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Via E-FILE

January 7, 2019

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

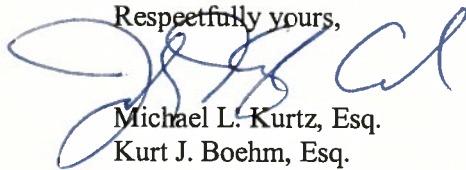
In re: Case No. 18-1185-EL-UNC and 18-1186-EL-ATA

Dear Sir/Madam:

Please find attached the REPLY OF THE OHIO ENERGY GROUP e-filed today in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Michael L. Kurtz", is written over the typed name.

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

MLKkew

Encl.

Cc: Certificate of Service

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Application Of Duke Energy Ohio, Inc.,	:	Case No. 18-1185-EL-UNC
For Implementation of the Tax Cuts and Jobs Act of 2017.	:	
	:	
In The Matter Of The Application Of Duke Energy Ohio, Inc.,	:	
For Approval of Tariff Amendments.	:	Case No. 18-1186-EL-ATA
	:	

REPLY OF THE OHIO ENERGY GROUP

Pursuant to Ohio Admin. Code 4901-1-12, the Ohio Energy Group (“OEG”) submits its Reply to the Memorandum Contra of Duke Energy Ohio, Inc. (“Duke” or “Company”) filed January 2, 2019. In its Memorandum Contra, Duke misconstrues the nature of OEG’s request in an attempt to foreclose OEG (and other interested stakeholders) from proposing an alternative methodology to allocate \$224.3 million in excess accumulated deferred income taxes (“EDIT”). Contrary to its assertions, Duke’s proposal is not the only one worthy of Commission consideration. The Attorney Examiner should disregard Duke’s mischaracterizations and grant OEG’s request for an expedited procedural schedule that includes an opportunity for intervenor testimony and a hearing. This is what R.C. 4909.18, due process, and recent Commission precedent demands.

As an initial matter, OEG is in no way seeking to relitigate previous base distribution rate cases, as Duke suggests.¹ OEG’s concern here is merely that the taxes actually paid by various customer classes over the 40-50 year build-up of the deferred tax balance (40% of which is now excess due to the 40% reduction in the federal corporate income tax rate from 35% to 21%) should be taken into account when determining how to properly allocate the \$224.3 million in EDIT resulting from the Tax Cuts and Jobs Act (“TCJA”). OEG is not attempting to change the past. Rather, we are only seeking to ensure that all relevant facts be considered when addressing the new issues resulting from the enactment of the TCJA in 2017. Duke’s unsound arguments regarding res judicata and collateral estoppel should therefore be dismissed for multiple reasons.²

¹ Duke Memorandum Contra at 2-3.

² Duke Memorandum Contra at 3-4.

First, Duke's theory that under the legal doctrines of res judicata and collateral estoppel the only lawful and reasonable way to allocate its \$224.3 million EDIT balance is based upon current distribution revenue is flatly contrary to the Commission's October 3, 2018 Order approving the Stipulation in AEP Ohio's TCJA proceeding.³ That Order approved the allocation of AEP Ohio's \$177.6 million non-normalized EDIT balance on a basis radically different than Duke's proposal. Instead of base distribution revenue by rate schedule, one half of AEP Ohio's \$177.6 million EDIT balance was allocated to residential customers and non-residential customers (Rates GS-1, GS-2, GS-3, GS-4 and Lighting) based on their respective 5 Coincident Peaks ("CP") and one half on kWh sales. And \$48.2 million of the AEP Ohio residential share was used as a one-time offset to the deferred residential PTBAR under-recovery. The November 9, 2018 Stipulation in FirstEnergy's TCJA proceeding, which included Staff, also included an allocation flatly contrary to Duke's method. In the FirstEnergy Stipulation, the \$482.7 million property-related normalized EDIT and \$194.3 million non-normalized property EDIT were allocated to residential and non-residential rate schedules (GS, GP, GSU, GT, STL, POL and TRF) one half based on 4 Coincident Peaks and one half on kWh sales.⁴

Second, the doctrines of res judicata and collateral estoppel have no application to the unprecedented 2017 TCJA. The effects on regulated utility rates of the TCJA are not settled issues that OEG seeks to relegate. Instead, this is a case of first impression. All commissions in all states across the U.S. are handling the TCJA in unique ways consistent with their particular regulatory paradigms.

Third, the doctrines of res judicata and collateral estoppel are generally limited to civil litigation among the same parties. These doctrines have almost no application in rate regulation. The clearest example is return on equity. The appropriate return on equity is relitigated each rate case based upon changed circumstances despite the same issue having been litigated in the prior rate case, and in the rate case prior to that.

Finally, as the recent TCJA cases of AEP Ohio and FirstEnergy have shown, OEG's request is not impractical. In both of those cases, interested stakeholders were permitted to intervene, given an opportunity to participate in discussions amongst the parties, and provided an outlet to voice any concerns prior to a Commission

³ Case Nos. 18-1007-EL-UNC and 18-1451-EL-ATA.

⁴ Case Nos. 18-1604-EL-UNC and 18-1656-EL-ATA.

order resolving that proceeding. And in both of those cases, allowing procedural opportunities for intervenor debate, including debate as to the proper allocation of EDIT, did not result in undue delay.

Duke tries to dismiss OEG's opposition to its EDIT flow back methodology by arguing that the concerns of transmission voltage customers with respect to the distribution-related EDIT are irrelevant and/or impractical, and that transmission-related TCJA issues should be addressed by FERC.⁵ This argument misses the point. End use customers served by each investor-owned electric utility regulated by this Commission all pay base distribution rates as well as all non-bypassable riders, regardless of service voltage. This is true of transmission, sub-transmission, and primary voltage customers. Duke's TS customers currently pay distribution rates, and have done so during the 40-50 year build-up of the EDIT. The transmission voltage customers of AEP Ohio and FirstEnergy also all pay Commission-approved distribution rates and all non-bypassable riders. The suggestion that OEG's concerns are better suited to FERC highlights the insincerity of Duke's arguments.

Even without a perfect reconstruction of the payment of EDIT among Duke's rate classes over the last 40 to 50 years, it is evident that TS customers have paid significant distribution-related taxes in the past. A few excerpts from Duke's history sufficiently demonstrate that point.

For instance, from Duke's 1993 distribution rate case (Case No. 92-1464-EL-AIR) until Duke's next distribution rate case in 2005 (Case No. 05-59-EL-AIR), Duke's base distribution rates were effectively frozen. During that period, the distribution rate for TS customers was significantly over cost. Duke's cost-of-service study from its 2005 distribution case (attached) demonstrated that TS present distribution revenue was \$2,432,234. But the total distribution cost of service to TS customers was only \$523,818. So over that 13-year period, TS customers were paying a \$1,908,416 distribution subsidy to other customer classes. While Duke's 2005 rate of return on distribution rate base was 3.75%, the return on distribution rate base from TS customers was 438.53%, or 117 times the system average return. Consequently, for 13 years, TS customers were clearly paying someone else's distribution-related tax expense, including ADIT, 40% of which is now excess. Currently, the total distribution revenue from TS customers is about \$67,800, down from \$2.4 million annually during 1993-2005.⁶ So if the \$224.3

⁵ Duke Memorandum Contra at 5.

⁶ See Staff Report, Case No. 17-32-EL-AIR Table 4.

million EDIT balance that has been built up over decades is credited back to customers based on current distribution revenue, TS customers would be significantly prejudiced.

In the attached affidavit, Steven J. Baron calculates the amount of federal income taxes paid in the distribution rates of each Duke rate schedule over the 24-year period August 1993 through December 2017. This analysis is based upon Duke's own cost-of-service studies. It shows that over this 24-year period, Rate TS paid 6.2% of Duke's total distribution-related federal income taxes. Based on this analysis, Rate TS should receive 6.2% of the EDIT balance.

Duke's rush to judgment without due process is contrary to the Commission's expressed intent "*to employ a deliberative and thorough approach to evaluating the complicated effects of the TCJA on each Ohio rate-regulated utility.*"⁷

Duke's rush to judgment is also contrary to the Commission's December 19, 2018 Opinion and Order in Duke's distribution rate case wherein the Commission referred to these proceedings as the forum to address the TCJA-related issues"⁸ Among the TCJA issues reserved to this case was "*the refund of jurisdictional excess ADITs.*"⁹ That is precisely the issue that OEG seeks to be heard on, and precisely the issue on which Duke stonewalls despite its agreement in the rate case Stipulation to fully vet it here.

Given the Commission's October 24, 2018 Order ensuring a "*deliberative and thorough*" approach to handling TCJA issues, and given the Commission's December 19, 2018 rate case Order reserving to this proceeding TCJA issues including the "*refund of jurisdictional excess ADITs,*" the suggestion that a hearing is unnecessary under R.C. 4909.18 is misplaced.¹⁰ A \$224.3 million issue deserves the thorough deliberation that the Commission promised. Importantly, the Staff Report did not address the allocation of the EDIT balance. It is not reasonable to only consider Duke's side of the story. The affidavit of Mr. Baron provides ample evidence that the "*application may be unjust or unreasonable,*" thus mandating a hearing under R.C. 4909.18.¹¹

⁷ Case No. 18-47-AU-COI (October 24, 2018) at 17.

⁸ Opinion and Order, Case Nos. 17-1263-EL-SSO *et al.* (December 19, 2018) at 64.

⁹ Id. At 51. "*The Signatory Parties understand that this Stipulation does not fully reflect the net savings realized by the Company as a result of the TCJA because certain matters, such as the refund of jurisdictional excess ADITs, remain unresolved.*"

¹⁰ Duke Memorandum Contra at 2.

¹¹ 4909.18 provides that: "*If it appears to the Commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing...*"

Very importantly, granting OEG's request will not result in harm to other customers since all of the tax savings that will be flowed back to Duke's customers will be subject to carrying charges during the pendency of these proceedings. Consequently, customers will ultimately be made whole for any temporary delay, as they were in both the AEP Ohio and FirstEnergy TCJA cases. There is no need to rubber stamp Duke's proposal merely for exigency's sake. While OEG appreciates and shares the desire to flow tax savings back to customers quickly, that desire should not override the Commission's responsibility to properly scrutinize Duke's application.

In sum, OEG seeks an opportunity to present a reasonable alternative EDIT allocation methodology, such as one based on Mr. Baron's affidavit or a variant on the methodologies used in the recent AEP Ohio and FirstEnergy TCJA cases. Therefore, OEG respectfully requests that the Attorney Examiner grant OEG's Motion.

Respectfully submitted,



Michael L. Kurtz, Esq.

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January 7, 2019

COUNSEL FOR THE OHIO ENERGY GROUP

CASE NO. 05-59-EL-A
ATTACHMENT KKF
PAGE 1 OF 1

PRIOR TO SUBSIDY EXCESS CALCULATION

THE CHOCOMATI GAS & ELECTRIC CO.
COST OF SERVICE STUDY
TWELVE MONTHS ENDING JUNE 30, 2005
ELECTRIC CASE NOS: 05-000-EL-AIR & 05-000-EL-AAM
DATA-3 MONTHS ACTUAL & 9 MONTHS ESTIMATE
INITIAL FILING

ITEM	ALLO	TOTAL	RESIDENTIAL	DS. WP.	SECONDARY	ah	dm	SECONDARY	05-01	PRIMARY	TRANSMISSION	LIGHTING	TOTAL	DISTRIBUTION	ALL
															OTHER
00003 ELECTRIC PLANT IN SERVICE		\$5,820,226.000	\$801,221,888	\$490,504,378	\$7,644,390	\$82,782,139	\$2,367,482	\$120,802,948	\$287,726	\$42,120,518	\$1,527,541,477	\$4,082,984,523			
DR11 TOTAL DEPRECIATION RESERVE		(2,345,487,000)	(27,484,657)	(188,678,037)	(2,521,951)	(20,804,224)	(772,388)	(39,485,898)	(108,447)	(20,188,821)	(517,455,221)	(1,828,031,779)			
RB71 TOTAL RATE BASE ADJUSTMENTS		(184,855,070)	(74,613,052)	(52,266,478)	(822,208)	(8,157,893)	(235,118)	(12,703,486)	78,514	(3,784,517)	(150,536,217)	(54,318,655)			
RB91 TOTAL RATE BASE		3,089,883,930	451,724,189	279,559,880	4,300,231	35,820,022	1,339,980	68,403,584	285,793	18,136,380	859,550,038	2,230,333,891			
OPERATING EXPENSES															
17 TOTAL O&M EXPENSE		257,492,489	84,506,340	33,889,912	488,313	6,221,140	152,730	8,421,583	458,975	1,108,797	135,037,770	122,454,729			
18 TOTAL DEPRECIATION EXPENSE		48,429,812	20,556,940	12,355,285	189,072	1,823,419	59,041	3,025,798	19,345	780,777	38,809,877	10,820,135			
19 TOTAL OTHER TAX & MISC EXPENSE		59,782,185	28,391,194	17,351,721	287,503	2,218,501	83,428	4,241,190	15,479	1,142,940	53,711,954	6,070,231			
20 TOTAL OF EXP EXC INC & R TAX		386,704,496	133,454,474	83,406,918	924,888	10,063,060	295,187	15,688,551	483,799	3,032,514	227,359,401	139,345,095			
21 NET FED INCOME TAX ALLOWABLE		11,408,834	14,030,896	8,888,277	134,046	1,110,573	41,843	2,124,262	7,861	589,346	26,706,704	(15,287,871)			
22 NET STATE INCOME TAX ALLOWABLE		(56,176)	3,232,570	1,899,347	30,870	255,662	9,589	488,818	1,784	131,013	6,149,833	(6,711,394)			
23 TOTAL REVENUE TAX		0	0	0	0	0	0	0	0	0	0	0			
24 TOTAL OPERATING EXPENSE		377,551,569	150,717,940	74,084,542	1,089,804	11,429,295	348,409	18,301,831	503,244	3,732,873	260,215,738	117,335,830			
25 RETURN ON RATE BASE		78,648,828	41,532,763	25,579,727	393,471	3,277,532	122,608	6,258,928	24,320	1,659,479	78,648,828	1			
26 TOTAL OTHER OPERATING REVENUES		(11,354,486)	(2,881,899)	(1,304,227)	(20,284)	(223,893)	(8,434)	(311,784)	(3,746)	(89,830)	(4,841,887)	(8,522,008)			
27 TOTAL ELECTRIC COST OF SERVICE		444,835,902	189,188,904	98,370,042	1,462,861	14,483,134	482,583	24,248,795	523,818	5,302,522	334,022,879	110,813,222			
28 PROPOSED REVENUES		1,130,259,086	151,877,855	82,202,201	982,154	17,215,278	418,842	14,231,108	2,432,234	8,721,125	256,080,395	874,178,871			
29 EXCESS REVENUES		685,423,184	(37,291,149)	(38,167,841)	(480,827)	2,732,144	(43,941)	(10,017,689)	1,908,416	1,418,803	(77,942,284)	783,385,449			
30 TOTAL RETURN EARNED		486,838,400	19,135,873	4,051,272	107,285	4,903,807	96,453	286,024	1,180,281	2,503,885	32,254,660	454,383,741			
31 RATE OF RETURN EARNED		0.588154823	0.042381409	0.014481808	0.024844008	0.1368901284	0.071980925	0.004327610	4.385355747	0.139058697	0.037525052	0.203729021			
32 TOTAL RATE OF RETURN ALLOWABLE		0.94995	0.02311	(0.02820)	(0.00771)	0.19040	0.07552	(0.04419)	7.87257	0.19245	0.01455	0.09150			
33 RETURN EARNED ON COMMON EQUITY															
34 ALLOWED RETURN ON COMMON EQUITY															
35 PRESENT REVENUES		1,130,259,086	151,877,855	82,202,201	982,154	17,215,278	418,842	14,231,108	2,432,234	8,721,125	256,080,395	874,178,871			
36 PRESENT REVENUES		(885,423,184)	37,291,149	36,167,841	480,827	(2,732,144)	43,941	10,017,689	(1,908,416)	(1,418,803)	77,942,284	(783,385,449)			
37 REVENUE INCREASE JUSTIFIED		0	0	0	0	0	0	0	0	0	0	0			
38 REVENUE INCREASE REQUESTED		0	0	0	0	0	0	0	0	0	0	0			
39 AFTER SUBSIDY EXCESS REVENUES		1,130,259,086	150,042,523	67,811,145	1,027,599	14,225,180	379,859	16,138,597	1,465,975	5,189,537	256,080,395	874,178,871			
40 PRESENT REVENUES AFTER SUBSIDY EXCESS															

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Application Of Duke Energy Ohio, Inc.,	:	Case No. 18-1185-EL-UNC
For Implementation of the Tax Cuts and Jobs Act of 2017	:	
	:	
In The Matter Of The Application Of Duke Energy Ohio, Inc.,	:	
For Approval of Tariff Amendments.	:	Case No. 18-1186-EL-ATA

**AFFIDAVIT OF
STEPHEN J. BARON**

1. My name is Stephen J. Baron. My business address is J. Kennedy and Associates, Inc. ("Kennedy and Associates"), 570 Colonial Park Drive, Suite 305, Roswell, Georgia 30075. I am the President and a Principal of Kennedy and Associates, a firm of utility rate, planning, and economic consultants in Atlanta, Georgia. Kennedy and Associates provides consulting services in the electric and gas utility industries.

2. I have more than forty years of experience in the electric utility industry in the areas of cost and rate analysis, forecasting, planning, and economic analysis. I have presented testimony as an expert witness in Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Maryland, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming, the Federal Energy Regulatory Commission and in United States Bankruptcy Court.

3. I have prepared an analysis that measures the amount of Federal Income Tax ("FIT") paid by each rate class for the period August 1993 through December 2017. This analysis, which is based on CG&E and Duke Energy Ohio ("Duke") class cost of service studies, represents the best measure of the historic contribution of each rate class to the Company's Accumulated Deferred Federal Income Taxes ("ADFIT"), based on actual class cost of service studies developed by the Company. A summary of the analysis is shown in Attachment 1 to my Affidavit.
4. Based on the results of my analysis, which covers a period of over 24 years, the Transmission Service ("TS") rate class has contributed 6.2% of the ADFIT balance associated with distribution facilities through December 2017. It is therefore appropriate to assign 6.2% of the excess ADFIT balance that was created by the Tax Cut and Jobs Act ("TCJA") to the TS rate class.
5. This 6.2% allocation of excess ADFIT to the TS rate class far exceeds an allocation that is based on current distribution rate revenues. The reason for this large difference and the justification for the 6.2% rate TS allocation is that distribution rates paid by Rate TS customers far exceeded the cost of service for Rate TS distribution service, as I will discuss. As a result of the excess distribution revenues paid by Rate TS customers, these TS customers paid a substantially greater portion of the FIT, including the ADFIT, than would be case if Rate TS distribution rates had been set at cost of service. Again, because the TS rates were substantially above cost of service, with rates of return

exceeding 400% for many years, TS customers have historically contributed millions of dollars more in FIT than justified by cost of service based rates.

6. While recent TS distribution rates are closer to cost of service, on average, over the past 24 years during which the ADFIT balance has been accumulating, this has not been the case. As such, it would be incorrect, and unjust to allocate the excess ADFIT balance on current distribution revenues rather than on a measure of the contribution of Rate TS customers over a long period of time to the ADFIT balance.
7. The analysis that I developed uses the results of the Company's filed class cost of service studies in Cases 05-059-EL-AIR (2005 distribution rate case), 08-709-EL-AIR (2008 distribution rate case) and 17-32-EL-AIR (2017 distribution rate case) to measure the test year contribution of each rate class to total FIT. Once the test year FIT contribution, at present rates, in each of these distribution rate cases was calculated, I assumed that this level of FIT contribution was made by each rate class for each year that the rates had been in effect. For example, the "present rates" that were in effect in 2008 (the test year in the 2008 distribution rate case) became effective in June 2006 pursuant to the Commission's Order in Case 05-056-EL-AIR. Because the new rates in the 2008 rate case did not become effective until July 2009, the FIT amounts paid by each rate class using the 2008 class cost of service study results were in effect for 37 months or 3.083 years. Similar calculations were made for the effective period of FIT contribution from the 2005 rate case and the 2017 rate case.

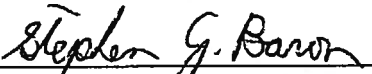
8. As shown in Attachment 1, the weighted average contributions to FIT for each rate class are calculated based on 24.417 years. For Rate TS, the weighted allocation factor is 6.2%, which represents the average distribution FIT contribution over the 24.417 years. This is the appropriate measure of the Rate TS class contribution to excess ADFIT.

AFFIDAVIT

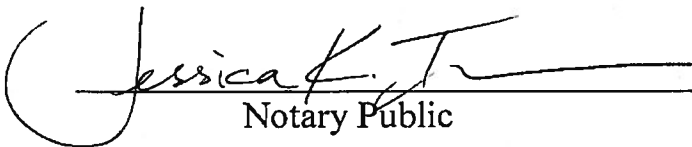
STATE OF GEORGIA)

COUNTY OF FULTON)

STEPHEN J. BARON, being duly sworn, deposes and states: that the attached is his sworn testimony and that the statements contained are true and correct to the best of his knowledge, information and belief.


Stephen J. Baron

Sworn to and subscribed before me on this
7th day of January 2019.


Notary Public



**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Application Of Duke Energy Ohio, Inc.,
For Implementation of the Tax Cuts and Jobs Act of 2017

:
:
:

Case No. 18-1185-EL-UNC

In The Matter Of The Application Of Duke Energy Ohio, Inc.,
For Approval of Tariff Amendments.

:
:

Case No. 18-1186-EL-ATA

ATTACHMENT 1

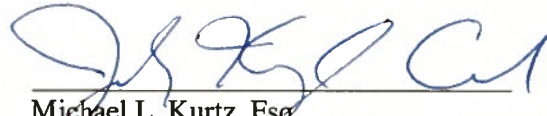
DUKE ENERGY OHIO

ALLOCATION OF EXCESS ADIT BASED ON FEDERAL INCOME TAXES PAID BY EACH RATE CLASS (8/1993 THROUGH 12/2017)

	<u>Years in Effect</u>	<u>Res</u>	<u>DS</u>	<u>EH</u>	<u>DM</u>	<u>GSFL</u>	<u>DP</u>	<u>TS</u>	<u>LIGHTING</u>	<u>TOTAL DISTRIBUTION</u>
6/30/2005 Allocated FIT (new rates 6/2006) Weight back to 8/1993	12.833	36.2%	0.0%	0.0%	34.6%	0.5%	0.0%	10.8%	17.9%	100.0%
12/31/2008 Allocated FIT (new rates 7/13/2009) Weight back to 6/2006	3.083	66.6%	0.0%	0.0%	22.5%	0.1%	0.0%	4.1%	6.6%	100.0%
12/31/2017 Allocated FIT Weight back to 7/2009	8.5000	40.42%	39.44%	0.20%	9.32%	0.16%	8.60%	0.04%	1.82%	100.00%
Weighted Average (8/93 - 12/17	24.417	41.5%	13.7%	0.1%	24.3%	0.3%	3.0%	6.2%	10.9%	100.0%

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, OH io Administrative Code, the PUCO'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 this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 7th day of January, 2019 to the following:



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

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in

Case No(s). 18-1185-EL-UNC, 18-1186-EL-ATA

Summary: Reply Ohio Energy Group (OEG) Reply to Memorandum Contra of Duke Energy Ohio, Inc. electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group