

**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

To allow time to ensure resolution of the Universal Service Fund (“USF”) proceedings so that the Ohio Department of Development (“ODOD”) has sufficient funding to administer the percentage of income payment plan (“PIPP”), the Public Utilities Commission of Ohio (“the Commission”) has consistently approved a two-part process. *See, 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 Distribution Utilities*, Case No. 22-556-EL-USF, Opinion and Order (Oct. 5, 2022) (“*NOI Opinion and Order*”). The first part of the process is referred to as the “Notice of Intent” (“NOI”), which is designed “to provide interested stakeholders with the opportunity to raise and pursue objections to the specific methodology ODOD 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 adjustments.” *NOI Opinion and Order* at ¶ 10. The NOI process permits parties to raise objections, if needed, while allowing sufficient time for the Commission to resolve any issues before the implementation of new rates. The second phase, ODOD simply files the USF rider rate adjustments applying the methodology approved during the NOI phase of the proceeding. *Id.* The Commission approved

the NOI methodology that is to be used for setting the rates of the USF, over OCC's objections. *Id.* at ¶¶ 50, 57-60.

The Commission has approved USF rider rate adjustments, as necessary, each year for each of the Ohio jurisdictional electric utilities since 2001. *NOI Opinion and Order* at ¶ 5. The November 23, 2022, Joint Stipulation and Recommendation ("Rates Stipulation") filed in this case addresses the second part of the proceeding – the USF rider rate adjustments set forth in ODO's November 21, 2022, Amended Application. The Rates Stipulation, which was signed by seven parties<sup>1</sup> and only opposed by the Office of the Ohio Consumers' Counsel ("OCC"), meets the three-prong test used for evaluating stipulations filed before the Commission. In an unprecedented move, however, OCC is the only party to challenge the rate adjustment portion of the USF proceeding. OCC stubbornly raises the same issue(s) that it raised during the NOI process and were rejected by the Commission. Therefore, the Commission should approve the Rates Stipulation and reject OCC's continued attempt to wage an assault on the USF process that only serves as an attempt to deny timely assistance programs to Ohio's most vulnerable customers.

## **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?

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<sup>1</sup> Signatory Parties include: ODO, The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio"), Duke Energy Ohio, Inc. ("Duke"), Industrial Energy Users-Ohio, Ohio Energy Group ("IEU-Ohio"), and Ohio Power Company ("AEP Ohio"). Ohio Energy Group ("OEG") and the First Energy EDUs (The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company) signed as "non-opposing parties." Staff indicated that it neither supports nor opposes the Rates Stipulation.

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 Rates Stipulation filed on November 23, 2022, represents a product of serious bargaining amongst capable and knowledgeable parties. The Commission already found during the NOI process that the same parties are “capable parties with competent counsel, familiar with the USF.” *NOI Opinion and Order* at ¶ 35. ODOD filed the original rates application on October 31, 2022 (*See*, ODOD Ex. 1), to which no objections or comments were received. (ODOD Ex. 6). Counsel reminded everyone through a November 15, 2022, email and indicated a reserved time for settlement discussions. (ODOD Ex. 6). Despite no party having indicated any specific issues or objections to the Application, all parties were given the opportunity to participate in a settlement conference on November 21, 2022. (ODOD Ex. 5 at p. 3; ODOD Ex. 6; Tr. at p. 10). In fact, the settlement conference was moved to accommodate OCC's scheduling conflicts. (ODOD Ex. 6). After the November 21, 2022, settlement meeting, a draft stipulation was circulated and further settlement discussions occurred as indicated by revisions to the initially circulated draft. (Tr. at p. 11). After negotiations, the Rates Stipulation was filed on November 23, 2022, which is based on a template from prior years (*see*, Tr. at pp. 11-12), and accurately implements the process set forth in the Commission-approved NOI process. (ODOD Ex. 5 at p. 4).

The Stipulation was signed by ODOD, AEP Ohio, AES Ohio, Duke, IEU-Ohio as well as the FirstEnergy EDUs and OEG signing as “non-opposing parties.” (ODOD Ex. 1). The Commission Staff neither supports nor opposes the Rate Stipulation. (Tr. at p. 57). OCC is the only party opposing the Stipulation, once again 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.

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.”). OCC’s cries to amend the three-prong stipulation analysis is simply an effort to acquire a veto right masquerading under the guise of a “diversity of parties” requirement. In fact, during the NOI process, the Commission once again rejected the adoption of a “diversity of parties” requirement reaffirming that the Commission has “repeatedly and consistently determined that we will not require any single party, including OCC, to agree to a stipulation in order to meet the first part of

the three-part test.” Opinion and Order at ¶ 35. The Commission similarly denied OCC’s application for rehearing on this very issue.<sup>2</sup>

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 Rates Stipulation benefits the public interest because it ensures adequate funding for low-income customer assistance programs that benefits some of the most vulnerable customers in Ohio. (ODOD Ex. 5 at p. 4). Moreover, “the USF rider rates represent the minimal rates necessary to collect the EDUs’ USF rider revenue requirements as calculated in accordance with the methodology approved in the NOI order.” (*Id.*) 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). 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). 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 rates that comply with a process that has already been approved by this Commission. Indeed, ODOD witness Meadows explains the process of

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<sup>2</sup> OCC’s November 4, 2022 Application for Rehearing (“AfR”) was denied by operation of law when the Commission did not grant or deny the AfR prior to December 5, 2022. *See*, R.C. 4903.10

developing the rates set forth in the Application, (ODOD Ex. 2 and Ex. 4) and confirms that it complies with the NOI methodology approved in the NOI Order. (ODOD Ex. 5 a p. 4).

Despite the Commission approving the NOI process over OCC's objections, OCC submitted limited testimony raising the same issue – 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. 1 at pp. 3-4, 9.) OCC even admits that this testimony only serves to bolster the NOI testimony now that the proposed rates have been filed (despite OCC's NOI testimony containing projected values). (OCC Ex. 1 at pp. 3-4). It is important to note that this case, much less the rate setting phase, 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 that were discussed at length by the Commission in the *NOI Opinion and Order*.

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 electric distribution utility (“EDU”) PIPP SSO auction results following the approvals in May 2022. Accordingly, as the Commission found during the NOI process, OCC failed to timely file an application for rehearing in the appropriate case where the process for acquiring the PIPP SSO generation was established (Case No. 16-247-EL-UNC) and that OCC's arguments are nothing

more than an improper collateral attack on that case and the EDU PIPP RFP auction cases. *NOI Opinion and Order* at ¶ 44. This problem has only compounded for OCC, which filed an application for rehearing challenging the underlying *NOI Opinion and Order* yet failed to challenge the Commission's finding that OCC's NOI challenges were untimely. (See, Joint Memorandum Contra<sup>3</sup> at pp. 3-6 (Nov. 14, 2022)). Moreover, OCC's application for rehearing of the *NOI Opinion and Order* was denied by operation of law. But again, OCC's issues regarding the PIPP SSO auction process should have been raised over six years ago after the Commission issued its March 2, 2016 Finding and Order establishing the PIPP SSO auction process.

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

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<sup>3</sup> "Joint Memorandum Contra" refers to the November 14, 2022 Joint Memorandum Contra of The Dayton Power and Light Company, Duke Energy Ohio, Inc. and Ohio Power Company in Opposition to the Application for Rehearing Filed by the Office of the Ohio Consumers' Counsel.

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 has had numerous bites at this same apple – the very purpose for which res judicata and collateral estoppel serves to prevent. 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. OCC did not challenge any of the EDU PIPP SSO auction results. Nor did OCC intervene or otherwise challenge the EDU tariffs that adopted the PIPP SSO auction rates. And now OCC can add to the list the fact that this very issue was raised and addressed by the Commission during the NOI phase of this proceeding. OCC is 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 Rates Stipulation, which meets the three-prong test for evaluating a stipulation and is compliant with the NOI process that was approved by the Commission in its October 6, 2022, Opinion and Order.



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 December 6, 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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