

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates.) Case No. 08-709-EL-AIR)

In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.) Case No. 08-710-EL-ATA)

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.) Case No. 08-711-EL-AAM)

RECEIVED-DOCKETING DIV
2009 FEB -2 PM 4:24
PUCO

tw telecom of ohio llc's REPLY TO
DE-OHIO'S MEMORANDUM IN OPPOSITION

Pursuant to Ohio Administrative Code Rule 4901-1-12(B)(2), tw telecom of ohio llc ("TWTC") now replies to the Memorandum in Opposition of Duke Energy Ohio ("DE-Ohio") to TWTC's motion to intervene filed in this matter.

Ohio Revised Code ("R.C.") 4903.221 provides that any person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding, provided that such person meets certain threshold requirements. The statute then sets forth those factors that the Commission must consider in evaluating the merits of a motion to intervene. Those factors include: the nature and extent of the intervenor's interest; whether the intervenor will unduly delay the proceedings or prejudice an existing party; and, "[w]hether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues." Based upon this statutory standard, it is clear that TWTC should be granted intervention because: (1)

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician AJ Date Processed 2/3/09

TWTC is a real party in interest whose interest is not now represented; (2) TWTC pledges that it will not unduly delay these proceedings or prejudice any existing party; and (3) TWTC can make a valuable contribution to these proceedings.

1. TWTC has a very real and substantial interest in the outcome of these proceedings.

DE-Ohio claims TWTC should be denied intervention because TWTC is a public utility, and that any pole attachment agreements entered into with other public utilities (i.e., DE-Ohio) “are not within the purview of R.C. 4905.71,”¹ and that TWTC’s current pole attachment agreement with DE-Ohio “will not be impacted by the proposed pole attachment tariff.”² These statements, however, do not touch on the question of whether TWTC has a real and substantial interest in the outcome of these proceedings.

TWTC has a very real and substantial interest in these proceedings. First, the outcome of these proceedings will have “consequences on the operations and business interests of the members of the OCTA.”³ The OCTA represents direct competitors of TWTC as well as entities whom TWTC relies upon for certain network services. DE-Ohio’s pole attachment rates impact TWTC’s business in both instances.

Currently, the members of OCTA and other cable service providers offering VoIP telephony and other data transmission services (who are not defined as public utilities) are able to take service under the pole attachment tariffs because the Commission has taken a “hands off” approach to the regulation of VoIP services. The reason: jurisdictional and regulatory issues relating to VoIP services

¹ DE-Ohio’s Memorandum in Opposition to the Motion to Intervene of tw telecom of ohio llc (“DE-Ohio’s Memo in Opp.”), p. 2.

² DE-Ohio’s Memo in Opp., p. 2.

³ Motion to Intervene of the Ohio Cable Telecommunications Association (“OCTA”), p. 3.

remain under review by numerous state public utilities commissions (including Ohio) and the Federal Communications Commission (“FCC”).⁴

Because TWTC’s direct competitors (i.e., members of the OCTA) take service under the pole attachment tariff (that rate is lower than the rate charged to TWTC), TWTC’s competitors have a lower cost structure, which directly impacts TWTC’s ability to compete within Ohio’s telecommunications industry. While the Commission’s rules and the Revised Code do not set a threshold level of interest, it cannot be said that TWTC’s interests are not substantially impacted by the issues at stake in this case, such that a denial of the opportunity to participate would be warranted.

TWTC’s situation is no different than many regular intervenors in Commission proceedings. For instance, the National Energy Marketers Association in the recent (and still pending) electric SSO cases has been given full party status in those cases. The SSO cases were designed to determine the rates for the utilities’ standard service offers. Despite the fact that the National Energy Marketers Association would not be subject to these default rates, they were allowed to intervene in the SSO cases. The reason: the outcome of the SSO proceeding would directly impact the National Energy Marketers Association’s members’ ability to compete in the restructured electric industry. This concern for the ability to compete is the very reason that TWTC seeks intervention in this case.

Allowing competitors like OCTA and VoIP providers to participate in these proceedings to address issues relating to the proposed pole attachment tariff rates, while prohibiting TWTC from doing so, would place TWTC at a competitive disadvantage. DE-Ohio’s contention that the OCTA already represents TWTC’s interest is simply incorrect. While TWTC is a member of the OCTA as a certificated telecommunications carrier and as public utility, it has separate issues and concerns with

⁴ Entry on Rehearing dated February 11, 2004 from PUCO Case No. 03-2229.

DE-Ohio's proposed pole attachment tariff rates and the accounting methodologies that produce those rates. TWTC's interests merit intervention on this basis alone.

2. TWTC will not cause undue delay in these proceedings.

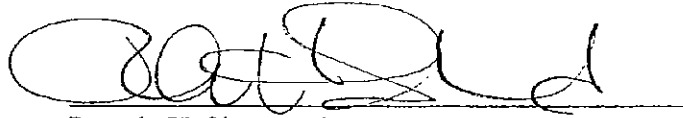
DE-Ohio's allegation that TWTC's participation will cause undue delay is baseless. TWTC herewith affirmatively represents that its participation in these proceedings will not cause undue delay or unjustly prejudice any existing party. The Staff Report in this proceeding was issued within the past week, on January 27, 2009; a procedural entry has not yet been issued to address the remainder of the schedule in this case. To suggest that TWTC's participation would cause a delay in the proceedings is exaggerated to the point of being ludicrous.

3. TWTC will contribute to the just and expeditious resolution of the issues and concerns set forth in these proceedings based upon its knowledge of, and familiarity with, pole attachment tariffs and FCC accounting processes and procedures.

Rather than causing a delay in these proceedings, TWTC will bring a valuable depth of knowledge on the issues and competing considerations that attend the subject of pole attachment rate. TWTC is a regular participant in the FCC and PUCO proceedings concerning this subject and its participation in this case will help ensure the best possible record is assembled for the Commission's consideration.

WHEREFORE, TWTC respectfully requests that its motion to intervene in the above-captioned proceedings be granted.

Respectfully submitted on behalf of
tw telecom of ohio llc

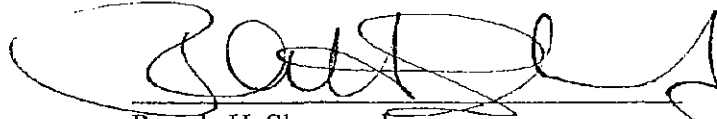
A handwritten signature in black ink, appearing to read 'P. Sherwood', written over a horizontal line.

Pamela H. Sherwood
Vice President of Regulatory Affairs, Midwest
Region

tw telecom
4625 West 86th Street, Suite 500
Indianapolis, IN 46268
Telephone: (317) 713-8977
Facsimile: (317) 713-8937
e-mail: pamela.sherwood@twtelecom.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply was served upon the parties of record listed below this 2nd day of February 2009 via regular mail.



Pamela H. Sherwood

Paul A. Colbert
Amy B. Spiller
Elizabeth H. Watts
Rocco D'Ascenzo
Duke Energy Ohio, Inc.
139 Fourth Street, 25 Atrium II
Cincinnati, OH 45202
Paul.colbert@duke-energy.com
Amy.spiller@duke-energy.com
Elizabeth.watts@duke-energy.com
Rocco.dascenzo@duke-energy.com

David F. Boehm
Michael L. Kurtz
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
dboehm@bklawfirm.com
mkurtz@bklawfirm.com

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com
cmooney2@columbus.rr.com

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213
jbentine@cwsllaw.com
myurick@cwsllaw.com

Ann M. Hotz
Jeffrey L. Small
Jacqueline Lake Roberts
Michael E. Idzkowski
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
hotz@occ.state.oh.us
small@occ.state.oh.us
roberts@occ.state.oh.us
idzkowski@occ.state.oh.us

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

Mary W. Christensen
Christensen Christensen Donchatz
Kettlewell & Owens LLP
100 East Campus View Blvd, Suite 360
Columbus, OH 43235-4679
mchristensen@columbuslaw.org

Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, OH 45202
dhart@douglashart.com

Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
smhoward@vorys.com

Gardner F. Gillespie
Hogan & Hartson LLP
Columbia Square
555 Thirteenth Street, NW
Washington DC 20004
gfgillespie@hhlaw.com