

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
the Ohio Department of)	
Development for an Order)	Case No. 22-556-EL-USF
Approving Adjustments to the)	
Universal Service Fund Riders.)	

**REPLY BRIEF OF
DUKE ENERGY OHIO, INC.**

I. INTRODUCTION

The Ohio Department of Development (ODOD), in its May 27, 2022, Notice of Intent (NOI), identified the methodology that it intended to use for the purpose of developing the annual Universal Service Fund rider (USF Rider) revenue requirement and rate design associated with its 2022 application to adjust the USF riders of all Ohio electric distribution utilities (EDUs). Thereafter, various parties to the underlying proceeding offered comment upon the NOI, and the methodologies set forth therein. Comments were received from the Office of the Ohio Consumers' Counsel (OCC) and the FirstEnergy electric distribution utilities (FE Companies), and those comments were analyzed and responded to by ODOD and the other parties to this proceeding. A Stipulation and Recommendation was subsequently entered into between Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company), the Ohio Power Company (AEP Ohio), The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio), Industrial Energy Users – Ohio (IEU), the Ohio Energy Group (OEG), and ODOD, with the Staff of the Public Utilities Commission of Ohio (Staff) and the FE Companies as non-opposing parties (the Stipulation). That Stipulation is before the Commission for its consideration and approval in this proceeding.

As has been the case since 2005, ODOD followed the USF’s two-pronged process in the underlying case. The two phases of that process are as follows: “In the first phase of the USF case . . . ODOD files, by May 31 each year, an application with its proposed methodology to calculate the USF revenue requirement and rate design, as well as any other matters that ODOD deems appropriate[.]” and “[i]n the second phase of the USF proceeding, ODOD files, by October 31 each year, an application to adjust the USF rider rates of the EDUs, as necessary.”¹ This multi-phase process allots time for the Commission and the parties’ consideration of objections that may be raised as to the rate design on an expedited, but timely basis.² The Commission, “after reasonable notice and opportunity for hearing, may adjust the universal service rider by the minimum amount necessary to provide additional revenues” to cover the administrative costs of certain low-income customer assistance and consumer education programs, and to provide adequate funding for those programs, such as the Percentage of Income Payment Plan (PIPP) program.³

As is made clear, by statute, established Commission process, and very recent Commission precedent, the aggregation of PIPP customers by ODOD is not discretionary. And the purpose of the NOI stage is the methodology for calculating the USF revenue requirement and the rate design for the EDUs’ respective USF riders. As the Commission has previously found, its role in this

¹ *In re Ohio Department of Development*, Case No. 21-659-EL-USF (“2021 USF Case”), Opinion and Order (Dec. 15, 2021) at ¶ 5.

² *Id.*; *see also Id.* at ¶ 23 (approving a stipulation and agreeing that the “ODOD should again follow the NOI process first adopted in Case No. 04-1616-EL-UNC for 2022”).

³ R.C. 4928.52(B); *Cf.* 2021 USF Case, Opinion and Order (Oct. 6, 2021) at ¶ 2.

regard “is limited primarily to facilitating the process by which ODOD files for and the EDUs implement their respective USF rider rates.”⁴

For its part, OCC opposes the Stipulation, not because of the proposed methodology for calculating the USF revenue requirement and rate design—as is the only question currently before the Commission—but rather in opposition to the various Commission orders relating to the establishment of PIPP rates for the various EDUs.⁵ OCC asks that the Commission combine the PIPP load aggregation with the EDUs’ SSO process. However, OCC fails to present convincing argument as to why the Commission can or should overturn its approvals of the 2022-2023 PIPP Auction Process for each of the EDUs, upend the process for consideration of the USF revenue requirement and rate design in the underlying case, and change the scope of the EDUs’ recent SSO processes. The Commission should reject OCC’s arguments, advanced on brief and at hearing, and adopt the Stipulation.

II. LAW AND ARGUMENT

A. **ODOD is Statutorily Required to Aggregate PIPP Load—and Cannot Decide, without Legislative Guidance, to Cease PIPP Aggregation in the Underlying Case.**

As OCC admits in its post-hearing brief, “[t]he law supports the aggregation of PIPP customers for the purpose of establishing a competitive procurement process (involving energy marketers) for the supply of electricity for these customers and for that process to be an auction.”⁶ This law, R.C. 4928.54, not only supports the aggregation of PIPP customers—it requires it. As ODOD explains in its initial post-hearing brief, while OCC argues that ODOD is “not required to

⁴ 2021 USF Case, Opinion and Order (Dec. 15, 2021) at ¶ 29 (“Thus, in light of the Commission’s limited role in these USF proceedings, our evaluation of the issues raised in this proceeding and Staff’s participation in this case, is restricted.”).

⁵ See, e.g., Direct Testimony of Michael Williams, OCC Ex. 1 (Williams Direct Testimony) at 26:16-28:2.

⁶ Initial Post-Hearing Brief of OCC (OCC Brief) at 13.

aggregate PIPP customers, that [ODOD] has the authority to terminate the PIPP aggregation, and that [ODOD] should adopt the SSO price for electricity rather than the PIPP auction price in determining the cost of PIPP[.]” the aggregation of PIPP load is not discretionary under R.C. 4928.54. And as ODOD rightfully explains, “[n]ot only is OCC’s request an improper collateral attack of the PUCO’s [EDU PIPP Auction] orders, it is unlawful under R.C. 4928.54” as “[u]nder the statute, the PIPP price of electricity must be determined by an auction conducted “for those [PIPP] customers.”⁷ The Commission has adopted this very view as recently as this week. In a September 21, 2022, Finding and Order in *In the Matter of the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC (AES SSO Case), the Commission addressed objections from OCC directly related to the PIPP aggregation process. There, the Commission found “OCC’s objections to the application unavailing” because “AES Ohio uses a Commission-approved competitive-auction based format to supply SSO load to certain customers, pursuant to R.C. 4928.141 and 4928.143.”⁸ The Commission determined that

Despite OCC’s reference to Ohio Adm.Code 122:5-3-06, R.C. 4928.54 specifically requires that “[t]he director of development services shall aggregate [PIPP] program customers for the purpose of establishing competitive procurement process for the supply of competitive retail electric service for those customers. The process shall be an auction[.]”⁹ . . . In response to OCC’s request to combine PIPP and SSO auctions, it is clear from the plain language of the statute that the General Assembly intended that PIPP program loads be aggregated and procured from a competitive bidding process separate from the SSO customers. For example, when responding to a stakeholder request to use a descending-clock PIPP auction format instead of a [RFP] auction format, we noted in [Case No. 16-247-EL-UNC] that the plain language of “R.C. 4928.54 provides that only [competitive retail electric service] providers may participate in the auction. However, more than just CRES providers participate in the SSO auctions.” Therefore, OCC’s proposed solution is untenable.

⁷ ODOD Initial Post-Hearing Brief at 8

⁸ AES SSO Case, September 21, 2022 Finding and Order at ¶ 18.

⁹ *Id.*

In regard to OCC's claim that electricity prices resulting from the PIPP auctions have been higher than those procured under the SSO auction and that this outcome violates R.C. 4928.02(L) and 4928.542, we note that we addressed the possibility of this situation in the decision to use the current format stating that, "while this may occasionally result in the PIPP load being served at a price higher than the blended SSO price, the RFP auction has been established to reduce the cost of the PIPP program to the otherwise applicable SSO over the long-term, in compliance with R.C. 4928.542(B)." Consequently, we affirm our previous determination that the existing PIPP program auction format is required under law.¹⁰

While OCC has refused to accept ODOD's position in this litigation, that ODOD lacks authority to modify the Commission-approved PIPP price of electricity established in individualized PIPP Auction cases for each EDU, OCC will hopefully heed the words of the Commission on this topic. The Commission has clearly spoken, and made no indication that aggregation is discretionary, nor has ODOD treated the process as discretionary since its establishment in 2016.

OCC argues that ODOD must terminate the aggregation, because aggregation in 2022-2023 did not result in substantial savings for PIPP customers. As more thoroughly explained by ODOD in its coverage of this topic, this is an incorrect interpretation of the ability ODOD has to decide whether or not aggregation should be undertaken. The parties and ODOD have relied upon the statutory implications of R.C. 4928.54 and relied upon them in following Commission orders. And the Commission itself has clarified in the AES SSO Case that the "RFP auction has been established to reduce the cost of the PIPP program to the otherwise applicable SSO over the long-term[,] and may occasionally result in disparities."¹¹ OCC's request, that the PIPP auction price be replaced by the SSO price, is unreasonable, untimely, and not supported by the Commission's own findings. Put more simply, ODOD cannot singlehandedly flip a switch and incorporate all PIPP customers into the SSO auction process—nor would the Commission approve such a change.

¹⁰ *Id.* (emphasis added).

¹¹ AES SSO Case at ¶ 18.

B. The Commission Found that the PIPP Auction Results Complied with R.C. 4928.542 and OCC has Failed to Establish that the EDUs Acted Unreasonably.

As highlighted by nearly all parties to the Stipulation in initial post-hearing briefs, the Commission was statutorily required by R.C. 4928.544 to “design, manage and supervise” the PIPP auction process. Under the statute, the Commission is also given the responsibility to ensure that the auction results comply with R.C. 4928.542. The Commission designed the PIPP auction process in the RFP Auction Case, Case No. 16- 0247-EL-UNC , and has managed and supervised each annual auction for the EDUs since that process was established. Moreover, the Commission expressly found that the bids it accepted for each EDU’s PIPP electric supply during the test year complied with R.C. 4928.542.¹²

As established by the record in the underlying case, and as admitted by OCC at hearing and on brief¹³ the EDUs followed, and the Commission approved, the RFP Auction process for the June 1, 2022 to May 31, 2023 delivery period. As set forth in previous arguments by the Company and others, following the enactment of R.C. 4928.54, *et seq.*, the Commission was tasked with establishing a proceeding to define the auction process for aggregated PIPP Plus customers in Case No. 16-0247-EL-UNC. The Commission commenced a comment period and invited all interested parties to participate regarding formulation of the auction structure for the aggregated

¹² See *In the Matter of 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*, Case No. 16-936-EL-UNC, Finding and Order (April 6, 2022) at ¶ 6, and Finding and Order (February 10, 2021) at ¶ 6; *In the Matter of the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Duke Energy Ohio*, Case No. 16-940-EL-UNC (May 4, 2022) at ¶ 6, and Finding and Order (April 27, 2021) at ¶ 6; *In the Matter of the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Ohio Power Company*, Case No. 16- 1031-EL-UNC (May 4, 2022) at ¶ 7, and Finding and Order (May 5, 2021) at ¶ 7; and *In the Matter of the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Dayton Power and Light Company [AES Ohio]*, Case No. 17-1163-EL-UNC (May 18, 2022) at ¶ 7, and Finding and Order May 5, 2021) at ¶ 7 (collectively, the “EDU Auction Cases”).

¹³ E.g., OCC does not indicate that the PIPP Auction processes were not followed per Commission order)

PIPP customers. OCC participated in this design process. And what is more, OCC did not appeal or seek rehearing from the process as adopted by the Commission, even though other parties offering comments in the case did.

The process set forth in the RFP Auction Case’s Opinion and Order, Case No. 16-0247-EL-UNC, was followed by the EDUs, including Duke Energy Ohio. Indeed, Duke Energy Ohio, in consultation with Staff and independent auction managers retained by the Company, accepted bids for its initial competitive RFP auction on April 18, 2022.¹⁴ At that time, no conforming bids were submitted in the Duke Energy Ohio PIPP auction.¹⁵ As a result, Commission rules dictated that the Company must hold a subsequent, supplemental RFP auction, again in consultation with Staff and independent auction managers on May 3, 2022.¹⁶ This supplemental auction was able to procure 100% of the PIPP load for the Company.¹⁷ As has been established in testimony and briefing in this case, the Commission reviewed the results of the PIPP RFP auction and found that the auction followed the competitive process adopted by the Commission in the Case No. 16-0247-EL-UNC, and also met the requirements of R.C. 4928.542.¹⁸ If OCC now takes issue with the Commission’s finding that the Company’s PIPP Auction complied with R.C. 4928.542—that was clearly a determination made during Duke Energy Ohio, and the other EDUs’ respective PIPP Auction cases.

¹⁴ See Duke Energy Ohio PIPP Auction Case, Notification of PIPP RFP Results (April 20, 2022) (informing the Commission that “No bidder submitted a conforming bid in the RFP process during the Bid Window on Monday, April 18, 2022.”).

¹⁵ *Id.*

¹⁶ See Duke Energy Ohio PIPP Auction Case, Notification of Supplemental PIPP RFP Results (May 4, 2022).

¹⁷ *Id.* at 1.

¹⁸ Duke Energy Ohio PIPP Auction Case, Finding and Order (May 4, 2022) at ¶ 6 (finding “that the competitive RFP auction process followed the process adopted by the Commission in the RFP Auction Order and met the requirements of R.C. 4928.542. Accordingly, the Commission will not reject the results of the competitive RFP auction.”).

With winning bids secured for 2022-2023, the auction results, as adopted and approved by the Commission, were relied upon; contracts were entered into with suppliers for the PIPP load established for 2022-2023; and the Commission established the finality of the 2022-2023 auction results¹⁹ The EDUs have relied in good faith on the Commission's approvals in their respective PIPP Auctions, and have executed CRES supply contracts for PIPP load for 2022-2023. OCC's attempts to unwind that process are made clear on brief.²⁰ But any attempt to undo or alter such arrangements, especially when such arrangements were expressly approved of by the Commission, would result in an unfair change to the process. This case, and the NOI process, do not authorize or establish the process for acquiring PIPP load, or approval of PIPP auction results. Those issues were the subject of separate Commission proceedings. In its arguments in the underlying case, OCC fails to demonstrate that the PIPP Auction process, as established by the Commission (with input from OCC), suffered from improper procedure, undue influence, or any other factors that would serve to invalidate their Commission-approved results.

C. OCC's Arguments are an Impermissible Collateral Attack on the Commission's PIPP Auction Orders.

Finally, as further highlighted by the parties to the Stipulation on brief, OCC's arguments against the Stipulation amount to an improper collateral attack on the Commission's prior PIPP Auction orders. OCC requests that the PIPP auction price in determining the cost of PIPP be replaced by the SSO price of electricity. As discussed above, the PIPP price of electricity must be

¹⁹ *Id.* at 109:8-17 (“Q: And you understand, I believe, based on the conversation you had with Mr. Stinson earlier, that the electric distribution utilities have already executed those contracts with winning bidders for the SSO – PIPP SSO auctions, correct? A: It’s—that’s my understanding, yes.”).

²⁰ *See, e.g.*, OCC Brief at 21 (“This includes requiring the electric distribution utilities to make adjustments to PIPP billing or accounts for amounts that are paid to the electric utilities from the USF . . . [e]lectric distribution utilities should not be authorized to collect from consumers any of the adjustment costs that are made to the customer billing and accounts as described above.”).

determined by an auction conducted “for those [PIPP] customers.”²¹ The SSO auctions were not conducted for PIPP customers. As ODOD itself has stated, it “has no authority to modify these PUCO-approved prices in this NOI proceeding” and “OCC did not contest these PUCO orders in the various EDU Auction Cases, which are final and non-appealable.”²² If OCC now sees those orders (both the PIPP Auction Order for 2022-2023, and the underlying Auction RFP Order creating the current system) to be unlawful and seeks to contest them in this separate NOI proceeding, OCC is engaged in an impermissible collateral attack.²³ The Auction RFP Order and the EDUs’ Auction Orders for 2022-2023 are final orders of the Commission. OCC did not appeal those final orders, but now, in the NOI proceeding, seeks to attack the Commission’s orders establishing the RFP process, approving the PIPP auction results this year, and the resulting PIPP rates (despite waiving those arguments by not raising them in those proceedings). As fleshed out by AES Ohio in its initial brief, OCC now seeks to “have Ohio EDUs guarantee the results of the “competitive procurement process” by subsidizing winning bidders, with whom they entered contractual relationships for the 2022/2023 delivery year in reliance on the Commission’s orders.”²⁴ This would not be a reasonable result in the underlying proceeding.

The process set forth in the RFP Auction Case’s Opinion and Order, Case No. 16-0247-EL-UNC, was followed by the EDUs, including Duke Energy Ohio, for the June 2022 to May 2023 delivery period.²⁵

²¹ See R.C. 4928.54; see also AES SSO Case, Entry at ¶ 18.

²² ODOD Brief at 6-7.

²³ *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550 (an final order is considered valid, even if perhaps flawed; and absent a lack of jurisdiction or fraud, is not subject to collateral attack).

²⁴ AES Ohio Initial Post-Hearing Brief at 8.

²⁵ Duke Energy Ohio PIPP Auction Case, Finding and Order (May 4, 2022) at ¶ 6 (finding “that the competitive RFP auction process followed the process adopted by the Commission in the RFP Auction Order and met the requirements of R.C. 4928.542. Accordingly, the Commission will not reject the results of the competitive RFP auction.”).

III. CONCLUSION

OCC has not met its burden in opposing the Stipulation. For the foregoing reasons, the Commission should approve the Stipulation, as it 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 years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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