers who pay the USF. In addition, ODOD claims that because the PUCO rejected the diversity of interests argument in the NOI phase of the proceeding, it should reject the argument again.[[42]](#footnote-44) These arguments should fail.

The USF phase 2 Settlement specifically addresses the costs that customers will pay under the USF. The substantial cost increases to the USF rider rates (Table 2, page 11 in OCC’s brief) are cause for the PUCO to consider the importance of diversity of interests in this Settlement, and whether the USF rates proposed by ODOD are just and reasonable.

Moreover, diversity of interest is particularly important where, as here, ODOD was not responsive even as USF costs have increased significantly. OCC’s post-hearing brief discussed how ODOD admitted on cross-examination that the agency has not had discussions about the high PIPP rates compared with the SSO rates at the time the application and amended application were prepared.[[43]](#footnote-45) ODOD admitted on cross that bill impacts associated with the amended application have not been considered.[[44]](#footnote-46) ODOD’s indifference to the consequence of its proposal for PIPP consumers and those who pay the USF is not indicative of an agency that represents the interests of these very consumers.

AEP’s initial brief similarly dismisses the diversity of interests consideration.[[45]](#footnote-47) But it’s an important consideration, especially in light of this Settlement, for reasons just discussed. It is also important in light of Paragraph 12 of the Settlement. There, the Signatory Parties support initiatives that are intended to control USF costs and agreed that the USF Rider Working Group should continue.

And even though OCC raised concerns about potential increases in the USF rider rates in the 2022 USF case, ODOD and the Signatory Parties have done nothing to control costs for the USF. Further, ODOD witness Meadows even admitted on the stand that she can’t recall when the USF working group was last convened.[[46]](#footnote-48) Yet the USF Rider rates have increased substantially and there is no effort by ODOD or any other Signatory Party to reduce the costs. In fact, all that ODOD and the Signatory Parties have done is to attempt to silence OCC, the statutory advocate for residential consumers – both those consumers paying for the USF and the residential low income PIPP consumers being billed higher than SSO rates.[[47]](#footnote-49) Contrary to the parties’ arguments, diversity of interests is an important consideration in this Settlement.

# III. CONCLUSION

The Settlement does not pass the PUCO’s three-part test for evaluating settlements. The Settlement harms customers and disserves the public interest because low-income PIPP consumers are being billed rates higher than the standard service offer, and USF charges are significantly increased to all consumers. The Settlement lacks serious bargaining and also lacks a diversity of interests as it was not signed by a legal representative of residential utility consumers including PIPP consumers. And the Settlement violates regulatory principles by, among other things, sanctioning unjust and unreasonable rates. That is a violation of Ohio law.

The PUCO should protect consumers by rejecting or modifying the Settlement.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this Reply Brief for Consumer Protection was served on the persons stated below via electronic transmission, this 8th day of December 2022.

 */s/ Amy Botschner O’Brien*

 Amy Botschner O’Brien

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The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. Post-Hearing Brief for Consumer Protection by Office of the Ohio Consumers’ Counsel (“OCC Brief”) (December 6, 2022) at 1-3, 8-12. [↑](#footnote-ref-3)
2. ODOD Ex. 4 at 5. [↑](#footnote-ref-4)
3. OCC Ex. 1 (Testimony of James D. Williams) (November 23, 2022) at 6; OCC Brief at 2-3, 9-12. [↑](#footnote-ref-5)
4. OCC Ex. 1 (Testimony of James D. Williams) Table 1 at 6. The 2022 USF Revenue Requirement was $187,258,690. The 2023 USF Revenue Requirement is $358,924,849. $187,258,690 - $358,924,849 = -$171,666,159/$187,258,690 = 91.7% (rounds to 92%) increase. [↑](#footnote-ref-6)
5. OCC Ex. 1 (Testimony of James D. Williams) at 3, 6, 8-9; Post-Hearing Brief for Consumer Protection by Office of the Ohio Consumers’ Counsel (September 12, 2022) at 8-9, Post-Hearing Brief for Consumer Protection by the Office of the Ohio Consumers’ Counsel (December 6, 2022) at 8-12. [↑](#footnote-ref-7)
6. ODOD Ex. 4 at 5 (“the net impact of these changes was to increase the indicated aggregate revenue requirement associated with the adjust test-year cost of PIPP component from $329,246,200.05 to $358,924,849.37.”) The difference between these two numbers is $29,678,649. *See*, OCC Brief at 2-3, 9-12; OCC Ex. 1 (Testimony of James D. Williams) at 3, 5-6. [↑](#footnote-ref-8)
7. Ohio Department of Development’s Initial Brief (“ODOD Brief”) (December 6, 2022) at 4. [↑](#footnote-ref-9)
8. In addition to OCC and ODOD, initial briefs were also filed by AEP, AES-Ohio and Duke. [↑](#footnote-ref-10)
9. ODOD Brief at 6. [↑](#footnote-ref-11)
10. Initial Post-Hearing Brief of Duke Energy Ohio, Inc. (“Duke Brief”) (December 6, 2022) at 8. [↑](#footnote-ref-12)
11. Initial Brief of Ohio Power Company (“AEP Brief”) (December 6, 2022) at 5. [↑](#footnote-ref-13)
12. OCC Brief at 8-12. [↑](#footnote-ref-14)
13. Initial Post-Hearing Brief of AES Ohio (“AES Brief”) (December 6, 2022) at 2. [↑](#footnote-ref-15)
14. R.C. 4928.542(B). [↑](#footnote-ref-16)
15. OCC Brief at 10-11. [↑](#footnote-ref-17)
16. AES Brief at 2. [↑](#footnote-ref-18)
17. OCC Brief at 9-10; OCC Ex. 1 (Testimony of James D. Williams) at 8-9. [↑](#footnote-ref-19)
18. *Id*. [↑](#footnote-ref-20)
19. AES Brief at 2. [↑](#footnote-ref-21)
20. Tr. at 40-46; 51-53. [↑](#footnote-ref-22)
21. *See* Supplemental Testimony of Megan Meadows (MM-25 – MM-30). [↑](#footnote-ref-23)
22. *See* OCC Brief at 11. [↑](#footnote-ref-24)
23. Duke Brief at 9. [↑](#footnote-ref-25)
24. Tr. at 40-51; OCC Brief at 9-12. [↑](#footnote-ref-26)
25. ODOD Brief at 7. [↑](#footnote-ref-27)
26. Duke Brief at 8. [↑](#footnote-ref-28)
27. AEP Brief at 5. [↑](#footnote-ref-29)
28. AEP Brief at 6-7. [↑](#footnote-ref-30)
29. *In the Matter of the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC, Finding and Order (March 2, 2016). [↑](#footnote-ref-31)
30. AEP Brief at 6-7. [↑](#footnote-ref-32)
31. *Id*. [↑](#footnote-ref-33)
32. *See, In Re the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan,* Case No. 08-1094-EL-SSO, Entry on Rehearing at ¶ 38 (June 16, 2021) (citing *In re Application of Ohio Power Co*., 2015-Ohio-2056 at ¶ 20; *Consumers’ Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)). [↑](#footnote-ref-34)
33. *In the Matter of the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC, Finding and Order (March 2, 2016). [↑](#footnote-ref-35)
34. *See, e.g.,* R.C. 4905.22, R.C. 4928.02(A) and R.C. 4928.542(B). [↑](#footnote-ref-36)
35. *In the Matter of the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC, Staff Report (September 2, 2016) (emphasis added). [↑](#footnote-ref-37)
36. OCC Post-Hearing Brief at 1; *see also*, OCC Initial Brief at 1-2 (September 12, 2022). Estimates are that the annual electricity billings for an individual low-income PIPP consumer (for the year ending May 31, 2023) will exceed the standard offers by approximately $1,154 for AEP PIPP consumers, $1,289 for Duke PIPP consumers, $584 for AES PIPP consumers, $334 for CEI PIPP consumers, $331 for Toledo Edison PIPP consumers and $339 for Ohio Edison PIPP consumers. [↑](#footnote-ref-38)
37. ODOD Ex. 4 at 3. [↑](#footnote-ref-39)
38. ODOD Brief at 2-4. [↑](#footnote-ref-40)
39. Amended Application and Supplemental Testimony of Megan Meadows filed at 4:03 p.m. November 21, 2022; Stipulation filed at 4:37 p.m. November 23, 2022. [↑](#footnote-ref-41)
40. ODOD Brief at 5. [↑](#footnote-ref-42)
41. R.C. 4928.53. [↑](#footnote-ref-43)
42. ODOD Brief at 6. [↑](#footnote-ref-44)
43. Tr. at 21; OCC Brief at 11-12. [↑](#footnote-ref-45)
44. Tr. at 20; OCC Brief at 11-12. [↑](#footnote-ref-46)
45. AEP Brief at 4. [↑](#footnote-ref-47)
46. Tr. at 49, 54. [↑](#footnote-ref-48)
47. ODOD Motions to Strike OCC Witness Williams’ testimony (joined by AEP), Tr at 62-69. [↑](#footnote-ref-49)