

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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|-------------------------------------------------|---|-------------------------|
| In the Matter of the Annual Application of Duke |) | |
| Energy Ohio, Inc. for an Adjustment to Rider |) | Case No. 17-2318-GA-RDR |
| AMRP Rates. |) | |

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|-------------------------------------------------|---|-------------------------|
| In the Matter of the Application of Duke Energy |) | Case No. 17-2319-GA-ATA |
| Ohio, Inc. for Tariff Approval. |) | |

**POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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TABLE OF CONTENTS

| | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| I. BACKGROUND | 1 |
| II. BURDEN OF PROOF AND STANDARD OF REVIEW | 3 |
| A. Burden of Proof..... | 3 |
| B. Standard of Review..... | 4 |
| III. RECOMMENDATIONS..... | 5 |
| A. The proposed Settlement violates regulatory principles and practices that would result in unlawful and unjust charges that consumers would pay..... | 5 |
| 1. The inclusion of an Uncollectible Account Expense gross-up factor in the riders violates regulatory principles and practices because there is an annual true up for over- or under- collection of the amounts consumers pay through the riders. | 5 |
| 2. The inclusion of an Uncollectible Account Expense gross-up factor in the Riders violates regulatory practices..... | 6 |
| 3. Failure to reduce the charges consumers pay to reflect the lower tax rate that went into effect on January 1, 2018 is contrary to Ohio law..... | 8 |
| B. The proposed Settlement, as a package, offers little, if any, benefits to customers or the public interest. | 10 |
| 1. Failing to address the over-collection of taxes from January 1, 2018, to April 30, 2018, under the guise of PUCO consistency among utilities does not benefit customers or the public interest..... | 10 |
| 2. Failing to instruct Duke to file for a base rate case prevents customers from realizing the full benefits of the AMRP or other programs performed by Duke. | 11 |
| IV. CONCLUSION..... | 14 |

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I. BACKGROUND

This case is about how much consumers should pay for replacement of gas mains and gas risers. Duke Energy Ohio, Inc. (“Duke”) filed an annual application for the adjustment of the Accelerated Main Replacement Program Rider (“AMRP”) and the Riser Replacement Program Rider (“RRP”) (collectively, the “Riders”). Duke’s application seeks authority to continue charging customers for costs associated with the AMRP and the RRP. The Office of the Ohio Consumers' Counsel (“OCC”), an intervenor in this case, files this brief on behalf of Duke’s approximately 390,000 residential customers.

The AMRP has existed since 2002; the Public Utilities Commission of Ohio (“PUCO”) approved a stipulation in a rate case involving Duke’s predecessor company.¹ In 2008, the PUCO authorized Duke to continue the AMRP and established the RRP.² In

¹ *In re The Cincinnati Gas & Elec. Co.*, Case No. 01-1228-GA-AIR, *et al.*, Opinion and Order (May 30, 2002) (“CG&E Rate Case”).

² *In re Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, *et al.*, Opinion and Order (May 28, 2008).

2013, the PUCO approved another stipulation that modified various aspects of the AMRP and RRP.³ The PUCO's Order required Duke to apply for approval of new tariffs every year before charging customers for the two replacement programs.⁴ The replacement of bare steel, cast iron mains, and risers covered under the AMRP and RRP was completed in 2015. This case began on November 28, 2017 when Duke docketed its pre-filing notice. Duke filed its application on February 26, 2018. Although Duke has proposed decreasing the amount it collects from customers through the Riders, the PUCO should determine whether the charges customers pay through the Riders should be reduced further.

On January 1, 2018, Duke's statutory and normalized federal corporate tax liability decreased from 35% to 21%, as a result of the Tax Cuts and Jobs Act of 2017 ("Federal Tax Act").⁵ Duke's application states the Pre-Tax Rate of Return "has been adjusted to reflect a reduction of the Corporate tax rate...."⁶ OCC and PUCO Staff filed comments on March 28, 2018. Among the issues OCC raised is that the amount Duke collects from customers through the Riders should be further reduced to account for an over-collection of federal taxes from January 1, 2018 through April 30, 2018.⁷ Duke's pre-tax rate of return adjustment only reflects Duke's lower tax liability beginning May 1, 2018.

On April 5, 2018, Duke filed a Stipulation and Recommendation ("Settlement") that was reached between Duke and PUCO Staff. But, the Settlement fails to address

³ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order (November 13, 2013).

⁴ *Id.* at 13.

⁵ See Pub. L. No. 115-97 (2017).

⁶ Duke Exhibit 2 at Schedule 1, Note 1.

⁷ See OCC Exhibit 4 at 4; See also OCC Exhibit 1 at 9-16.

several core issues of this case and would result in unlawful rates. The Stipulation would have the PUCO disregard its own precedent and statutory duty to the detriment of Duke's customers. Thus, OCC respectfully requests the PUCO reject the Settlement. In addition, OCC requests that the PUCO reduce the amount Duke will collect from customers through the Rider to reflect the reduction of Duke's Federal tax liability from January 1, 2018, to April 30, 2018. The amount collected through the Riders should be further reduced to remove an inappropriate Uncollectable Account Expense gross up factor used by Duke. Further, Duke should be instructed to file a base rate case to pass on to consumers the cost of savings that have occurred as a result of these infrastructure replacement programs.

II. BURDEN OF PROOF AND STANDARD OF REVIEW

A. Burden of Proof.

Since the inception of the AMRP and RRP, the PUCO has reauthorized the Riders through a number of proceedings. In Case No. 07-589-GA-RDR, the PUCO approved a stipulation that continued the AMRP and RRP.⁸ Under the stipulation, Duke assumed the burden of proof in its annual filings for the Riders.⁹ When the PUCO reauthorized the Riders, in 2013, the burden of proof remained with Duke.¹⁰ Even if Duke hadn't specifically assumed the burden of proof through the stipulation, as the applicant Duke would still have the burden under R.C. 4909.18.

⁸ *In re Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, *et al.*, Opinion and Order (May 28, 2008).

⁹ *Id.* at Stipulation and Recommendation (Feb. 28, 2008) at 8.

¹⁰ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order (November 13, 2013).

R.C. 4909.18 states “[A]t such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility.”¹¹ There is no dispute that Duke is a public utility as defined in R.C. 4909.01 and 4905.02. There was a hearing on April 10, 2018, to determine if the application is just and reasonable. As such, Duke bears the burden of proof to show that its application is just and reasonable.

B. Standard of Review

The PUCO has the responsibility to approve rates that are just and reasonable.

R.C. 4905.22 reads as follows:

All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

In addition, the Supreme Court of Ohio (“Court”) in *Consumers’ Counsel v Pub. Util. Com.*¹² considered whether a just and reasonable result was achieved with reference to criteria adopted by the PUCO in evaluating settlements:

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?
3. Does the settlement package violate an important regulatory principles or practice?

¹¹ R.C. 4909.18.

¹² 64 Ohio St.3d, 123, 126 (1992).

III. RECOMMENDATIONS

The proposed Settlement, if approved, will result in unjust and unreasonable charges that customers will pay. Because, the charges will be unjust and unreasonable the stipulation cannot pass the PUCO's three-prong test. The Settlement violates regulatory principles, Ohio law, and as a package fails to benefit customers or the public interest.

A. The proposed Settlement violates regulatory principles and practices that would result in unlawful and unjust charges that consumers would pay.

1. The inclusion of an Uncollectible Account Expense gross-up factor in the riders violates regulatory principles and practices because there is an annual true up for over- or under- collection of the amounts consumers pay through the riders.

Duke calculated a pre-tax rate of return that includes a miscalculated gross up factor. Duke calculated its pre-tax rate of return based on its capital structure, cost of debt, cost of common equity, and a gross-up factor.¹³ But, the gross-up factor erroneously contained an Uncollectible Account Expense factor.

An Uncollectible Account Expense factor is inappropriate because the riders are subject to annual reconciliation and true-up. OCC Witness Daniel Duann testified that there are no uncollectible account expenses associated with the rider because of the annual reconciliation and true-up.¹⁴ But, Duke Witness Sarah Lawler wrongfully asserts “there has never been an annual reconciliation and true-up in the entire history of Rider AMRP.”¹⁵ This is simply not true.

¹³ OCC Exhibit 1 at 5:8-12.

¹⁴ *Id.* at 5:14-17.

¹⁵ Duke Exhibit 4 at 2:10-11.

In approving every annual filing since the last rate case the PUCO has stated, “[I]n accordance with the Settlement approved in the *CG&E Rate Case*, the rider was to be adjusted annually to account for any over- or under- recovery....”¹⁶ In fact the PUCO has previously reduced the revenue requirement because Duke over-collected. In the 2007 annual filing the PUCO Staff determined that Duke over-collected from customers under the AMRP rider.¹⁷ As a result, the PUCO reduced the revenue requirement for the next twelve-month period of the AMRP rider.¹⁸ Thus, the Riders are subject to annual reconciliation that includes a true up for over- or under-collection.

Because there is an annual reconciliation and true-up, there is no bad debt associated with the Riders. Thus, there are no uncollectible expenses associated with the Riders. Including an Uncollectible Account Expense factor in the amount consumers pay through the Riders is unreasonable.

2. The inclusion of an Uncollectible Account Expense gross-up factor in the Riders violates regulatory practices.

In a belated attempt to justify its overstated and unreasonable gross-up factor, Duke asserts that the Uncollectible Account Expense does not represent bad debt. Duke Witness Lawler claimed that the uncollectible account expense factor is not a bad debt rider.¹⁹ Even if this assertion is true the inclusion of the Uncollectible Account Expense

¹⁶ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider AMRP Rates to Recover Costs Incurred in 2016*. Case No. 16-2209-GA-RDR, *et al.*, Finding and Order (Apr. 19, 2017) at ¶4; *See also* Case No. 15-1904-GA-RDR, Opinion and Order (Apr. 20, 2016) at ¶3; Case No. 14-2052-GA-RDR, Opinion and Order (April 22, 2015) at ¶2; Case No. 13-2231-GA-RDR, Opinion and Order (Apr. 23, 2014) at 2; Case No. 12-3028-GA-RDR, Opinion and Order (April 24, 2013) at 2; Case No. 11-5809-GA-RDR, Opinion and Order (April 25, 2012) at 2.

¹⁷ *In re Cincinnati Gas & Electric No Known as Duke Energy Ohio, Inc.*, Case No. 01-1228-GA-AIR, *et al.*, Sixth Opinion and Order (Apr. 18, 2007).

¹⁸ *Id.* *See also* Case No. 01-1228-GA-AIR, Stipulation Exhibit 1 (March 27, 2007).

¹⁹ Duke Exhibit 4 at 3:7-12.

factor is still inappropriate. Witness Lawler testified that the Uncollectible Account Expense accounts for “collection fees and time value of money components that are not recovered under the gas operations uncollectible rider (Rider UE-G)”²⁰ But, this is contrary to PUCO practice with other gas utilities.

As OCC Witness Duann pointed out, other Ohio gas utilities-such as East Ohio Gas Company and Columbia Gas of Ohio do not include any items other than federal income tax in the gross-up of the pre-tax rate of return used in their pipeline infrastructure replacement programs.²¹ No other utility attempts to include additional gross up factors in their riders. Thus, it would be contrary to legitimate previously sanctioned utility practices to now allow Duke such a gross-up.

In an attempt to further justify the gross-up, Witness Lawler testified that the Uncollectible Account Expense factor is appropriate because “(it) has been used in each annual adjustment of Rider AMRP rates since the Company’s last gas distribution base rate case.”²² Simply allowing Duke to continue doing business as usual to the detriment of customers would be unreasonable. The PUCO must ensure under R.C. 4905.22 that the charges Duke collects from customers are just and reasonable. Including the Uncollectible Account Expense factor in the riders results in unjust and unreasonable charges to consumers.

²⁰ *Id.* at 3:10-12.

²¹ *Id.* at 6:5-12.

²² *Id.* at 4:3-4.

3. Failure to reduce the charges consumers pay to reflect the lower tax rate that went into effect on January 1, 2018 is contrary to Ohio law.

The Federal Tax Act reduced Duke's statutory tax liability beginning on January 1, 2018. Parties do not dispute that Duke reduced the amount it seeks to collect from customers through the Riders in its application for new rates to reflect the lower federal tax liability. But, parties also do not dispute that Duke did *not* reduce the amount it seeks to collect from customers through the Riders to reflect its reduced federal income tax liability during the period January 1, 2018 to April 30, 2018.²³ Duke and the PUCO Staff believe that it is not necessary to adjust the charges to customers in this proceeding. In support of the stipulation Witness Lawler testified that over-collection of taxes from January 1, 2018 to April 30, 2018 should be addressed in Case No. 18-0047-AU-COI ("Tax COI").²⁴ But, making customers continue to pay for over-collection of taxes contradicts Ohio law.

Court precedent requires the PUCO to account for changes to tax rates under the Federal Tax Act when setting new rates in pending cases before it. In *East Ohio Gas Co. v. PUCO*,²⁵ the PUCO knew that tax rates changed from the time of the test period to the time that new rates would actually be in effect.²⁶ The Court found that "[i]t was the duty of the commission to consider not only the taxes actually assessed during the test period, but to compute what they would be after the test period in view of the change in

²³ The application requests the new rates to be effective May 1, 2018.

²⁴ Duke Exhibit 4 at 4:13-16.

²⁵ 133 Ohio St. 212 (1938).

²⁶ *Id.* at 226.

laws....”²⁷ Because the PUCO knew about the change in tax rate at the time of its order, its decision to set charges to customers using the old tax rates was “arbitrary and unreasonable.”²⁸ The Court remanded the case to the PUCO and instructed it to determine the amount of taxes that the utility would actually pay when setting new charges to customers.²⁹

The PUCO has in past cases followed the Court’s dictate and made adjustments that reflect changes in the actual taxes a utility is liable for. In an AEP Ohio rate case,³⁰ for example, the PUCO cited *East Ohio Gas* and concluded: “Ohio Law requires that all known changes in the tax laws after the test year must be recognized in setting rates.”³¹ Accordingly, the PUCO approved the utility’s charges to customers based on a new tax rate that went into effect after the test period ended.³²

While this proceeding is not a base rate case, the PUCO is setting new rates that Duke will collect from customers. In this proceeding the PUCO’s duty is not satisfied by simply changing the rates effective May 1, 2018. Because the annual true up adjusts the rates to reflect any over- or under-collection during the preceding 12-month period, the PUCO has a duty to reduce the rates customers pay to reflect the over-collection. In this case, the PUCO is aware of Duke’s reduced federal tax liability. The reduction of the tax

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ PUCO Case No. 78-676-EL-AIR, 1979 Ohio PUC LEXIS 2 (Apr. 16, 1979).

³¹ *Id.* at *41.

³² *Id.* See also *In re Application of the Cleveland Elec. Illuminating Co. for Authority to Amend & Increase its Filed Schedules Fixing Rates & Charges for Elec. Serv.*, Case No. 86-2025-EL-AIR, 1987 Ohio PUC LEXIS 28 (Dec. 16, 1987) (rejecting utility proposal to use higher tax rate when new lower tax rate was in effect).

liability is one that can be easily calculated. Setting rates that do not account for the over-collection will result in “arbitrary and unreasonable” charges to customers. Thus, it would be unlawful for the PUCO to simply wait for a result from the Tax COI to pass the benefits of the Federal Tax Act along to customers. In addition, there is no benefit for customers or the public in postponing providing the full benefits of the Federal Tax Act to Duke’s customers.

B. The proposed Settlement, as a package, offers little, if any, benefits to customers or the public interest.

1. Failing to address the over-collection of taxes from January 1, 2018, to April 30, 2018, under the guise of PUCO consistency among utilities does not benefit customers or the public interest.

Duke asserts that it is in the public interest to address changes in the tax code in the Tax COI. Witness Lawler testified that addressing the over-collection associated with Duke’s federal tax reduction would guarantee that utilities are treated consistently.³³ But, this contradicts Duke’s position in the Tax COI. In the Tax COI Duke advocates for the PUCO “to take the time necessary to carefully evaluate the adjustments that it requires, and it should do so on a utility-specific basis.”³⁴ In addition, the Joint Application for Rehearing, which Duke signed, advocates that the impacts from the Federal Tax Act should flow through the riders under “the terms of the approved rider mechanism.”³⁵ The AMRP and RRP have an approved rider mechanism, the true-up and reconciliation, rates should be reduced to reflect the over-collection of taxes. But, Duke seeks to delay the

³³ Duke Exhibit 4 at 4:13-16.

³⁴ Case No. 18-47-AU-COI, Reply Comments of Duke Energy Ohio, Inc. (March 7, 2018) at 12.

³⁵ Case No. 18-47-AU-COI, Joint Application for Rehearing (Feb. 9, 2018) at 8-9.

benefits of the Federal Tax Act because Duke continues to deny the PUCO's jurisdiction in this manner.³⁶

If Duke truly worried about consistency it would reduce the amount collected from customers through the Riders to reflect the lower tax rate beginning January 1, 2018. As pointed out by OCC Witness Duann, a number of other gas utilities have lowered customers' rates to reflect the change beginning January 1, 2018.³⁷ Specifically, East Ohio Gas Company and Columbia Gas of Ohio have proposed reducing the amount to be collected from customers for pipeline replacement programs to reflect the lower federal income tax rate beginning January 1, 2018.³⁸ Thus, if consistency is Duke's goal then it would reduce the amount to be collected from customers in this proceeding to address for the over-collection of taxes from January 1, 2018 to April 30, 2018.

2. Failing to instruct Duke to file for a base rate case prevents customers from realizing the full benefits of the AMRP or other programs performed by Duke.

Duke's most recent base rate case was filed in 2012.³⁹ OCC Witness James Williams testified that since the most recent rate case Duke has completed projects associated with the AMRP, RRP, and Advanced Utility Rider.⁴⁰ But, customers are not receiving the full benefits associated with the expected reduction of operating costs associated with any of these programs. In the AMRP and RRP riders customers are only

³⁶ See Case No. 18-47-AU-COI, Initial Comments of Duke Energy Ohio, Inc. (Feb. 15, 2018).

³⁷ OCC Exhibit 1 at 12:14-13:9.

³⁸ See Case No. 17-2177-GA-RDR, Application, Attachment A, Schedules 1, 17 and 17A (Feb. 28, 2018); Case No. 17-2374-GA-RDR, Application, Schedules AMRP-1, R-1, and AMRD-1 (Feb. 27, 2018).

³⁹ See Case No. 12-1685-GA-AIR, *et al.*

⁴⁰ OCC Exhibit 2 at 8:4-10.

receiving the minimum guaranteed stipulated savings.⁴¹ The current annual \$312,532 guaranteed operational savings received by customers pales in comparison to the hundreds of millions of dollars of customer money Duke spent on the AMRP.

Witness Lawler testified that customers benefit if Duke does not file a rate case.⁴² In addition, Lawler argues that under a rate case, customers would see an increase in rates to account for higher operational costs and the net plant of completed projects would be “locked into” rates.⁴³ But Ms. Lawler fails to recognize the benefits of a rate case for customers. As OCC Witness Williams testified, single-issue ratemaking (like the AMRP) enables Duke to cherry pick what costs it seeks to collect, while ignoring operational savings that could reduce customer bills.

OCC Witness Williams testified to a number of benefits customers will receive from Duke filing a base rate case. First, a rate case will eliminate the AMRP, RRP, and Advance Utility riders, including costs associated with tracking and monitoring these riders, from customers’ monthly bills.⁴⁴ Second, it will eliminate deferrals (i.e., carrying charges) and costs associated with Duke’s pipeline inspection program.⁴⁵ Third, a rate case provides a comprehensive review of Duke’s expenses to avoid double collecting on costs from customers.⁴⁶ Finally, a comprehensive review of Duke’s Operation and Maintenance expenses should help verify operational savings and also evaluate improvements of safety and reliability of the distribution system achieved by the rider

⁴¹ See *id.* at 5:12-19; Duke Exhibit 4 at 6:3-9.

⁴² Duke Exhibit 4 at 6:14-22.

⁴³ *Id.*

⁴⁴ OCC Exhibit 2 at 8:12-17.

⁴⁵ *Id.* at 7:13-16.

⁴⁶ *Id.* at 7:10-12.

programs. This should result in customers receiving benefits, among others, in the form of lower rates due to verified operational savings that can help offset the massive spending that Duke has made in the AMRP, RRP, and similar programs.⁴⁷

It would benefit customers for the PUCO and interested parties to have an opportunity to contemporaneously review all of Duke's revenues and expenses. Such a review is necessary for Duke to demonstrate that the rates it is charging customers are just and reasonable.⁴⁸ In addition, it is good regulatory practice and would benefit the public interest for Duke to file for a base rate case. The PUCO has previously held the review of utility rates in a distribution rate case "it is a prudent regulatory practice to gain a holistic understanding of the regulated distribution company on a regular basis."⁴⁹

The opportunity to gain a holistic understanding includes evaluating past programs for effectiveness versus cost comparison. Because the AMRP and RRP have been completed for almost three years, the PUCO should evaluate the effects of these programs on Duke's overall safety and reliability. The PUCO should also evaluate the programs' operations and maintenance costs. Simultaneously assessing these data will assist in setting future PUCO policy in determining what projects will result in necessary and adequate service and facilities.⁵⁰ And of more immediate importance, the PUCO should require Duke to file an application for a base rate case to demonstrate that it is charging customers just and reasonable rates.

⁴⁷ *Id.* at 6:17-19.

⁴⁸ R.C. 4905.22.

⁴⁹ *In re the Application of Ohio Edison Co., the Cleveland Elec. Illuminating Co., and the Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Eighth Energy on Rehearing (Aug. 16, 2017) at 90-91.

⁵⁰ *See* R.C. 4905.22.

IV. CONCLUSION

The proposed Settlement offered by Duke and the PUCO Staff would result in unjust and unreasonable charges to customers. The PUCO, when setting new rates, is required to reduce the amount collected from customers through the Riders to reflect for known reductions that occurred as a result of the Federal Tax Act. Because the Riders in this proceeding are subject to annual reconciliation and true up, the PUCO should reduce the amount collected from customers through the Riders to account for the over-collection of federal corporate tax from January 1, 2018 through April 30, 2018. In addition, the PUCO should no longer permit Duke to have a pre-tax gross-up factor that includes an Uncollectible Account Expense factor. Moreover, Duke should be instructed to file a base rate case to resolve a number of the issues presented in this proceeding. A rate case will allow the PUCO and interested parties the opportunity to comprehensively review Duke's charges to consumers.

Ultimately, the proposed Settlement benefits only Duke and is not in the public interest. Thus, the PUCO should reject the Settlement and make the charges collected through the Riders just and reasonable. This means that Duke's customers will get a larger credit on their bills than the credit proposed in the Settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Post-Hearing Brief was served on the persons stated below via electronic transmission this 16th day of April 2018.

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