BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company for Approval of a Tariff Change	**)))**	**Case No. 18-564-EL-ATA**

MEMORANDUM CONTRA OF OHIO EDISON COMPANY TO APPLICATION FOR REHEARING OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

Applications for Rehearing are governed by Section 4903.10, Ohio Revised Code ("O.R.C") and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."). Under those authorities, applications for rehearing are to be granted only where an order of the Public Utilities Commission of Ohio ("Commission") is "unreasonable or unlawful." Ohio Edison Company ("Ohio Edison" or "Company") hereby files its Memorandum Contra to the application for rehearing regarding certain issues as detailed herein. As it relates to the issues addressed in this Memorandum Contra,[1] the automatic effectiveness of the Company's pole attachment tariff formula rate update is not "unreasonable," "unlawful," or "unjust." As indicated below, the Ohio Cable Telecommunications Association's ("OCTA") application for rehearing fails to meet those standards. Thus, the Commission should deny rehearing.

I. INTRODUCTION

After a lengthy rulemaking proceeding in which OCTA actively participated, the Commission adopted the formula rate approach used by the Federal Communications Commission ("FCC") to determine the maximum just and reasonable rate for attachment to poles

[1] Failure by the Company to address any particular issue raised in an Application for Rehearing of OCTA should not be construed as agreeing with its arguments. The Company reserves its right to all procedural due process under Ohio law.

by cable companies such as OCTA's members.[2] In the Company's attendant tariff revision compliance proceeding, the Commission approved Ohio Edison's pole attachment tariff, including the provision establishing an annual update filing process that includes a 60-day automatic effectiveness provision.[3] Subsequently, the Commission established a 60-day automatic effectiveness provision applicable to all pole attachment tariff amendment applications.[4]

On May 1, 2018, the Company filed its annual pole attachment tariff rate formula update in the instant proceeding. On May 22, 2018, OCTA filed a Motion to Intervene, and Objections to the Company's filing. On June 22, 2018, the Company filed its Response to OCTA's Objections. Staff filed its review and recommendations on June 29, 2018, recommending the Company's tariff be approved as filed.[5] On June 28, 2018, OCTA filed a Motion to Strike the Company's Response, and on June 29, 2018, the Company filed its Memorandum Contra OCTA's Motion to Strike.

II. ARGUMENTS

OCTA sets forth three grounds for rehearing, summarized herein as: 1) there was no investigation of the reduction in Accumulated Deferred Income Taxes ("ADIT") before rates automatically went into effect; 2) rates went into effect automatically without waiting for the outcome of the Commission investigation in 18-47-AU-COI; 3) the Commission did not grant

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[2] *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, regarding Access to Poles, Ducts, Conduits, and Rights of Way by Public Utilities*, Case No. 13-579-AU-ORD (July 30, 2014).

[3] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Change Their Pole Attachment Tariffs*, Case No. 15-975-EL-ATA, Finding and Order (September 7, 2016).

[4] *In the Matter of the Application of AT&T Ohio to Update its Pole Attachment and Conduit Rates*, Entry, November 8, 2016.; *See also* Case No. 13-579-AU-ORD, Entry, November 30, 2016.

[5] "Staff has reviewed the pole attachment rate calculations as well as the source of the data used in the calculations provided by Cleveland Electric Illuminating and has found them to be consistent with the formula contained in rule 4901:1-3-4(D)(2). Therefore, Staff believes that approval of the application will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge."

OCTA's Motion to Strike the Company's Response to its Objections. These reasons do not warrant rehearing as set forth below.

A. The Staff Review and Recommendation Properly Concluded that the Calculations and Data Sources Were Compliant with the Rule.

OCTA complains that "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."[6] OCTA gives several reasons why it believes it is necessary for some analysis of the reason why FERC Form 1 account data changed, including that an increase in rates is "punitive" to its members. However, OCTA failed to acknowledge the Commission's findings when it adopted the formula rate approach that stated the benefits of using reported FERC Form 1 accounting data sources. OCTA's own witness in the Tax Cuts and Jobs Act ("TCJA") case, Patricia D. Kravtin, testified that "The hallmark of the FCC Formula is its reliance on a specific set of regularly and uniformly reported FERC Form 1 accounting data in the case of electric utilities and a similar set of publicly reported uniform accounting data for telephone utilities filed with the FCC."[7]

The Commission has already established that the formula produces rates that are just and reasonable. With a full and complete record before it, the Commission found that the rate formula is appropriate and should be adopted for the purpose of determining a maximum just and reasonable rate.[8] Indeed, the explicit language of the adopted rule makes crystal clear that

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[6] OCTA Application for Rehearing, p.6.

[7] *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Public Utilities*, Case No. 18-47-AU-COI, Direct Testimony of Patricia D. Kravtin, p.9 (June 29, 2018).

[8] *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, regarding Access to Poles, Ducts, Conduits, and Rights of Way by Public Utilities*, Finding and Order, p. 41 (July 30, 2014) ("Based on the record in this case and the analysis set forth supra, the Commission finds that, with respect to calculation of pole attachment occupancy rates, the definitions, assumptions, and methodologies set forth in 47 C.F.R. 1.1409(e)(1) should be adopted, including those related to the net cost of a bare pole and carrying charge rates.")

application of the formula rate by definition and operation of the rule results in rates that are just and reasonable.[9] Further, in Case No. 15-975-EL-ATA, the Commission rejected OCTA's request to use a different input other than the Company's annual FERC Form 1 reported Administrative and General Expenses.[10] The benefits from the formula rate approach using reported FERC Form 1 data are not lost simply because the outcome does not favor attachers.

OCTA also complains that its Objections were not mentioned by Staff in its Review and Recommendation.[11] OCTA concludes that since its Objections were not specifically discussed, that Staff must not have performed the analyses that OCTA believes should have been made. While the Company contends that no such analysis is required by the rules adopting the formula rate approach, there also is no basis other than conjecture for OCTA's conclusion that no analysis was performed. As will be discussed further below, under the Commission's automatic approval process, it is up to the Commission's discretion whether to suspend such approval "to the extent it deems necessary."[12] It is entirely possible—and even plausible—that Staff or the Commission did, in fact, consider OCTA's Objections and simply found them unmeritorious. The lack of Commission discourse on OCTA's Objections in this pole attachment tariff formula rate update is neither unlawful nor unreasonable, and OCTA cites to no rule or law establishing otherwise.[13]

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[9] 4901:1-3-04(D)(2): "The commission will apply the formula set forth in 47 C.F.R. 1.1409 (e)(1), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for pole attachments."

[10] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Change Their Pole Attachment Tariffs*, Case No. 15-975-EL-ATA, Finding and Order, p.7 (September 7, 2016).

[11] OCTA Application for Rehearing, p.6 ("Staff 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.")

[12] Case No. 16-2117-TP-ATA, p.4 ("To the extent that it deems necessary, the Commission may suspend such applications, resulting in the need for the Commission to issue the applicable Order.")

[13] Notably, OCTA did not contest this issue by filing an application for rehearing or an appeal of the Order in Case No. 16-2117-TP-ATA establishing the new process for AT&T and other utilities which omitted any requirement for on-record discussion of analysis of filed Objections.

B. The Commission Committed No Error by Not Waiting for a Ruling in the TCJA Investigation.

OCTA argues that the automatic approval of the Company's annual formula rate update is "counterproductive to the Commission's ongoing investigation of the implementation of the TCJA" apparently because the Commission has not yet determined how it "is intending to carry [savings] through to customers." [14] However, any perceived "counterproductive" result does not rise to the level of "unreasonable" or "unlawful." The Commission will make its decision in the TCJA investigation based on the record before it, just as it made its decision based on the record before it in this proceeding. And there is no reason to presume the Commission made its decision in the instant case with ignorance or indifference to its other pending cases. The exact opposite is true, the Commission is presumed familiar with the cases pending before it.

Further, this argument by OCTA seems directed at other utilities—not Ohio Edison. For example, OCTA complains that "Once effective, the pole rate remains until the utility decides to file a future pole rate application".[15] This argument is off-base because the Company clearly *must* file its formula rate updates annually pursuant to its approved tariff, of which no doubt the Commission also was fully cognizant when it allowed the Company's rates to automatically become effective.[16] OCTA seems to have merely copied its generic arguments from the investigation case applicable to utilities that do not have a tariff provision requiring annual updates. In short, OCTA's concerns raised on this issue simply do not apply to the Company, and therefore cannot be found a reasonable ground upon which to grant rehearing in this matter.

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[14] OCTA Application for Rehearing, p.7.

[15] Id. (Also, "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.")

[16] The Finding and Order in Case No. 15-975-EL-ATA at p.7 specifically cites the Company's annual update filing process as part of its reasoning for rejecting OCTA's recommendation to substitute for actual annual reported data.

C. The Commission Did Not Err by Not Ruling on OCTA's Motion to Strike.

OCTA argues that "It was error, however, for the Commission to have reviewed and relied on OE's response in automatically approving the proposed rate."[17] OCTA further argues "it was unfair so far into the process for the Commission to not strike a substantive response through which Ohio Edison built its record and sought to justify an anomalous ADT input that it had failed to address in its original application." There are two major flaws with OCTA's argument: 1) there is no evidence the Commission reviewed and relied on the Company's Response in choosing to allow the new rate to become automatically effective; and 2) since there is no provision in the automatic approval process for OCTA to reply to any response filed, OCTA was not prejudiced by the timing of the filing. These flaws are discussed in turn below.

With regard to the first flaw, as OCTA notes elsewhere in its Application, the Staff Review and Recommendation does not even mention OCTA's Objections. Similarly, it also does not mention the Company's Responses to OCTA's Objections. There simply is no indication that the Company's Response influenced Staff's Review and Recommendation in any way. Nor is there an Entry or Finding and Order that would indicate that the Commission considered the Company's Response in reaching its determination not to suspend the automatic effectiveness of the Company's formula rate update. OCTA unreasonably presumes the Company's Response was considered and influenced the decision simply because its Motion to Strike was not granted before July 1, 2018. This presumption is without foundation.

It is certainly just as plausible that the Commission instead considered the testimony of OCTA witness Kravtin in the TCJA investigation, filed one week after the Company's Response and just one day after OCTA's Motion to Strike, which testimony included at least two of the

[17] Id. at p.8.

same points made by the Company in its Response, namely, that the FCC formula rate approach relies upon publicly reported accounting data source inputs, and that the ADIT balance also appears in the denominator of the carrying charge components.[18]

On the second major flaw, there is no reason for OCTA to complain, and even less reason to claim it was unreasonable or unlawful for the Commission not to strike the Company's Response. Under the process established in Case No. 16-2117-TP-ATA, only an Objection and a Response is contemplated—there is no provision for the filing of a Reply to a Response. In fact, in 2015 the Commission explicitly rejected OCTA's request for leave to file a reply to the Company's Response in the Company's first tariff compliance filing pursuant to the rulemaking case.[19] Furthermore, if any party was prejudiced by the timing of the filing, it would be the Company itself, as the Commission and Staff had more time to consider the merits of OCTA's Objections unrebutted by the Company's Response than the new process provides. In other words, it is reasonable to conclude the Commission gave more weight to OCTA's Objections during the delay before receiving the Company's Response than the other way around. There certainly is no indication whatsoever that Staff or the Commission gave the Company's Response *more* weight because it had *less* time to consider it.

Ultimately, as mentioned above, the decision to suspend automatic effectiveness is entirely at the Commission's discretion "to the extent deemed necessary." OCTA does not and cannot point to anything that suggests the outcome would be any different if its motion to strike *had* been granted. Interestingly, OCTA did not file a motion for expedited ruling on its motion to strike. OCTA also fails to consider the illogic of the argument in its Motion to Strike when it complained that the Company should not be allowed to "build a record" late in the 60-day

[18] Kravtin, Case No. 18-47-AU-COI, p. 9 and p. 13 (footnote 12), respectively (June 29, 2018).
[19] Case No. 15-975-EL-ATA, Finding and Order, p.3 (September 7, 2016).

window, because if the Commission had suspended the automatic approval in order to further investigate the questions raised by OCTA's Objections, such as by scheduling a hearing, the Company most likely would have had the opportunity to build the exact same record that its Response provided. The only difference in that event would be causing the Commission, the Company, and OCTA each to expend more resources to arrive at the same result. Judicial economy weighs against such needless waste. On the other hand, if the Commission determined that OCTA's Objections simply did not warrant suspension on its own merit, striking the Company's Response would be utterly moot.

III. CONCLUSION

For all of the foregoing reasons, the Commission should deny OCTA's Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served via electronic mail to the following person on this 9th day of August 2018.

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/s/ *Robert M. Endris*
An Attorney for Ohio Edison Company

Summary: Memorandum Memorandum Contra of Ohio Edison Company to Application for Rehearing of the Ohio Cable Telecommunications Association electronically filed by Mr Robert M Endris on behalf of Endris, Robert Mr.