

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )	
Energy Ohio, Inc., for Implementation of )	Case No. 18-1185-EL-UNC
the Tax Cuts and Jobs Act of 2017. )	

In the Matter of the Application of Duke )	
Energy Ohio, Inc., for Approval of Tariff )	Case No. 18-1186-EL-ATA
Amendments. )	

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**DUKE ENERGY OHIO'S MEMORANDUM CONTRA**

**MOTION TO INTERVENE**

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On July 25, 2018, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed an application (Application) in the above-captioned proceedings to establish a rider to credit its electric customers with the benefits of the Tax Cuts and Jobs Act of 2017 (TCJA). On August 14, 2018, the Ohio Cable Telecommunications Association (OCTA) moved to intervene in these proceedings, pursuant to the provisions of R.C. 4903.221 and O.A.C. 4901-1-11. Duke Energy Ohio opposes the intervention of OCTA. For the reasons described in detail below, the Company submits that the Public Utilities Commission of Ohio (Commission) should deny OCTA's motion to intervene.

**Argument**

Ohio law allows for intervention only where the potential intervenor "may be adversely affected by" a proceeding.<sup>1</sup> In order to determine whether the person may be adversely affected, the Commission is required to consider four specified criteria:

- (1) The nature and extent of the prospective intervenor's interest;

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<sup>1</sup> R.C. 4903.221

- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.<sup>2</sup>

The Commission's administrative rule, promulgated under the authority of that statute, provides some additional detail. The rule states that intervention is permissible where the person "has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties."<sup>3</sup> In determining whether that criterion is met, the rule also identifies various factors to be considered. Those factors duplicate the statutory factors, with one addition related to prior representation by other parties.<sup>4</sup>

OCTA does not meet these required tests. It will not be adversely affected by this proceeding, the legal position advanced by OCTA is unrelated to the merits of this case, its intervention would unduly prolong or delay the proceedings, and its intervention will not contribute to the full development or equitable resolution of the factual issues raised in the proceedings.

OCTA argues that, because pole attachment rates include a tax component, OCTA has an interest in these proceedings. It suggests that there is some lack of clarity as to whether the proposed credit rider would apply to pole attachment rates, even though the Application is quite clear that the rider would provide a credit to electric distribution customers. The matters

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<sup>2</sup> R.C. 4903.221(B)

<sup>3</sup> O.A.C. 4901-1-11(A)(2)

<sup>4</sup> O.A.C. 4901-1-11(B)

addressed in the Application are unambiguous and do not include adjustment of pole attachment rates. Therefore:

- OCTA's interest, as expressed in its Motion, is solely related to pole attachment rates, which rates are not addressed by the Application. Thus, it has no interest in the matters covered by the Application.
- OCTA's legal position is that the TCJA has an impact on pole attachment rates, because taxes are a component of the formula used to calculate such rates. This argument has no relation to the merits of the Company's Application.
- Because OCTA's interest is unrelated to any of the issues in the Application, its intervention would, if granted, unduly prolong or delay resolution of the proceedings.
- OCTA expresses no interest in the mechanism proposed by the Company to provide credits to electric distribution customers. Thus, it is unlikely that OCTA would significantly contribute to full development and equitable resolution of any factual issues.

Duke Energy Ohio does not disagree that taxes are a component of the calculation of pole attachment rates. However, OCTA's justification for intervention misconstrues the impact of the TCJA as it relates to the Commission-approved pole attachment formula rate. Updating the formula rate necessarily requires updating all components of the formula, not just the tax portion. The Commission-approved formula for pole attachment rates is based on audited historical information from Duke Energy Ohio's Form 1 Annual Report, as filed with the Federal Energy Regulatory Commission. As approved, the formula rate allows for no projected costs, no normalization, and no other adjustment to actual historical costs.

OCTA's plea for relief in this case is untimely and misplaced. The requested relief is untimely because the pole attachment formula rate is "backward" looking. The TCJA only became effective on January 1, 2018. The first year that Duke Energy Ohio's income taxes will be lower as a result of the TCJA will be 2018. At such time as the Company updates its pole

attachment formula rates after 2018, the rates will reflect the lower income taxes. That is a fundamental component of the pole attachment formula rate.

OCTA's requested relief is misplaced because the pole attachment formula is subject to the Commission's approval. OCTA's argument that excess accumulated deferred income taxes (EDITs) should be included in the formula as an offset is moot for Duke Energy Ohio's current pole attachment rates. The EDITs that were created on December 31, 2017, as a result of the TCJA, derive from accumulated deferred income taxes that are already included as an offset to rate base in the 2014 data that was used for the existing pole attachment rates. Only when there is an application to revise the pole attachment rates will there be a need to revisit the Commission-approved pole attachment formula to ensure that EDITs are properly credited as a rate base offset. Duke Energy Ohio is not opposed to ensuring that the rate base reflects EDITs; however, this would be a modification to the Commission's pole attachment rate formula that is entirely outside the scope of this proceeding and, in addition, would not be appropriate for consideration in a utility-specific case.

OCTA certainly has the right to file a complaint if it believes that the current pole attachment rates are unreasonable and unfair. Should it choose to initiate such a case, the Company would use more current actual data, which might result in significantly increased rates, even if all of the TCJA benefits being sought were reflected in the pole attachment rate formula. Duke Energy Ohio's current pole attachment rates are based on FERC Form 1 data from 2014. The Company has, since that time, significantly increased its level of investment in assets that would flow through the pole attachment formula. That increase would significantly increase the pole attachment rates. The Company is not proposing to make such an update at this time but will necessarily reflect updated data in its pole attachment formula if OCTA is truly seeking to

reflect all contemporary information. Once again, any of the benefits OCTA is seeking as a result of the TCJA will require modifications to the existing formula and/or waiting until at least until after the 2018 FERC Form 1 is available.

The fact that the Company is proposing to pass the benefits of the TCJA to its retail electric distribution customers does not result in OCTA having any valid interest in the resolution of the impact of the TCJA on electric distribution customers. If OCTA believes that its pole attachment rates should be adjusted, there are standard processes by which they can be adjusted. But participation in the present proceedings will not accomplish OCTA's goal.

If OCTA's intervention in these proceedings were to be granted, its presence would inject issues unrelated to the Application filed by Duke Energy Ohio. As a result, it can only be concluded that such intervention would unduly prolong or delay the proceedings. Further, as an entity uninterested in the actual issues at hand, it is indisputable that its participation would not contribute to the development of those issues or their equitable resolution.

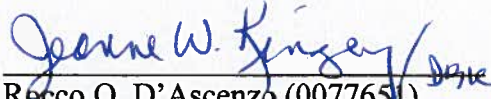
### **Conclusion**

For the reasons set forth herein, Duke Energy Ohio respectfully requests that the Commission deny the motion by OCTA to intervene in the above-captioned proceedings. OCTA has no cognizable interest in the issues in the proceedings and its participation would only delay the ultimate resolution.



Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in blue ink, reading "Jeanne W. Kingery". To the right of the signature, there is a small, illegible handwritten mark.

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## CERTIFICATE OF SERVICE

The undersigned certifies that notification of the filing of the foregoing document is being made upon the persons listed below via electronic mail, this 29<sup>th</sup> day of August, 2018.

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Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Motion to Intervene electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Rocco D'Ascenzo and Kingery, Jeanne W.