

**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     | : | Case No. 22-556-EL-USF |
| Universal Service Fund Riders of          | : |                        |
| Jurisdictional Ohio Electric Distribution | : |                        |
| Utilities.                                | : |                        |

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**OHIO DEPARTMENT OF DEVELOPMENT'S  
REPLY BRIEF**

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**December 8, 2022**

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**I. INTRODUCTION**

In the Notice of Intent (“NOI”) phase of this proceeding, the Office of the Ohio Consumers’ Counsel (“OCC”) argued that the PIPP generation rates the PUCO approved in prior proceedings violated R.C. 4928.542(B). OCC reasoned the PIPP generation rates were unlawful because they were greater than standard service offer (“SSO”) generation rates (the “PIPP/SSO issue” or “PIPP/SSO argument”). By order issued October 5, 2022, the PUCO specifically found that OCC’s argument constituted an impermissible collateral attack on the PUCO’s prior orders and fell outside of the scope of this Universal Service Fund (“USF”) rider rate proceeding.<sup>1</sup>

Nevertheless, on November 23, 2022, OCC filed a motion to continue the evidentiary hearing scheduled for November 30, 2022, to engage in discovery on this same issue. OCC witness Williams also addressed this PIPP/SSO issue in his direct written testimony filed November 23, 2022.<sup>2</sup> By entry of November 29, 2022, the Attorney Examiner denied OCC’s request for continuance. At the hearing held November 30, 2022, the Attorney Examiner orally granted the Ohio Department of

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<sup>1</sup> Opinion and Order (October 5, 2022) (“NOI Order”) at ¶ 44.

<sup>2</sup> OCC Ex. 1.

Development's ("Development") motion to strike the portions of Mr. Williams' testimony that addressed the PIPP/SSO generation rate issue.<sup>3</sup> The Attorney Examiner further admonished all parties not to "use any aspect of the testimony that has been stricken in your briefs."<sup>4</sup>

OCC ignored the Attorney Examiner's directive. OCC's initial brief is replete with arguments that the Stipulation and Recommendation filed November 23, 2022 (the "Application Stipulation") is unreasonable and unlawful because PIPP generation rates are higher than SSO generation rates.<sup>5</sup> The PUCO should strike the references in OCC's brief.

OCC's continued reliance on its PIPP/SSO argument demonstrates its misunderstanding of the two-phase USF proceeding. The concluded NOI phase approved the methodologies to be used in calculating the USF rider rate. This Application phase considers the electric distribution utilities' ("EDUs") test-year data (*e.g.*, EDU kWh, customer count), which is to be applied to the approved methodologies (*e.g.*, PIPP generation prices) in setting final rates. Even though Development filed its Application on October 31, 2022 applying test year data to the NOI methodologies, OCC did not engage in discovery on the data, or otherwise contest it on brief. With its PIPP/SSO argument stricken, OCC is reduced to arguing that the Application Stipulation should be rejected simply because USF rider rates are higher than last year.<sup>6</sup>

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<sup>3</sup> Tr. at 69-70.

<sup>4</sup> *Id.*

<sup>5</sup> See OCC initial brief at 1, 5 (and fn.15), 6, 7, 8 (and fn. 26), 11-12, and 13.

<sup>6</sup> Development, and other signatory parties, obviously share the interest in controlling USF rider rates as much as practicable. Development committed to considering the issue in future Working Group meetings. Tr. At 55. However, the driver to the increased 2023 USF rider rates is the recently volatile electric market during which PIPP generation rates were fixed by the competitive auction. As reflected in the NOI Order, the auction process is outside of the scope of USF proceedings and cannot be resolved by the Working Group, which is comprised only of parties to USF proceedings. See Case No. 03-2049-EL-UNC, Opinion and Order (December 3, 2003) at 8. Signatory parties to the Application Stipulation have expressed their willingness throughout this proceeding that the PIPP generation rate process be reviewed. However, that process should be a PUCO proceeding in which all stakeholders participate, including the competitive retail electric service providers that supply PIPP load. See Joint Response of AES Ohio, Ohio Power Company, and Duke Energy Company (July 17, 2022) at 4; Development Reply Testimony (Meadows) (August 26, 2022) at 4-5. Neither OCC nor any other party has responded to this overture.

OCC's argument does not constitute cause to reject the Application Stipulation. As discussed below, the recommended rates are reasonable because, based upon the record in this case, they represent the minimum amount necessary to support USF programs.<sup>7</sup> Indeed, if the Application Stipulation were rejected (which it shouldn't be), the remedy would be to litigate the uncontested test year data – only to arrive at the same USF rates the stipulating parties recommend for approval. Fruitless litigation does not serve the public interest.

Development respectfully requests the PUCO to approve the Application Stipulation.

## **II. ARGUMENT**

OCC challenges the Application Stipulation using the PUCO's standard for approving partial stipulations:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement package violate any important regulatory principle or practice?
- (3) Does the settlement, as a package, benefit ratepayers and the public interest?

The record demonstrates that each criterion has been satisfied.

### **A. The settlement is the product of serious bargaining among capable, knowledgeable parties.**

Development fully addressed this prong of the partial stipulation standard in its initial brief.<sup>8</sup> OCC argues that serious bargaining did not occur, claiming that negotiations in this Application phase of the proceeding occurred only from November 21-23, 2022.<sup>9</sup> OCC ignores that it had the opportunity to engage in discovery on, and contest, and negotiate the accuracy of, test year data since the application

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<sup>7</sup> R.C. 4928.52(B).

<sup>8</sup> See Development Initial Brief at 5-6.

<sup>9</sup> OCC initial brief at 5.

was filed on October 31, 2022. It failed to do so and shouldn't be heard to complain now.<sup>10</sup> Bargaining was serious and led to the provision that Development could consider revisions to USF rates during the 2023 collection period if warranted, in Development's sole discretion, as discussed below.

In addition, OCC also raises the same argument the PUCO rejected in the NOI Order<sup>11</sup> – that a settlement must include a diversity of interest.<sup>12</sup> The PUCO repeatedly has found (1) that a diversity of interest among the signatory parties is not a determinative aspect of the first prong of the three-part test,<sup>13</sup> and (2) that no particular party is required to join a stipulation for the test's first prong to be met.<sup>14</sup> The PUCO should reject OCC's argument again.

**B. The settlement package does not violate any important regulatory principle or practice.**

OCC argues that the recommended USF rider rates are not just and reasonable as required by R.C. 4905.22 and 4928.02(A). OCC explains that, "It is not just and reasonable to charge PIPP customers higher rates than the rates charged to standard service offer consumers."<sup>15</sup> OCC's argument is a thinly veiled proxy for the argument rejected in the NOI Order that PIPP generation rates must not exceed SSO rates. OCC's argument relies on stricken testimony and should be ignored. Regardless, the recommended USF rider rates are just and reasonable because, based on the record in this

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<sup>10</sup> Development Ex. 6.

<sup>11</sup> NOI Order at ¶ 35.

<sup>12</sup> OCC criticizes Development witness Meadows' testimony that Development represents the interest of PIPP and non-PIPP customers, arguing that Ms. Meadows (a non-attorney) was unable to point to explicit statutory authority to support her claim. OCC initial brief at 6. OCC ignores that under R.C. 4928.52(B), Development is statutorily charged with setting the minimal rates necessary – for PIPP and non-PIPP customers – to support the USF programs.

<sup>13</sup> See, e.g., *In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR, et al., Opinion and Order (Sept. 26, 2019) at ¶ 90; *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, Second Entry on Rehearing (Feb. 1, 2017) at ¶ 14; *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al., Opinion and Order (Mar. 31, 2016) at 52.

<sup>14</sup> *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, et al., Opinion and Order (Apr. 13, 2005) at 9.

<sup>15</sup> OCC initial brief at 13.

proceeding, they represent the minimal amount necessary to support USF programs, and were calculated in accordance with approved NOI methodology.<sup>16</sup>

OCC also claims that the Application violates regulatory principles because consumers are not provided notice “*why* the USF rider rate has increased.”<sup>17</sup> (Emphasis added.) OCC’s argument should be rejected. The Application Stipulation recommends that notice be given to consumers of the USF rider rate increase – the same notice the PUCO has approved in numerous prior USF proceedings.<sup>18</sup>

**C. The settlement, as a package, benefits ratepayers and the public interest.**

Once again, OCC relies on stricken testimony to argue that the recommended USF rates do not benefit consumers or the public interest. The caption to its argument states that the Application Stipulation should be “rejected or modified because higher PIPP rates relative to the standard service offer” do not benefit ratepayers or the public interest. In the text of its argument, it refers to the recommended rates violating R.C. 4928.542(B),<sup>19</sup> and that “PIPP rates that exceed the SSO rates for generation are unreasonable.”<sup>20</sup> The PUCO also should ignore these arguments as thinly veiled proxies for OCC’s stricken testimony.

Stripped of the PIPP/SSO arguments, OCC’s argument is reduced to a claim that the Application Stipulation does not benefit consumers or the public interest because 2023 USF rider rates will be higher than last year. This argument should be rejected because, based on the record in this proceeding, the rates represent the minimal amount necessary to support USF programs, and were calculated in accordance with approved NOI methodology.<sup>21</sup>

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<sup>16</sup> See R.C. 4928.52(B) and Development Ex. 5 (Meadows Direct) at 4.

<sup>17</sup> OCC initial brief at 13.

<sup>18</sup> See Joint Ex. 1 (Application Stipulation) Appendix A.

<sup>19</sup> OCC initial brief at 8.

<sup>20</sup> OCC initial brief at 9.

<sup>21</sup> See R.C. 4928.52(B) and Development Ex. 5 (Meadows Direct) at 4.

Moreover, the Application Stipulation in this proceeding contains a provision that acknowledges Development's right, in its sole discretion, to initiate a proceeding to adjust USF rider rates during the 2023 collection year.<sup>22</sup> As Development witness Meadows testified, this provision, would allow Development to seek a reduction in USF rates should generation prices decrease in the next PIPP auctions.<sup>23</sup> This is a decided benefit to consumers.

OCC misunderstands the intent of this negotiated provision in which the Stipulating Parties are to be consulted before Development initiates the proceeding. OCC witness Williams testified:<sup>24</sup>

The Settlement even includes specific provisions where changes can be made in residential rates or costs to supply PIPP customers in 2023 apparently without OCC involvement.

This statement is inaccurate. The Signatory Parties negotiated a provision wherein they would be consulted before Development, in its sole discretion, initiated a proceeding to adjust USF rider rates during the 2023 collection year. This provision does not preclude Development from also consulting OCC or any other non-signatory party. Indeed, Development witness Meadows confirmed that OCC would be consulted.<sup>25</sup> Moreover, like the Signatory Parties, OCC would have the ability to oppose any proposal Development made in the proceeding before the PUCO. Development cannot unilaterally adjust USF rider rates. While Development may propose adjustments, the PUCO ultimately determines, after due process, whether the proposed rates are just and reasonable.<sup>26</sup>

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<sup>22</sup> The Application Stipulation provides at paragraph 9:

Development in its sole discretion may, after consulting Signatory Parties, commence a separate proceeding to address any potential changes in residential rates or to the cost to supply electricity to PIPP customers during the 2023 collection period. The Signatory Parties may oppose any proposals made by Development in such a proceeding.

<sup>23</sup> Tr. 15.

<sup>24</sup> Tr. 60.

<sup>25</sup> Tr. 54.

<sup>26</sup> R.C. 4928.52(B).

### III. CONCLUSION

For the foregoing reasons, Development respectfully requests that the Application Stipulation be approved.

Respectfully submitted on behalf of  
Ohio Department of Development

A handwritten signature in cursive script that reads "Dane Stinson".

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Reply Brief* has been served upon the following parties by electronic mail this 8<sup>th</sup> day of December 2022.



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**This foregoing document was electronically filed with the Public Utilities  
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**12/8/2022 11:26:23 AM**

**in**

**Case No(s). 22-0556-EL-USF**

Summary: Reply Brief of the Ohio Department of Development electronically filed  
by Teresa Orahod on behalf of Dane Stinson