

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	:	Case No. 15-1046-EL-USF
Universal Service Fund Riders of	:	
Jurisdictional Ohio Electric Distribution	:	
Utilities.	:	

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**OHIO DEVELOPMENT SERVICES AGENCY'S  
REPLY BRIEF**

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**I. INTRODUCTION**

The issue to be determined in this proceeding is whether the Joint Stipulation and Recommendation<sup>1</sup> (“Joint Stipulation”) satisfies the Public Utilities Commission of Ohio’s (“Commission”) three prong test when considering the approval of partial stipulations:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Development Services Agency’s (“ODSA”) initial brief, as well as that of the Industrial Energy Users – Ohio (“IEU”), convincingly demonstrate that the test is satisfied. The arguments raised by Ohio Power Company (“AEP Ohio”) and the Ohio Partners for Affordable Energy (“OPAE”), as discussed below, do nothing to alter that conclusion.

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<sup>1</sup> Joint Ex. 1.

## **II. ARGUMENT**

### **A. The Joint Stipulation is a Product of Serious Bargaining Among Capable, Knowledgeable Parties Representing a Diversity of Interests.**

#### **1. The Joint Stipulation is the Product of a Diversity of Interests**

In its initial brief, AEP Ohio attempts to distinguish the Joint Stipulation, and the application of the Commission's three prong test, on the basis that its interests are uniquely tied to the AEP Ohio service territory, and do not affect the other signatory electric distribution utilities ("EDU"). AEP Ohio reasons that the only other parties to the Joint Stipulation are ODSA and IEU, which should compel the Commission to take a "closer look" at AEP Ohio's issues.<sup>2</sup> In other words, AEP Ohio alleges that the Joint Stipulation is not supported by a diversity of interests.

First, AEP Ohio's position is not unique. In countless partial stipulations before the Commission, some parties' individual interests or positions were not adopted as a part of the stipulation. Indeed, that is what prompts the numerous hearings on "partial" or "non-unanimous" stipulations. In this proceeding, AEP Ohio's position was not included in the stipulation, but other parties, including other EDUs, decided to stipulate as a part of a larger compromise among all issues in this case.<sup>3</sup> Thus, if parties with a diversity of interests compromise to sign a stipulation, as here, the inquiry proceeds to the test's second prong of whether the stipulation, as a package, benefits customers and is in the public interest. It simply is not necessary that signatory parties' interests be aligned with a party who chooses, for individual interests, not to sign the stipulation. Commission precedent rejects this argument.

Second, a diversity of interests clearly exists. As ODSA stated in its initial brief, only AEP Ohio and OPAE opposed the Joint Stipulation to satisfy their individual interests. The

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<sup>2</sup> AEP Ohio Initial Brief, at 16.

<sup>3</sup> Joint Stipulation, at 6.

remaining nine (9) parties either were signatories to the Joint Stipulation, or do not oppose it. The signatories include (1) ODSA, which represents the interests of all customers (residential, commercial, and industrial) who must pay the USF rider, as well as residential PIPP Plus customers;<sup>4</sup> (2) IEU, which represents the interests of industrial customers; and (3) four EDUs: Cleveland Electric Illuminating Company, Toledo Edison Company, Ohio Edison Company and Dayton Power and Light Company.<sup>5</sup> Moreover, and not recognized in AEP Ohio's initial brief, the parties electing not to oppose the Joint Stipulation include the Office of the Ohio Consumers' Counsel ("OCC") (which represents AEP Ohio's residential customers), Duke Energy Ohio ("Duke"), and the Commission's Staff.<sup>6</sup>

## **2. The Joint Stipulation is the Product of Serious Bargaining**

Surprisingly, OPAE's counsel alleges for the first time in its initial brief that the Joint Stipulation was not the result of "serious bargaining." OPAE did not raise this issue in its initial testimony, did not file ANY reply testimony in this proceeding (which would have been the proper vehicle to address this issue), and did not cross examine ODSA's witness on this issue at hearing. Yet, OPAE inappropriately makes its first claim, on brief, that ODSA did not bargain with it, stating:

As for OPAE, it participated in no settlement negotiations and was unaware of any settlement negotiations taking place among the parties. There was no bargaining with OPAE.<sup>7</sup>

If the Commission wishes to consider this inappropriate and inaccurate "testimony," ODSA requests that OPAE's witness be made available for direct testimony with the opportunity

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<sup>4</sup> Tr. at 84.

<sup>5</sup> Joint Stipulation, at 7.

<sup>6</sup> By correspondence filed in this docket on September 2 and 3, 2015, OCC and Duke notified the Commission that they did not oppose or support the Joint Stipulation. By letter of September 2, 2015, Staff informed the Commission of its limited participation in USF proceedings and indicated it would not be filing a brief.

<sup>7</sup> OPAE Initial Brief, at 8.

for cross-examination. Moreover, ODSA should be provided the opportunity to present rebuttal testimony to show that OPAE's allegation is untruthful; and that ODSA did, in fact, enter into a lengthy negotiation session with OPAE prior to filing the Joint Stipulation in this proceeding.

Apparently aware that it offered no evidence in this record to support its allegation of a lack of "serious bargaining," OPAE attempts to rely on the testimony of AEP Ohio witness Gill, who initially made a similar claim in his reply testimony. However, in lieu of ODSA offering rebuttal testimony on this issue, AEP Ohio and ODSA entered into a Stipulation of Facts and Process<sup>8</sup> in which AEP Ohio agreed not pursue this issue on brief, thus waiving it.<sup>9</sup>

The facts of record in this proceeding as to OPAE show:

- (1) ODSA filed its Notice of Intent on May 29, 2015, proposing to retain the declining block rate schedule;
- (2) OPAE filed its objections to the Notice of Intent for all parties' consideration on July 6, 2015, opposing (once again) the proposed rate design;
- (3) ODSA and IEU filed replies to OPAE's objections on July 13, 2015, favoring retention of the declining block rate structure in this proceeding;
- (4) ODSA circulated a draft stipulation on July 22, 2015, and invited all parties to provide suggestions to the draft or to request a prehearing conference among all parties;<sup>10</sup>
- (5) A prehearing conference to discuss the terms of the Joint Stipulation was not requested of the Attorney Examiner and was not held;
- (6) the signatory parties agreed that the Joint Stipulation "is the product of serious discussions among knowledgeable and capable parties undertaken in a cooperative process in which all parties were provided the opportunity to participate";<sup>11</sup> and
- (7) the Joint Stipulation "represents a compromise involving a balancing of competing positions, and it does not necessarily reflect the position that one or more of the Signatory Parties would have taken if these issues had been fully

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<sup>8</sup> See Stipulation of Facts and Process, filed August 24, 2015.

<sup>9</sup> Pursuant to Commission practice, issues not briefed by a party are waived.

<sup>10</sup> See Stipulation of Facts and Process filed August 24, 2015, at 4.

<sup>11</sup> Joint Stipulation, at 2.

litigated. The Signatory Parties believe that this Stipulation represents a reasonable compromise of varying interests.”<sup>12</sup>

The record clearly shows that serious bargaining occurred in this proceeding and that, if OPAE did not choose to take advantage of the opportunities presented,<sup>13</sup> it has no one to blame but itself.

**B. The Settlement, as a Package, Benefits Ratepayers and the Public Interest.**

As ODSA stated in its initial brief, the Joint Stipulation adopts the methodologies approved in numerous prior USF proceedings, including the last proceeding. The methodologies 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. Moreover, the Joint Stipulation benefits consumers and the public interest because the methodologies adopted will result in USF rider rates that represent the minimal rates necessary to collect the EDUs’ USF rider revenue requirements,<sup>14</sup> which is the ultimate goal that this Commission is statutorily charged with ensuring.<sup>15</sup>

Moreover, the Joint Stipulation represents a compromise involving a balancing of competing positions, and it does not necessarily reflect the position that one or more of the signatory parties would have taken if all issues had been fully litigated. The Joint Stipulation resolves several significant issues, including the methodologies for determining (1) the cost of PIPP, (2) Electric Partnership Program Costs, (3) administrative costs, (4) year end PIPP account balances, (5) the reserve component, (6) allowance for undercollection, (7) PIPP audit costs, (8) the USF interest offset,

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<sup>12</sup> Joint Stipulation, at 6.

<sup>13</sup> As stated above, ODSA objects OPAE’s mischaracterization that ODSA did not engage in bargaining.

<sup>14</sup> ODSA Ex. 2, at 6.

<sup>15</sup> R.C. 4928.52(B).

(9) aggregation cost recovery, and (10) rate design. Although the Joint Stipulation does not accommodate AEP Ohio's and OPAE's specific individual interests (for good reason), it represents a reasonable compromise of varied interests<sup>16</sup> and, as a package, benefits ratepayers and the public interest, particularly considering that the Joint Stipulation spares the parties the considerable resources otherwise necessary to litigate these complex issues.

**1. AEP Ohio's Position is Without Merit.**

ODSA's position in this proceeding has been clear from the start: (1) ODSA would defer to the Commission's orders whether the Ohio Power ("OP") and Columbus Southern Power ("CSP") rate zones could be merged for purposes of the USF rider, and (2) ODSA could not recommend the merger until it completes its internal review of potential process and technical issues related to the merger.<sup>17</sup>

AEP Ohio devotes a considerable portion of its initial brief to whether the OP and CSP rate zones could be merged for purposes of the USF rate. Considering ODSA's repeated statements it will defer to the Commission's orders on this issue, ODSA will not respond to AEP Ohio's arguments.

As ODSA also has maintained throughout this proceeding, potential process and technical issues could arise if the OP and CSP USF rates were merged, but OP and CSP customers continued to be charged different standard tariffed rates. ODSA believes these concerns necessarily would be eliminated once riders PIRR and PTBAR are terminated in 2018, because the tariffed rates in each zone will be the same, resulting in a single USF rate. However, ODSA is willing to consider whether its process and information technology system can

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<sup>16</sup> Joint Ex. 1, at 6.

<sup>17</sup> See Stipulation of Facts and Process filed August 24, 2015, at 4-5.



accommodate the change before then, provided the USF rate merger is compliant with Commission orders. ODSA has begun but not completed that review.

AEP Ohio continues to claim that, in lieu of ODSA's review, its witness Gill has completed a review of ODSA's processes and has determined that the merger can be technically implemented in time for the October 31, 2015 application filing.<sup>18</sup> However, as explained in ODSA's initial brief, AEP Ohio witness Gill is not qualified to review and determine whether ODSA information technology system is capable of accommodating the changes and particularly by the application deadline. ODSA is in the process of conducting its internal review and will propose the merged USF rate if its concerns are resolved, provided the merger is compliant with the Commission's prior orders. However, the review will not be completed in time for filing the October 31 application.<sup>19</sup> It certainly is in the interest of ODSA's PIPP customers, and all OP and CSP ratepayers, to ensure that its system can efficiently, technologically and cost-effectively implement the merger before ODSA agrees to do so.

Most importantly, the Commission's jurisdiction is limited to adjusting the USF rider rate by the minimum amount necessary to provide additional revenues for the USF fund.<sup>20</sup> The Joint Stipulation indisputably accomplishes that goal. Whether the OP and CSP USF rider rates are merged will not affect it. The Commission has no jurisdiction, as AEP Ohio suggests, to review efficiency of ODSA's processes and information technology systems. Thus, the Joint Stipulation must be found to benefit customers and the public interest.

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<sup>18</sup> AEP Ohio Initial Brief, at 14-15.

<sup>19</sup> If ODSA's internal concerns are resolved prior to filing the next Notice of Intent in May 2016, ODSA would recommend a merged USF rate for the AEP Ohio service territory, provided the merger were compliant with Commission orders. If ODSA's concerns are not resolved after completion of its internal investigation, the concerns will resolve themselves in the natural course of events – when the PIRR and PTBAR riders eventually are eliminated (by 2018). At that point OP and CSP zone tariffs will be the same, necessarily leading to a single USF rider rate for the AEP Ohio territory.

<sup>20</sup> R.C. 4928.52(B).

## **2. OPAE's Position is Without Merit.**

OPAE has mischaracterized the facts of record in this proceeding.<sup>21</sup> OPAE argues that the traditional declining block rate structure does not benefit customers and is not in the public interest because it “is now benefitting only a very small subset of extremely large users in the industrial class.”<sup>22</sup> However, OPAE has presented absolutely no evidence in this proceeding to support this claim.<sup>23</sup> It's evidence purports only to show the impact of the two-block rate design relative to a uniform rate.<sup>24</sup>

Moreover, as ODSA witness Moser testified, if OPAE's uniform kWh rate design were adopted in this proceeding, it would cause very large and abrupt USF charge increases to some customers.<sup>25</sup> Even OPAE's analysis of consumption under 2015 rates<sup>26</sup> shows that OPAE's proposal could result in hundreds of thousands of dollars in increases in next year's USF rates. OPAE's proposal violates the regulatory principle of gradualism.

It is against this backdrop that the signatory parties agreed, and ODSA witness Moser testified, that the declining block rate structure provides a reasonable contribution by all customer classes to the USF revenue requirement.<sup>27</sup> All customer classes are charged the first

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<sup>21</sup> OPAE also misrepresents that AEP Ohio witness Gill raised in his direct and reply testimony (AEP Ohio Exs. 1 and 2) that the declining block rate structure was not in the public interest. Mr. Gill offered no such testimony. OPAE Initial Br. at 9.

<sup>22</sup> OPAE Initial Br., at 11 and 12.

<sup>23</sup> OPAE also relies on the USF proceedings from 2001 to 2014, without presenting evidence from those proceedings and without obtaining administrative notice from the Attorney Examiner. The Attorney Examiner granted administrative notice only of a document from the 2014 USF proceeding. Tr. at 26.

<sup>24</sup> Tr., 109.

<sup>25</sup> ODSA Ex. 3, at 6.

<sup>26</sup> OPAE Ex. 3, ATT. DCR-1.

<sup>27</sup> Joint Ex. 1, at 5; ODSA Ex. 2, at 7.

block in the declining block rate design, and if the USF revenue requirement increases, all customer classes' contributions necessarily will increase.<sup>28</sup>

**C. The Settlement Package Does Not Violate Any Important Regulatory Principle or Practice.**

**1. The Commission is Without Jurisdiction to Determine Whether ODSA's Current Mechanism to Process USF Rider Rates Violates the "Practice of Cost Prudence."**

In its initial brief, AEP Ohio argues that the Commission has exclusive jurisdiction over rate and service issues, citing *Kazmaier Supermarket, Inc. v. Toledo Edison* (1991), 61 Ohio St.3d 147, 573 N.E.2d 655. AEP Ohio reasons that *Kazmaier* authorizes the Commission to merge the OP and CSP USF rates and modify the Joint Stipulation to implement them.

AEP Ohio is wrong. *Kazmaier* was decided in 1991 and addressed the Commission's ratemaking authority under R.C. 4909.15, 4909.16, 4909.30, and 4905.22. The General Assembly enacted R.C. 4928.52 in 1999, limiting the Commission's authority to "adjust the universal service rider by the minimum amount necessary to provide the additional revenues." R.C. 4928.52 controls over R.C. 4909.15 and the related statutes cited in *Kazmaier*. R.C. 1.52(A). As ODSA stated in its initial brief, the Commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly.<sup>29</sup> The Commission's jurisdiction in this proceeding is limited to adjusting the USF rider rate by the minimum amount necessary to provide additional revenues for the USF fund. R.C. 4928.52(B). The Commission has no jurisdiction to review how ODSA manages the USF system, or to order ODSA to ensure

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<sup>28</sup> Tr., at 111-112.

<sup>29</sup> See, e.g., *Cols. Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993).

that its information technology systems can accommodate AEP Ohio's requests.<sup>30</sup>

## **2. The Two-Step Declining Block Rate Design Does Not Violate Regulatory Practices or Principles.**

First, OPAE claims that the Joint Stipulation violates R.C. 4909.15, which requires the Commission to set just and reasonable rates. OPAE's assertion is without merit. This proceeding is not a ratemaking proceeding under R.C. 4909.15, but is governed by R.C. 4928.52.

Next, OPAE argues that the declining block rate structure violates R.C. 4928.52(C) because it benefits a subset of very large industrial customers.<sup>31</sup> As stated previously, OPAE has presented no evidence of the costs incurred by a "subset of very large industrial customers."<sup>32</sup> Indeed, OPAE's witness admitted that his testimony does not identify cost shifts between customer classes, but that it only explains the impact of the two-block rate design relative to a uniform rate.<sup>33</sup>

## **III. CONCLUSION**

For the foregoing reasons, ODSA respectfully requests that the Commission approve the Joint Stipulation.

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<sup>30</sup> See, also, 4909.154. Although the Commission has the authority to consider the whether management policies and practices of a public utility are inefficient or imprudent, and may only make "recommendations" for changes, it has no such authority over another state agency, including ODSA.

<sup>31</sup> OPAE Initial Brief, at 15.

<sup>32</sup> The number of customers taking service at various usage levels likely was available from the EDUs in discovery, which OPAE apparently did not pursue.

<sup>33</sup> Tr., at 109.

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief has been served upon the following parties by first class mail, postage prepaid, and/or electronic mail this 9<sup>th</sup> day of September 2015.



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