

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc. to Amend its Pole)	Case No. 22-164-EL-ATA
Attachment and Conduit Occupancy Tariff)	
P.U.C.O. No. 1.)	

**MEMORANDUM CONTRA OF DUKE ENERGY OHIO INC.
TO MOTION TO EXPEDITE DISCOVERY SCHEDULE**

I. INTRODUCTION AND BACKGROUND

Pursuant to the authority granted under Ohio Administrative Code (O.A.C.) 4901-1-12(C), Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) hereby files its memorandum contra (Memorandum Contra) the Ohio Cable Telecommunications Association's (OCTA) Motion to Expedite the Discovery Schedule and Request for Expedited Ruling (Motion).

This case stems from Duke Energy Ohio's March 4, 2022 filing to amend its Pole Attachment Tariff for the first time since that tariff it went into effect in 2015. OCTA's Motion seeks to shorten the time that Duke Energy Ohio would have available to respond to any discovery that OCTA serves in the underlying matter. The Commission's procedural rules set forth the general proposition that discovery requests must be answered within 20 days after service.¹ However, the rule allows the Commission, or one of its Attorney Examiners, to amend that response period as they deem appropriate.²

OCTA offers a single-page memorandum in support of its request to cut in half the discovery response timeframe established by Commission rules. In its Memorandum, OCTA sets forth two reasons why the Commission should grant its request: (1) OCTA makes general

¹ O.A.C. 4901-1-19(A).

² *Id.*

reference to the 60-day automatic approval process associated with ATA filings, and Duke Energy Ohio's filing in particular, stating that a 10-day response timeframe is therefore appropriate, and (2) OCTA relies upon the fact that the Commission *partially* granted OCTA's request for an expedited discovery timeline in a wholly separate and entirely unique 2015 proceeding. Neither of these arguments, however, is supported with any precedent or explanation by OCTA, nor should either prove convincing to the Commission.

II. LAW AND ARGUMENT

First, as it relates to OCTA's general reference to the automatic 60-day approval process established by O.A.C. 4901:1-03-04(A) as proof that the discovery response period should be shortened by half, OCTA highlights a problem of its own making. If the need OCTA describes were legitimate, OCTA would not have delayed intervening in the underlying docket until 19 days after Duke Energy Ohio's filing and just two days prior to the due date for objections. By its Motion, OCTA demonstrates its own awareness of the 60-day approval timeframe governing the underlying action. OCTA's Motion demonstrates its experience with the 2015 tariff filings by Duke Energy Ohio and other various electric distribution utilities. Knowing the process, having the same counsel as the 2015 case, and being aware of Duke Energy Ohio's filing on March 4, 2022, it was well within OCTA's ability to plan ahead and prepare both its motion to intervene and initial discovery requests prior to nineteen days after the Company's tariff adjustment filing. OCTA now seeks to force Duke Energy Ohio to pay for OCTA's own delay in intervening and initiating discovery in the underlying matter. However, Duke Energy Ohio's resources are not unlimited, and the Company must balance and continue to be responsive to the investigation of Commission Staff in the underlying matter, something a ten-day discovery response timeline

would surely hinder. The Company should not be forced to suffer the consequences of OCTA's delay nor its plea for an abridged timeframe.

Also, it should be noted that OCTA has *already* served Duke Energy Ohio with what the Company can only hope is the bulk of OCTA's discovery requests in this case. On March 24, 2022, just one day after filing its Motion seeking to slash the discovery response timeframe in half, OCTA served the Company with its first set of requests. This first set of requests consists of upwards of thirty interrogatories, a dozen requests for production of documents, and half a dozen requests for admission, covering most topics at issue in the underlying matter (and beyond). Not only are these requests numerous, but they seek information such as the identification of pole height and material by category for all approximately 250,000 poles in Duke Energy Ohio's charge—a request that will take no shortage of time and manpower to respond to. The fact that OCTA has already served its discovery in this case establishes two things: (1) that Duke Energy Ohio will need every bit of the 20 days the Commission's rules allow it to respond to the multitude of detailed (and multi-part) requests served by OCTA, and (2) that the 20-day timeframe for response will not prejudice OCTA by any means. Indeed, a 20-day response deadline to discovery served on March 24, 2022 will leave OCTA an additional nearly three weeks to consider Duke's responses to discovery prior to the running of the 60-day automatic approval timeframe. This time is more than sufficient for OCTA to consider the Company's responses and make its arguments before the Commission. Indeed, this timeframe is greater than the time available to consider discovery responses in many other Commission proceedings. For these reasons, OCTA fails to establish the need it sets forth in its Motion.

Second, and finally, OCTA's reference to and reliance upon Duke Energy Ohio's prior pole attachment ATA filing, and the Commission's holding related to discovery deadlines in that

matter, is misguided and does not paint the full picture. Not only was the posture of the 2015 case different than the one at hand³ the Commission only granted OCTA's request in part and denied it in part.⁴ For many of the reasons identified above, OCTA was left with a fifteen-day discovery response timeline, not the ten days it originally requested. The Company is not advocating for a fifteen-day response timeframe in the underlying case, nor does it believe that it is necessary or warranted. However, ten days would certainly be out of the question of Commission precedent as it relates to the Commission's prior findings, a point conveniently left out by OCTA in its Motion. While Duke Energy Ohio is committed to being responsive to OCTA's discovery requests, as laid out in its Memorandum Contra, there is no need to hamstring the Company's ability to successfully respond to those requests, as well as balancing the many other requests, in this case and others, which are the Company's responsibility.

III. CONCLUSION

WHEREFORE, for all the above reasons, Duke Energy Ohio respectfully requests that the Commission deny OCTA's Motion and decline to abridge the discovery response time in the underlying case.

³ The 2015 case upon which OCTA relies dealt with Duke Energy Ohio's (and all EDUs') response to a July 30, 2014 Finding and Order in Case No. 13-579-AU-ORD (13-579), *In re Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, which established, for the first time, Commission rules for the access to poles, conduits, and rights-of-way. On February 25, 2015, the Commission issued an Entry in Case No. 13-579-EL-ATA which, among other things, directed utility pole owners to each file the appropriate company-specific tariff amendment application. OCTA intervened in the Company's filing at that time, along with eight other filings from various pole owners. It is not necessarily instructive, nor precedent establishing, as it relates to the underlying matter.

⁴ See *In the Matter of the Application of Duke Energy Ohio, Inc. to Amend its Pole Attachment and Occupancy Tariff*, P.U.C.O. No. 1, Case No. 15-965-EL-ATA, *et al.*, Entry (July 10, 2015).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a courtesy copy of the foregoing document was served via electronic mail on the 28th day of March, 2022, on all persons/entities listed below:

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Summary: Memorandum Memorandum Contra of Duke Energy Ohio, Inc.to Motion to Expedite Discovery Schedule electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Rocco D'Ascenzo and Kingery, Jeanne W. and Akhbari, Elyse H.