

In the Matter of the Application of the :
Ohio Department of Development for an : **Case No. 22-0556-EL-USF**
Order Approving Adjustments to the :
Universal Service Fund Rider of :
Jurisdictional Ohio Electric Distribution :
Utilities. :

I. INTRODUCTION AND BACKGROUND

In an effort to resolve the outstanding comments, on July 26, 2022, ODOD hosted a settlement conference in which all intervening parties participated. After negotiations, a Joint Stipulation and Recommendation (“Stipulation”) was filed on August 5, 2022, which was signed

¹ FirstEnergy Companies refers collectively to Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

by six of the parties.² The Commission Staff and the FirstEnergy Companies agreed not to oppose the Stipulation. OCC is the only party opposing the Stipulation, seemingly raising a single issue of contention – that the PIPP SSO generation price is higher than the SSO generation price for the 2022-2023 delivery year. This finite issue, however, is not an issue appropriate for this case, which is solely designed for setting the rates of the USF rider that includes generation rates that have already cleared. *See e.g., In Re the Application of The Ohio Department of Development Services Agency for an Order Approving Adjustments to the Universal Service Fund Rider of Jurisdictional Ohio Electric Distribution Utilities (“2021 USF NOI Order”),* Case No. 21-659-EL-USF, Opinion and Order at ¶ 5 (Oct. 6, 2021).

The Commission has approved USF rider rate adjustments, as necessary, each year for each of the Ohio jurisdictional electric utilities since 2001. *2021 USF NOI Order* at ¶ 5. Nevertheless, OCC takes issue with the cost of the PIPP SSO generation prices and calls upon the Commission to reject the Stipulation such that the USF rates are set at the SSO auction generation prices; thereby saddling the utilities with the difference between the SSO auction price and the PIPP SSO auction price. (OCC Ex. 1 at pp. 27-28; Transcript at pp. 86-87). This is a mind-boggling proposal given the fact that this suggestion goes well beyond the scope of the NOI process and that the auctions have already cleared and have been approved by the Commission. This is even more perplexing when OCC admits that the six distribution utilities followed the process that was set forth in R.C. 4928.54, *et seq.* and the applicable Commission Orders. (Transcript at pp. 101-102). To ensure a timely and orderly process for updating the USF rates, the Commission should adopt the Stipulation.

² Signatory Parties include: ODOD, The Dayton Power and Light Company d/b/a AES Ohio, Duke Energy Ohio, Inc., Industrial Energy Users-Ohio, Ohio Energy Group, and Ohio Power Company.

II. LAW AND ARGUMENT

When considering whether to approve a stipulation, the Commission employs the following three-part test, which the Supreme Court of Ohio has endorsed:

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?

In Re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, 155 Ohio St.3d 326, 2018-Ohio-4698 at ¶39 (citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992)). For the reasons more fully described below, the Stipulation should be approved because it meets the three-prong test.

A. The Stipulation was a Product of Serious Bargaining Amongst Capable and Knowledgeable Parties.

The Joint Stipulation filed on August 5, 2022, represents a product of serious bargaining amongst capable and knowledgeable parties. At ODOD's invitation, all parties to this matter met on July 26, 2022, to discuss the option of settlement. (Development Exhibit 3 at p. 4). All of the parties to the case were in attendance at the settlement conference and have extensive experience "actively participating in the USF proceedings for several years" and are represented by experienced counsel. (Id. at p. 4.) In fact, all Signatory Parties and the FirstEnergy Companies have been signatories to NOI stipulations at some point in previous years. (Id. at p. 4); *see also*, *In Re 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. 18-976-EL-USF, Opinion and Order at ¶ 13 (Sept. 19, 2018) ("2018 USF NOI Order").

Resolving the NOI phase of a USF case is always particularly challenging because of the time demands on having an Opinion and Order issued with enough time for ODOD to meet its commitment of filing the application for rates no later than October 31 so that those rates can go into effect before January 1 of the subsequent year. Despite this time crunch, however, ODOD sought and received a one-week extension to the procedural schedule to facilitate further settlement negotiations. Entry at ¶ 10 (July 29, 2022); *see also* (Development Ex. 3 at p. 4). The August 5, 2022, Stipulation reflects a resolution of the FirstEnergy Companies’ objection regarding the reserve component and the signatures of the other three EDUs and two representatives of customer groups (Ohio Energy Group and Industrial Energy Users-Ohio). The Stipulation also adopts a process that is familiar to the parties and routinely adopted and approved by the Commission in prior years. *See, infra* at p. 6. OCC, however, opposes the Stipulation because 2022-2023 delivery year prices for the PIPP SSO generation is higher than the SSO generation price. (OCC Ex. 1 at pp. 11-15.) But OCC unreasonably (and improperly) seeks a resolution that effectively requests ODOD to “redesign or modify the PUCO-approved PIPP procurement process.” (Development Ex. 3 at p. 5).

OCC as the sole party choosing to oppose the Stipulation does not undermine the fact that the Stipulation was a product of serious bargaining amongst capable and knowledgeable parties. Indeed, “the Commission has long ruled that no single party should be afforded veto power under the first part of the three-part test.” *In Re the Application of Campbell Supply Soup Company L.L.C. for the Approval of a Reasonable Arrangement for its Napoleon, Ohio Plant*, Case No. 21-1047-EL-AEC, Opinion and Order at ¶ 51 (June 1, 2022) (citing *In re Duke Energy Ohio, Inc.*, Case No. 19-791-GA-ALT, Opinion and Order (Apr. 21, 2021) at ¶ 50; *see also*, *Dominion Retail, Inc. v. The Dayton Power and Light Co.*, Case No. 03-2405-EL-CSS, et al.,

Opinion and Order (Feb. 2, 2005) at 18 (“The Commission will not require OCC’s approval of stipulations.”); *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, et al., Opinion and Order (Apr. 13, 2005) at 9 (“There is no requirement that any particular parties execute stipulations in order for the first prong of the test for stipulations to be met.”). This is particularly true when the Stipulation adopts a process previously approved by the Commission and, as more fully described in section C of this Brief, OCC’s sole issue of dispute is not appropriately raised in this USF proceeding and constitutes an improper collateral attack on prior Commission Orders.

The Commission should approve the Stipulation by finding that it is the product of serious bargaining amongst capable and knowledgeable parties.

B. The Stipulation Benefits the Public Interest.

The Stipulation in this proceeding benefits the public interest because it sets forth a process to ensure timely resolution of updating the USF rider so that there are sufficient funds for customers in need to benefit from the PIPP Plus program. Specifically, “the methodologies adopted will result in USF rider rates that represent the minimal rates necessary to collect the EDUs’ USF rider revenue requirements.” (Development Ex. 3 at p. 6.) Assuming they meet the terms of their PIPP Plus membership, PIPP Plus customers will only be required to make the PIPP Plus payments. Ohio Adm. Code 122:5-3-04(A); (Transcript at p. 117.) Thus, irrespective of the amount of their monthly usage and generation rate applied to that usage, PIPP Plus customers only pay a percentage of their income and the remainder is forgiven. Ohio Adm. Code 122:5-3-04(A); (Transcript at pp. 117-118.) This is a tremendous benefit to those customers and this Stipulation allows for a timely continuation of the USF Rider, which funds the PIPP Plus program that benefits the public interest.

C. The Stipulation Does Not Violate Any Important Regulatory Principles or Practices.

The Commission should approve the Stipulation because it does not violate any important regulatory practice or principle as it represents a process that has been routinely approved by this Commission for recovery of USF rates and includes generation rates that were already approved by the Commission. The Stipulation in this matter is identical to the stipulated process and terms that have been approved by the Commission for at least the past five years. *See e.g., 2018 USF NOI Order; In Re 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. 19-1270-EL-USF, Opinion and Order (Sept. 11, 2019) (“*2019 USF NOI Order*”); *In Re 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. 20-1103-EL-USF, Opinion and Order (Sept. 9, 2020) (“*2020 USF NOI Order*”); *2021 USF NOI Order*; *see also*, (Joint Exhibit 1). This process has been found to be compliant with R.C. 4928.52. *See, 2018 USF NOI Order* at p. 12; *2019 USF NOI Order* at p. 14; *2020 USF NOI Order* at p. 15; *2021 USF NOI Order* at p. 16. This Stipulation also incorporates the results of the 2022-2023 PIPP SSO auction results for each of the utilities, which were also approved by the Commission.

Despite this long-standing Commission-approved process, OCC submitted testimony that the Stipulation violates regulatory practices and principles because the PIPP SSO rates to be included in the USF Rider exceed the rates for non-PIPP SSO load. (OCC Ex. at pp. 23-26.) It is important to note that this case, much less the NOI process, does not establish the process for acquiring the PIPP SSO generation. Nor does this case establish or otherwise approve the PIPP

SSO auction results. Those issues were directly addressed by the Commission in separate proceedings.

The process for acquiring generation to serve the PIPP SSO load was a process established over six years ago. R.C. 4928.54 requires ODOD to aggregate PIPP customers “for the purpose of establishing a competitive procurement process for the supply of competitive retail electric service for those customers.” Upon written request by the director of ODOD, the Revised Code also provides that the “public utilities commission shall design, manage, and supervise the competitive procurement process required by section 4928.54 of the Revised Code.” R.C. 4928.544(A). Upon receiving such request from ODOD, the Commission opened a docket to establish a process and invited two rounds of comments from all stakeholders, including OCC and the electric distribution utilities. *In Re the Implementation of Sections 4928.54 and 4928.544 of the Revised Code (“16-247 Order”)*, Case No. 16-247-EL-UNC, Finding and Order at ¶¶ 3, 5 (May 2, 2016). The Commission issued an Opinion and Order adopting a modified version of the Second Staff Recommendation for securing PIPP SSO load. The EDUs are to conduct a competitive RFP process whereby every registered CRES may submit a bid to provide generation to the entire PIPP SSO load for a twelve-month period at a price lower than the SSO auction. *Id.* at ¶ 7; *In Re the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Ohio Power Company (“16-1031 Order”)*, Case No. 16-1031-EL-UNC, Finding and Order at ¶ 4 (May 4, 2022). In the event there are no qualifying RFP bids, then the distribution utilities are directed to conduct a supplemental auction to secure generation for the PIPP SSO load at the best available price. *Id.* The Commission specifically found that this process satisfies the requirements of R.C. 4928.542. *Id.*

In accordance with the *16-247 Order*, for the 2022-2023 delivery year, each of the EDUs conducted the first RFP auction where no conforming bids were received. *16-1031 Order* at ¶ 5; *In Re the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Dayton Power and Light Company* (“*17-1163 Order*”), Case No. 17-1163-EL-UNC, Finding and Order at ¶5 (May 18, 2022); *In Re the Procurement of Percentage of Income payment Plan Program Generation for Customers of Duke Energy Ohio, Inc.* (“*16-940 Order*”), Case No. 16-940-EL-UNC, Finding and Order at ¶ 5 (May 4, 2022); and *In Re the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company* (“*16-936 Order*”), Case No. 16-936-EL-UNC, Finding and Order at ¶ 5 (April 6, 2022). As a result, each of the EDUs were required to conduct a supplemental auction for the 2022-2023 delivery year. *Id.* Finding that each of the EDUs “***followed the process adopted by the Commission in [16-247-EL-UNC]***,” the Commission approved the PIPP SSO auction results for each of the respective EDUs. *See, 16-1031 Order* at ¶ 7; *17-1163 Order* at ¶ 6; *16-940 Order* at ¶ 7; *16-936 Order* at ¶ 6 (emphasis added).

OCC admits that the current process for ascertaining generation for the PIPP SSO is through a specific two-step auction process that was established by the Commission in Case No. 16-247-EL-UNC. (Transcript at p. 100.) OCC further admits that the EDUs followed that process for purposes of the 2022-2023 delivery years. (Transcript at pp. 101-102.) Despite sitting on their hands in those cases, however, OCC now requests that the Commission-approved PIPP SSO auction process should be abandoned or altered and that the Commission should set aside the results and charge the same rate as the SSO auctions (OCC Ex. 1 at pp. 27-28; Transcript at pp. 86-87) – a position that should be rejected.

The appropriate mechanism for taking issue with a Commission decision is to file an application for rehearing “set[ting] forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” R.C. 4903.10(A). But an application for rehearing must be filed within thirty days of the entry of the respective Order. R.C. 4903.10(B). OCC did not file an application for rehearing challenging the process established for administering the PIPP SSO auction in Case No. 16-247-EL-UNC (that the utilities followed). Nor did OCC file an application for rehearing challenging any of the EDU PIPP SSO auction results following the approvals in May 2022. Thus, OCC’s arguments in this matter are nothing more than a collateral attack via an untimely application for rehearing on the Commissions’ rulings in Case Nos. 16-247-EL-UNC, 16-1031-EL-UNC, 17-1163-EL-UNC, 16-940-EL-UNC, and 16-936-EL-UNC. The Commission has previously dismissed untimely applications for rehearing disguised as collateral attacks on final commission entries and orders. *See, In Re Ohio Suburban Water Co.*, Case No. 95-3118-WS-UNC, Finding and Order (August 3, 1995); *see also, In Re the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-EL-AIR, Entry at ¶ 10 (June 18, 2008).

Alternatively, OCC’s request is barred by the doctrines of res judicata and collateral estoppel. “Collateral estoppel may be applied in a civil action to bar the re-litigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings.” *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)). “The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.” *Id.* (citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226). This includes whether the party actually raised the issue or could have been litigated in the prior action. *State ex rel. Armatas v. Plain Township Board of Zoning Appeals*, 130 Ohio St.3d 161, 2020-Ohio-2973 at ¶ 9. And these two doctrines have been applied to administrative proceedings. *Office of Consumers' Counsel v. Public Utilities Com'n of Ohio*, 16 Ohio St.3d at 10. Indeed, the Supreme Court of Ohio affirmed a Commission order based on collateral estoppel and res judicata, preventing OCC from “attempting to relitigate [an issue] . . . which was previously determined to be proper.” *See, Id.* The Court specifically pointed to the fact that OCC “failed to appeal or request a rehearing of the previous order.” *Id.*

OCC participated in the 16-247-EL-UNC case that established the PIPP SSO auction process and availed itself of the opportunity to raise concerns about the process. The Commission ruled and established the process for conducting the PIPP SSO auction, but OCC did not file an application for rehearing or appeal. And despite ample opportunity, OCC chose not to intervene or file an application for rehearing in the public dockets certifying and accepting the PIPP SSO auction results. (Transcript at pp.107, 132, 139, 141.) Nor did OCC intervene or otherwise challenge the EDU tariffs that adopted the PIPP SSO auction rates. (Transcript at pp.112, 134, 143.) OCC is now barred by the doctrines of res judicata and collateral estoppel from raising claims related to the PIPP SSO auction process and the results of those auctions.

For this myriad of reasons, the Stipulation does not violate any regulatory principles or practices and should be approved.

III. CONCLUSION

For the aforementioned reasons, the Commission should approve the Stipulation, which meets the three-prong test for evaluating a stipulation and is consistent with the same process and procedures that have successfully been used to execute the USF Rider and PIPP Plus program for several years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-filed with the Public Utilities Commission of Ohio on September 12, 2022. The PUCO's e-filing system will electronically service notice of the filing of this document on the following parties:

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