

**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.                                | ) |                         |

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**INDUSTRIAL ENERGY USERS-OHIO'S  
MEMO CONTRA OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
APPLICATION FOR REHEARING**

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**I.     INTRODUCTION**

This is the 17<sup>th</sup> Universal Service Fund (“USF”) proceeding before the Public Utilities Commission of Ohio (“Commission”), and in every USF proceeding the Commission has authorized a two-step declining block rate design for the USF riders. In each case, the Commission, either explicitly or implicitly, has found that the rate design does not result in a cost-shift among the customer classes in violation of R.C. 4928.52(C). In this proceeding, the Ohio Development Services Agency (“ODSA”) presented evidence again demonstrating that the continuation of the existing rate design methodology would not result in a cost-shift among the customer classes.

The intervening parties in this case were provided an opportunity to present testimony addressing the revenue requirement and rate design methodologies contained in ODSA’s proposal. Ohio Partners for Affordable Energy (“OPAE”), an intervenor in this USF proceeding and all but one of the prior USF cases, elected to forgo cross-

examination of the ODSA witness who testified concerning the rate design or to present a witness. Simply put, OPAE was provided an opportunity to rebut the prima facie case established by the testimony of ODSA, but sat silently. OPAE nonetheless challenged on brief the continuation of the two-step declining block rate design, relying heavily on testimony offered by The Kroger Co. (“Kroger”) concerning aggregation of customer load by mercantile customers to qualify for rates based on the second block.

In response to OPAE’s challenge, the Commission approved the continued use of the two-step declining block rate design. The Commission correctly noted that OPAE’s reliance on the record evidence regarding Kroger’s proposed aggregation under the existing rate design was misplaced; that OPAE’s challenge to the Commission’s findings in prior non-appealable orders was improper; and that a theoretical challenge to the existing rate design did not demonstrate a violation of R.C. 4928.52(C).<sup>1</sup>

On rehearing, OPAE again presents the same flawed claims and arguments that the Commission rejected in its Opinion and Order in this case and the 2015 USF case. Due to OPAE’s failure to present any new or meritorious argument, the Commission should deny OPAE’s Application for Rehearing.

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<sup>1</sup> Opinion and Order at 26 (Oct. 11, 2017). The third ground for rejecting OPAE’s challenge of the rate design also formed a part of the Commission’s previous denial of OPAE’s challenge to the two-step declining block rate design in the 2015 USF case. *Id.*, citing *In re ODSA*, Case No. 15-1046-EL-USF, Opinion and Order at 21 (Oct. 28, 2015).

## II. ARGUMENT

### A. **OPAE's Application for Rehearing is based on extra-record claims and ignores the uncontested evidence that demonstrates that the two-step declining block rate design is lawful**

In its Application for Rehearing, OPAE presents what the Commission previously characterized as a theoretical attack (*i.e.* one not based on any record support) on the two-step declining block rate design. OPAE's theoretical challenge to the two-step declining block rate design rests on an unsupported claim that the purpose of the rate design is to shift costs among customer classes. This claim then drives an analysis based on imaginary customers. These two flaws are fatal to OPAE's argument and require the Commission to deny OPAE's Application for Rehearing.

#### 1. **OPAE's claim that the purpose of the two-step declining block rate design methodology to shift costs among the customer classes is contradicted by the only evidence in the record regarding the lawfulness of the rate design**

ODSA introduced the direct testimony of Ms. Meadows in support of the revenue requirement and rate design methodologies ODSA proposed in its Notice of Intent ("NOI"). On the rate design, 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

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<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.

Commission has found in each USF proceeding that the two-step declining block rate design does not violate R.C. 4928.52(C).<sup>4</sup> This evidence demonstrates that the two-step declining block rate design represents a reasonable contribution by all customer classes and therefore does not violate the prohibition of inter-class cost-shifts in R.C. 4928.52(C).

In response, OPAE did not cross-examine Ms. Meadows on this testimony or offer any exhibits or testimony in support of its claim that the purpose of the two-step declining block rate design methodology is to shift costs among the customer classes.<sup>5</sup>

On brief, OPAE sought to support its attack of the rate design by relying on Kroger's testimony,<sup>6</sup> but that reliance was misplaced, and the Commission rejected OPAE's misuse of that evidence.<sup>7</sup>

Absent some credible evidence, the Commission has nothing on which to act.<sup>8</sup> A party's "failure to offer relevant citations to the record to support" their arguments is a fatal flaw to the preservation of the argument.<sup>9</sup> Because OPAE cannot point to any part of the

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4928.52(C). See, e.g., *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. 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> OPAE's only cross-examination was whether Ms. Meadows had correctly paraphrased OPAE's objections (which is itself not part of the record). After Ms. Meadows read a portion of OPAE's objection, OPAE concluded all cross-examination. Tr. at 22-28.

<sup>6</sup> OPAE's Initial Brief at 7 (Aug. 28, 2017).

<sup>7</sup> Opinion and Order at 26 (Oct. 11, 2017).

<sup>8</sup> R.C. 4903.09.

<sup>9</sup> *In re Fuel Adjustment Clauses for Columbus so. Power Co.* 140 Ohio St.3d 352, 2014-Ohio-3764, ¶ 36 (citing *Allnet Communications Servs., Inc. v. Pub. Utils. Comm.*, 70 Ohio St. 3d 202, 206, 1994-Ohio-460, 638 N.E.2d 516 (rejecting argument where appellant provided no "record citations to support" it); *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶ 40; *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 13, quoting *Day v. N. Indiana Pub. Serv. Corp.*, 164 F.3d 382, 384 (7th Cir.1999) ("Appellate attorneys should not expect the court to 'peruse the record without the help of pinpoint citations' to the record")).

record to support its claim that the purpose of the two-step declining block rate design methodology is to shift costs among the customer classes, the Commission must reject that claim.

**2. OPAE's claims regarding hypothetical customer impact fails to demonstrate that the Commission should reverse course and find that the existing rate design is unlawful**

To support its request for rehearing, OPAE then moves to a theoretical attack of the rate design. Its attack rests on an analysis identifying three imaginary customers: a single residential customer using 1,000 kWh/month, a commercial/industrial customer using 833,333 kWh/month, and a commercial/industrial customer using 1,250,000 kWh/month.<sup>10</sup> OPAE then identifies hypothetical rates under the existing rate design and OPAE's preferred uniform kWh rate design.<sup>11</sup> Based on the hypothetical consumption of these customers, OPAE asserts that the residential customer pays an additional \$2.45 under the existing rate design than under OPAE's preferred rate design and that an industrial or commercial customer would benefit from a single uniform kWh rate until it reaches a consumption level of 1,250,000 kWh/month.<sup>12</sup> This analysis is flawed for multiple reasons.

Although OPAE provides no citation in its Application for Rehearing,<sup>13</sup> it is apparent that OPAE draws its hypothetical analysis on the revenue requirement and consumption information for Ohio Power Company's USF rider contained in the Application filed by

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<sup>10</sup> OPAE's Application for Rehearing at 4-5 (Nov. 9, 2017).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Again, a failure to provide record citations is sufficient basis alone to deny OPAE's Application for Rehearing. *Supra*, at 3, n. 3.

ODSA on October 31, 2017.<sup>14</sup> Thus, the hypothetical rate differences for OPAE's imaginary customers are based on nothing that is contained in the record in this phase of the proceeding.

Consistent with the Commission's prior ruling in the 2015 USF Case,<sup>15</sup> OPAE could have presented an analysis challenging the lawfulness of the existing rate design based on current rates at the evidentiary hearing.<sup>16</sup> Having failed to take advantage of the leeway the Commission had provided it in the 2015 USF Case, OPAE should not be rewarded for ignoring the prior Commission decision regarding the evidence that the Commission would consider.<sup>17</sup>

Furthermore, even if OPAE's hypothetical analysis were considered, it does not demonstrate that the existing rate design results in an unlawful cost-shift among the customer classes. R.C. 4928.52(C) prohibits cost-shifts among the customer classes. To support a finding of a violation of the statute, a party must show how a customer class is adversely affected. As in the 2015 USF Case, OPAE has failed to provide any testimony or evidence to support its claims that the continuation of the existing rate design unlawfully shifts costs among customer classes.<sup>18</sup> Due to its failure to support its claims, the Commission should again reject this theoretical attack on the rate design.

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<sup>14</sup> Application at 11, Exhibit J.

<sup>15</sup> *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 ("2015 USF Case").

<sup>16</sup> 2015 USF Case, Opinion and Order at 14 (Oct. 28, 2015).

<sup>17</sup> *Id.*

<sup>18</sup> 2015 USF Case, Opinion and Order at 21 (Oct. 28, 2015).

Moreover, OPAE's analysis presumes that a uniform kWh methodology is an appropriate metric to measure whether a cost-shift has occurred. OPAE offers no support for that conclusion. Maintaining the existing rate design is the best course for ensuring that the annual update to the USF revenue requirement does not create a cost-shift among the customer classes.<sup>19</sup>

The Commission correctly rejected OPAE's arguments in the Opinion and Order. OPAE's repetition of its unsupported claims does not serve as a basis for the Commission to grant OPAE's Application for Rehearing. Accordingly, the Commission should deny OPAE's Application for Rehearing.

**B. OPAE fails to justify a deviation from Commission precedent or offer a lawful or reasonable alternative path for the Commission to take**

OPAE also argues that the Commission should have adopted OPAE's preferred rate design methodology. OPAE again fails to provide any basis for the Commission to approve its proposal.

The Supreme Court has routinely held that the Commission should respect its precedent, but may deviate from its precedent if it provides a reasoned basis for the deviation.<sup>20</sup> Furthermore, to deviate from its precedent, the new regulatory course charted by the Commission must be lawful and reasonable.

As the Commission noted in its Opinion and Order, it has explicitly or implicitly found in each of the past sixteen USF cases that the existing two-step declining block

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<sup>19</sup> See *2015 USF Case*, ODSA's Reply Brief at 8 (*citing* testimony of ODSA witness Moser) (OPAE's analysis demonstrates that adopting OPAE's uniform kWh rate would cause very large and abrupt USF charge increases to some customers, which would be inconsistent with the regulatory principle of gradualism) (Sep. 9, 2015).

<sup>20</sup> *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, at ¶ 16-17.

rate design satisfies the statutory requirement in R.C. 4928.52(C) that the USF rider not shift the costs of funding the USF program among the customer classes. In its order in this case, the Commission again found, based on the uncontested evidence, that the existing rate design was lawful.

OPAE fails to provide a reasoned basis for the Commission to deviate from its precedent. Because OPAE's entire Application for Rehearing relies on extra-record assumptions, there is no basis for the Commission to conclude that a deviation from its precedent is warranted or that the new course is substantively lawful and reasonable.<sup>21</sup>

### **III. CONCLUSION**

The uncontested record evidence demonstrates that the continuation of the existing two-step declining block rate design, a rate design that has been authorized in every single USF case, will comply with the statutory requirements in R.C. 4928.52(C). At the hearing, OPAE did not challenge the record evidence supporting the rate design through either cross-examination or the presentation of any evidence to support its challenge of the rate design. Moreover, OPAE has failed to offer any legitimate basis for the Commission to deviate from the existing rate design. Accordingly, OPAE's Application for Rehearing challenging the lawfulness of the existing rate design and proposing an unsupported alternative rate design should be rejected.

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<sup>21</sup> *Id.*; see also *In re Columbus S. Power Co.*, 129 Ohio St. 3d 271, 2011-Ohio-2638, ¶ 19 (it is generally the party's responsibility to develop its own arguments); *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 29 (citing *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 30 ("Ruling on issues without record support is an abuse of discretion and reversible error.")).

Respectfully submitted,

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## **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 Memo Contra Ohio Partners for Affordable Energy's Application for Rehearing* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 20<sup>th</sup> day of November 2017, *via* electronic transmission.

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