

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

**MEMORANDUM CONTRA OF THE  
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

Duke Energy Ohio, Inc.’s motion for a protective order to stay responses to all discovery served by the Ohio Cable Telecommunications Association (“OCTA”) should be rejected as it does not comport with the Commission’s administrative rules and policies.

First, Duke states in its memorandum in support at page 4 that the “OCTA should not be entitled to automatically engage in discovery” because Duke opposes the OCTA intervention. That is contrary to the Commission’s long-standing practice of allowing intervenors to serve discovery and is contrary to the purposes of the Commission’s discovery rules, which include prompt and expeditious use of prehearing discovery. Moreover, the OCTA has amply demonstrated its interest in these proceedings in its motion to intervene. The OCTA was granted intervention in similar cases preceding this matter, and the OCTA again has a real and substantial interest here that could be adversely affected. It should be permitted to conduct discovery consistent with the Commission’s rules.

Second, Duke’s motion for a protective order should be rejected because Duke did not try to resolve its differences before filing its motion and because Duke did not include an affidavit from counsel. Commission rules require counsel to file an affidavit explaining efforts to resolve the issue before a protective order will be granted. Absent the affidavit, the motion should be denied.

Third, Duke's motion should be rejected because Duke has not satisfied the test used by the Commission to analyze stay requests. Duke did not even reference the test in its motion. For these reasons, Duke's motion for a protective order requesting a stay on all discovery from the OCTA should be rejected. Also, the Commission should require Duke to promptly respond to the OCTA's discovery request, given the additional time the utility has effectively garnered by filing the motion.

**A. A protective order should not issue because the OCTA is permitted to conduct discovery under the Commission's rules.**

Duke is asking the Commission to reverse its long-standing policy that any person who has filed a motion to intervene is permitted to obtain relevant discovery. *See*, Rule 4901-1-16(B) and (H) of the Ohio Administrative Code. Duke wrongly claims that the OCTA should not be entitled to automatically engage in discovery. Duke's motion seeks to preclude one intervenor – the OCTA – from conducting *any* discovery because Duke opposes the OCTA's intervention. If Duke's motion were granted (which it should not be), the Commission would encourage Duke and the other utilities to manipulate the discovery process by opposing intervention requests. This would also be contrary to the Commission's long-standing policy that encourages "prompt and expeditious use of prehearing discovery." *See*, Rule 4901-1-16(A).

The OCTA will not repeat the arguments from its motion to intervene and its reply in support, but notes that the OCTA has a substantial interest in this proceeding and therefore no protective order should be issued. The Commission has recognized that substantial interest and granted intervenor status to the OCTA in *multiple* Commission cases involving the flow-through of the Tax Cuts and Jobs Act of 2017 ("TCJA") benefits.<sup>1</sup> Just last week, the Commission not

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<sup>1</sup> *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI; *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC; *In the Matter of the Application of Ohio Power Company to Amend its Tariffs*, Case No. 18-1451-EL-ATA.

only approved a stipulation signed by the OCTA and others to resolve matters related to the TCJA for Ohio Power Company, the Commission cited the OCTA testimony in finding the stipulation to be reasonable.<sup>2</sup> Duke opened these dockets in similar fashion – “to resolve matters related to the [TCJA] for Duke Energy Ohio’s electric distribution operations and to facilitate an efficient resolution of those matters.” *See*, Duke’s application in these matters at page 1. *See, also*, its memorandum in support at page 4. The OCTA seeks to intervene here similarly to preserve its interests related to the TCJA benefits. It should not be precluded from conducting discovery because Duke chose to oppose the intervention motion.

**B. A protective order should not issue because Duke failed to comply with the Commission’s requirements.**

Duke states its motion is filed “pursuant” to Rule 4901-1-24. Duke, however, did not comply with the requirements in the Commission’s rule. Duke failed:

- To try to exhaust all other reasonable means to resolve its differences prior to filing its motion – required by Rule 4901-1-24(B)
- To include an affidavit from counsel setting forth the efforts to resolve its differences – required by Rule 4901-1-24(B)(3)

Duke did neither because it has made *no* attempts to resolve its differences. *See*, Attachment 1, Affidavit of Counsel attached to this Memorandum Contra. This lack of compliance, alone, should justify a prompt denial of the protective order.

**C. A protective order should not issue because Duke failed to demonstrate that a stay should be issued.**

Rule 4901-1-24(A) states that a protective order may issue when necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Duke makes only a brief sweeping assertion on page 5 of its memorandum in support that a stay will

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<sup>2</sup> Case Nos. 18-1007-EL-UNC and 18-1451-EL-ATA, *supra*, Finding and Order at ¶¶17 and 18(October 3, 2018).

prevent “time-consuming and costly discovery.” That unsubstantiated statement is insufficient to justify a stay of all discovery by the OCTA.

Duke has additionally failed to show that it meets the four-factor test used by the Commission for evaluating and granting stays. Specifically, the Commission considers:<sup>3</sup>

- Whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits;
- Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- Whether the stay would cause substantial harm to other parties; and
- Where lies the public interest.

Duke cannot satisfy those four factors. As noted, the OCTA is likely to prevail on its intervention request and staying discovery is contrary to the Commission rules. Duke fails to demonstrate that it will suffer *irreparable harm* without the stay. Duke simply wants to avoid responding to legitimate discovery requests. Also, a stay would cause substantial harm to other parties by delaying this proceeding for an undeterminable period. And, for reasons noted earlier, the stay should be denied as a matter of public interest.

Lastly, Duke claims in its memorandum in support at pages 4-5 that the OCTA is somehow abusing the discovery process.<sup>4</sup> That claim is false for multiple reasons, including the fact that the OCTA has an interest in these TCJA-related cases and the right to pursue discovery as explained earlier. The OCTA seeks information that is likely to lead to admissible evidence – asking about such things as the balances of Duke’s excess accumulated deferred income taxes created by the TCJA, how Duke is accounting for those amounts, how Duke is distinguishing

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<sup>3</sup> *In Re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (February 20, 2003); *In Re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Entry at 3 (March 30, 2009).

<sup>4</sup> Note, Duke is not raising any arguments in its motion for protective order regarding specific discovery requests. Its motion seeks a blanket ruling allowing Duke to not respond to any discovery requests submitted by the OCTA.

between the different excess accumulated deferred income tax amounts, and the amortization periods for the excess accumulated deferred income taxes. No abuse is occurring and no stay is justified.

**D. Conclusion**

Duke has not set forth any reasonable or justifiable grounds for a protective order staying responses to the discovery requests from the OCTA. Duke's motion is contrary to multiple Commission's rules and policies – Rule 4901-1-16, Rule 4901-1-24, and the purpose of discovery and the test for a stay – and should be denied. Moreover, Duke's purpose in these proceedings, as it acknowledges in its memorandum in support at page 4, is for returning the remaining TCJA benefits, a matter of substantial interest to the OCTA and a that the n interest the Commission has acknowledged. The Commission should deny the motion for protective order and require Duke to promptly respond to the OCTA's discovery requests, given the delay resulting from the filing of Duke's motion.

Respectfully Submitted,

/s/ Gretchen L. Petrucci

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*Attorneys for the Ohio Cable Telecommunications  
Association*

### **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served (via electronic mail) on the 10<sup>th</sup> day of October 2018 upon the entities and persons listed below.

/s/ Gretchen L. Petrucci  
Gretchen L. Petrucci

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**AFFIDAVIT OF COUNSEL**

STATE OF OHIO )  
 ) ss:  
FRANKLIN COUNTY )

Gretchen L. Petrucci, after being first duly sworn according to law, deposes and, states as follows:

1. I am the attorney of record in this proceeding for the Ohio Cable Telecommunications Association ("OCTA"). I am personally familiar with the information referenced in this Affidavit.
2. Prior to filing its motion for a protective order in these proceedings on October 4, 2018, Duke did not contact counsel for the OCTA to resolve its differences related to the OCTA's first set of discovery requests.

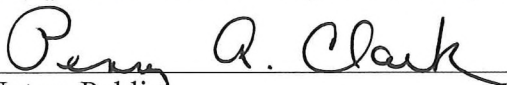
Further Affiant sayeth naught.

  
\_\_\_\_\_  
Gretchen L. Petrucci

Sworn to before me and subscribed in my presence this 10<sup>th</sup> day of October, 2018.



**PENNY A. CLARK**  
Notary Public, State of Ohio  
My Commission Expires  
03-21-2021

  
\_\_\_\_\_  
Notary Public

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Summary: Memorandum Contra electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telecommunications Association