

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Commission's Investigation of the)	
Financial Impact of the Tax Cuts and Jobs)	Case No. 18-47-AU-COI
Act of 2017 on Regulated Ohio Utility)	
Companies.)	

**BRIEF OF THE
OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

August 13, 2018

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I. INTRODUCTION

Good cause exists for the Public Utilities Commission of Ohio to adopt safeguards and directives that will stop the negative effect that recent tax changes from the Tax Cuts and Jobs Act of 2017 (“TCJA”) and this Commission’s required deferred liability are having on attachment rates. Instead of seeing a beneficial reduction included in the rate calculation (as occurs for other utility rates), the tax changes and accounting directive have the opposite effect under the attachment formulas without any corresponding cost basis. This anomaly establishes good cause for the safeguards and directives recommended by the Ohio Cable Telecommunication Association (“OCTA”) expert witness as well as others identified in this brief by the OCTA.

The OCTA recommendations will ensure that neither the creation of the deferred liability nor the other TCJA-related changes have the perverse result of allowing a utility to leverage those changes for the purpose of extracting higher pole attachment rates. First, the OCTA submits that the following safeguards and directives should be adopted on an interim basis: (1) a specific directive that there should be no adverse impact as a result of the Commission-ordered deferred liability, (2) a prohibition against using the TCJA-related accounting changes as a basis for extracting higher attachment rates, (3) a requirement that the utilities track and preserve their costs and dollars in the deferred liability (including appropriate distinctions between the different categories of dollars), and (4) a directive that each of those must commence January 1, 2018 and apply to all affected utilities. These interim proposals went unchallenged at hearing and several witnesses expressed support.

Second, the Commission should adopt the following safeguards and directives as part of the Commission’s final TCJA decision: (1) apply the attachment rate formulas by recognizing

the TCJA-related accounting changes that have taken place and by not ignoring the monies now held in deferred liability accounts rather than in other accounts used in the pole formula (this would apply to any rate adjustments based on 2017 data, as well as rate adjustments based on 2018 data and beyond); (2) like protected excess accumulated deferred income taxes (“Excess ADIT”), the unprotected Excess ADIT should be amortized over a recommended presumptive 20-year period or longer, which is consistent with the protected Excess ADIT amortization period, and the amortization should also apply to the aggregate Total Utility Plant amounts; and (3) the future rate applications must include appropriate documentation that demonstrates compliance with the Commission’s directives from this proceeding.

These safeguards and directives collectively will avoid harming broadband deployment by the many businesses in Ohio that must have access to affordable utility poles, ducts, conduit, etc. to provide services to their existing and future customers. These safeguards are within the Commission’s purview. They are just, reasonable and consistent with public policy, and should be adopted.

II. ARGUMENT

A. The tax changes can impact attachment rates adversely and perversely.

1. The Tax Cuts and Jobs Act of 2017 changed the federal income tax rate and accumulated deferred income taxes, which affects attachment rates.

The TCJA was signed on December 22, 2017,¹ implementing a number of changes to the federal tax system. It reduced the federal corporate income tax rate from 35% to 21%, effective January 1, 2018. Generally speaking, the reduced income tax rate is expected to impact utility rates because the utility rates will ultimately be based on a lower corporate income tax rate. The

¹ Tax Cuts and Jobs Act 131 Stat. 2054 §2561 (2017).

OCTA believes that, at a minimum, the lower federal income tax rate should not result in higher attachment rates.²

The TCJA also had another effect. It turned a significant portion of the utilities' ADIT dollars into "Excess ADIT." OCTA witness Patricia Kravtin explained how the Excess ADIT was created:

The utility's actual federal tax obligation is generally less than the tax expense the utility is allowed to recover from ratepayers, due to accelerated depreciation provisions in the tax code applicable in the early years of a new asset's life as compared with the typically level depreciation accruals over the asset life recognized for regulatory purposes. A reduction in the deferred income tax expense obligation of the utility creates what is referred to as "excess" ADIT, given that there is now an "excess" of tax prefunded by the ratepayers that will never be paid to the federal government under the new tax law.³

Per the TCJA, the Excess ADIT was divided into two categories and the law instructed how the protected part of the Excess ADIT is to be returned to customers:

- **Protected Excess ADIT:** The TCJA requires, beginning January 1, 2018, that these dollars to be amortized over "the remaining life of the property which gave rise to the reserve for deferred taxes," which is based on the average rate assumption method ("ARAM").⁴
- **Unprotected Excess ADIT:** The TCJA does not specify the amortization period or methodology for the unprotected Excess ADIT.⁵

The record in this proceeding reflects that at least some Ohio utilities moved their Excess ADIT dollars as of December 2017 into regulatory liability accounts prior to the effective date of the TCJA in anticipation of possible regulatory action per Generally Accepted Accounting Principles ("GAAP").⁶

² See OCTA Correspondence filed March 7, 2018 in this docket.

³ OCTA Exhibit 1 at 12, footnote 10.

⁴ AEP Exhibit 1 at 3. See, also, Tax Cuts and Jobs Act 131 Stat. 2054 §2561(d)(3)(B) (2017).

⁵ Transcript at 31.

⁶ AEP Ohio Exhibit 1 at 3; Duke Exhibit 1 at 7; IEU Ex. 1 at 6-7; Transcript at 16, 32-33, 69-70, and 141.

2. The Commission required a deferred liability while investigating how the tax law benefits would flow to customers.

In January 2018, the Commission initiated this investigation docket to study the impact of the TCJA on the Commission's jurisdictional rate-regulated utilities, and determine the appropriate course of action to pass on its benefits.⁷ The Commission also ordered the utilities on January 10, 2018, to record on their books as a deferred liability, the estimated reduction in the federal income tax resulting from the TCJA.⁸ This is an interim directive applied to all TCJA-related reductions effective January 1, 2018 to "preserve as many potential solutions as possible for the Commission's ultimate determination in this proceeding (or in other proceedings)."⁹ Interested parties were given the opportunity to file comments and a hearing was held on July 10, 2018. The Commission asked what rate components need to be reconciled with the TCJA, how the Commission should carry out the reconciliations, and whether the utilities should be required to establish a deferred liability, effective January 1, 2018.

As result of the TCJA and the Commission's January 2018 interim accounting directive, the utilities' deferred liability accounts include: protected Excess ADIT, unprotected Excess ADIT, federal income tax savings, and amortization of the protected Excess ADIT. Part of the deferrals is pre-TCJA, ADIT dollars that in December 2017 were placed into a deferred liability account per GAAP and the other part is post-TCJA deferrals placed into the deferred liability starting January 1, 2018, per Commission order.

3. These tax changes can and are adversely and perversely affecting the attachment rates.

⁷ Entry at ¶ 3 (January 10, 2018); Second Entry on Rehearing at ¶ 1, 21 and 26 (April 25, 2018).

⁸ Entry at ¶ 7 (January 10, 2018).

⁹ Second Entry on Rehearing at ¶ 26 (April 25, 2018).

Attachments to a public utility's poles, ducts, conduits and rights-of-way must be provided under rates, terms and conditions that are just and reasonable. *See*, Ohio Revised Code Section 4905.71 and Ohio Adm. Code Rule 4901:1-3-03(A)(1). As reflected in Ohio Adm. Code Rule 4901:1-3-04(D)(1), the attachment rates are to be cost-based:

[A] 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, or the percentage of the total duct or conduit capacity, 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, duct, conduit, or right-of-way.

To that end, the Commission adopted the "FCC Formula" to calculate the attachment rate and adopted a special process for adjusting attachment rates.¹⁰ That FCC formula relies on a specific set of uniform accounting data, which is reported in FERC Form 1 in the case of electric utilities and reported in ARMIS Reports in the case of telephone utilities.¹¹ OCTA witness Kravtin testified that the FCC Formula includes various tax inputs, including tax expenses and ADIT from specific designated accounts.¹² Thus, the attachment rates are affected by the TCJA tax changes, the Commission's interim deferred liability directive, and will be affected by the Commission's other TCJA-related conclusions.

OCTA witness Kravtin detailed how the attachment formula operates and how the collective impact of the TCJA on an attachment rate formula should be a reduction.¹³ She

¹⁰ *See* Ohio Adm. Code Rule 4901:1-3-04(D) and *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-TP-ORD, Entry at ¶17 (November 30, 2016).

¹¹ OCTA Exhibit 1 at 9.

¹² OCTA Exhibit 1 at 9, 12-13.

¹³ OCTA Exhibit 1 at 9, 12-13, 14. This evidence does not reflect that all pole rates should be reduced because of the TCJA; it reflects that the TCJA-related inputs should be beneficial to the rate calculation. The OCTA understands that after other cost-related inputs are included in the formula, the calculated rate may increase or may decrease.

identified, however, several factors that individually and collectively could produce the opposite impact. Ms. Kravtin first noted that the mechanics of the attachment formula create an incentive to calculate the rates based on a lump sum removal of the Excess ADIT from the pole formula account without a corresponding recognition of its movement into the deferred liability. Any reduction of ADIT will result in a dollar-for-dollar increase in the net pole investment, a key component of the formula,¹⁴ without any corresponding cost-related reason and ultimately result in an adverse impact on the rate. As Ms. Kravtin stated at the hearing, the utilities:

need to implement the formula in such a way that accounts for the fact that ADIT still exists. It's still existing in accounts not identified in the pole formula awaiting how it will be returned.

Absent that, what may happen and what seems to be happening is that the pole formulas will be calculated automatically assuming that ADIT has disappeared or already been returned....¹⁵

She noted also that a lump sum removal of Excess ADIT from the calculation would not be consistent with tax and regulatory principles for returning Excess ADIT over the life of the utility assets in which the ADIT arose.¹⁶

Second, Ms. Kravtin similarly explained that the federal income tax savings may not be reflected in an attachment formula by virtue of the Commission's requirement (albeit interim) that those savings be held as deferred liability, not in the accounts where they normally would be booked and included in the formula.¹⁷ Again, there is an incentive for the utilities to calculate the rates assuming that the tax savings do not exist because the savings are being held as deferred

¹⁴ OCTA Exhibit 1 at 15.

¹⁵ Transcript at 87.

¹⁶ OCTA Exhibit 1 at 14.

¹⁷ OCTA Exhibit 1 at 17.

liability which is not included in the formula. The record in this proceeding shows that the Excess ADIT and income tax savings can be sizeable.¹⁸

Third, Ms. Kravtin cited to GAAP-related accounting changes in the year-end 2017 FERC Form 1, and pointed out that if not recognized by the Commission, they would result in the use of a lump sum reduction to ADIT in the formula, resulting in an artificial increase in attachment rates. Ms. Kravtin cited specifically the FirstEnergy utilities' recent use of 2017 data, including a dramatically lower ADIT value following the utilities' GAAP-related accounting change at December 31, 2017.¹⁹ In those cases, it appears the utilities calculated the rates assuming that the Excess ADIT does not exist because it had been moved, per pre-TCJA GAAP accounting, from the standard ADIT accounts included in the formula into a deferred liability account which is not included in the formula.

Lastly, the rate-setting process also lends itself to adversely and perversely affecting the attachment rate in this context. The utility controls when it seeks to adjust the attachment rate, and the application will be based on a specific set of year-end data and costs and include only a minimal worksheet. There is no reconciliation or catch-up involved. If the utility waits several years to seek an adjustment, TCJA-related benefits in prior years would not be captured. This creates an incentive to undermine this Commission's investigation to the detriment of the attachers. Also, with these applications subject to an automatic approval process (and a limited

¹⁸ The income tax savings for Ohio Power Company (AEP) accrues approximately \$4 million per month and its protected Excess ADIT level was \$278 million and its unprotected ADIT level was \$178 million as of May 31, 2018. Similarly, for Duke Energy Ohio, Inc., the income tax savings is accruing at approximately \$6 million per month, and the protected Excess ADIT was \$133 million and the unprotected Excess ADIT was \$69 million as of December 31, 2017. (AEP Exhibit 1 at 5; Transcript at 14-15 and 48-49).

¹⁹ OCTA Ex. 1 at 16, citing *In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of a Tariff Change*, Case No. 18-563-EL-ATA; *In the Matter of the Application of Ohio Edison Company for Approval of a Tariff Change*, Case No. 18-564-EL-ATA; and *In the Matter of the Application of The Toledo Edison Company for Approval of a Tariff Change*, Case No. 18-565-EL-ATA. Rehearing applications are pending in all three proceedings.

opportunity to evaluate and conduct discovery), there is added difficulty for the attachers and Staff to analyze whether the tax changes are appropriately recognized in the proposed rate.

Ms. Kravtin's testimony regarding these factors was unchallenged at hearing and, as Ms. Kravtin stated, these adverse impacts appear to have begun. The TCJA and the deferred liability, however, should not incentivize or result in attachment rates that are not reflective of the true underlying costs of the utility. That would be contrary to the fundamental, cost-based nature of the attachment rules adopted by the Commission. Such adverse and perverse impacts are not resulting in just and reasonable rates.

B. The Commission has the authority to safeguard attachment rates, data, and dollar amounts against adverse and perverse impacts.

As noted, the TCJA has already determined that the protected Excess ADIT would be returned via amortization over “the remaining life of the property which gave rise to the reserve for deferred taxes.”²⁰ The Commission, however, has the discretion to determine the treatment of the remainder of the deferred liability.²¹ AEP, Duke, OCC, and Staff agree that the Commission has the authority to determine the appropriate treatment of the expected reduction in federal income tax in the deferred liability.²² Similarly, multiple parties agree that the Commission has the authority to determine the appropriate treatment of the unprotected Excess ADIT.²³ In addition, the Commission may, upon good cause shown, waive an attachment requirement in Ohio Adm. Code Chapter 4901:1-3.²⁴

²⁰ AEP Exhibit 1 at 3. *See, also*, Tax Cuts and Jobs Act 131 Stat. 2054 §2561(d)(3)(B) (2017).

²¹ AEP Ohio Exhibit 1 at 3; OEG Ex. 1 at 5; OCC Ex. 1 at 7-8.

²² Transcript at 17-18 (AEP Witness Allen), 51-52 (Duke Witness Wathen), 125 (OCC Witness Willis), and 140 (Staff Witness Borer).

²³ Transcript at 27, 28 (AEP Witness Allen), OEG Ex. 1 at 5; OCTA Ex. 1 at 14, footnote 13.

²⁴ *See* Ohio Adm. Code Rule 4901:1-3-02(D).

C. The OCTA-recommended safeguards and directives are just, reasonable, and consistent with public policy.

While the Commission directed the establishment of a deferred liability to preserve as many potential solutions as possible for its ultimate determination in this proceeding,²⁵ and the Commission has stated that accounting practices do not affect rates,²⁶ the uncontroverted evidence is that the TCJA and the Commission's deferred liability impact, adversely and perversely, the attachers through increased rates. Since the Commission's intent with this proceeding is to determine the appropriate course of action for the TCJA benefits, it stands to reason that the Commission does not seek to harm or create incentives that harm rates.

The Commission should adopt the following safeguards and recommended directives of the OCTA. They are narrowly targeted, generic, and uniformly applicable for all of the pole-owning and conduit-owning utilities. As explained by OCTA witness Kravtin in response to a question posed by the Attorney Examiner, a generic set of safeguards and directives (as opposed to a utility-by-utility approach) is simple, administratively efficient and low cost, like the attachment formulas.²⁷ Importantly, **through these safeguards and directives, the costs intended to be included in the attachment formulas would be included (and not omitted because they were relocated into a non-formula account).** The unique circumstances presented and the uncontroverted evidence support these safeguards and directives.

- 1. Interim Recommendations: Safeguard data and rates and avoid adverse harm from the creation of the deferred liability with threshold principle of no adverse harm and with tracking and preservation of data and dollar amounts.**

²⁵ Second Entry on Rehearing at ¶ 26 (April 25, 2018).

²⁶ *Id.* at ¶ 20.

²⁷ Transcript 89-91.

First and foremost, the Commission should affirmatively state and require the utilities to also recognize that attachment rates should not be adversely affected by the creation of the deferred liability (or any other transfer account or regulatory asset created in connection with the TCJA). The Commission has already stated in this proceeding that accounting changes should not affect rates, but it should take it one step further. Multiple witnesses at the hearing testified that the Commission's specific accounting change in this proceeding should not adversely affect rates.²⁸ Notably, these witnesses represent numerous different customer groups and perspectives in Ohio – third-party pole attachers, large industrial customers, residential customers, and Staff. Given the Commission's earlier statements and this widespread agreement among many parties, the Commission should establish as a principle that the deferred liability cannot be used to adversely affect rates and specifically cannot be used as a basis for calculating higher attachment rates.

Second, the Commission should direct the utilities to keep track of and preserve, for the future use in the attachment rate calculations, the underlying cost data and associated detail on the estimated reduction in taxes in the deferred liability or any other transfer account or regulatory asset created in connection with the TCJA. This would include adequate documentation identifying and distinguishing the protected ADIT amounts from the unprotected ADIT amounts and other components within the deferred liability. Staff witness Borer agreed that the deferred liability provides the Commission with the ability to preserve the dollar amounts for future consideration.²⁹ The Commission, however, should ensure that the

²⁸ OCTA Exhibit 1 at 7, 19; Transcript at 93 (OEG Witness Kollen), 98 (IEU Witness Bowser), 112 (OCC Witness Willis) and 135 (Staff Witness Borer).

²⁹ Transcript at 136.

preservation is adequately and thoroughly documented through this specific directive to the utilities.

Third, the two directives above must be effective at the start of the TCJA on January 1, 2018. They should continue until the TCJA-related resolutions are decided by the Commission and put into place.

Significant witness support for preventing adverse impact and safeguarding the data from the time the TCJA took effect warrants adoption by the Commission. Additionally, none of the recommendations were challenged during the hearing, which also supports their adoption.

2. Final Recommendations: Prevent an adverse and perverse impact from the reduced ADIT and deferred tax savings by recognizing them in the formula, adopting a presumptive value for amortizing the unprotected Excess ADIT, and requiring documentation with future applications.

The OCTA supports the attachment formulas adopted by the Commission. However, a non-cost-based accounting change (such as the deferred liability) should not be an acceptable basis for increasing attachment rates. As Ms. Kravtin testified, the formulas should be “applied in a smart way that understands that it’s not the ADIT doesn’t exist, it’s just in a different holding tank waiting determination for amortization.”³⁰ The formulas encourage cost-based calculations and the use of actual utility data when that data is available and supported. They also allow for the inclusion of applicable costs in non-formula accounts and in the manner consistent with the life of the utility assets involved. Precedent from the Federal Communications Commission supports inclusion. In *Telecable of Piedmont et al, v Duke Power Company*, 10 FCC Rcd. 10898, 10900-10901, 1995 FCC LEXIS 3983, 1995 WL 370472 (June 15, 1995), the Federal Communications Commission allowed repair costs caused by Hurricane

³⁰ Transcript at 88.

Hugo, which were booked in a non-formula FERC account, to be included in Duke Power Company's pole attachment rate calculation finding that "probative direct evidence regarding an acceptable alternative to meet unique circumstances" was presented. We have unique circumstances here too³¹ and, in the case of the electric utilities, the Excess ADIT is being booked in a FERC account not included in the formula.

Therefore, the Commission should adopt final resolutions for the attachment formula as well. The Commission should apply the attachment formulas to:

- Recognize the TCJA-related accounting changes by including the account(s) now holding the dollars.
- For any pole rate adjustments based on 2017 data, not permit use of the reduced ADIT balances resulting from the accounting change in anticipation of the TCJA. Staff witness Borer confirmed that without the TCJA, the accounting deferrals would not have been established under GAAP.³² There is, therefore, no cost basis for allowing the attachment rate to increase because of this anticipatory accounting change. The Commission attachment formula, before the TCJA, captured these monies and was devised to take them into account; with the changes incurred because to the TCJA, blind application of the formula would no longer take them into account.
- For any rate adjustments based on 2018 data and beyond, establish a generic presumption for amortization of the unprotected Excess ADIT for the attachment formulas, and require that the amortization be applied to the aggregate Total

³¹ Staff Witness Borer testified that major overhauls to the Federal Income Tax rate are "quite rare." (Staff Ex. 1 at 6.)

³² Transcript at 141.

Utility Plant amounts. The amortization period can be consistent with the utility's ARAM amortization period applicable to the protected Excess ADIT, which would avoid gaming or inconsistent impacts when comparing protected and unprotected ADIT ratios. A uniform amortization period allows for simplicity and internal consistency since the assets involved are the same. The amortization period should be no shorter than 20 years, which is consistent with the long life of the involved assets.³³

- For the future rate adjustments, require appropriate supporting documentation be filed with the application that demonstrates compliance with the above. The utility has the burden of proof and its application should substantiate its request. Attachers and Staff should not have to request additional information to determine, for instance, what portion of the federal tax savings currently in the deferred liability was included in the calculation.

3. Ohio public policy supports the OCTA's interim and final recommended safeguards and directives.

Preventing an adverse impact from the TCJA and the creation of the deferred liability or preventing a utility from leveraging the existence of the deferred liability for purposes of extracting higher rates are consistent with Ohio public policy. For instance, Ohio Revised Code Section ("R.C.") 4928.02(I) states that it is the electric policy of Ohio to ensure against unreasonable market power. OCTA witness Kravtin explained that one of the primary purposes of the pole attachment rate regulation was to protect attachers against potential abuse by the utilities that control access to the essential facility needed by attachers and for which there is no

³³ OCTA Exhibit 1 at 14.

practical alternative.³⁴ It is simply illogical to regulate the rate as a means of protecting the attachers and then allow the utility to use an accounting change ordered by the Commission (or per GAAP directives implemented in anticipation of Commission directives) to essentially turn the rate regulation on its head by extracting higher rates for non-cost reasons.

Similarly, these OCTA-recommended safeguards and directives are consistent with the state's telecommunications policy. R.C. 4927.02(A)(1) states in pertinent part that it is the policy to:

- (1) Ensure the availability of ... voice service to citizens throughout the state;

* * *

- (6) Promote diversity and options in the supply of telecommunication services and equipment throughout the state;

* * *

- (9) Not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services....

These recommended safeguards and directives will ensure the availability of voice service by not harming access to an essential facility used to provide voice service, promote services from attachers, and not unduly disadvantage attachers vis-à-vis other service providers.

In addition to these safeguards and directives being just and reasonable, Ohio's public policy supports them. The Commission should adopt them.

III. CONCLUSION

Recent changes within the federal tax system as a result of the TCJA will affect the attachment rates of Ohio's pole-owning and conduit-owning utilities, but they should not intentionally or unintentionally harm the attachment rates. Likewise, the interim accounting directive issued in this investigation docket by the Commission on January 10, 2018 (or related

³⁴ OCTA Exhibit 1 at 10.

GAAP changes in anticipation of the implementation of the Commission's directive), should not harm the attachment rates. The OCTA identified multiple factors that could produce adverse and perverse impacts through higher rates without a corresponding cost basis, while benefiting the utility. Generic and uniform safeguards and directives to the pole-owning and conduit-owning utilities must be adopted to ensure no harm occurs and to safeguard attachment rates, data, and dollars. The OCTA presented recommendations for specific, targeted safeguards and directives for the period before final resolutions are adopted and put into place and none were challenged. In addition, the OCTA-recommended final resolutions for the attachment formula should be adopted as well to further avoid adverse and perverse impacts in future rate-setting. The purposes for those safeguards and directives are consistent with the Commission's own statements in this docket and are consistent with Ohio public policy. The Commission should adopt the OCTA's recommendations.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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Summary: Brief electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable
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