**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Annual Application of Duke Energy Ohio, Inc., for an Adjustment to Rider AMRP Rates. | )<br>)<br>) | Case No. 17-2318-GA-RDR |
| In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval. | )<br>) | Case No. 17-2319-GA-ATA |

---

**DUKE ENERGY OHIO'S MEMORANDUM CONTRA APPLICATION FOR REHEARING**

---

# I. INTRODUCTION

Pursuant to authority granted under Ohio Administrative Code (O.A.C.) 4901-1-35(B), Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby files its memorandum contra (Memorandum Contra) the Application for Rehearing (Application) filed with the Public Utilities Commission of Ohio (Commission) on May 25, 2018, by the Office of the Ohio Consumers' Counsel (OCC).

The Company's Accelerated Main Replacement Program, and recovery therefor under the associated rider (Rider AMRP), has been in place, allowing Duke Energy Ohio to continue providing safe and reliable service, since its initial approval in a 2001 base rate case.[1] After participating in several Company rate cases and numerous rider adjustment proceedings since that time, OCC now objects. One of OCC's complaints is new this year, but the other is one that it could have raised—but did not—any time since the inception of Rider AMRP.

OCC claims that the Opinion and Order (Order) issued in these proceedings on April 25, 2018, was unreasonable and unlawful in two respects. OCC is wrong on both counts:

[1] *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Rates*, Case No. 01-1228-GA-AIR.

1. The Commission's Order was not in violation of law and precedent, nor was its Order unjust or unreasonable, based on its deferment of certain federal income tax issues to a separate, pending investigation.

2. The Commission's Order was not unreasonable for having failed to "require" the Company to file a base rate case.

## II. ARGUMENT

### A. The Commission Has the Discretion to Defer its Decision relating to Impacts of Federal Income Tax Changes to Another Pending Proceeding.

In late 2017, Congress passed the Tax Cuts and Jobs Act of 2017 (TCJA), which, *inter alia*, lowered the corporate federal income tax percentage. This change, as the Commission is aware, impacted the pre-tax return to which the Company is entitled. The Company fully included this impact in its application, as well as in the stipulation it entered into with Staff of the Commission. OCC complains that, because the new rate did not take effect on the effective date of the TCJA (January 1, 2018), the Company should lower the rate even further in order to account for the overcollection between January 1 and the actual effective date of the new rates, on May 1, 2018.

OCC makes much of the fact that one of its witnesses made a calculation that he believes reflects the overcollection for those four months. It points to case law and Commission precedent that would have the Commission address the four-month lag in these proceedings. However, what OCC fails to account for is the Commission's discretion to handle its various proceedings as it deems most appropriate.

In none of the cases cited by OCC was there any discussion of another, pending case in which the issue in question could also have been addressed.

- In the first case cited by OCC, a decision from 1938, the Court was considering whether the Commission should have accounted for known, increasing levels of federal taxation in the years following the test year. There was no reference to

another ongoing case in which changes in federal taxes laws were being considered.[2]

- OCC's second citation is slightly more recent, but again is not helpful to its position. In that case, the Court addressed the process by which the Commission had calculated income tax expenses, whereby the Commission had based its decision on a hypothetical company rather than the real entity before it. A change in tax law was not discussed and there was no other ongoing proceeding in which the issue was being addressed.[3]

- OCC's final reference is a Commission decision, in which the Commission was considering how to address tax changes in a base rate case. The opinion says nothing about any overlap between that deliberation and another, ongoing investigation.[4]

Here, however, the Commission is in the process of investigating the impacts of the TCJA on all regulated utilities in a pending case.[5] This is a distinction that cannot be ignored.

Case law is clear that the Commission has the discretion to manage its docket as it deems most expedient and appropriate. Both the Commission and the Ohio Supreme Court have confirmed this to be true. "The Commission is vested with comprehensive discretion to manage its dockets including how to conduct the orderly flow of its business."[6] "The Commission is vested with broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary

[2] *East Ohio Gas Company v. Pub. Util. Comm. of Ohio*, 133 Ohio St. 212 (1938).
[3] *General Telephone Company of Ohio v. Ohio Pub. Util. Comm.*, 174 Ohio St. 575 (1963).
[4] *In the Matter of the Application of The Cleveland Electric Illuminating company for Authority to Amend and Increase Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 86-2025-EL-AIR, pp. 194-198 (Dec. 16, 1987).
[5] *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.
[6] *In the Matter of the Application of Ohio Power Company for a Limited Waiver of Ohio Adm.Code 4901:1-18-06(A)(2)*, Case No. 17-1380-EL-WVR, *et al.*, Entry on Rehearing, ¶ 20 (Sept. 6, 2017)(Ohio Supreme Court citations omitted).

duplication of effort."[7] There is, simply, no reason why the Commission cannot decide that it will address the impacts of the TCJA in a single, uniform proceeding.

OCC's first ground for rehearing should be denied.

B. The Commission Has Neither an Obligation nor any Authority to Require the Company to File a Base Rate Case

OCC claims that the Commission should have ordered Duke Energy Ohio to file a base rate case and that its failure to do so resulted in an unreasonable order. Unfortunately, OCC does not—and, indeed, cannot—cite any authority that would allow the Commission to issue such an order. Only the utility itself can make the decision to file an application to adjust its base rates. "Any ***public utility*** desiring to . . . modify, amend, change, increase, or reduce any existing rate . . . ***shall file a written application*** with the public utilities commission."[8]

There is, of course, nothing to stop the Commission from making a determination that a utility's rates should be reviewed. The Ohio General Assembly has given the Commission specific authority to do so: "If the public utilities commission believes that any rate or charge may be unreasonable or unjustly discriminatory, and that an investigation relating thereto should be made, it may investigate them upon its own motion."[9] Thus, the Commission may open an investigation, but may not order the Company to file a rate case.

Ohio law also provides a mechanism whereby OCC itself could commence an action to review the base rates of Duke Energy Ohio, pursuant to the standard complaint statute: "Upon complaint in writing against any public utility by any person, firm, or corporation . . . that any

[7] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, *et al.*, pg. 10 (March 31, 2016)(Ohio Supreme Court citations omitted). *Accord In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, *et al.*, pg. 36 (*citing Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559 (1982)).
[8] R.C. 4909.18 (emphasis added).
[9] R.C. 4909.27. *See also* R.C. 4905.26 ("upon the initiative or complaint of the public utilities commission . . .")

rate . . . is in any respect unjust . . . if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing . . ..”[10] OCC could have availed itself of this opportunity, but has not done so.

OCC could also have sought to include this issue in a stipulation, in any one of the numerous Rider AMRP adjustment cases or the several base rate cases that approved the continuation of Rider AMRP over the years. OCC is well aware of this tactic, as it was used in another proceeding in which OCC was a stipulating party.[11] OCC cannot simply announce its desire for a rate case at this late stage and expect its preferences to be addressed. There is no legal mechanism to do so, without the Company’s agreement.

OCC’s second ground for rehearing must be denied.

## III. CONCLUSION

Duke Energy Ohio respectfully submits that the Commission should deny the OCTA’s Application for Rehearing.

[10] R.C. 4905.26.
[11] *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set Its Gas and Electric Recovery Rate for 2010 SmartGrid Costs Under Rider AU and Rider DR-IM and Mid-deployment Review of AMI/SmartGrid Program*, Case No. 10-2326-GE-RDR, Stipulation and Recommendation, Section II.d. (Feb. 24, 2012).

Respectfully submitted,

DUKE ENERGY OHIO, INC.

*/s/ Jeanne W. Kingery*

Rocco O. D'Ascenzo (0077651)
Deputy General Counsel
Jeanne W. Kingery (0012172) (Counsel of Record)
Associate General Counsel
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, Ohio 45201-0960
(614) 222-1334 (telephone)
(614) 222-1337 (facsimile)
Rocco.DAscenzo@duke-energy.com
Jeanne.Kingery@duke-energy.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 4th day of June, 2018, to the parties listed below.

*<u>/s/ Jeanne W. Kingery</u>*
Jeanne W. Kingery

Steven Beeler
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
steven.beeler@ohioattorneygeneral.gov

Counsel for Staff of the Commission

Zachary E. Woltz
Terry L. Etter
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Zachary.woltz@occ.ohio.gov
Terry.etter@occ.ohio.gov

Counsel for OCC