

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	)	
Duke Energy Ohio, Inc., for an	)	Case No. 12-1682-EL-AIR
Increase in Electric Distribution Rates.	)	

In the Matter of the Application of	)	
Duke Energy Ohio, Inc., for Tariff	)	Case No. 12-1683-EL-ATA
Approval.	)	

In the Matter of the Application of	)	
Duke Energy Ohio, Inc., for Approval	)	Case No. 12-1684-EL-AAM
to Change Accounting Methods.	)	

**DUKE ENERGY OHIO, INC.'S
MEMORANDUM CONTRA
MOTION TO INTERVENE BY TW TELECOM OF OHIO, LLC**

I. Introduction

On June 7, 2012, Duke Energy Ohio, Inc. (Duke Energy Ohio), filed an application to increase its electric distribution rates, in the above-referenced cases. On June 20, 2011, tw telecom of ohio, llc (TWTC), 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 TWTC. For the reasons described in detail below, Duke Energy Ohio submits that the Public Utilities Commission of Ohio (Commission) should deny the TWTC motion to intervene.

II. Argument

Ohio law allows for intervention only where the potential intervenor “may be adversely affected by” a proceeding.¹ 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;
- (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.²

The Commission’s corresponding administrative rule, promulgated under the authority of that statute, provides some additional detail. The applicable 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.”³ 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.⁴

TWTC has met none of the required tests. TWTC will not be adversely affected by this proceeding, the legal position advanced by TWTC is unrelated to the merits of this case, its intervention would unduly prolong or delay the proceedings, and its intervention would not

¹ R.C. 4903.221

² R.C. 4903.221(B)

³ O.A.C. 4901-1-11(A)(2)

⁴ O.A.C. 4901-1-11(B)

contribute to the full development or equitable resolution of the factual issues raised in the proceedings.

TWTC's entire description of its interest in these proceedings comprises three sentences.⁵

TWTC argues as follows:

- (1) TWTC has a pole attachment agreement with Duke Energy Ohio.
- (2) The pole attachment agreement charges a rate based on a Federal Communications Commission (FCC) formula.
- (3) TWTC has "a significant number of attachments" to poles owned by Duke Energy Ohio.
- (4) The application in these proceedings includes "pole attachment rate applications."
- (5) If granted, those "pole attachment rate applications" could significantly impact the "price paid and terms of use by TWTC" for both pole attachments and conduit occupancies, once the pole attachment agreement expires.

The only one of these arguments that is actually true is the first one; TWTC does indeed have a pole attachment agreement with Duke Energy Ohio. However, that pole attachment agreement charges for attachments on the basis of a negotiated rate, with no mention of or reference to FCC formulae. Further, even if the agreement did reference an FCC formula, it is critical to recognize that the current FCC formula bases rates on costs that are disclosed in filings at the Federal Energy Regulatory Commission, not on anything related to or affected by state rate cases.⁶ Further, and importantly, to the best of Duke Energy Ohio's knowledge, TWTC does not have a "significant number" of attachments to Duke Energy Ohio's poles. Indeed, to the best of Duke Energy Ohio's knowledge, TWTC does not have any direct attachments to its poles and Duke Energy Ohio is not currently billing TWTC under the pole attachment agreement.⁷

⁵ TWTC Motion to Intervene at 2.

⁶ WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50, April 7, 2011.

⁷ TWTC does apparently have a small number of "overlashings," whereby its equipment is overlashed on top of attachments of Time Warner Cable LLC, a former affiliate of TWTC. However, such overlashings does not result in charges by Duke Energy Ohio to TWTC.

Duke Energy Ohio also notes that the application in these proceedings does not propose any changes to the rates or terms of the pole attachment tariff. Thus, it is unclear how these proceedings can be described as including “pole attachment rate applications.” And, even if the pole attachment tariff⁸ were proposed to be amended, such changes would have no impact on TWTC. TWTC is a utility and Duke Energy Ohio’s pole attachment tariff, by its terms, only applies to entities that are not utilities.

It is highly probable that, if TWTC’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.

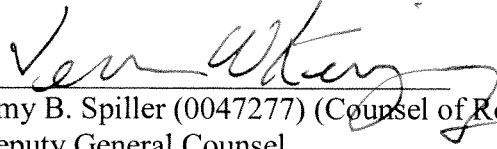
III. Conclusion

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

⁸ P.U.C.O. No. 1

Respectfully submitted,

DUKE ENERGY OHIO, INC.



Amy B. Spiller (0047277) (Counsel of Record)
Deputy General Counsel

Rocco O. D'Ascenzo (0077651)

Associate General Counsel

Jeanne W. Kingery (0012172)

Associate General Counsel

Elizabeth H. Watts (0031092)

Associate General Counsel

Duke Energy Business Services LLC

139 E. Fourth Street, 1303-Main

P.O. Box 961

Cincinnati, Ohio 45201-0960

(513) 287-4359 (telephone)

(513) 287-4385 (facsimile)

Amy.Spiller@duke-energy.com

Rocco.D'Ascenzo@duke-energy.com

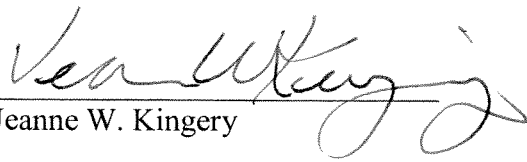
Jeanne.Kingery@duke-energy.com

Elizabeth.Watts@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 5th day of July, 2012, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.


Jeanne W. Kingery

William L. Wright
Section Chief
John H. Jones
Assistant Section Chief
Assistant Attorneys General
Public Utilities Section
180 East Broad St., 6th Floor
Columbus, Ohio 43215
William.wright@puc.state.oh.us
John.jones@puc.state.oh.us

Counsel for Staff of the Commission

Terry L. Etter, Counsel of Record
Kyle L. Kern
Assistant Consumer's Counsel
Office of the Ohio's Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
etter@occ.state.oh.us
kern@occ.state.oh.us

Counsel for Office of the Ohio Consumers' Counsel

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

Counsel for tw telecom of ohio llc

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
Jody M. Kyler, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLLawfirm.com
mkurtz@BKLLawfirm.com
jkyler@BKLLawfirm.com

Counsel for The Ohio Energy Group

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

Attorneys for The Kroger Co.

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

Counsel for the City of Cincinnati