**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider AU for 2016 Gas Grid Modernization Costs. | ) ) ) | Case No. 17-690-GA-RDR |

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**MEMORANDUM CONTRA MOTION OF DUKE ENERGY OHIO, INC., TO AMEND RIDER AU FOR 2016 GRID MODERNIZATION COSTS**
**BY**
**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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## I. INTRODUCTION

Customers deserve to pay lower rates for their natural gas utility service because the federal government has cut the corporate tax rate that utilities pay starting January 1, 2018. Duke's motion (the "Motion") to amend its natural gas grid modernization rider, Rider AU, is a step toward the ultimate goal of providing *all* benefits of the Tax and Jobs Cuts Act of 2017[1] to customers. But to achieve this goal in full, other steps are necessary.

## II. RECOMMENDATIONS

The Office of the Ohio Consumers' Counsel ("OCC") appreciates Duke's proposed rate adjustment to its rider charge and makes the following recommendations.

First, in its Commission-Ordered Investigation, the Public Utilities Commission of Ohio ("PUCO") ordered all Ohio utilities to record on their books as a deferred liability an amount equal to the estimated reduction in federal income tax resulting from the Tax Cut Act.[2] In approving any new rates in this grid modernization rider case, the

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[1] H.R. 1, 115th Cong. (2017) (the "Tax Cut Act").

[2] *In re the Comm'n's Investigation of the Fin. Impact of the Tax Cuts & Jobs Act of 2017 on Regulated Ohio Util. Cos.*, Case No. 18-47-AU-COI (the "Tax COI"), Entry ¶ 7 (Jan. 10, 2018).

PUCO should reinforce Duke's obligation to maintain a deferred liability for the benefit of customers.

Second, as proposed in the Motion, Duke will adjust its Rider AU rates effective April 2, 2018 to reflect the reduction in the federal income tax rate from 35% to 21%.[3] But Duke has been paying the lower 21% tax rate since January 1, 2018. Thus, the PUCO should ensure that (a) the revenue requirement calculation for Rider AU includes all tax savings on and after January 1, 2018, or (b) Duke's tax savings from January 1, 2018 through April 1, 2018 are returned to customers through the Tax COI proceeding. In either case, the amount of such savings should continue to be accounted for in Duke's regulatory liability account, as the PUCO ordered in the Tax COI proceeding.

Third, to the extent Rider AU impacts the amount of Duke's excess accumulated deferred income taxes ("ADIT"), (i) Duke should expeditiously quantify the amount of the excess ADIT and maintain a deferred liability in the amount of the excess ADIT, and (ii) the PUCO should require Duke to return that excess ADIT to customers, consistent with OCC's recommendations in the Tax COI proceeding.[4]

Fourth, the Rider AU tariff should include an explicit provision that the rider is charged subject to refund. On January 24, 2018, the Supreme Court of Ohio issued a decision in an appeal of FirstEnergy's alternative energy rider case.[5] The PUCO had

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[3] Motion at 2.

[4] *See* Tax COI, Comments & Recommendations to Reduce Ohioans' Util. Bills as a Result of the Fed. Tax Cuts & Jobs Act of 2017 by the Office of the Ohio Consumers' Counsel at 13-14 (Feb. 15, 2018) (recommending generally that Ohio utilities be required to estimate their excess ADIT and begin providing bill credits to customers as soon as possible).

[5] *In re Rev. of Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, Slip Op. 2018-Ohio-229 ("*FirstEnergy*").

audited FirstEnergy's rider and, based on the audit, ordered it to return more than $43 million in imprudently incurred charges to customers.

On appeal, the Court determined that the automatic approval of FirstEnergy's quarterly filings constituted PUCO approval of new rates.[6] The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject to refund.[7] Thus, even though the order approving FirstEnergy's alternative energy rider stated that it could only collect prudently incurred costs, the Court held that the PUCO's order that FirstEnergy refund the overcharges to customers involved unlawful retroactive ratemaking.[8]

The Court's decision has far-reaching ramifications for consumers who pay utility charges through riders. Unless the PUCO takes action to conform these riders to the Court's decision, any subsequently-conducted prudence review of the riders could be rendered meaningless.[9] Consumers could be overcharged for utility service without any way to be reimbursed, resulting in an unfair windfall for utility companies.[10]

To protect consumers, the PUCO should take the following actions regarding riders that are subject to prudency reviews:

- The PUCO should not allow any riders to be automatically approved. Under the Court's *FirstEnergy* decision, automatic approval would make the rate a "filed" rate that is not subject to refund through a prudency review.

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[6] *Id.* ¶ 10.

[7] *Id.* ¶ 18.

[8] *Id.* ¶ 8, 19.

[9] *Id.* ¶ 85 (French, J. dissenting).

[10] *Id.* ¶ 18.

- The PUCO should order that tariffs for riders that are subject to prudency review include language that the approve rate is subject to refund. In rejecting the PUCO's order that FirstEnergy refund $43 million to customers, the Ohio Supreme Court emphasized that FirstEnergy's tariff did not state that the rider was subject to refund.

OCC recommends that the PUCO add the following language to Rider AU: "All charges under this rider are subject to refund." This language should be permanent in the Rider AU tariff. In addition, any PUCO order regarding this matter should include a clause stating: "Rider AU is subject to refund if its charges are found to be unjust, unreasonable, imprudent, or unlawful."

## III. CONCLUSION

Subject to these recommendations, OCC supports Duke's effort to adjust customers' rates to provide them the benefits of the Tax Cut Act. In addressing Duke's Motion, the PUCO should implement the consumer protections OCC proposes above to (i) ensure that the benefits of the Tax Cut Act are properly and fully passed back to customers, and (ii) require Duke's Rider AU tariff to explicitly state that collection from customers is subject to refund so that consumers are eligible to receive refunds of any charges later found to be unjust, unreasonable, imprudent, or unlawful.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served via electronic transmission upon the parties this 27th day of February 2018.

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