

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Filing by Ohio Edison )  
Company, The Cleveland Electric )  
Illuminating Company, and The Toledo ) Case No. 16-481-EL-UNC  
Edison Company of a Grid Modernization )  
Business Plan )

In the Matter of the Filing by Ohio Edison )  
Company, The Cleveland Electric )  
Illuminating Company, and The Toledo ) Case No. 17-2436-EL-UNC  
Edison Company Application for Approval of )  
a Distribution Modernization Plan )

In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo ) Case No. 18-1604-EL-UNC  
Edison Company to Implement Matters )  
Related to the Tax Cuts and Jobs Act of 2017 )

In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo ) Case No. 18-1656-EL-ATA  
Edison Company for Approval of a Tariff )  
Change )

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**INTERLOCUTORY APPEAL,  
REQUEST FOR CERTIFICATION TO FULL COMMISSION, AND  
APPLICATION FOR REVIEW  
BY  
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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**I. INTRODUCTION**

On January 10, 2018, the Public Utilities Commission of Ohio (Commission) ordered all rate-regulated utilities to record on their books a deferred liability to account for the reduction in the utilities' federal income tax obligation resulting from the Tax Cuts and Jobs Act of 2017

(TCJA).<sup>1</sup> Since issuing that Order, the Commission has been clear that the savings resulting from the TCJA must be returned, in full, to customers. As recently as October 27, 2018, the Commission stated that, “[a]s an initial matter, we once again find it necessary to note that we intend all benefits resulting from the TCJA will be returned to customers.”<sup>2</sup> In pursuit of that goal, the Commission directed all rate-regulated utilities that had not already done so to file an application to pass tax savings resulting from the TCJA on to customers.<sup>3</sup> Yet, the FirstEnergy companies—Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the Companies)—appear to have taken the Commission’s unambiguous directive to pass tax benefits on to customers and used it as a mechanism to extract concessions from customers through a so-called settlement process that has not allowed stakeholders adequate time to properly assess the Companies’ requests.

The Companies filed an application to pass tax savings on to customers on October 30, 2018.<sup>4</sup> However, the Companies immediately tied the fate of their application to return TCJA savings to customers to the fate of two applications to extract additional funds from customers in order to fund undefined grid modernization projects. These grid modernization cases were not previously related to the TCJA, but the Companies nonetheless tethered them to the TCJA tax refund filing in hopes of having the cases resolved quickly together. Fewer than two weeks after the Companies filed their Tax Application as directed by the Commission in its October 24, 2018 Finding and Order in the Commission Tax Investigation case, the Companies filed a Stipulation

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<sup>1</sup> 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 (Commission Tax Investigation), Entry at ¶ 7 (January 10, 2018).

<sup>2</sup> Commission Tax Investigation, Finding and Order at ¶ 27 (October 24, 2018).

<sup>3</sup> Id. at ¶ 29.

<sup>4</sup> See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017*, Case No. 18-1604-EL-UNC, Application (October 30, 2018) (Tax Application).

that passes tax savings back to customers while also increasing charges assessed to customers to resolve the Companies' grid modernization applications.<sup>5</sup> A swift settlement was filed within 10 days of the filing of the Tax Application, but, unlike the settlement filed in the Ohio Power Company's (AEP Ohio) tax proceeding,<sup>6</sup> the Companies' settlement was far from unanimous.<sup>7</sup> Despite the differing subject matters of these cases, the Companies moved to consolidate them into a single proceeding on November 13, 2018.<sup>8</sup> Despite the fact that the Companies did not request expedited treatment in their motion to consolidate, their motion was granted only two days after it was filed, before any party had a chance to exercise its rights under the Commission's rules to oppose the Companies' motion.<sup>9</sup>

While the Ohio Manufacturers' Association Energy Group (OMAEG) feels it is important to timely pass back all tax savings to customers (and has been advocating for all utilities to do such since shortly after the TCJA became effective in January), OMAEG believes that stakeholders are entitled to due process and oppose the rushed process deployed in this case. Parties were afforded a little over one week to evaluate the Companies' Tax Application, assess proposals to resolve that Tax Application, along with two other cases concerning unrelated matters, and determine whether or not to join a settlement that was ultimately filed in this case. Now, without hearing arguments opposing consolidation, the Commission has granted consolidation and ordered the parties to litigate these separate, unrelated matters in a single proceeding within less than three months.

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<sup>5</sup> Stipulation and Recommendation (November 9, 2018).

<sup>6</sup> See *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, Joint Stipulation and Recommendation (September 26, 2018).

<sup>7</sup> Stipulation and Recommendation (November 9, 2018).

<sup>8</sup> Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion to Consolidate (November 13, 2018) (Motion to Consolidate).

<sup>9</sup> See Entry (November 15, 2018); see also Ohio Adm. Code 4901-1-12.

The decision to consolidate these proceedings is a departure from past precedent, as the conditions that the Commission typically looks for in determining whether consolidation is appropriate are not present here. Moreover, the issue of consolidating these proceedings presents new, novel questions of law and policy; specifically, whether proceedings that bear no relation to each other aside from being included in the same stipulation can be consolidated even if the typical considerations underlying consolidation are not present and whether regulated utilities should be permitted to tie their compliance with Commission orders to concessions of additional cost recovery from customers. As such, pursuant to Ohio Adm. Code 4901-1-15(B), the Attorney Examiner should certify this appeal to the full Commission for careful consideration of the arguments contained herein.

## **II. ARGUMENT**

Consolidation of cases is a useful vehicle to avoid redundant proceedings and allow for the efficient use of resources. As such, the Commission typically allows for the consolidation of cases where there are common issues and efficiencies to be gained.<sup>10</sup> Conversely, cases that deal with different issues, testimony, and concerns are inappropriate for consolidation, as considering unrelated cases at the same time does not offer any additional efficiency. In considering whether or not to consolidate cases, the Commission should consider whether common issues exist and whether the issues in each case are similar, not whether a utility has used one case to gain a favorable result in the other.

Until the Companies decided to tie these cases to each other, there was no evidence to indicate that the cases were related. On one hand, the Companies had an application to return tax

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<sup>10</sup> *In the Matter of the Inquiry into the 1989 Long-Term Forecast Report of the Ohio Gas Company*, Case No. 89-0874-GA-GCR, et al., Opinion and Order (June 26, 1989) (“[C]onsolidation of the hearings is appropriate because common issues exist between these proceedings and the consolidation will enhance the efficiency of the proceedings.”)

savings to customers that they had been ordered to file by the Commission, and, on the other, had two outstanding requests to collect additional charges from customers over and above the amounts approved in the Companies' latest ESP proceeding. Requests to collect new charges for grid modernization are in no way related to a request to return money to customers at the direction of the Commission pursuant to a change in federal tax law that was effective over 10 months ago.

In asserting that these matters should be consolidated, the Companies focused on the fact that the Stipulation addresses all of these cases.<sup>11</sup> According to the Companies, consolidation will "prevent undue waste and expense from the duplication of efforts across four individual dockets that are all related to the Stipulation."<sup>12</sup> The Motion to Consolidate, however, overlooked the reality that the Companies' grid modernization cases concern different issues than the tax case. As such, any efficiencies that the Companies suggested could result from consolidation would be minimal, at best.

In order for consolidation to truly present the opportunity for increased efficiency, the testimony and cross-examination of witnesses in one proceeding would need to be similar to that which would occur in the other proceeding or proceedings. Here, that is not the case. The Companies and other parties would still need to file testimony both in support of the grid modernization provisions of the Stipulation and the tax provisions of the Stipulation. The Stipulation filed in these proceedings does not offer detailed information regarding the grid modernization projects that it asks the Commission to authorize. As such, the Companies (and others) would presumably need to offer testimony at hearing of witnesses to support these projects and provide specific information. These witnesses would likely not address the tax

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<sup>11</sup> See Motion to Consolidate at 5.

<sup>12</sup> Id.

portion of the Stipulation. Similarly, witnesses filing testimony supporting the tax portion of the Stipulation may not offer any assistance to the Commission in evaluating the grid modernization aspects. As such, considering these matters in a single proceeding without any evidence that doing so will create actual efficiencies will not actually curtail testimony or provide any benefit to the Commission or the parties. Rather, consolidation would only result in a single, longer hearing instead of two shorter hearings.

The Companies cite a recent decision to grant consolidation of a number of cases related to Duke Energy Ohio, Inc. (Duke).<sup>13</sup> As the Companies note, that consolidation resolved a number of proceedings related to costs recovered by Duke from customers, including a base distribution rate case where base rates were adjusted to reflect tax changes. Thus, it presented a case where Duke and other parties would have filed testimony by similar witnesses in each of the separate proceedings, thus creating redundancy. Unlike this case, that case was able to be streamlined by consolidation. Similarly, the Companies inaccurately represent the issues at stake in the recent AEP Ohio consolidation that the Companies cite. There, the Commission granted consolidation of AEP Ohio's application to return tax dollars to customers with its application to create a mechanism for doing so.<sup>14</sup> AEP Ohio did not attempt to include any other proceedings that were not related to tax savings and relief when it consolidated those matters. Indeed, had the Companies only asked to consolidate their tax application (18-1604-EL-UNC) and their application to implement tariffs to facilitate the return of tax relief (18-1656-EL-ATA), OMAEG would not object to consolidation. Thus, citation of AEP Ohio's consolidation of only tax-related cases does not support the Companies' attempt to consolidate two cases related to grid modernization with cases related to tax relief.

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<sup>13</sup> Motion to Consolidate

<sup>14</sup> See *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017, et al.*, Case Nos. 18-1007-EL-UNC, et al., Finding and Order at ¶ 21 (October 3, 2018).

In addition to its departure from the typical factors that the Commission looks to in assessing whether or not to consolidate proceedings, the issues at stake here present novel questions of policy for the Commission to consider. First among these questions is whether the Commission ought to permit utilities that have been ordered to provide benefits to customers to hold those benefits hostage until customers have agreed to provide the utility with additional cost recovery for unrelated activities. The Commission should carefully consider whether it is appropriate for the Companies to condition refunds and rate reductions related to the TCJA upon the receipt of additional cost recovery above that which it already receives from customers through its current ESP, including current distribution investment riders. If the Commission allows consolidation of these cases, it will set a precedent that utilities can essentially hold customers hostage and demand a ransom of increased cost recovery whenever they are ordered to provide unrelated benefits to customers. This is a policy decision that could reverberate throughout future proceedings, and one that should be considered by the whole Commission before being adopted.



### III. CONCLUSION

Proceedings relating to the Companies' need to provide TCJA relief for customers outside of a base distribution case should not be tied to the Companies' grid modernization proposals. The Attorney Examiner should certify this interlocutory appeal to the full Commission for its consideration and the Commission should reverse the decision to consolidate these proceedings and allow the parties to litigate these matters on the merits in individual proceedings.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail November 20, 2018.

/s/ Brian W. Dressel  
Brian W. Dressel

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Summary: Application Interlocutory Appeal, Request for Certification to Full Commission, and Application for Review electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group