

BOEHM, KURTZ & LOWRY

ATTORNEYS AT LAW
36 EAST SEVENTH STREET
SUITE 1510
CINCINNATI, OHIO 45202
TELEPHONE (513) 421-2255

TELECOPIER (513) 421-2764

Via E-FILE

August 13, 2018

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

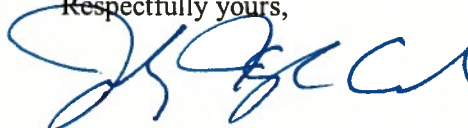
In re: Case No. 18-47-AU-COI

Dear Sir/Madam:

Please find attached the POST HEARING BRIEF OF THE OHIO ENERGY GROUP e-filed today in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

A handwritten signature in blue ink, appearing to read 'Michael L. Kurtz', is written over the typed name.

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY

MLKkew

Encl.

Cc: Certificate of Service

**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
---	----------------------------	-----------------------

POST-HEARING BRIEF OF THE OHIO ENERGY GROUP

The Ohio Energy Group ("OEG") submits this Post-Hearing Brief to the Public Utilities Commission of Ohio ("Commission") on *"the narrow question of whether the utilities should be required to establish a deferred tax liability, effective January 1, 2018."* OEG's recommendations are set forth below.

BACKGROUND

On January 10, 2018, the Commission issued an Entry opening this proceeding *"to consider the impacts of the Tax Cuts and Jobs Act of 2017 [("TCJA")]* and determine the appropriate course of action to pass benefits resulting from the legislation on to ratepayers."¹ Additionally, pursuant to its authority under R.C. 4905.13, the Commission directed jurisdictional rate-regulated utilities, effective January 1, 2018, *"to record on their books as a deferred liability, in an appropriate account, the estimated reduction in federal income tax resulting from the TCJA."*²

On February 9, 2018, the rate-regulated Ohio electric utilities filed a Joint Application for Rehearing, arguing in part that the January 10, 2018 Entry was unlawful or unreasonable because the Commission's accounting directive was issued without prior notice or hearing.

On April 25, 2018, the Commission issued a Second Entry on Rehearing, finding that *"the Commission is well within its authority, pursuant to R.C. 4905.13, to enter an accounting order without advance notice to utilities or a hearing. Although R.C. 4905.13 provides that a hearing may be held, the statute vests the*

¹ Entry (January 10, 2018) at 1.

² Id. at 2.

*Commission with discretion to determine whether a hearing is necessary, and the Commission generally does not hold hearings on modifications to accounting procedures.”*³ The Commission also pointed to several cases in which Ohio electric utilities argued that no hearing was necessary before an accounting directive could be issued since that directive would not result in an increase to any rate or charge.⁴

Notwithstanding these findings, the Commission chose to exercise its discretion under R.C. 4905.13 and schedule an evidentiary hearing “*on the narrow question of whether the utilities should be required to establish a deferred tax liability, effective January 1, 2018.*”⁵ That hearing was held July 10, 2018. The case now stands for briefing.

ARGUMENT

I. The Commission Correctly Required Ohio Utilities To Establish A Deferred Tax Liability Effective January 1, 2018.

The Commission’s decision to require the Ohio utilities to establish a regulatory liability effective January 1, 2018 for the tax savings resulting from the TCJA was: 1) consistent with generally accepted accounting principles; 2) lawful; and 3) necessary to facilitate its objective of returning all TCJA-related savings to customers.

a. The Commission’s Decision Was Consistent With Generally Accepted Accounting Principles.

The Commission’s Entry was proper from an accounting perspective because the “*rate action*” of a regulator is required in order to defer expenses or revenues that otherwise would be recognized in current period income under Generally Accepted Accounting Principles (“GAAP”).⁶

The Financial Accounting Standard Board (“FASB”) is recognized by both the Security and Exchange Commission and the American Institute of Certified Public Accountants as the official authority for establishing

³ Second Entry on Rehearing (April 25, 2018) at 11; *See also* Finding and Order, Case No. 04-1645-EL-AAM (June 1, 2005), Entry on Rehearing (July 13, 2005); Finding and Order, Case No. 09-712-GA-AAM (November 12, 2009); Finding and Order, Case No. 08-1338-EL-AAM (January 7, 2009).

⁴ Second Entry on Rehearing at 11-12 (citing Application, Case No. 17-2118-GA-AAM (October 12, 2017) at 4; Application, Case No. 16-2464-EL-AAM, (December 30, 2016) at 3; and Application, Case No. 04-1931-EL-AAM, Application (December 30, 2004) at 3).

⁵ Second Entry on Rehearing at 12.

⁶ OEG Ex. 1 (Direct Testimony of Lane Kollen) at 3:18-21.

and interpreting GAAP in the United States.⁷ FASB Accounting Standards Codification (“ASC”) 980 contains industry-specific accounting guidance for regulated operations, including FASB ASC 980-405-25-1, which addresses the required criteria, timing, and location for recognizing and recording regulator-imposed liabilities. That provision states in part “*rate actions of a regulator can impose a liability on a regulated entity. Such liabilities are usually obligations to the entity's customers.*”⁸ The Commission’s decision to require Ohio utilities to establish a deferred tax liability for TCJA-related savings was therefore well within its discretion under GAAP.

In either this case or other rate proceedings related to the TCJA, the Commission will also have discretion to determine how utilities must account for and refund a significant portion of that deferred tax liability. While the TCJA prevents the Commission from determining the amortization period for any protected excess accumulated deferred income taxes (“ADIT”),⁹ the Commission will have the discretion to determine the period over which any unprotected excess ADIT will be amortized. And much of that unprotected excess ADIT has resulted from deferrals (such as for capacity costs, storm damage, or fuel) previously authorized by the Commission. For example, at the hearing in this proceeding, Ohio Power Company witness Allen testified that the majority of that utility’s \$178 million in excess ADIT recorded as of May 2018 resulted from such deferrals:

Q. ...Would you agree that the preponderance of the unprotected excess ADIT was created through the various deferrals that the Commission has implemented in the ESPs over time?

*A. That's my understanding, yes.*¹⁰

Hence, the Commission’s discretion to address how Ohio utilities must account for TCJA-related savings extends well beyond its January 10, 2018 directive.

b. The Commission’s Decision Was Lawful.

The Commission’s January 10, 2018 accounting directive was lawful. It is common for the Commission to issue an accounting directive pursuant to its authority under R.C. 4905.13 without first holding a hearing.¹¹

⁷ Staff Ex. 1 (Direct Testimony of Jonathan J. Borer) at 3:6-10.

⁸ Staff Ex. 1 at 3:14-22.

⁹ That excess ADIT must be returned using the Average Rate Assumption Method (“ARAM”).

¹⁰ Tr. (July 10, 2018) at 20:2-7.

¹¹ Finding and Order, Case No. 09-712-GA-AAM (November 12, 2009) at 3-4 (“*Since the requested authority to change Duke’s accounting procedures does not result in any increase in rate or charge, the Commission approves this application without a hearing. The recovery of the deferred amounts will be addressed in a base rate case proceeding should Duke ever seek to recover the deferrals.*”); See also Entry, Case No. 08-606-GA-AAM (September 24, 2008) at 3.

And utilities have consistently advocated for such an approach.¹² Accordingly, as the Commission already explained, “[a]ny claim by the [utilities] in this proceeding that a hearing is necessary before acting under R.C. 4905.13 represents a stark reversal of individual electric distribution utilities’ prior representations to the Commission, and it is notable that the [utilities] make no attempt to distinguish prior cases where an electric distribution utility has represented to the Commission that no hearing was necessary on an application submitted pursuant to R.C. 4905.13.”¹³ Regardless, the Commission has now afforded the utilities due process by providing an opportunity for them to file testimony and present objections to the Commission’s accounting directive at the July 10, 2018 hearing in this proceeding.

Moreover, any claims of retroactive ratemaking with respect to the Commission’s decision to issue an accounting directive effective January 1, 2018 are baseless. That decision is no different than its past decisions granting utilities the authority to defer storm damage costs incurred prior to issuance of the deferral order.¹⁴ The Commission’s January 10, 2018 Entry did not result in any increase or decrease in any rate or charge. Because the Commission did not actually engage in *ratemaking* by issuing its accounting directive to the utilities, that directive cannot violate the prohibition on retroactive ratemaking.¹⁵

c. The Commission’s Decision Was Necessary To Effectuate Its Goals Of Flowing All TCJA-Related Savings Back To Customers.

In its April 25, 2018 Second Entry on Rehearing, the Commission stated that it “*intends that all tax impacts resulting from the TCJA will be returned to customers, whether through this proceeding or through a case-by-case determination for each affected utility; and the deferred liability for each utility should remain in place until this has been accomplished.*”¹⁶ Later in that same Entry, the Commission reiterated this intent, explaining that “. . . *irrespective of whether the final determination is made in this proceeding, or on a case-by-*

¹² Application, Case No. 17-2118-GA-AAM (October 12, 2017) at 4; Application, Case No. 16-2464-EL-AAM (December 30, 2016) at 3; and Application, Case No. 04-1931-EL-AAM (December 30, 2004) at 3).

¹³ Second Entry on Rehearing at 11-12.

¹⁴ Opinion and Order, Case No. 12-3062-EL-RDR (December 17, 2014).

¹⁵ *Elyria Foundry Co. v. Pub. Util. Comm.*, 2007-Ohio-4164 at ¶19.

¹⁶ Second Entry on Rehearing at 6 (emphasis added).

case basis in other proceedings, we will be guided by one central principle: all tax savings resulting from the TCJA should be returned to the ratepayers.”¹⁷

The Commission’s January 10, 2018 accounting directive was necessary to facilitate the Commission’s stated intent in this proceeding. As OEG witness Kollen testified, without that directive, the utility income tax expense savings and the negative amortization related to the protected excess ADIT could be recognized in the current period pursuant to GAAP.¹⁸ This could prevent customers from receiving all of the TCJA-related savings experienced as of January 1, 2018 by opening the door to retroactive ratemaking arguments. The Commission’s accounting directive was therefore necessary to preserve the ability of the Commission to flow back 100% of the TCJA-related savings to customers.

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: (513) 421-2255 Fax: (513) 421-2764

E-Mail: mkurtz@BKLawfirm.com

kboehm@BKLawfirm.com

jkylercohn@BKLawfirm.com

COUNSEL FOR THE OHIO ENERGY GROUP

August 13, 2018

¹⁷ Id. at 8 (emphasis added).

¹⁸ OEG Ex. 1 at 4:19-5:8.

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 this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing POST-HEARING BRIEF OF THE OHIO ENERGY GROUP was sent to the following parties of record *via* electronic transmission this 13th day of August, 2018 to the following:


Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

*GREEN, MICHELLE A
PUBLIC UTILITIES COMMISSION OF OHIO
180 E. BROAD ST.
COLUMBUS OH 43215

*SMITH, CHERYL A MS.
CARPENTER LIPPS & LELAND
280 N. HIGH STREET SUITE 1300
COLUMBUS OH 43081

*DRESSEL, BRIAN W MR.
CARPENTER LIPPS & LELAND LLP
280 NORTH HIGH ST. SUITE 1300
COLUMBUS OH 43215

*MACDONALD, CHERYL A
NISOURCE INC.
290 W. NATIONWIDE BLVD.
COLUMBUS OH 43215

*MOONEY, COLLEEN L
OPAE
PO BOX 12451
COLUMBUS OH 43212-2451

*BLEND, CHRISTEN M. MS.
AMERICAN ELECTRIC POWER SERVICE CORPORATION
1 RIVERSIDE PLAZA 29TH FLOOR
COLUMBUS OH 43215

*LEPPLA, MIRANDA R MS.
THE OHIO ENVIRONMENTAL COUNCIL
1145 CHESAPEAKE AVENUE SUITE I
COLUMBUS OH 43212

*BOJKO, KIMBERLY W. MRS.
CARPENTER LIPPS & LELAND LLP
280 NORTH HIGH STREET 280 PLAZA SUITE 1300
COLUMBUS OH 43215

BOTSCHNER-O'BRIEN, AMY

*BINGHAM, DEB J. MS.
OFFICE OF THE OHIO CONSUMERS' COUNSEL
65 EAST STATE STREET, 7TH FLOOR
COLUMBUS OH 43215-4203

*WHITFIELD, ANGELA MRS.
CARPENTER LIPPS & LELAND LLP
280 NORTH HIGH STREET, SUITE 1300
COLUMBUS OH 43215

*PETRUCCI, GRETCHEN L. MRS.
VORYS, SATER, SEYMOUR AND PEASE
52 EAST GAY STREET, P.O. BOX 1008
COLUMBUS OH 43216-1008

*GLOVER, REBEKAH J. MS.
WHITT STURTEVANT
88 E. BROAD ST SUITE 1590
COLUMBUS OH 43215

*HAYS, THOMAS R. MR.
8355 ISLAND LN
MAINESVILLE OH 45039-9537

*ORAHOD, TERESA
BRICKER & ECKLER LLP
100 SOUTH THIRD STREET
COLUMBUS OH 43215-4291

*ELISAR, SCOTT E.
MCNEES WALLACE & NURICK
21 EAST STATE STREET - 17TH FLOOR
COLUMBUS OH 43215

*WILLIAMS, JAMIE MS.
OHIO CONSUMERS' COUNSEL
65 EAST STATE STREET, 7TH FLOOR
COLUMBUS OH 43215-4213

*FISCHER, MARY E MS.

OFFICE OF THE OHIO CONSUMERS' COUNSEL
65 EAST STATE STREET, 7TH FLOOR
COLUMBUS OH 43215

*DARR, FRANK P MR.
MCNEES, WALLACE & NURICK
21 E. STATE STREET 17TH FLOOR
COLUMBUS OH 43215

*STINSON, DANE
BRICKER & ECKLER
100 SOUTH THIRD STREET
COLUMBUS OH 43215

*CLARK, JOSEPH MR.
NISOURCE CORPORATE SERVICES COMPANY
290 WEST NATIONWIDE BLVD
COLUMBUS OH 43215

*TEUSCHER, TYLER A. MR.
THE DAYTON POWER AND LIGHT COMPANY
1065 WOODMAN DR.
DAYTON OH 45432

*DUNN-LUCCO, CARRIE M MS.
FIRSTENERGY SERVICE COMPANY
76 MAIN STREET S
AKRON OH 44308

MCKENNEY, BRYCE
OHIO CONSUMERS COUNSEL
65 E STATE ST 7TH FL
COLUMBUS OH 43215

IGS ENERGY
JOSEPH OLIKER
6100 EMERALD PARKWAY
DUBLIN OH 43016

NORTHEAST OHIO PUBLIC ENERGY COUNCIL
31320 SOLON ROAD SUITE 20
SOLON OH 44139

GRIFFIN, RANDALL V MR.
THE DAYTON POWER AND LIGHT COMPANY
1065 WOODMAN DRIVE
DAYTON OH 45432

PUBLIC UTILITIES COMMISSION OF OHIO
180 E. BROAD ST.
COLUMBUS OH 43215

*KELLIE, JESSICA E MRS.
DAYTON POWER AND LIGHT
1065 WOODMAN DRIVE
DAYTON OH 45432

*OLIKER, JOSEPH E. MR.
IGS ENERGY
6100 EMERALD PARKWAY
DUBLIN OH 43016

*PRITCHARD, MATTHEW R. MR.
MCNEES WALLACE & NURICK
21 EAST STATE STREET #1700
COLUMBUS OH 43215

*NOURSE, STEVEN T MR.
AMERICAN ELECTRIC POWER SERVICE CORPORATION
1 RIVERSIDE PLAZA, 29TH FLOOR
COLUMBUS OH 43215

*COCHERN, CARYS
DUKE ENERGY
155 EAST BROAD ST 20TH FLOOR
COLUMBUS OH 43215

WOLTZ, ZACHARY T
OHIO CONSUMERS' COUNSEL
65 EAST STATE STREET 7TH FLOOR
COLUMBUS OH 43215

MOORE, KEVIN F
OHIO CONSUMERS COUNSEL
65 E STATE ST 7TH FL
COLUMBUS OH 43215-4203

OHIO CONSUMERS' COUNSEL
CHRISTOPHER HEALY
65 EAST STATE STREET 7TH FLOOR
COLUMBUS OH 43215-4203

*OLIVE, EMILY MS.
DUKE ENERGY OHIO
155 EAST BROAD STREET 20TH FLOOR
COLUMBUS OH 43215

KROGER CO
LINDA VIENS
60 WORTHINGTON MALL
WORTHINGTON OH 43085

OHIO CABLE TELECOMMUNICATIONS, ASSOCIATION
172 E STATE STREET STE 302
COLUMBUS OH 43215-4352

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/13/2018 3:39:49 PM

in

Case No(s). 18-0047-AU-COI

Summary: Brief Ohio Energy Group (OEG) Post-Hearing Brief electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group