BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP'S MEMORANDUM CONTRA JOINT APPLICATION FOR REHEARING OF OHIO POWER COMPANY, OHIO EDISON COMPANY, THE DAYTON POWER AND LIGHT COMPANY, DUKE ENERGY OHIO, INC., THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

On December 20, 2017, the United States Congress took a substantial step to improve and stimulate the country's economy by putting more money in the hands of companies doing business here. Specifically, Congress enacted the Tax Cuts and Job Acts of 2017 (TCJA), a significant overhaul of the Internal Revenue Code that became effective on January 1, 2018. In pertinent part, the TCJA lowered the federal corporate income tax rate from 35% to 21% with the intent and purpose of giving tax relief to American companies, which would then result in savings to American consumers. The tax reductions become more important to manufacturers who are also large consumers of utility services as customers of regulated utilities also pay for the regulated utilities' tax obligations through their regulated utility rates. Further, Ohio law mandates that the regulated utilities only collect rates from customers that are just and reasonable and **not more than the charges allowed by law.** R.C. 4905.22. Specifically, R.C. 4905.22 states: "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and *not more than the charges allowed by law* or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, *or in excess of that allowed by law* or by order of the commission." R.C. 4905.22

(emphasis added). Additionally, for any charges established through Chapter 4928, Revised Code, the Public Utilities Commission of Ohio ("Commission") must "ensure the availability to consumers of . . . reasonably priced retail electric service."

Therefore, to effectuate this new federal law and to be consistent with Ohio law, the Public Utilities Commission of Ohio ("Commission") should act expeditiously and require the Ohio utilities to reduce their regulated rates to pass the tax savings onto customers as envisioned by the Commission's January 10, 2018 Entry. Given the electric utilities' arguments concerning retroactive ratemaking discussed further below, time is of the essence. ,

On January 10, 2018, the Commission instituted its Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies to ensure that the tax relief received by Ohio utilities translates into rate savings for Ohio customers in accordance with Ohio law.[1] The Commission clearly and indisputably has the authority to order the COI and require all utilities to pass their tax savings onto Ohio ratepayers.

Notwithstanding the federally-mandated TCJA and Ohio law requiring just and reasonable rates for utility service, Ohio's investor-owned electric utilities want to retain all of the benefits resulting from the new tax laws, asking the Commission to excuse them from passing those benefits onto Ohio consumers. Specifically, in their Joint Application for Rehearing, the Ohio Power Company, Ohio Edison Company, The Dayton Power and Light Company, Duke Energy Ohio, Inc., The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the EDUs) seek to unjustly delay and stymie the rate relief owed to Ohio's businesses as a result of the TCJA. In essence, the EDUs want to realize substantial tax savings immediately as the EDUs will have reduced tax obligations beginning

[1] Entry (January 10, 2018).

January 1, 2018, but the EDUs claim that the Commission cannot force the utilities to immediately reduce the level of tax expense collected from ratepayers in order for customers to reap those same benefits. Instead, the EDUs argue that the Commission is only able to reduce their rates in accordance with separate rate proceedings at some unknown date in the future, which could not be until 2024, six years after the TCJA was enacted. Such a result would constitute a violation of Ohio and federal law and cause an unfair and unreasonable result to Ohio's businesses by requiring them to continue to pay unjust and unreasonable rates for electric service based upon federal tax rates that are no longer the law in this country. Accordingly, the EDUs' Joint Application for Rehearing should be denied.

Indeed, in order to see the abnormality of this anti-customer approach by Ohio's EDUs, the Commission need look no further than its incongruity with the actions of utilities and Commissions in other states. For example, three days after the TJCA went into effect, Eversource Electric in Massachusetts agreed to pass $56 million in savings to its 1.4 million customers, just months after the company had been approved for a $37 million increase.[2] That same week, the Baltimore Gas & Electric Company announced plans to pass $82 million in tax savings to customers.[3] Less than a month after the law went into effect, Louisville Gas & Electric Company and the Kentucky Utilities Company agreed to pass almost $180 million in savings to customers.[4] The contrast between the way these companies worked proactively with their respective state public utilities commissions to provide rate relief to customers (as

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[2] Globe Staff, "Eversource to Pass on Corporate Tax-Cut Savings to Electricity Customers," *The Boston Globe* (January 4, 2018).

[3] Sarah Gantz, "Baltimore Gas & Electric Co. Wants to Pass on $82M in Tax Savings to Customers After Federal Tax Reform," *The Baltimore Sun* (January 5, 2017).

[4] Louisville Gas & Electric and Kentucky Utilities Company, Press Release: LG&E and KU Reach Unanimous Settlement to Deliver Nearly $180 Million in Tax Savings to Customers (January 29, 2018).

envisioned by the TCJA) and the insistence of Ohio's electric utilities to continue to collect rates from customers that include expenses associated with federal tax rates that are no longer in effect is stark. To adopt the EDUs' positions set forth in their Application for Rehearing would not only violate Ohio law, but would make Ohio an outlier from other states across the country.

The Ohio Manufacturers' Association Energy Group (OMAEG) supports the Commission's efforts to protect customers, and opposes the intransigent approach to addressing tax relief that the electric utilities advance in their Joint Application for Rehearing. OMAEG represents a number of manufacturers across the state of Ohio that stand to benefit significantly from a reduction in the utilities' rates to reflect the federal tax rate reductions included in the TCJA. These benefits coupled with the manufacturers' own reduced federal tax obligation should bring relief to Ohio businesses and help spur the economy. While OMAEG understands and endorses the need to study this issue thoroughly, OMAEG urges the Commission to continue its review, and upon completing it, expeditiously pass the federal tax savings onto customers. As such, OMAEG asks the Commission to deny the EDUs' attempt to contravene state and federal policies and proceed along the course it charted in its January 10 Entry towards reducing customers' utility rates in step with the federal tax changes.

II. ARGUMENT

A. The EDUs' Requests for the Commission to Clarify the January 10, 2018 Entry Are Unnecessary.

In their first two assignments of error, the EDUs do not assert a legal error made by the Commission as required by R.C.4903.10. Instead, the EDUs ask the Commission to clarify various aspects of the January 10, 2018 Entry. First, they ask the Commission to clarify that the accounting directive in its January 10 Entry is "preliminary, temporary, and without prejudice to the outcome of this proceeding or any subsequent related proceeding and only pertains to retail

rates subject to the Commission's jurisdiction."[5] The EDUs then ask the Commission to clarify that "the accounting directive does not predetermine the outcome of any future rate or rate proceeding."[6]

OMAEG does not believe that these clarifications are necessary to implement the Commission's accounting directive, as the January 10 Entry speaks for itself. The Commission's Entry directed the utilities to "record on their books as a deferred liability, in an appropriate account, the estimated reduction in federal income tax resulting from the TCJA."[7] At no point in that Entry does the Commission indicate that either the outcome of this case or any rate proceeding is predetermined. Accordingly, the first two assignments of error should be denied. OMAEG does not oppose, however, a clarification of the January 10 Entry should the Commission feel that doing so is necessary.

B. Although Many of the EDUs' Arguments Are Not Ripe for Review, the Commission has Legal Authority to Order a Reduction in Any Rates Charged to Customers by Utilities.

i. Ohio Law Gives the Commission Authority to Issue Its January 10 Entry.

The EDUs are incorrect in their assertion that rates for riders established through the ESP process under R.C. 4928.143 can only be modified by the utility's consent or through the ESP process. The EDUs are also incorrect that the customer refunds can only be accomplished through the significantly excessive earnings test (SEET). Further, the EDUs' assertion that base rates can only be changed prospectively through a rate proceeding under R.C. 4909.18 is incorrect. R.C. 4909.16 states that when the Commission deems it necessary to prevent injury to the interests of the public, it may "temporarily alter" existing rates of any public utility "for such

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5 Joint Application for Rehearing at 5.

6 Id. at 6.

7 Entry at ¶ 7.

length of time as the commission prescribes."

Additionally, Ohio law mandates that the regulated utilities only collect rates from customers that are just and reasonable and **not more than the charges allowed by law.** R.C. 4905.22. To ensure that rates are just and reasonable, R.C. 4905.26 allows the Commission to initiate its own investigation of the rates currently being charged by utilities and make adjustments as it deems necessary. Specifically, the Commission is authorized to determine whether any rate charged is "in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law . . ."[8]

As to the EDUs' argument that the Commission cannot conclude such an investigation by adjusting rates that it ultimately determines are unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law, the Supreme Court of Ohio has already rejected the EDUs' position, finding that prohibiting the Commission from actually adjusting rates it identifies as being in need of adjustment "strips [R.C. 4905.26] of its usefulness."[9] The Court has reaffirmed its holding in that case on a number of occasions, even citing a case where the Court explicitly rejected the argument, made by the EDUs here, that R.C. 4909.18 prevents the Commission from adjusting rates based on its own investigation.[10] In a subsequent case, the Court stated that "[w]e have repeatedly held that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding such as this, without compelling the affected utility to apply for a rate increase under R.C. 4909.18."[11] Even the Supreme Court case that the EDUs cite states that the EDUs' position is incorrect. In *Lucas County Commissioners v. Public Utilities*

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8 R.C. 4905.26.

9 *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 58 Ohio St. 2d 153, 157 (1979).

10 OCC Comments at 3.

11 *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 2006-Ohio-4706 at ¶ 29, 110 Ohio St. 3d 394.

Commission, 80 Ohio St. 3d 344, 347 (1997), the Court reaffirmed that the Commission "may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable." Importantly, when the Court made that statement, it was referring to a proceeding under R.C. 4905.26, and not the R.C. 4909.18 proceeding or an ESP proceeding, which the EDUs contend are the only permissible ways to adjust rates.[12]

ii. The Commission Should Continue Its Investigation and Then Expeditiously Implement Its Findings.

The Commission has correctly identified the need to study the impact that the TCJA has on utility rates charged to customers. The EDUs agree that there exists a need to "resolve these issues."[13] Yet, the EDUs contend that any necessary changes to base rates should not be implemented until the each respective utility's next base rate case. In addition to the legal reasons that counter the position that the Commission is required to wait for a base rate case, practicality and fairness demand an expeditious resolution of this issue. As such, the Commission should take the following steps:

a. For Utilities that Are Not in a Pending Rate Case, the Commission Should Implement New Rates Immediately Rather than Waiting for the Utility to Voluntarily File a New Rate Case.

The Commission should not force Ohio's utility ratepayers to wait for their public utilities to voluntarily file a rate case before they receive the full financial benefit of the TCJA. As the EDUs point out, some utilities have made commitments to not file a new rate case in the near future.[14] It would be an unacceptable resolution of these issues to deny the customers of

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[12] See 80 Ohio St. 3d at 347.

[13] Joint Application for Rehearing at 12.

[14] Joint Application for Rehearing at 11.

those utilities access to the relief Congress has already provided for them until their utilities decide to file a rate case. Instead of reaching this outcome, the Commission should exercise its statutorily-granted power discussed above to give these customers relief as soon as the Commission determines what the impact of the tax law on public utility rates ought to be.

b. For Utilities that Are Currently in a Pending Rate Case, the Commission Should Address the Impact of the TCJA in those Pending Cases.

Meanwhile, for utilities that have a pending base rate case, the Commission should address these issues in those respective cases. If the Commission does not resolve this investigation prior to the culmination of pending rate cases, and the changes in federal tax law are not addressed in those cases, customers will be deprived of the tax savings until a subsequent proceeding or the COI is resolved.

Addressing the tax changes now is also required by Ohio law. The Supreme Court of Ohio has held that it is the Commission's duty to consider changes in tax laws that occur after the test period of a pending rate case.[15] Indeed, the Commission previously followed that directive from the Supreme Court when deciding an electric base rate case where the federal tax law had changed after the establishment of the test year. The Commission held that an approach that did not fully account for the new tax rate "misses the point" that a new tax law was in effect and that "rates are being set prospectively."[16] The Commission should not permit any utility currently in a pending rate case to fail to fully account for the tax changes in its new rates, even if the Commission has not concluded this investigation at the time the rates are set.

Moreover, Ohio law regarding retroactive ratemaking and the as-filed rate doctrine will

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[15] See *East Ohio Gas CO. v. Public Utilities Commission*, 133 Ohio St. 212 (1938)

[16] *In re Application of the Toledo Edison Company for an Increase in Rates for Electric Service*, 86-2026-EL-AIR, Entry on Rehearing (December 16, 1987).

certainly be used by the EDUs in an attempt to prevent later refunds to customers to recognize the lower federal tax rates after the new rates are established through a rate case that included expenses associated with taxes that were no longer in effect. The Commission has stated its intent to pass benefits from the TCJA on to ratepayers.[17] It would therefore be nonsensical to avoid the issues in cases initiated with the purpose to set new rates. Ratepayers should not be forced to litigate these pending rate cases, have new rates set, and then have to wait for a new rate case or the conclusion of the Commission investigation in order to receive the benefits associated with the federal tax rate reductions that are already in effect.

[17] Entry at ¶ 2 (January 10, 2018).

III. CONCLUSION

Although the specifics of this issue require careful study by the Commission, utilities, and stakeholders, the bigger picture is clear. Congress passed a new federal tax law to provide benefits to the American people and businesses. Ohio law gives the Commission the authority to ensure that ratepayers to Ohio's public utilities receive those benefits. The Commission recognized as much and initiated this proceeding and issued an accounting directive to ensure that ratepayers receive these benefits. The EDUs fail to offer a valid legal basis for the Commission to change course. For that reason, and the reasons stated above, the Commission should deny the EDUs' Joint Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via electronic mail on all parties of record on February 20, 2018.

/s/*Kimberly W. Bojko*

Summary: Memorandum OMAEG Memorandum Contra Joint application For Rehearing electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group