BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)))	Case No. 16-1853-EL-AAM

REPLY IN SUPPORT OF MOTION TO PROTECT CONSUMERS BY REOPENING PROCEEDING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

Ohio's residential consumers deserve the benefit of the lower taxes that Ohio Power Company ("AEP") will pay as a result of the Tax Cuts and Jobs Act of 2017.[1] The Public Utilities Commission of Ohio ("PUCO") should reopen the record in this proceeding so that parties can present additional evidence to ensure that the benefit of the lower corporate tax rate promptly and fully flows to consumers in the form of lower electric rates. AEP should not be permitted to charge consumers rates based on a 35% federal tax rate when it only actually pays a 21% tax rate. As AEP itself has said, this case is the right place to address the tax cuts.[2] The costs included by AEP in the riders under which consumers will be charged are created and subject to approval in this electric security plan ("ESP") proceeding.

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[1] Public Law No. 115-97.

[2] See *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, Comments of Ohio Power Company filed February 15, 2018 ("AEP Comments") at 4-5.

Further, when AEP overcharges consumers, those consumers deserve refunds. The PUCO should reopen this proceeding so that parties can present additional evidence and recommendations regarding the *FirstEnergy* decision by the Supreme Court of Ohio ("Court"), so that the PUCO can direct AEP to include refund language in its tariffs for every rider under which consumers are potentially being overcharged. This case is the proper forum to address these issues because it is where the riders are created and approved. AEP should not be permitted to separately negotiate with any individual party, including Staff, about language to include in these tariffs that is allegedly sufficient to protect consumers from potentially being overcharged without refund.

The matters raised by OCC in its Motion – the implications of the tax cuts and the Court's decision in *FirstEnergy*[3] -- are directly at issue in this case, where the charges that consumers will potentially pay over the next six years are being considered. But these matters raised by OCC did not arise until after the close of the evidentiary record. Accordingly, the PUCO should grant OCC's Motion to permit the presentation of additional evidence and recommendations to protect consumers from being overcharged.

II. RECOMMENDATIONS

OCC has met the requirements of Ohio Adm. Code 4901-1-34 to reopen this proceeding. As required by Ohio Adm. Code 4901-1-34, good cause exists to reopen this proceeding because both the Tax Cuts and Jobs Act of 2017 and the Court's *FirstEnergy* decision occurred after the close of the evidentiary record. Further, OCC has met the requirement of Ohio Adm. Code 4901-1-34(B) by specifically describing the nature and purpose of the evidence to be presented at hearing and setting forth the facts showing

[3] *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion 2018-Ohio-229.

why such evidence could not, even with reasonable diligence, have been presented earlier. Both the tax cuts and the Court's *FirstEnergy* decision occurred after the close of the evidentiary record, and both issues directly affect consumers and the rates and riders at issue. Accordingly, the PUCO should grant OCC's Motion for the presentation of additional evidence and recommendations in accordance with Ohio Adm. Code 4901-1-34.

A. The PUCO should reopen this proceeding to permit the presentation of additional evidence and recommendations regarding the Tax Cuts and Jobs Act of 2017.

AEP argues that the PUCO should address the tax cuts in Case No. 18-47-AU-COI, "in due course," or in its next base rate proceeding.[4] But in Case No. 18-47-AU-COI, AEP argues that "[t]he most appropriate manner in which to address tax reform impacts for each utility, including AEP Ohio, is through separate, individualized proceedings."[5] This electric security plan is one such "separate, individualized proceeding" pending before the PUCO right now. That is why the Motion makes sense and this case presents an opportune time for considering these important consumer issues.

AEP appears to be playing a regulatory shell game, where customers lose out. AEP's strategy is to convince the PUCO that it cannot[6] address the tax cuts in Case No. 18-47-AU-COI, and it should not address the tax cuts in this proceeding, thus effectively depriving consumers of due process or the benefit of lower rates. If the PUCO accedes to AEP's arguments in both proceedings, then the PUCO will have eliminated any forum to

[4] See Memorandum Contra at 3-6.

[5] *In re Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017*, Case No. 18-47-AU-COI, AEP Comments (Feb. 15, 2018) at 1.

[6] See *In re Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017*, Case No. 18-47-AU-COI,, Joint Application for Rehearing of Ohio Power, *et al.* at 9 ("It would violate the ESP statute to modify riders adopted in an ESP without the utility's consent or outside of the comprehensive ESP process." (citations omitted).

address the tax issue, despite AEP and other utilities expressly acknowledging that "it is necessary and appropriate for the Commission to 'consider the impacts of the Tax Cuts and Jobs Act of 2017.'"[7] But the PUCO should address the tax cuts in both cases – in this ESP where the riders are being created and approved, as well as in Case No. 18-47-AU-COI which applies to all utilities (not just Ohio's electric utilities). A dual approach would be helpful for utilities that don't have individualized cases pending that would allow for rate cuts to reflect the tax cuts.

The Tax Cuts and Jobs Act of 2017 lowered the corporate income tax rate from 35% to 21%.[8] The lower tax rates became effective January 1, 2018.[9] But AEP's proposed rates in this case do not reflect the significantly lower tax burden. AEP should not be permitted to implement rider rates, even temporarily while another case is pending, to charge consumers at a 35% tax rate when it is only actually paying a 21% tax rate. Charges to consumers are being determined now, in this ESP. The tax issue, which affects consumers' charges, should be addressed now, in this ESP.

Addressing the tax issue here is all the more important and appropriate because AEP (and other utilities) has challenged the PUCO's authority to address the issue in Case No. 18-47-AU-COI, saying that the ESP process is the appropriate place to address

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[7] See *In re Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017*, Case No. 18-47-AU-COI, Joint Application for Rehearing of Ohio Power, et al. at 1 (Feb. 9, 2018).

[8] See Tax Cuts and Job Acts of 2017, Public Law No. 115-97

[9] See *id.*

the tax effect on riders.[10] AEP's proposed ESP establishes rates prospectively for the next six years. The PUCO should approve rider rates in this ESP that pass though the tax benefits to consumers, foregoing the battle being waged in the investigation case (18-47-AU-COI) over the PUCO's authority to reduce rates for the tax cuts.

Additionally, AEP's arguments *against* reopening this proceeding should cause the PUCO to reach the opposite conclusion – this proceeding *should* be reopened. AEP asserts that it has already identified six riders that have a tax component and has already filed tariffs to reflect the lowered taxes.[11] Other riders can be dealt with "in due course".[12] Further, AEP attempts to obfuscate by asserting that "OCC's position also misconstrues the mechanics and design of existing and proposed riders – by assuming that all riders should incorporate all tax impacts relating to the subject of the rider . . . ."[13] AEP then states "[t]he reality is that not all tax impacts relate to the mechanics and scope of those riders."[14] AEP is over-complicating this issue. If a rider is grossed up for taxes or if the rider involves the collection of investment or deferred dollars, then the rate derived from that rider must be reduced for the decrease in the corporate income tax and for the Alternative Deferred Income Taxes ("ADIT"). AEP is very familiar with which riders are impacted and which riders are not. The rates charged consumers under all impacted should be reduced based on the tax cuts now, in this case.

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[10] AEP Comments at 4-5; see also Joint Application for Rehearing of Ohio Power Co. et al at 9 (Feb. 9, 2018) ("the Commission can only modify how TCJA impacts are reflected in the terms and conditions of rider through a separate ratemaking proceeding (i.e. outside the context of this generic investigation) that is prospective in nature and comprehensively reviews offsetting changes in other expense or carrying charge component.").

[11] See Memorandum Contra at 4.

[12] See *id.*

[13] See *id.* at 5.

[14] *Id.*

More importantly, none of AEP's assertions are supported by the record in this case, which is why it should be reopened. The PUCO should reopen this case and address which riders are at issue, how the lowered taxes should be reflected in those riders so consumers are not overcharged, and what are the mechanics and scope of the existing and proposed riders. Further, the PUCO should determine how the riders' revenue requirements are determined in light of the tax cuts, as well as how to deal with ADIT.

B. The PUCO should reopen this proceeding for the presentation of additional evidence and recommendations regarding the *FirstEnergy* decision.

AEP argues that *FirstEnergy's* implications can be dealt with in other dockets.[15] AEP's arguments *against* reopening this proceeding to deal with *FirstEnergy's* implications are of the same vein as its arguments relating to the tax cuts. They demonstrate that this proceeding *should* be reopened.

AEP asserts that it is making tariff filings with language to address *FirstEnergy* and is already working with Staff "to revise rider tariff language to make clear that each existing rider is subject to reconciliation based upon the specific terms and conditions approved by the Commission when it approved the rider."[16] And "to the extent the Commission approves new riders that have been proposed in the pending Stipulation, the Commission can direct that those riders contain comparable reconciliation language, as appropriate."[17]

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[15] See id. at 7-8.

[16] *Id.* at 7.

[17] *Id.* at 8.

None of this is of record in this case. A myriad of subjects need to be addressed on the record, including the implications of *FirstEnergy*, what riders need to have language to address it, what language is appropriate to do so, and whether the tariff language should be limited to "the specific terms and conditions approved by the Commission when it approved the rider." Further, the PUCO should reopen this proceeding to determine when it would be "appropriate" for the PUCO to direct that new riders contain language to deal with *FirstEnergy*. Similar to the abundance of matters related to the tax cuts, this list relating to the *FirstEnergy* decision is by no means an exhaustive list of matters that should be of record in this case.

C. The PUCO should rule on OCC's Motion based upon the merits of the arguments raised by OCC.

OCC's Motion has merit and should be granted. AEP essentially concedes that point. AEP argues that "OCC's motion contains no specific example or factual claim to support its generalized and unsubstantiated allegation."[18] Even AEP recognizes that the PUCO, as the finder of fact, should reopen this case so that such specific examples and facts can be introduced into the record. OCC has described the specific nature and purpose of such evidence, as required by Ohio Adm. Code 4901-1-34(B), and such specific examples and facts should be made on the record. That is precisely why the PUCO should reopen this proceeding, to allow for the presentation of additional evidence into the record. OCC's Motion is not intended (nor is it required) to create an evidentiary record of examples and facts. It asks the PUCO to reopen the evidentiary record in accordance with Ohio Adm. Code 4901-1-34 so that the PUCO can have a full and

[18] See Memorandum Contra at 3.

complete record on which to address important consumer issues that arose after the record's close.

AEP has attempted to introduce its own examples and facts. They are not supported by the evidentiary record. AEP alleges that only six of its riders have a gross revenue conversion factor with a tax component, and that not all tax impacts relate to the mechanics and scope of riders previously approved in AEP's *ESP III* [19] or riders proposed to be created, modified, or continued in this proceeding.[20] This assertion is entirely absent from the current evidentiary record, which underscores OCC's argument that the PUCO should reopen the record for the presentation of additional evidence.

Even the PUCO has recognized that OCC's arguments have merit, since the PUCO opened a proceeding to address the very issues raised by OCC – that consumers deserve the benefit of the Tax Cuts and Jobs Act of 2017 and refunds if AEP overcharges them. But if the PUCO denies OCC's Motion in this case and instead deflects these issues to Case No. 18-47-AU-COI, then consumers will likely be overcharged. AEP argued in Case No. 18-47-AU-COI that the PUCO lacks jurisdiction to lower rates to reflect the tax cuts in a COI proceeding. Even if the PUCO rejects such arguments, the utilities are likely to appeal. Further, the PUCO should not rely on the expectation that utilities will voluntarily amend their tariffs. Instead, the PUCO should address the tax cuts now, in this case, because it will be addressing the riders affected by the tax cuts.

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[19] *In re Ohio Power Company For Authority To Establish A Standard Service Offer*, Case No. 13-2385, et al.

[20] See Memorandum Contra at 4-5.

AEP mischaracterizes OCC's Motion as "vague" and "unspecific," before alleging that OCC has raised no "specific concern or basis" to reopen the case.[21] AEP goes so far as to say that OCC is attempting to "undermine the Stipulation"[22] and that it should not be "singled out."[23] On the contrary, OCC's interest in this case is to ensure that consumers fully and promptly receive the benefit of rate cuts derived from the reduced federal taxes. OCC is seeking the same rate treatment for consumers that AEP would certainly be asking for itself if the situation was reversed and AEP suddenly faced an increase in their tax obligation. Surely, AEP would not be content to sit back and wait for the PUCO to investigate and modify their rates in "due course." AEP's consumers deserve better, and the PUCO should not tolerate the delay tactics that AEP and other utilities are employing.

Contrary to AEP's assertions, OCC raised very specific concerns and bases for reopening this proceeding. OCC pointed to two specific reasons the PUCO should reopen this case: (1) the tax cuts, and (2) the *FirstEnergy* decision.[24] Regarding the tax cuts, OCC stated specifically that "the record should be reopened so that parties may address if, and how, the lower tax rate should be accounted for in consumers' rates that will be authorized in this proceeding."[25] OCC explained that AEP's proposed rates here

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[21] See, e.g., *id.*; see also *id.* at 2.

[22] See, e.g., *id.* at 3.

[23] See, e.g., *id.* at 3.

[24] See Motion at 6-9.

[25] *Id*. at 6.

"would deprive consumers of the benefit flowing from the reduced taxes."[26] OCC also stated that "[i]t would be unfair and would harm consumers if they pay rates that are overstated because of (and in spite of) the reduced taxes utilities will pay from 2018 forward."[27] Finally, OCC pointed out that AEP and other utilities are challenging the PUCO's ability to address the tax cuts in the PUCO's generic proceeding.[28]

Regarding *FirstEnergy*, OCC described the decision and its potential implications and stated specifically that the PUCO should reform the riders at issue here to avoid the result of the *FirstEnergy* decision – consumers paying for imprudently incurred costs.[29] OCC raised very specific concerns that unless the PUCO conforms AEP's riders to the Court's *FirstEnergy* decision, "it could be argued that each periodic review of the riders results in a 'filed' rate that cannot be adjusted for consumers' protection based on the PUCO's review."[30] AEP's assertions that OCC raised no specific concerns or bases for reopening this proceeding are patently false.

AEP is also mistaken that OCC is trying to undermine the Stipulation or that AEP would be "singled out" were this proceeding reopened. The matters raised in OCC's Motion did not arise until after the close of the evidentiary record, and those matters directly implicate AEP's charges to consumers and riders at issue in this case. When a matter arises after the close of the evidentiary record, there is a specific regulatory

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[26] *Id*. at 6; *see also generally id.* at 6-7. AEP exclaims in its Memorandum Contra: "As a threshold matter, OCC's motion includes no specific concern or basis supporting its generic thesis that the riders that exist or are being proposed are flawed because they will not adequately capture the impacts of tax reform. OCC's motion contains no specific example or factual claim to support its generalized and unsubstantiated allegation." Once again, in light of this quote directly from OCC's Motion, one must wonder if AEP even read the Motion.

[27] *Id.*

[28] See, e.g., *id.* at 2-3; 6.

[29] *Id.* at 7-9.

[30] *Id.* at 9.

mechanism to address such situations – Ohio Adm. Code 4901-1-34. OCC's Motion has been filed well within the existing regulatory construct. The PUCO should reject AEP's assertion that OCC (or any other party) should be held to a higher or different standard than what required by the Ohio Administrative Code. Further, AEP is not being singled out, and would not be singled out were this proceeding reopened. As AEP itself said in Case No. 18-47-AU-COI, the ESP process is an appropriate place to address the tax issue.[31] There can be no serious doubt that this pending ESP case, where AEP's riders will be considered and, potentially, approved, is the appropriate place to decide if charges to consumers under those riders should be reduced due to the tax cut and subject to refund. The PUCO should grant OCC's motion and reopen this proceeding to protect consumers from being overcharged by AEP.

III. CONCLUSION

Two very important matters to consumers occurred after the record closed in this Case – the Tax Cuts and Jobs Act of 2017 and the Court's opinion in *FirstEnergy*. To protect consumers, both of these matters need the PUCO's immediate attention – on the record. The PUCO should grant OCC's Motion on its merits and reopen this proceeding.

[31] AEP Comments at 4-5.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served via electronic transmission upon the parties this 20th day of March 2018.

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