

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke | ) |                        |
| Energy Ohio, Inc., to Amend its Pole     | ) |                        |
| Attachment and Conduit Occupancy         | ) | Case No. 15-965-EL-ATA |
| Tariff, P.U.C.O. No. 1.                  | ) |                        |

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**DUKE ENERGY OHIO'S MEMORANDUM CONTRA  
APPLICATION FOR REHEARING**

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**I. INTRODUCTION**

Pursuant to authority granted under Ohio Administrative Code (O.A.C.) 4901-1-35(B), Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby files its memorandum contra (Memorandum Contra) the Application for Rehearing (Application) filed with the Public Utilities Commission of Ohio (Commission) on May 12, 2017, by the Ohio Cable Telecommunications Association (OCTA).

This case stems from the Commission's adoption of new rules governing pole attachments and conduit occupancies, in O.A.C. Chapter 4901:1-3. In the course of its rule-making proceeding (Rule-Making Proceeding), the Commission ordered all pole-owning utilities to file tariff amendments to update the rates to be consistent with the mandates of the new rules.<sup>1</sup> On May 15, 2015, now more than two years ago, Duke Energy Ohio complied with that requirement by opening this proceeding with the filing of its revised tariff. The new rates for pole attachments and conduit occupancies were approved by the Commission in its Finding and Order, dated September 7, 2016

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<sup>1</sup> *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD, Entry (Feb. 25, 2015) and Entry (April 22, 2015).

(September 2016 Order).<sup>2</sup> Critically, OCTA did not file an application for rehearing of that September 2016 Order.

As directed by the September 2016 Order, Duke Energy Ohio filed its compliance tariffs on October 11, 2016. OCTA filed no comments. Ultimately, the Commission issued an Entry (April 2017 Entry) approving the compliance filing, effective as of the date of that filing. Having failed to seek rehearing of the September 2016 Order and having failed to comment on the compliance filing thereafter, or to the Company's specific statement at the time of the compliance filing that the tariffs would be effective October 11, 2016, OCTA now attempts to delay this case further with a proposed rehearing of the April 2017 Entry that simply approved the form of the tariffs filed in compliance with the Commission's substantive determination, as expressed in the September 2016 Order.

OCTA claims that the April 2017 Entry was unreasonable and unlawful in three respects. OCTA is wrong on all counts:

1. The Commission's April 2017 Entry did not grant a retroactive rate increase and, indeed, did not grant a rate increase at all.
2. The Commission's April 2017 Entry did not result in the substitution of newly approved rates and terms for ones that were already in effect.
3. The Commission's April 2017 Entry properly set the effective date for the approved tariff.

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<sup>2</sup> One of the rates approved in that Finding and Order was corrected, *nunc pro tunc*, by Entry issued October 5, 2016.

## **II. ARGUMENT**

### **A. The April 2017 Entry Did Not Grant a Retroactive Rate Increase**

OCTA argues that, by making the tariffs effective as of the date they were filed on October 11, 2016, the Commission was granting a retroactive rate increase. This is a misstatement of the law, in two regards.

First, the new pole attachment and conduit occupancy rates were approved, in no uncertain terms, in the September 2016 Order. The Commission, therein, specifically stated that the rates proposed by the Company, as well as the resultant rate impacts, were approved. And it is black-letter law that Commission orders are effective immediately upon issuance, unless stated otherwise. “Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission.”<sup>3</sup>

Thus, although the compliance tariff had not yet been filed, the Commission’s approval of the rate increase (or decrease, with regard to conduit occupancies) was effective upon the issuance and journalization of the September 2016 Order. Even if the April 2017 Entry had granted a rate increase effective October 11, 2016, which it did not, that rate increase could not have been retroactive, as the rates were approved prior to October 11, 2016.

The second reason why the April 2017 Entry did not constitute an illegal retroactive rate increase is that the Commission had already determined that the changes to pole attachment and conduit occupancy rates being considered herein are not subject to the requirements applicable to proposed increases in rates charged to customers for electric services. In the Rule-Making Proceeding, OCTA argued that any increases in

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<sup>3</sup> R.C. 4903.15.

attachment or occupancy rates could be made only in the context of a standard rate case under Chapter 4909 of the Ohio Revised Code. The Commission denied OCTA's argument.<sup>4</sup> If Chapter 4909 does not apply to this proceeding, then the claim of retroactive rate-making must be denied.

B. The April 2017 Entry Did Not Have the Effect of Approving New Rates and Terms for a Prior Period

Extending the logic of its first argument, OCTA next claims that the April 2017 Entry's "approval of revised rates" should not result in the Company being allowed to substitute new tariff pages for the prior ones that had then been on file. While it is true that Ohio law requires utilities to charge on the basis of approved tariffs that are filed with the Commission, it is critically important to understand that (i) the rates and terms for these attachments and occupancies had already been approved in the September 2016 Order and (ii) the new tariff pages were properly on file, in both the above-captioned proceeding and in the Company's Commission-approved tariff docket, as of October 11, 2016.

Thus, the Commission's April 2017 Entry did not result in the substitution of newly approved rates and terms for ones that were already in effect.

C. The April 2017 Entry Properly Set the Effective Date for the Approved Tariff

Finally, OCTA asserts that the Commission, in its April 2017 Entry, should have prohibited Duke Energy Ohio from charging the new rates prior to "the date on which the newly approved tariff is properly on-file [*sic*] with the Commission." It reasons that the Company should not have filed its compliance tariffs in the tariff docket, as they had not

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<sup>4</sup> *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD, Entry, at pg. 6 (April 22, 2015).

yet been approved. OCTA seeks an order from the Commission, directing the Company to rebill any attachers or occupiers that were billed under the new rate prior to the journalization of the April 2017 Entry and, apparently, the subsequent refiling of the tariffs that have already been filed pursuant to the Commission's directive.

OCTA seems not to understand that the September 2016 Order provided all of the approval of rates and terms that was necessary. That order did not state that revised tariffs should be filed for approval by the Commission. It simply said that they should be revised as directed and then filed.

As OCTA is well aware, the Commission does, at times, direct utilities to file tariff revisions for the Commission's review and subsequent approval. For example, in a 2002 base rate case, the Commission specifically stated that "[t]he rates shall be effective upon approval of the necessary tariff revisions."<sup>5</sup>

On the other hand, the Commission also has a history of ordering modifications to be made to tariffs and ordering them to be filed, with those modifications, without requiring subsequent review and approval. For example, in a 2002 Columbia Gas proceeding for which OCTA's counsel of record was the assigned attorney examiner, Columbia was ordered to modify its proposed tariff in several regards and to then final-file it. "COH should modify those areas and final-file its tariffs accordingly."<sup>6</sup>

In the Commission's September 2016 Order, it did not specify that it would subsequently review and approve the tariffs that it required the Company to file. To the extent that there was any lack of clarity in that regard, the Commission has indisputably

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<sup>5</sup> *In the Matter of the Application of Ohio Cumberland Gas Company for an Increase in Rates*, Case No. 02-1200, Opinion and Order, at pg. 4 (January 23, 2003).

<sup>6</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc., to Revise its Columbia Customer Choice Program*, Case No. 02-2903-GA-ATA, Entry, at pg. 6 (April 29, 2004).

clarified its intent by setting the effective date for the tariffs as the date they were filed in the docket of this case and the Company's tariff case.

### **III. CONCLUSION**

Duke Energy Ohio respectfully submits that the Commission should deny the OCTA's Application for Rehearing.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 22nd day of May, 2017, to the parties listed below.

/s/ Jeanne W. Kingery

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