

**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. 18-0047-AU-COI

REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

In response to a reduction in the federal corporate income tax rate that became effective on January 1, 2018, the Public Utilities Commission of Ohio (“Commission”) opened this proceeding and requested comments from public utilities whose rates are regulated and other interested parties.

In its comments, Industrial Energy Users-Ohio (“IEU-Ohio”) recommended that the Commission focus on three outcomes. First, rate reductions are an obvious way of assuring that customers benefit from the lower federal corporate income tax rate. Second, the Commission should consider using tax reduction benefits to reduce regulatory assets and the related carrying charges. Third, the Commission should also participate in federal proceedings to assist in assuring that customers benefit from the tax rate reduction in wholesale rates. Comments of Industrial Energy Users-Ohio at 6-8 (Feb. 15, 2018).

The comments filed by the public utilities and other interested parties struck some common themes. For example, there is wide agreement that the Commission should address the reductions in rates in company-specific responses due to differences in the companies and the regulatory structures applicable to different utility sectors. The electric distribution utilities (“EDUs”) and natural gas companies also identified the process for updating riders as a means of providing tax reduction benefits to customers.

While there is general recognition that riders with tax components will update in due course, many of the public utilities argue that they should be permitted to bill base rates without recognition of the reduction in the corporate tax rate until they proceed with a rate case, often years in the future. Additionally, the utilities and customers do not agree

on whether customers will benefit from the tax reduction for the period from January 1, 2018 to the date on which the rider or a base rate is updated.

Under current law, the Commission has tools to assure that customers benefit from the tax rate reduction. Through the reasonable use of this authority, the Commission can provide customers the benefits that should result from the tax rate reduction.

II. RIDER ADJUSTMENTS

The utilities' comments consistently recognize that riders which contain a provision that is affected by the tax rate should be adjusted to recognize the federal tax rate reduction. See, e.g., Initial Comments of Duke Energy Ohio, Inc. at 9 (Feb. 15, 2018); Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 3 (Feb. 15, 2018).

The public utilities, however, do not agree on whether the adjustment should be effective for tax savings beginning on January 1, 2018. On the one hand, Columbia Gas of Ohio recognizes the over-collection period began January 1, 2018 and that riders should be adjusted to recognize that overcollection. Comments of Columbia Gas of Ohio Inc. at 4-5 (Feb. 15, 2018) (rider adjustment to be filed to incorporate tax reduction beginning Jan. 1, 2018). Many utilities have also begun to incorporate the reduction in the tax rate through rider filings, effective for overcollection beginning on January 1, 2018. See, e.g., *In the Matter of the Annual Application of Duke Energy Ohio, Inc. for an Adjustment to Rider AMRP Rates*, Case No. 17-2318-GA-RDR, Application, Schedule 1 (Feb. 26, 2018); *In the Matter of the Update to the Distribution Modernization Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 17-2280-EL-RDR, Staff Review and Recommendation (Feb. 1, 2018).

On the other hand, Ohio Power Company (“AEP-Ohio”) takes the position that the Commission cannot modify riders to reflect the impacts of the tax reduction starting January 1, 2018. Comments of Ohio Power Company at 3 (Feb. 15, 2018). As part of a broader argument on the limits of the Commission’s authority to adjust riders, AEP-Ohio claims that “the Commission may lack authority to selectively modify one component of [a] rider (e.g., requiring that a rider be modified to reflect tax reform impacts) without an existing basis in the rider tariff.” *Id.* at 4. In a recent application updating its distribution investment rider approved as part of its electric security plan (“ESP”), it acted on that claim and filed a proposed rate that did not incorporate an adjustment for the change in the corporate income tax rate. In a subsequent filing, however, AEP-Ohio added language to the proposed tariff sheet that recognizes that the rider may be subject to reconciliation based on the outcome of this and other proceedings. *In the Matter of the Application of Ohio Power Company to Update its Distribution Investment Rider*, Case No. 14-1696-EL-RDR, Finding and Order at 2-3 (Feb. 21, 2018).

As the recent rider applications demonstrate, a case-by-case process for implementing the tax changes is already taking place. In these individual proceedings, the parties have the opportunity to present to the Commission the changes that they believe should be incorporated in riders for the change in tax rate.

Individualized proceedings also provide customers and the Commission the opportunity to test utility claims about the scope of their proposed changes in riders. For example, Duke Energy Ohio, Inc. (“DEO”) states in its Comments that “[t]he formula for Rider DCI effectively provides for a return on 100 percent of the Company’s current distribution rate base including a provision for federal income taxes.” Initial Comments of

Duke Energy Ohio, Inc. at 9 (Feb. 15, 2018). That claim can be tested in either a separate rider proceeding or in the context of a pending case.¹ Similarly, customers should be permitted to present their arguments regarding whether the revenue requirements of riders should be adjusted to incorporate the tax reduction back to January 1, 2018. Individualized proceedings thus provide the utilities, customers, and the Commission with an opportunity to test conflicting claims about the effects that should be incorporated into utility riders.

III. ADJUSTMENTS TO RIDERS AND RETROACTIVE RATEMAKING

When the Commission opened this proceeding and requested comments, it also ordered the regulated public utilities to record as a deferred liability the estimated reduction in federal income tax. Entry at 3 (Jan. 10, 2018). Based on the belief that the order was a predicate to retroactive ratemaking, the EDUs sought rehearing of the accounting order. 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 (Feb. 9, 2018). In that application for rehearing, the EDUs included the broad claim that some riders could not be adjusted to account for the tax rate reduction. *Id.* at 8.

In its comments filed on February 15, 2018, AEP-Ohio renews this claim. See Comments of Ohio Power Company at 3-4 (Feb. 15, 2018). AEP-Ohio claims that the nature of a rider, the terms and conditions of a rider, and whether a rider is approved in

¹ See, also, *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 16-1852-EL-SSO, Motion to Protect Consumers by Reopening Proceeding of the Office of the Ohio Consumers' Counsel (Mar. 2, 2018). In its motion, the Office of the Ohio Consumers' Counsel seeks an order reopening the record in a pending application to extend the electric security plan of AEP-Ohio because the record in that case was closed before the tax law became effective.

an ESP proceeding affects the Commission's authority to adjust the rider. *Id.* at 4. In a separate argument, AEP-Ohio adds that any changes to a rider must conform to the requirements of the ESP process. *Id.* at 5. Because the claims in support of retaining existing riders without adjustment for the changes in the federal income tax rate are both vague or incorrect, the Commission should reject them.

Regarding the first claim based on the “nature” of a rider, AEP-Ohio offers no explanation of what it means by the “nature of the rider” or how a rider’s “nature” might alter the rider’s adjustment for the tax rate reduction. On the second claim, AEP-Ohio does not explain how the terms and conditions of the rider might affect Commission treatment of the tax rate reduction. Thus, the first two claims are so vague that they do not provide a basis to accept AEP-Ohio’s argument that the Commission cannot adjust riders.

The third claim that any changes must follow an ESP process likewise is so vague as to be meaningless. AEP-Ohio does not explain what process it believes is required or why that process would not be afforded. Further, the EDUs and the Commission are already using the application processes for individual riders to address the effects of the tax rate reduction. If that is the process that AEP-Ohio is referring to, then it has no reason for complaint.

If, however, AEP-Ohio is claiming that approval of a rider under an electric security plan requires the Commission to modify the rider in another full electric security plan case, AEP-Ohio is wrong, as the case that AEP-Ohio cites for support makes clear. *Id.* at 5, citing *In re Ohio Power Company*, 144 Ohio St. 3d 1 (2015) (“*Ohio Power Carrying Charge Case*”). At issue in the *Ohio Power Carrying Charge Case* was the timeliness of an order

reducing the carrying charge on deferred revenue the Commission authorized under R.C. 4928.144 in its order approving AEP-Ohio's first ESP. Although the Commission initially permitted AEP-Ohio to apply a carrying charge on deferred revenue at the weighted average cost of capital, it reduced the carrying charge rate to the cost of debt in an order issued after the term of the ESP ended. AEP-Ohio appealed the order reducing the carrying charge and argued that the Commission was not permitted to modify the order because the Commission was governed by requirements of res judicata and because the timing of the order precluded AEP-Ohio from exercising its right to withdraw its ESP application under R.C. 4928.143(C)(2). The Court rejected AEP-Ohio's claim that the Commission was prevented from modifying the order by res judicata, but agreed that the Commission had been untimely. As a premise to its decision, the Court concluded that the Commission was permitted to modify its prior orders authorizing the ESP so long as the "new course [was] lawful and reasonable." *Ohio Power Carrying Charge Case*, ¶ 18. As the *Ohio Power Carrying Charge Case* demonstrates, the Commission may alter a prior order authorizing a rider without going through another complete ESP process.

AEP-Ohio's argument also is inconsistent with the Commission practice AEP-Ohio and other EDUs have encouraged. For example, AEP-Ohio successfully secured authorization of a new nonbypassable rider to collect \$36 million in under-recovered transmission costs. *In re Application of Ohio Power Company to Update its Transmission Cost Recovery Rates*, 140 Ohio St. 3d 509 (2014). In another instance, Dayton Power and Light Company ("DP&L") secured terms of its an ESP, which consisted of a mix-and-match of terms of its first and second ESPs, after DP&L withdrew its second ESP. *In the Matter of the Application of The Dayton Power and Light Company to Establish a*

Standard Service Offer in the Form of an Electric Security Plan, Case No. 08-1094-EL-SSO, Finding and Order (Aug. 26, 2016). In both cases, the EDUs successfully fought attempts to secure evidentiary hearings.

The real problem raised by AEP-Ohio's argument, however, is implied by its citation to the recent Supreme Court decision applying the filed rate doctrine to a rider approved in an ESP. Comments of Ohio Power Company at 4 (Feb. 15, 2018), citing *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Op. 2018-Ohio-229 ("*FE AER Case*"). In that case, the Court reversed a Commission order directing the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FE") to refund amounts collected from customers for costs the Commission later found to be imprudently incurred. In support of the reversal, both the lead and concurring opinions concluded that the Commission order violated the filed rate doctrine, but their reasons for applying the filed rate doctrine differed. *FE AER Case*, ¶ 18 (lead opinion states that REC costs recovered under a filed rate schedule had become final) & ¶ 66 (concurring opinion states that the Commission could not order a refund unless the tariff permitted that action).² The Commission can deal with AEP-Ohio's implied objection that rates may not be retroactively adjusted by suspending the automatic approval of applications for rider rate changes filed by the public utilities or enter an order that collection is subject to a future reconciliation to costs incurred and require that change to be incorporated into the tariff sheets.³ Customers should not be

² The dissenting opinion concluded that the rate collected by FE was not the final approved rate. *Id.*, ¶ 91.

³ The tariff filing in the AEP-Ohio distribution investment rider case seeks to preserve issues by explicitly recognizing that the rate is subject to additional review. *In the Matter of the Application of Ohio Power Company to Update its Distribution Investment Rider*, Case No. 14-1696-EL-RDR, Revised PUCO No. 20 Tariff (Feb. 21, 2018)

adversely affected when the Court itself gave the Commission the road map to address reconciliation of the riders for the reduction in the tax rate, prospectively and retroactively.

IV. BASE RATE ADJUSTMENTS

A. Commission Powers

The EDUs provide a range of reasons they say prevent the Commission from adjusting base rates. In addition to pointing to the terms of its settlement extending its ESP, AEP-Ohio argues that base rate changes can be effected only under provisions of Chapter 4909, the traditional ratemaking statutes. Comments of Ohio Power Company at 5 (Feb. 15, 2018). Not going quite that far, DP&L does not expressly exclude the possibility that other statutory provisions may authorize the Commission to adjust base rates but argues against single issue ratemaking. Comments of The Dayton Power and Light Company at 1 (Feb. 15, 2018). Taking a completely different approach, FE states that it is not subject to base rate adjustments because of provisions contained in its settlements. Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 4-12 (Feb. 15, 2018). DEO seeks to avoid the issue by pointing to adjustments to its distribution rider which it claims would address a large portion of the tax reduction. Initial Comments of Duke Energy Ohio, Inc. at 8-11 (Feb. 15, 2018).

While the claims made by AEP-Ohio, FE, and DEO about the limits that may be imposed on the Commission by related proceedings can be addressed in individual proceedings, the Commission should reject AEP-Ohio's argument that base rate adjustments can occur only in base rate proceedings under R.C. Chapter 4909.

In addition to rate case proceedings, the Commission may address the reasonableness of rates by complaint or on its own initiative under R.C. 4905.26. *Ohio Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 110 Ohio St. 3d 394 (2006). "R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, [the] court has held that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders." *Allnet Communications Servs. v. Pub. Utils. Comm'n of Ohio*, 32 Ohio St. 3d 115, 117 (1987).

Moreover, the review process under R.C. 4905.26 incorporates ratemaking standards that DP&L complains must apply. *Lucas County Comm'ners v. Pub. Utils. Comm'n of Ohio*, 80 Ohio St. 3d 344, 347 (1997). Thus, the process for investigating base rate changes under the complaint statute avoids the alleged problem of single issue ratemaking advanced by DP&L.

B. Incorporating Tax Savings From January 1, 2018

DP&L also urges the Commission to avoid addressing base rates on the ground that it would result in retroactive ratemaking if changes are calculated as being effective as of January 1, 2018. Comments of The Dayton Power and Light Company at 2-3 (Feb. 15, 2018). AEP-Ohio makes a similar claim that base rate changes may only be prospective. Comments of Ohio Power Company at 6 (Feb. 15, 2018). The arguments regarding retroactive ratemaking are a continuation of a problem that has infected Ohio ratemaking since at least 1957.⁴ This case will not resolve that debate.

⁴ *Keco Industries v. Cincinnati and Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957). While *Keco* addressed the subject matter of a court of general jurisdiction to order restitution following a determination that the rates that had been collected were unlawful or unreasonable, the Commission, with the Court's blessing has extended *Keco* to Commission proceedings.

To cut through the arguments about retroactive ratemaking caused by the Commission's delay in addressing the tax savings in base rates from January 1, 2018, the Commission should apply any tax savings prior to an adjustment in rates to reduce regulatory assets.⁵ Again, the Ohio Supreme Court has provided the Commission a road map to address the problem. In *In re Application of Columbus S. Power Co.*, 147 Ohio St. 3d 439, ¶ 40 (2016), the Court ordered the Commission to offset revenue collected under a rider that was authorized in violation of law against deferred revenue. Similarly, the Commission could direct public utilities to apply tax savings to regulatory assets that would otherwise be collected through either future base rates or riders.

V. CREDIT RATINGS

One potential effect of the Commission's response to the tax reform is a change in cash flow as the Commission reduces revenue requirements for the effects of the reduced tax rate. Based on reduced cash flow, DEO presents an argument that rate reductions will set off a credit ratings problem for utilities, pointing to a recent Moody's Rating Action downgrading 24 public utilities to negative from stable. It then urges the Commission to go slowly on rate changes that will reduce cash flow, citing the Commission's concern about the financial stability of FE and DP&L. Comments of Duke Energy Ohio, Inc. at 12-15 (Feb. 15, 2018). While there is no argument that the Commission should carefully address the effects of the tax rate reduction to assure that customers realize the tax benefits, DEO's claim that the Commission should factor in the effects on credit ratings to limit those benefits should be rejected.

⁵ This application of tax savings was advanced by both IEU-Ohio and several utilities including Dominion East Ohio. See, e.g., Comments of the East Ohio Gas Company dba Dominion Energy Ohio at 4 (Feb. 15, 2018).

In the Rating Action that DEO relies on, Moody's announced it changed the rating outlook for 24 regulated utilities including DEO's parent, Duke Energy Corporation. According to Moody's, the change was the result of incremental changes in cash flow caused by the tax law changes affecting companies that had or were expected to have weak financial metrics. See <http://www.naruc.org/default/assets/Image/meetings/Winter18/Rating%20Action%20Moody%27s%20changes%20outlooks%20on%2025%20US%20regulated%20utilities%20primarily%20impacted%20by%20tax%20reform%2001-19-18.pdf> (Moody's Investor Service, "Rating Action: Moody's changes outlooks on 25 regulated utilities primarily impacted by tax reform" (Jan. 19, 2018) ("Moody's Rating Action"))).

The Moody's Rating Action is of limited value to the actual question about what should be done to implement the tax changes for DEO. According to the Staff Report of Investigation in DEO's current rate case, DEO's revenue requirement for base rates should be reduced by at least \$18.4 million annually. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case Nos. 17-32-EL AIR, *et al.*, Staff Report Schedule A-1 (Sept. 26, 2017). If cash flow is a problem, the problem DEO has is too much, not too little.

Additionally, DEO fails to advise the Commission of the full scope of the responses Moody's identifies utilities might use to address adverse cash flow effects of a Commission order to reduce rates. As Moody's explains, the utilities could respond to the "cash leakage" through either regulatory and corporate finance changes and some might be expected to return to a stable rating. Moody's Rating Action. Thus, DEO or its parent could take the initiative to address the effects of the tax rate reduction on rates

through internal measures rather than looking to the Commission to sustain cash flow. In this regard, DEO's parent reported in a filing with the Securities and Exchange Commission that "[i]n order to strengthen its balance sheet and credit metrics and bolster cash flows, Duke Energy plans to issue \$2 billion of common stock equity during 2018, including its previous plan to issue \$350 million annually through its DRIP beginning in 2018, as well as reduce its capital expenditures during 2018-2022 by approximately \$1 billion." Duke Energy Corp., Annual Report for Fiscal Period Ended Dec. 31, 2017 at 71.⁶ Thus, as DEO's parent has indicated, this alleged problem with reduced cash flow need not fall on customers.

VI. CONCLUSION

In its comments, IEU-Ohio recommended that the Commission begin incorporating the tax rate reduction into rates and riders. Comments of Industrial Energy Users-Ohio at 8 (Feb. 15, 2018). Additionally, IEU-Ohio suggested that customers may also benefit if utilities with regulatory assets are authorized to apply the tax savings, if any, to reduce those assets. *Id.* The initial comments of other parties confirm that this approach is consistent with the expectation that riders will be adjusted as they come under review. Base rate adjustments present more difficult problems, but the Commission has legal tools to assure that customers benefit from the tax rate reduction, particularly if it also applies tax savings to regulatory assets.

⁶ https://www.duke-energy.com/_/media/pdfs/our-company/investors/2017-duke-energy-form-10-k.pdf.

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of the *Reply Comments of Industrial Energy Users-Ohio* upon the following parties identified below to be served by the e-file system. In addition, I hereby certify that a service copy of the foregoing *Reply Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following identified parties of record this 7th day of March 2018, via email.

/s/ Matthew Pritchard

Matthew Pritchard

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