

In the Matter of the Application of Ohio Edison Company for Approval of a Tariff Change.)
) **Case No. 18-564-EL-ATA**
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The facts and arguments supporting this Application for Rehearing are set forth in the attached memorandum in support. The OCTA respectfully requests that the Commission grant rehearing, suspend the new pole rate and further investigate consistent with the OCTA's objections filed on May 22, 2018.

Respectfully Submitted,

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**MEMORANDUM IN SUPPORT OF
THE APPLICATION FOR REHEARING OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

I. INTRODUCTION

The Commission automatically approved a new pole attachment rate of \$11.82 for OE on July 1, 2018. That decision should be reversed because the Commission failed to investigate whether the significantly lower amount of accumulated deferred taxes (“ADT”) included in OE’s pole-rate calculation appropriately had an effect of increasing OE’s net bare-pole costs, and the pole rate. This was not a minor decrease in ADT – it dropped by 50% and the magnitude of that change is important. Also important is the fact that the decrease in ADT occurred from an accounting change in response to a tax law that had not taken effect and therefore the counterbalancing benefits of that tax law are missing from the pole-rate calculation. The OCTA pointed out that, if the significant decrease in ADT is allowed in the pole-rate calculation, the new tax law is having a **harmful effect** on the OE customers paying pole attachments. The Commission should have further investigated whether it was proper for OE to take advantage of the unique circumstances associated with an accounting change in order to extract a higher pole rate² and whether a rate based on those circumstances constitutes a just and reasonable rate. The Commission also erred in not suspending automatic approval because of the Commission’s concurrent investigation into implementation of the new tax law with which this proceeding could conflict, given that the decision here could create a precedent and the pole rate is not subject to later adjustment/reconciliation. The Commission Staff did not address these points and it was error for the Commission to not have conducted that investigation. Lastly, it was error

² The OCTA recognizes that OE’s calculation includes other cost-based inputs, which the OCTA is not challenging. Rather, the OCTA’s challenge is specific to the apparent unique and non-cost-based effect that the ADT-related accounting change had on the pole rate.

for the Commission to have relied upon OE's improper, procedurally deficient and unfair response when automatically approving the pole rate.

II. ARGUMENTS

- A. It was unjust and unreasonable for the Commission to automatically approve the pole attachment rate proposed by OE without investigating whether the rate calculation properly included a significantly reduced amount of accumulated deferred taxes, the reduction of which was made as an accounting change in anticipation of a tax law that did not take effect until 2018.**

OE proposed a new pole rate based on 2017 costs and data.³ OE included a much lower amount of ADT in its pole-rate calculation than it has in its prior cases – approximately 50% less. A comparison of the ADT amounts in the company's last three pole-rate calculation worksheets (as contained on line 12 of each worksheet included in the last three applications) shows the dramatic change:

Year-End	ADT Amounts	Case Number
2014	612,864,141	15-975-EL-ATA
2016	600,366,492	17-2006-EL-ATA
2017	298,758,038	18-564-EL-ATA

OE's current pole-rate application did not explain the basis for the dramatic decrease in the amount of ADT. OE simply cited to its FERC Form 1 as the source for the current ADT data. OE's FERC Form 1 stated that OE reduced its ADT liability at December 31, 2017, because of the Tax Cuts and Jobs Act of 2017 ("TCJA").⁴ Also according to its FERC Form 1, OE offset that reduction with a regulatory liability. In other words, OE made a non-cost-based accounting change at the end of 2017 in anticipation of the TCJA taking effect in 2018 and OE

³ See OE Application Exhibit C.

⁴ See Exhibit 1 to the OCTA Objections, Page 123.1 of OE's FERC Form 1.

moved ADT out of the accounts used in the pole-rate calculation and into a different account in anticipation of potential future regulatory treatment but ahead of any actual change in cost for the utility. Nothing in OE's pole-rate calculation sheet or application reflects that the ADT moved into another account was otherwise included in its pole-rate calculation.

As reflected in Ohio Administrative Code Rule 4901:1-3-04(D)(1), the pole rates are to be cost-based. That rule states in pertinent part:

A [pole] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space * * * which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the public utility attributable to the entire pole * * *.

The OCTA identified that the change in ADT in OE's pole-rate calculation has had such an effect on the calculation causing a **perverse impact** and, as a result, raised a concern that the OE's rate may not be a just and reasonable rate. The accounting change was not due to additional costs in providing pole attachments, yet it appears to have increased the pole rate. The record in this matter demonstrates the Commission should still further investigate as requested by the OCTA:

- There is a dramatic decrease in the ADT input to the pole formula that, due to its magnitude, has a significant and punitive effect on the pole rate;

- The applicant failed to explain the dramatic decrease or justify the resulting rate;⁵
- The dramatic change in ADT is not cost-related; rather, it was due to an accounting change in anticipation of a tax law that had not taken effect.
- The law involved – the TCJA – did not intend to trigger increased pole rates; and
- A party identified the punitive effect of the dramatic change.

Altogether, the circumstances warrant more – the Commission should not simply verify the numerical accuracy of the inputs and whether the applicant ran them through the pole formula.

That further investigation, however, did not take place before the rate was automatically approved. The Staff's review and recommendation, filed on June 29, 2018, reflects only that OE's source data matches the inputs and that OE followed the formula. Staff's made no mention of the OCTA's objections, made no analysis of whether the ADT input should have been included as it was, and did not analyze the propriety of the ADT input.

It was unjust and unreasonable for the Commission to allow OE's higher pole rate to go into effect without such further investigation. The Commission should reverse the automatic approval of OE's pole rate and further investigate.

⁵ OE did not explain the significant reduction in ADT in its application and OE's response to the OCTA's objections should not be relied upon to fill in that gap. Rather, OE's response should be stricken for all the reasons set forth in the OCTA's June 28, 2018 Motion to Strike. (That motion has not yet been ruled on.)

B. It was unjust and unreasonable for the Commission to automatically approve the pole attachment rate proposed by OE when the Commission is still investigating how pole attachment rates are affected by the TCJA in Case No. 18-47-AU-COI, and what the proper treatment of the Excess ADIT created by the TCJA should be for purposes of the pole attachment formula.

Automatic approval of OE's rate was also counterproductive to the Commission's ongoing investigation of the implementation of the TCJA, given that no tax-related savings have been evident but the Commission is intending them to carry through to customers.⁶ The automatic approval could be precedential and the pole rate is not subject to adjustment or reconciliation. Once effective, the pole rate remains until the utility decides to file a future pole-rate application which will be based on other year-end data and costs. The interim period would not be captured, including the outcome of the Commission's TCJA investigation in Case No. 18-47-AU-COI and in particular, including the Commission's investigation into how pole attachment rates are affected by the TCJA and what the proper treatment of the Excess ADIT created by the TCJA should be for purposes of the pole attachment formula. The Commission's automatic approval of OE's pole rate in this context was, therefore, unjust and unreasonable. The Commission has stated that the tax benefits of the TCJA will be returned to customers,⁷ but the OE rate adversely affects the pole attaching customers without the upside of the actual tax reductions associated with the TCJA. With the utility controlling when it next seeks a pole rate adjustment, it holds all the cards and has the opportunity to undermine the Commission's investigation in the TCJA proceeding to the detriment of the pole attachers. Automatic approval was unjust and unreasonable.

⁶ See *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Entry at ¶3 (January 10, 2018) and Entry on Rehearing at ¶21 (April 25, 2018).

⁷ *Id.*

C. In automatically approving the pole attachment rate, it was unjust and unreasonable for the Commission to rely on the improper response filed by OE on June 22, 2018, and not grant the pending motion to strike.

Since the Commission has not ruled on the OCTA's motion to strike OE's June 22 response, OE's response is part of the record that the Commission reviewed. It was error, however, for the Commission to have reviewed and relied on OE's response in automatically approving the proposed rate. OE's response was untimely, procedurally deficient, without good cause, and unjustified as explained in the OCTA's motion to strike. The OCTA will not repeat all those arguments here; instead, it incorporates them by reference.

The OCTA emphasizes, however, because pole attachment cases have expedited reviews and an automatic approval process, it was unfair so far into the process for the Commission to not strike a substantive response through which OE built its record and sought to justify an anomalous ADT input that it had failed to address in its original application. OE's response should have played no part in the Commission's decision to automatically approve the application and it was error for the Commission to have relied on OE's response and not granted the OCTA motion to strike.

III. CONCLUSION

The OCTA supports the pole-rate formula adopted by the Commission in its administrative rules. The Commission should not, however, blithely allow the utility's formula inputs to result in punitively higher rates, particularly when, as here, the record shows that one specific input (ADT) is tied to a non-cost-based accounting change related to a change in federal tax law: a tax law change which was not in affect for the subject year, and which change should be benefitting customers. The Commission's automatic approval of OE's new pole rate occurred without further investigation of the anomaly, without consideration of its impact on the concurrent TCJA investigation, and with reliance on an improper and unfair pleading, all of

which were errors. For these reasons, it was unjust and unreasonable for the Commission to have automatically approved OE's pole rate. The Commission should grant rehearing, suspend the pole rate and investigate further consistent with the OCTA's objections in this matter.

Respectfully Submitted,

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Summary: Application for Rehearing electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telecommunications Association