BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF OHIO POWER COMPANY

Ohio Power Company ("AEP Ohio" or "the Company") files this Reply Brief in response to the argument(s) set forth in the Post Hearing Brief filed by the Office of the Ohio Consumers' Counsel ("OCC"). OCC is the only party that contests the Joint Stipulation and Recommendation ("the Stipulation") that was filed on August 5, 2022, setting forth the process for the Notice of Intent ("NOI") phase of developing the Universal Service Fund Rider ("USF") for 2023. The NOI process "is to provide interested stakeholders with an opportunity to raise and pursue objections to the specific methodology [Ohio Department of Development] intends to use in developing the USF rider revenue requirement and the USF rider rate design, which will be utilized in preparing its application for USF rider adjustment." *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*, Case No. 21-659-EL-USF, Opinion and Order at ¶ 6 (Oct. 6, 2021). This process has been in effect for over twenty years and has served to ensure timely resolution of the USF Rider so that there are adequate funds to assist Ohio's residential customers in most need.

Despite filing a twenty-two-page brief, OCC opposes this Stipulation on a single basis – that the PIPP SSO rates for the 2022-2023 deliver year are in excess of the SSO rates for the same time period. While OCC tries to repeatedly reframe the issue to attack each of the three prongs under which Stipulations are reviewed before the Commission, OCC is seeking to expand the scope of the proceeding to collaterally attack the PIPP SSO auction process and results that were previously approved. Thus, OCC is using this proceeding to file an untimely application for rehearing and to raise issues that are barred by the doctrines of res judicata and collateral estoppel. In additional to improper and untimely attacks (that alone is dispositive of OCC's position) OCC's analysis of the three-prong test fails for numerous additional reasons that include factual omissions and misunderstanding of the law. For the reasons more fully explained below and in AEP Ohio's Initial Brief, the Commission should approve the Stipulation that was not opposed by any other party in this proceeding, which is the product of serious bargaining amongst capable and knowledgeable parties, benefits the public interest, and does not violate any important regulatory principles.

A. OCC's Objections to the Stipulation Constitute an Untimely and Improper Collateral Attack on Prior Commission Orders and Should be Disregarded.

The Commission needs to conduct no further analysis after finding that OCC's sole issue of contention in this case – the price of PIPP SSO auctions for the 2022-2023 delivery year – is an improper collateral attack on prior Commission orders. OCC is transparently using this USF NOI process as a means to collaterally attack the PIPP SSO auction process as well as the results of the 2022-2023 delivery year auctions. This intent is no more transparent than it is in Section D of OCC's Brief where OCC argues for a "[a] better process . . . to be established going forward," and suggests changes to "future competitive procurement processes for the supply of electricity to serve PIPP customers," such as combining PIPP consumers into the standard SSO auctions. (Post-Hearing Brief for Consumer Protection by Office of the Ohio Consumers' Counsel ("OCC Brief") at pp. 19-20).

The process for acquiring PIPP SSO generation was set by the Commission over six years ago in Case No. 16-247-EL-UNC. OCC had the opportunity to comment on the proposed process and exercised that option. *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 p. 2 (March 2, 2016); *see also*, (Trans. at p. 99). Despite the Commission setting forth a process that acknowledged the possibility that there could be bids higher than the SSO, *id.* at p. 5; OCC chose not to file an application for rehearing. (Trans. at p. 101). Moreover, the Commission approved the EDUs' PIPP SSO auction results and rates for the 2022-2023 delivery year. *See*, *In Re the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Ohio Power Company*, Case No. 16-1031-EL-UNC, Finding and Order at ¶ 4 (May 4, 2022); *In Re the Procurement of Percentage of Income Payment Plan Program Generation for Customers of Dayton Power and Light Company*, Case No. 17-1163-ELUNC, 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.*, 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* , Case No. 16-936-EL-UNC, Finding and Order at ¶ 5 (April 6, 2022). The Commission also approved the tariffs adopting the SSO and PIPP SSO rates for each of the EDUs. *In Re the Generation Energy and Generation Capacity Riders of Ohio Power Company*, Case No. 22-486-EL-RDR, Finding and Order at ¶ 13 (May 18, 2022*); In Re the Application of The Dayton Power and Light Company d/b/a AES Ohio to Update its Standard Offer Rate Tariffs*, Case No. 22-373-EL-RDR, Finding and Order at ¶¶12-13 (May 18, 2022); *In Re the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.,* Case No. 18-6000-EL-UNC, Finding and Order at ¶ 10 (May 18, 2022);

OCC does not dispute the Commission's approval of the PIPP SSO rates, admitting that the rates contained OCC Witness Williams' testimony is what "the Commission has authorized PIPP customers to be charged for generation services." (OCC Brief at pp. 8-9). It is too late for OCC to now take issue with the 16-247 Order or the Commission orders approving the 2022-2023 PIPP SSO auction results. OCC waited to raise this issue until after the auctions, approval of the auctions, the filing of tariffs, the approval of tariffs, and contracts were executed with the winning bidders. (Transcript at p. 109). Tellingly, OCC never even addresses the 16-247 Order or the orders approving the 2022 PIPP SSO auction results. Such untimely behavior should not be rewarded – the doctrines of res judicata and collateral estoppel exist for this very purpose and is also why the Commission does not permit untimely applications for rehearing on prior orders masquerading as collateral attacks. (*See*, Initial Brief of Ohio Power Company at pp. 9-10).[1] For these reasons, the Commission should reject OCC's opposition as an untimely masquerade and approve the Stipulation.

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

OCC does not contest that there was a settlement process and that the parties and their counsel involved in this case, including signatories to the Stipulation, are well-versed and knowledgeable about the NOI process. (Development Ex. 3 at p. 4). Citing to a lack of diversity of interests signing the Stipulation, OCC argues that there was no serious bargaining because OCC, the government entity that has the right to represent residential customers of Ohio utilities,

[1] AEP Ohio refrains from restating the arguments set forth on pages 9-10 of its Initial Brief and hereby incorporates them by reference.

was not a signatory party. (OCC Brief at pp. 5-7). While there have been times where the Commission has ***considered*** diversity of parties, it has also found that "diversity of interests among signatory parties is ***not necessary*** for any stipulation to meet the first prong." *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electricity Security Plan*, Case No. 16-395-EL-SSO, Opinion and Order at ¶ 21 (Oct. 20, 2017) (emphasis added). No party other than OCC opposes the stipulation; thus, OCC is effectively seeking a veto right by arguing that "no residential consumer representative, such as OCC, signed the Settlement." (OCC Brief at p. 4). But the Commission has "consistently rejected numerous proposals that any one class of customers can effectively veto a stipulation." *Id.* at ¶ 21. In fact, the Commission has routinely upheld stipulations opposed by OCC, recognizing that no single party holds a veto right with respect to the first prong of the three-part test for examining stipulations. *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) (internal citations omitted).

OCC also understates the interests of the parties involved. OCC flippantly disregards the Ohio Department of Development's ("ODOD") status as a signatory party, dismissing them as a state agency with only "administrative oversight responsibility for the electric PIPP program, among its other responsibilities for businesses, communities and tourism." (OCC Brief at p. 5.) In addition to economic related development, the Department of Development is charged with responsibility of developing communities and creating "solutions for community problems." *See*, R.C. 122.011(A). Moreover, Megan Meadows testified that Development is representative of the USF customers. (Development Exhibit 3 at p. 2; Transcript at p. 16). OCC dismisses the testimony of Megan Meadows citing to OCC's legal right to represent residential customers. (OCC Brief at p. 6, citing Trans. at p. 16). Simply because OCC has the statutory right to represent residential customers in actions before the Commission, *see*, R.C. 4911.02(B), does not mean it is the only party that can advance the interests of residential customers for purposes of settlement. Indeed, the community services division of ODOD, of which Megan Meadows is the Chief, "[s]erve[s] as a statewide advocate for social and economic opportunities for low-income persons." R.C. 122.68(G).

OCC further complains that there was no bargaining because the Stipulation largely adopts the NOI application. (OCC Brief at p. 7). OCC relies upon the misstatement of witness Williams that the "stipulation accepts verbatim the methodology that ODOD proposed to use to calculate . . . reserves . . ." (OCC comments at p. 7 citing OCC Ex. 1 at p. 10). The Stipulation reflects an agreement with respect to the FirstEnergy Companies' objection regarding the reserve component in calculating the USF revenue requirement. (Development Ex. 3 at p. 5). But it makes sense why there was so little change between the NOI Application and the Stipulation; after all, the same process has been used and approved for decades without any issues. (Development Ex. 3 at p. 4 (stating "The Joint Stipulation recommends that the PUCO adopt the same rate design methodology that it has approved since 2001, and also recommends that the PUCO adopt nearly the same revenue requirement methodology")); *see e.g.,* Case No. 21-659-EL-USF, Opinion and Order at ¶ 29.

The Commission should find that the Stipulation meets the first prong of the settlement test because the Stipulation is the result of serious bargaining amongst capable and knowledgeable parties.

C. The Stipulation Benefits the Public Interest and Should be Approved.

In arguing that the Stipulation fails the second prong of the test for examining stipulations, OCC takes no issue with the process set forth in the NOI. Instead, OCC relies on a single reason why the stipulation fails the second prong and does not benefit the public interest – it incorporates the Commission-approved PIPP SSO generation rates for the 2022-2023 delivery year. (OCC Comments at pp. 8-13). Absent such a finding, OCC has no remaining basis upon which to contest that the Stipulation benefits the public interest. As previously discussed, *supra*, and in the Initial Brief of AEP Ohio, the 2022-2023 PIPP SSO auction rates are not a proper consideration in this matter. That alone should result in a finding that the Stipulation benefits the public interest. Nevertheless, there are a few poignant points to make regarding OCC's arguments about the public interest.

OCC argues that low-income customers will be responsible for paying higher PIPP arrearages as a result of the higher generation costs associated with the PIPP SSO rates for the 2022-2023 delivery year, (OCC Brief at p. 11), but this is a red herring. OCC has no evidence that this is actually going to happen; in fact, OCC's witness is not personally aware of a single PIPP customer that will pay more than their PIPP installment. (Trans. at p. 121). Moreover, PIPP customers will likely be protected because of the two separate benefits that are afforded by the PIPP Plus program. The first PIPP Plus benefit operates to provide the customer a credit of the delta between their bill as calculated based upon their usage and their PIPP installment. Ohio Adm. Code 122:5-3-04(B)(3); *see also*, (Trans. at p. 117). Thus, no arrearages will amass as long as PIPP customers are meeting their obligation to make timely PIPP installment payments. (Trans. at p. 117). OCC also raises concerns about amassing arrearages at higher rates if PIPP customers fail to meet their obligations under the PIPP program. (OCC Brief at p. 11). But even if PIPP customers do not make timely PIPP payments, they will not necessarily have to bear the burden of paying their arrearages because the second benefit of the PIPP program is a credit to the customer in the amount of 1/24 of a customer's arrearages with each timely PIPP payment. Ohio Adm. Code 122:5-3-04(B)(3); *see also,* (Trans. at pp. 117-118). This can be repeated such that any arrearages that are amassed in 2022-2023 delivery year can be the subject of future credits that will reduce the arrearages to zero over a subsequent twenty-four-month period. *See*, Ohio Adm. Code 122:5-3-04(B)(3); *see also*, (Trans. at p. 120).

OCC also argues that the Stipulation does not benefit the public interest because the "current process involving energy marketers for establishing electricity (generation) charges for PIPP customers is not producing savings for PIPP customers." (OCC Comments at pp. 13.) Putting aside the obvious fault that this argument advances OCC's continued untimely (and improper) collateral attack on the underlying process for acquiring the PIPP SSO generation, OCC makes this assertion based upon a projection of what may come to pass during the 2022-2023 delivery year in isolation. (OCC Brief at pp. 10-11). OCC's analysis is based upon using 2021-2022 customer data – number of customers and average usage – to develop a calculation of the delta between the PIPP SSO billed amounts versus what would be billed at the SSO rate. (Trans. at p. 116; OCC Brief at p. 12). But OCC witness Williams admits that he does not know what actual usage will be for the 2022-2023 delivery year or the number of customers that will avail themselves of the PIPP program in 2022 or 2023. (Trans. at p. 116). More importantly, however, through the most recent actuals of 2021, AEP Ohio's PIPP SSO rates actually resulted in PIPP SSO customers being billed $12,697,210 less than they would have otherwise been billed under the SSO rate since the inception of this process in 2016. (AEP Ohio Ex. 8). Thus, the PIPP SSO auction process, as approved by the Commission back in 2016, has benefitted the public interest.

Irrespective of the PIPP SSO generation rates (which only serve to distract from the true focus of this case), the Stipulation in this matter benefits the public interest because it adopts a process that has routinely been approved by this Commission, *see e.g.* Case No. 21-659-EL-USF, Opinion and Order at ¶ 29, to ensure timely resolution of the USF Rider proceeding that provides the necessary funding to the PIPP program for the 2023 year at minimal rates necessary. (Development Ex. 3 at p. 6).

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

Section C of OCC's Brief is a haphazard shotgun blast of ideas, none of which equate to a cogent argument that the Stipulation violates public policy. Despite a consortium of buzzwords and policy concepts, OCC ultimately just continues to argue that the USF NOI process set forth in the Stipulation violates R.C. 4928.542 because it incorporates the 2022-2023 delivery year rates that are higher than the SSO rate for the same time period. (OCC Brief at pp. 14, 16). But as set forth in detail in Section A and in the Initial Brief of AEP Ohio, the proverbial ship has sailed on contesting the PIPP SSO auction process and the results for 2022-2023.

In addition to the untimeliness of OCC's single issue of contention (that alone should warrant approval of the Stipulation), OCC reads words and context into R.C. 4928.542 to reach the conclusion that "PIPP customers cannot be billed higher generation rates on a per-kWh basis than non-PPP customers served under the standard service office." (OCC Comments at p. 16). But R.C. 4928.542 does not specify that the PIPP SSO auction must be lower than the SSO on a kWh basis each year – just that the winning bid or bids must "[r]educe the cost of the percentage of income payment plan program relative to the otherwise applicable standard service offer." R.C. 4928.542(B). As set forth above, since 2016 the Commission-approved PIPP SSO auction process established pursuant to R.C. 4928.54 has actually saved AEP Ohio PIPP customers over $12.5 million compared to the rates of the SSO. (AEP Ohio Ex. 8).

OCC also argues that the Stipulation violates regulatory principles by adopting a process that will include the rates from the PIPP SSO auction that do not result in the best value for persons paying the USF Rider as required by R.C. 4928.542. (OCC Brief at p.18). To the contrary, the Stipulation sets forth the methodologies for calculating the USF Rider "that will result in USF rider rates that represent the minimal rates necessary to collect the EDUs' USF rider revenue requirement." (Development Ex. 3 at p. 6). And it proposes to incorporate rates from the Commission's PIPP SSO auction process, which "selects the lowest bid offered to supply PIPP customers. This lowest bid is used to calculate the cost of PIPP and, therefore, helps produce the minimal rates necessary to collect the EDU's USF rider revenue requirements." (Development Ex. 4 at p. 3). This is the best value for PIPP SSO customers, even if OCC wishes the competitive market were lower.

E. The Commission Should Reject OCC's Attempts to Substitute a Preferred Rate for PIPP SSO Service in Place of the Commission-Approved Market Rate.

In its final argument, OCC swings for the fences and requests that the Stipulation be rejected and the Commission "calculate the USF rates . . . based on the 2022 Standard Service Offer rate and not the 2022 PIPP auction rate," whereby, the EDUs will eat the difference. (OCC Brief at pp. 20-21). This is a maddening suggestion given the fact that OCC concedes that the utilities followed the Commission's process as set forth in the 16-247 Order. (Trans. at pp. 101-102 ("Q. . . . you do not contend that any of the electric distribution utilities including AEP Ohio failed to follow the process set forth in the [16-247-EL-UNC] order before you, correct? A. No.

I mean, the tariffs were filed. They reflected the rates.")). The proposal is all the more absurd given the fact that the EDUs do not provide the generation and have no control over the competitive suppliers from which it is procured. (Trans. at p. 108-109 (OCC witness Williams admitting that the EDUs do not provide the generation; rather, a competitive market process secures the generation for the PIPP SSO load and that "the EDUs have no control over the markets that bid into [the PIPP SSO] competitive auction.")). Thus, OCC seeks to put the EDUs in the untenable and unsolvable situation of having to follow a Commission-ordered process while being held responsible for the results of a competitive market in which it does not operate or control. The only logical way to make sense of this argument is to see it at face value – OCC does not accept the Commission's 16-247 Order and repeatedly seeks to disregard the PPP SSO auction process and its results that the Commission approved in April/May of this year.

OCC's continued collateral attack seems to be rooted in the misimpression that aggregation of PIPP customers is permissive under Ohio Adm. Code 122:5-3-06, as evidenced by OCC stating that the Stipulation in this case "adopts a PIPP aggregation process." (OCC Brief at pp. 19-20). Despite OCC's attempt at sleight of hand, it was not the Stipulation that adopted the PIPP aggregation process, R.C. 4928.54 requires aggregation of PIPP load. It is well-established, however, that administrative code provisions may not conflict with the Ohio Revised Code. *Clayton v. Ohio Board of Nursing*, 2014-Ohio-1092 at ¶ 31 (citing *State ex rel. De Boe v. Indus. Comm*., 161 Ohio St. 67, 117 N.E.2d 925 (1954), paragraph one of the syllabus). Just this week the Commission found that "[d]espite 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*** percentage of income payment plan program customers for the purpose of establishing competitive procurement process for the supply of competitive retail electric service for those customers.'" *In the Matter of the Procurement of Standards Service Offer Generation for Customers of The Dayton Power and Light Company*, Case No. 17-957-EL-UNC, Finding and Order at ¶ 18 (Sept. 21, 2022) (emphasis added). As a result, the Commission rejected yet another one of OCC's attempts to collaterally attack the PIPP SSO auction by finding that combining the PIPP SSO and regular SSO auctions is an "untenable" solution. *Id.* at ¶ 18.

It is confounding for OCC to allege that the PIPP SSO auction results do not comply with R.C. 4928.542, only to suggest that PIPP SSO customers can be consolidated with SSO customers despite the statutory requirement that PIPP customers be aggregated for the purpose of procuring competitive generation. *See*, R.C. 4928.54. Thus, OCC's argument is built upon a flawed understanding of Ohio law that ODOD had discretion to refrain from aggregating the PIPP SSO customers so that they would be billed at the SSO rate. ODOD was required to aggregate the PIPP load and cannot just mandate that the PIPP SSO customers now be billed at the SSO rate simply because OCC does not like what the market produced.

F. 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 administer 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 23, 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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