THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC. FOR AN ADJUSTMENT TO RIDER AMRP RATES TO RECOVER COSTS INCURRED IN 2017.	CASE NO. 17-2318-GA-RDR
IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC. FOR TARIFF APPROVAL.	CASE NO. 17-2319-GA-ATA

SECOND ENTRY ON REHEARING

Entered in the Journal on July 11, 2018

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Ohio Consumers' Counsel.

II. DISCUSSION

A. *Procedural History*

{¶ 2} Duke Energy Ohio, Inc. (Duke or Company) is a natural gas company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} On May 30, 2002, the Commission approved a stipulation, which included a provision establishing Duke's accelerated main replacement program (AMRP) rider (Rider AMRP). *In re The Cincinnati Gas & Elec. Co.*, Case No. 01-1228-GA-AIR, et al. (*CG&E Rate Case*), Opinion and Order (May 30, 2002). The purpose of Rider AMRP was to recover the expenditures associated with Duke's ten-year plan to replace all 12-inch and smaller cast iron and bare steel gas mains in its distribution system. In accordance with the stipulation approved in the *CG&E Rate Case*, the rider was to be adjusted annually to account for any over- or under-recovery and Duke was to file applications annually supporting adjustments to the Rider AMRP rates.

{¶ 4} On May 28, 2008, the Commission approved a stipulation, which, inter alia, provided that the AMRP would be substantially completed by the end of 2019 and that the riser replacement program (RRP) would be completed by the end of 2012. In addition, the stipulation further defined the process for adjustments to Rider AMRP. *In re Duke Energy Ohio, Inc.*, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008).

{¶ 5} Subsequently, the Commission approved a stipulation in which the parties in the case agreed, in part, that the incremental increase to the AMRP for residential customers would be capped at $1.00 annually on a cumulative basis through 2016. *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (Nov. 13, 2013).

{¶ 6} On February 26, 2018, Duke filed its application to adjust Rider AMRP for the recovery period January 1, 2017, through December 31, 2017. A motion to intervene was filed by the Ohio Consumers' Counsel (OCC) on March 9, 2018. The attorney examiner granted the motion to intervene filed by OCC by Entry dated March 15, 2018.

{¶ 7} On April 5, 2018, Duke and Staff filed a stipulation and recommendation (Stipulation) that was intended to resolve all outstanding issues in these proceedings.

{¶ 8} A hearing was held in these matters on April 10, 2018. Thereafter, by Opinion and Order issued April 25, 2018 (Order), the Commission found that the Stipulation was reasonable and should be approved.

{¶ 9} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in the proceeding by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 10} On May 25, 2018, OCC filed an application for rehearing of the Commission's Order. Thereafter, on June 4, 2018, Duke filed a memorandum contra OCC's application for rehearing.

{¶ 11} By Entry on Rehearing dated June 20, 2018, the Commission granted rehearing for further consideration of the matters specified in the application for rehearing.

B. Consideration of the Application for Rehearing

1. Tax Rate

{¶ 12} For general background, the record in these cases reflects that, on December 22, 2017, the Tax Cuts and Jobs Act of 2017 (TCJA) was signed into law, effective January 1, 2018. The TCJA reduced the federal corporate income tax rate from 35 percent to 21 percent.

{¶ 13} In its first assignment of error on rehearing, OCC asserts that it was unreasonable and unlawful for the Commission to not adjust Duke's rates to reflect the known and measurable tax savings that resulted from the TCJA in the first four months of 2018. OCC maintains that this is contrary to Ohio law, Supreme Court of Ohio (Court) precedent, and Commission precedent and that the Commission should have adjusted Rider AMRP to reflect the over-collection of taxes for January 1, 2018, through April 30, 2018. OCC argues that the Commission, therefore, erred and rehearing should be granted.

{¶ 14} In support of its first assignment of error, OCC initially cites two Court cases, noting that the Court has held that, when the Commission approves a tax rate different than one it knew would be assessed, its order is arbitrary and unreasonable. OCC states that, in such a situation, the Court found that the Commission has a duty to compute and assess the taxes that a utility will actually be assessed. *East Ohio Gas Co. v. Pub. Util. Comm.*, 133 Ohio St. 212, 12 N.E.2d 765 (1938). In a second Court case, OCC notes that the Court again found that the Commission has a duty to adjust for known tax assessments, with the Court holding that "[t]he income tax which the company is required to pay to the federal government under the income tax law on its annual dollar return can be calculated mathematically according to the federal income tax law to an exact accurate amount." OCC states that the Court went on to say that doing otherwise is "contrary to law." *General Telephone Co. v. Pub. Util. Comm.*, 174 Ohio St. 575, 191 N.E.2d 341 (1963). OCC argues that, in the present cases, Duke's over-collection in taxes from January 1, 2018, through April 30, 2018, can be calculated mathematically to an exact accurate amount and that OCC witness Duann made the calculation that the over-collection is $921,365.18. Thus, according to OCC, it would be arbitrary and unreasonable for the Commission to not reduce Duke's AMRP rates by reducing the charge customers pay through the rider.

{¶ 15} Moreover, in a third cited Court case, OCC notes that the Commission has been instructed by the Court to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law." In addition, OCC states that the Court instructed the Commission that, when it does depart from a precedent, it must explain why, and the new order must be substantively reasonable and lawful. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 16.

{¶ 16} Finally, citing a Commission decision, OCC states that the Commission approved rates that reflected the federal income tax rate a company actually paid as opposed to a previous higher rate. OCC notes that, in that case, Staff had testified that "the Commission has consistently ruled that known and measurable tax changes should be recognized in the revenue requirement calculation." In addition, OCC states that the Commission's order recognized that its ruling "is in keeping with prior Commission decisions." *In re The Cleveland Electric Illuminating Co.*, Case No. 86-2025-EL-AIR, Opinion and Order (Dec. 16, 1987) at 194-198. OCC argues that, thus, the Commission's own precedent requires that Duke's AMRP rates be reduced to reflect the known and measurable over-collection of federal income tax.

{¶ 17} With regard to the Commission's decision that tax adjustments are not ripe for consideration in these matters, but are more appropriately addressed in *In re 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 (*Tax COI Case*), OCC argues that the dispute as to whether Duke must return to customers the over-collection of taxes from

January 1, 2018, through April 30, 2018, has sufficiently developed and is ready for review, and the Commission could, in these cases, make a decision on this issue.

{¶ 18} OCC argues that delaying a decision on this issue until a decision is reached in the *Tax COI Case* is likely to cause unreasonable delay for customers in getting refunds for the overpayment that occurred in the first quarter of 2018. OCC argues that this delay directly contradicts a previous Commission order in *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 17-2280-EL-RDR, Finding and Order (Feb. 28, 2018) at ¶ 17, wherein the Commission rejected OCC's tariff language, finding that it would delay the rate reduction as a result of the TCJA. Further, OCC states that the AMRP is adjusted for over- or under-collection annually, and the Commission, in these proceedings, has the opportunity to address this issue where there is an adjustment mechanism (in the AMRP) that allows customers to receive the savings associated with over-collection.

{¶ 19} In addition, OCC states that the Commission has already approved applications and settlements for Columbia Gas of Ohio, Inc. and The East Ohio Gas Company d/b/a Dominion Energy Ohio that adjusted for lower federal income tax liability beginning January 1, 2018. *In re Columbia Gas of Ohio, Inc.*, Case No. 17-2374-GA-RDR, Finding and Order (Apr. 25, 2018); *In re The East Ohio Gas Co. d/b/a Dominion Energy Ohio*, Case No. 17-2177-GA-RDR, Finding and Order (Apr. 18, 2018). OCC argues that it is arbitrary and capricious for the Commission to address the over-collection of taxes in other cases only to claim the same issue is not ripe in these proceedings.

{¶ 20} In response, Duke states that what OCC fails to account for, with its citations of case law and Commission precedent, is the Commission's discretion to handle its various proceedings as it deems most appropriate. Duke states that, 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. Duke notes, however, that there is a pending case, the *Tax COI*

Case, in which the Commission is in the process of investigating the impacts of the TCJA on all regulated utilities. Duke argues that, as clearly set forth in case law, the Commission has the discretion to manage its docket as it deems most expedient and appropriate. *In re Ohio Power Co.,* Case No. 14-1693-EL-RDR, et al., Opinion and Order (Mar. 31, 2016) at 10; *In re Ohio Power Co.,* Case No. 13-2385-EL-SSO, et al., Second Entry on Rehearing (May 28, 2015) at 36 (*citing Duff v. Pub. Util. Comm.,* 56 Ohio St.2d 367, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.,* 69 Ohio St.2d 559, 433 N.E.2d 212 (1982)).

{**¶ 21**} With regard to the preceding arguments and supporting cases that are cited by OCC concerning TCJA issues, the Commission initially notes that, in the April 25, 2018 Second Entry on Rehearing in the *Tax COI Case,* we affirmed that our determination as to the TCJA issues would be made in that proceeding. We also noted that no determination has been made yet regarding the actual amount of the impact of the TCJA on any utility and that guidance as to these issues would eventually be provided in the docket of the *Tax COI Case.* Moreover, the Commission stated that we intend that all tax impacts resulting from the TCJA will be returned to customers, whether through the *Tax COI Case* or through a case-by-case determination for each affected utility. *Tax COI Case,* Second Entry on Rehearing (Apr. 25, 2018) at ¶ 15).

{**¶ 22**} The Commission would further note that, in past cases, tax issues have been resolved through stipulations on a case-by-case basis. Here, as stated previously in this Second Entry on Rehearing, the Commission found that the Stipulation was reasonable. Further, although this Stipulation may differ substantively from other, past stipulations in which tax issues were resolved, it does specifically provide for tax adjustments based on the outcome of the *Tax COI Case* (Jt. Ex. 1 at 4-5).

{**¶ 23**} The Commission finds no error with regard to OCC's first assignment of error. We deem our discussion at Paragraphs 42-43 of the Order to be dispositive of this issue. As we stated in our Order, the Stipulation adopts Duke's proposed reduction in Rider AMRP rates, passes through to customers both operational savings and some of the tax benefits of the TCJA, and ensures that customers will receive additional tax benefits following additional review by the Commission in the *Tax COI Case*. As OCC acknowledges, the Commission has a docket open in the *Tax COI Case* to determine the issues raised by the TCJA that were discussed by the parties' witnesses in their testimony. We affirm our finding that the Stipulation reasonably provides that the Rider AMRP rates proposed by Duke in its application should be approved, subject to potential reconciliation, adjustments, or refunds that may result from the Commission's directives in the *Tax COI Case*. The Commission, therefore, finds that all of the issues raised by OCC in its first assignment of error have been fully considered and properly decided in the Order. OCC's first assignment of error should be denied.

2. Base Rate Case

{¶ 24} OCC states that the Commission erred when it failed to instruct Duke to file a base rate case, on the grounds that customers would see more benefits from reduced rider rates (with declining depreciation) than they would experience if net plant depreciation is fixed in a rate case. OCC argues that this conclusion is illusory as the net plant depreciation will eventually be folded into base rates, lowering the rate base and corresponding rates to customers. OCC argues that, in a base rate case, Duke customers would benefit even more because the lower plant values (as a result of depreciation) will be part of the formula rates set, where lower plant values will equate to lower base rates for customers. Further, OCC notes that Duke's expenses would be examined during a base rate case, and its customers would have the full opportunity to benefit from cost savings under the AMRP program. OCC argues, however, that, with no base rate case, Duke will continue to collect rates that do not reflect the full operational savings of the AMRP and other major smart grid projects funded through the Advanced Utility (AU) Rider that were completed since Duke's 2012 rate case. OCC argues that only through a rate case will customers have the opportunity to receive all savings associated with the AMRP, AU, and other programs.

{¶ 25} OCC states that the Commission has previously determined that it is prudent regulatory practice to conduct regular distribution cases. *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶ 91. OCC argues that the time is ripe for an examination of Duke's revenues and expenses, to ensure that programs implemented by Duke are effective in providing safe, secure, and reliable services at a just and reasonable price.

{¶ 26} In response, Duke states that there is no authority that would allow the Commission to issue such an order directing Duke to file a base rate case and that only the utility itself can make the decision to file an application to adjust its base rates. Citing R.C. 4909.18, Duke notes that: "Any public utility desiring to * * * modify, amend, change, increase, or reduce any existing rate * * * shall file a written application with the public utilities commission." Duke states that, pursuant to the authority set forth in R.C. 4909.27, the Commission may open an investigation into Duke's rates, but it may not order the Company to file a rate case.

{¶ 27} Duke states that OCC itself could commence an action, pursuant to R.C. 4905.26, the standard complaint statute, to review Duke's base rates, but has not done so. In addition, Duke notes that 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. Duke argues that there is no legal mechanism for the filing of a rate case, without the Company's agreement; thus, OCC's second ground for rehearing must be denied.

{¶ 28} With respect to OCC's second assignment of error, the Commission finds no merit in OCC's contention that we erred in not ordering Duke to file a base rate case. The Commission continues to believe that our findings with respect to this issue were correct. As set forth at Paragraph 43 of the Order in these matters, it is not necessary, at this time, for Duke's AMRP costs to be reviewed through a base rate case rather than annual Rider

AMRP adjustment filings. Additionally, because the Company's AMRP program has been fully deployed since 2015, customers will continue to benefit from a lower revenue requirement in Duke's annual Rider AMRP filings as assets are depreciated. Therefore, the Commission concludes that OCC's second assignment of error is without merit and should be denied.

III. Order

{¶ 29} It is, therefore,

{¶ 30} ORDERED, That OCC's application for rehearing be denied. It is, further,

{¶ 31} ORDERED, That a copy of this Second Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

KKS/mef

Entered in the Journal
JUL 1 1 2018

Barcy F. McNeal

Barcy F. McNeal
Secretary