BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of a Tax Savings Credit Rider	)))	Case No. 19-29-GA-ATA

REPLY BRIEF OF VECTREN ENERGY DELIVERY OF OHIO, INC.

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I. INTRODUCTION

As a result of the Tax Cuts and Jobs Act of 2017 ("TCJA"), the Commission ordered all utilities to return the benefit of the federal tax savings created by that law back to customers.[1] Vectren Energy Delivery of Ohio, Inc. ("VEDO") did not oppose this order, and has in fact attempted to follow as closely as possible the example set out by the Commission as the standard by which to do so, resulting in the Application in this proceeding.

Staff and the Office of the Ohio Consumers' Counsel ("OCC"), however, take the position that VEDO's application does not go far enough, and would have the Commission go beyond just requiring the return of the tax savings benefit VEDO realized to customers. The adoption of the position held by Staff and OCC would instead result in a windfall to customers by requiring VEDO to return more than just VEDO's tax savings.

Staff seeks to justify this position by examining some of the terms of VEDO's recent rate case proceeding, and rewriting the plain meaning of portions of the settlement in that

[1] Case No. 18-47-AU-COI, Finding and Order at 18 (Oct. 24, 2018) ("*Tax COI*").

case to tie the terms in the *Rate Case* Stipulation to this case.[2] As to the former, Staff cherry-picks certain terms and conditions of the whole package, while ignoring each and every concession made by the Company, in an effort to claim that the Stipulation was something more than a reasonable outcome.[3] The Staff position is as if Staff is trying to recast the settlement in the *Rate Case* as something other than a careful bargained for exchange by knowledgeable and capable attorneys.

In any event, Staff's position is at odds with the very language of the Stipulation and therefore should be given no weight. Staff acknowledged that the outcome of the Stipulation was a product of careful negotiations.[4] Staff acknowledged that each individual provision represented the parties' negotiations on the package as a whole.[5] Staff recommended in the *Rate Case* Staff Report, and then explicitly agreed in the *Rate Case* Stipulation to address all EDIT issues in this case, which included all of the EDIT associated with assets that were recovered in the DRR and CEP programs.[6] Staff's position here is inconsistent with the express terms of the *Rate Case* Stipulation.

In the *Tax COI* Order the Commission also recognized that a one-size-fits-all approach to returning the tax savings benefit to customers across all the different utilities and industries in the state would not be practical, and instead opted to take each utility's

[2] *See* Staff Br. at 5-6; *see also In re Vectren Energy Delivery of Ohio*, Case Nos. 18-298-GA-AIR et al, Stipulation and Recommendation (Jan. 4, 2019) ("*Rate Case*").

[3] *See* Staff Br. at 5-6.

[4] *See Rate Case* Stipulation at 2; *Rate Case*, Testimony in Support of the Stipulation of David M. Lipthratt at 2 (Jan. 22, 2019); *Rate Case*, Staff Post-Hearing Brief at 6 (Apr. 2, 2019).

[5] *Rate Case* Stipulation at 1-2; *Rate Case* Lipthratt Testimony at 2; *Rate Case* Staff Post-Hearing Brief at 15.

[6] *Rate Case*, Staff Report at 19 (Oct. 1, 2018); *Rate Case* Stipulation at 12.

individual circumstances into account.[7] Staff, on the other hand, is arguing for a strict, one-size-fits-all methodology regarding incremental returns, while ignoring the fact that it has deviated from its strict approach with at least several other utilities already.[8]

Moreover, Staff acknowledges that 64.39% of the EDIT at issue in this proceeding related to VEDO's riders would be reasonable to recover through VEDO's riders.[9] Nonetheless, Staff advances a form over substance argument that while those amounts are reasonable to recover it is unreasonable to do so through the Tax Savings Credit Rider ("TSCR").[10] Again, Staff's position is inconsistent with the *Rate Case* Stipulation because VEDO agreed with Staff to address those EDIT amounts in only this case.[11] It would be unreasonable for the Commission to treat these amounts as reasonable to recover, but prohibit recovery for VEDO from recovering those amounts in the case Staff recommended, that VEDO and Staff agreed to address the issue, and which the Commission adopted when it approved the *Rate Case* Stipulation.

As demonstrated in more detail below, the arguments against VEDO's recovery of Component D in its Application are without merit, and the Commission should approve Component D as proposed by VEDO.

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[7] *Tax COI* Order at 17.

[8] Staff Br. at 4, 6; *see also* VEDO Br. at 7-8.

[9] *See* Staff Br. at 4.

[10] *Id*.

[11] *Rate Case* Stipulation at 12.

II. ARGUMENT

A. The result of the Rate Case should not be used against VEDO to justify an unfair outcome in this proceeding.

The *Rate Case* Stipulation was a reasonable compromise among the Signatory Parties to resolve the issues in that proceeding. While it is certainly possible that one party or another could have negotiated differently or could have argued for a different deal, including Staff, each Signatory Party agreed to the terms of the *Rate Case* Stipulation as filed and approved by the Commission. It is not appropriate for Staff to attempt to relitigate the *Rate Case* or to rewrite the *Rate Case* Stipulation in this proceeding even if Staff is apparently dissatisfied with some of the terms of the settlement there. The terms of the *Rate Case* Stipulation speak for themselves and cannot be rewritten.

While it is not VEDO's position that the terms of the *Rate Case* should be relitigated here, in response to Staff's reference to several of those terms as "significant benefits," VEDO would point out that both Staff and the Commission agreed that VEDO was underearning at the time it filed the application in the *Rate Case*.[12] Staff, however, states in its brief here that "[t]he outcome of the *Rate Case* yielded significant benefits for the Company," and that it "*positively* impacted the Company."[13] Staff also states that "[f]ocusing only on the effects of the Incremental Return is a fallacy of selective attention."[14] These statements inaccurately portray and describe the circumstances of the *Rate Case*. There is no legitimate basis to reframe the *Rate Case* outcome as some kind

[12] Staff Br. at 6; *see Rate Case* Staff Report at 7; *Rate Case*, Opin. & Order at 81 (Aug. 28, 2019).

[13] Staff Br. at 5-6 (emphasis in original).

[14] *Id*. at 5.

of windfall for the Company that trumps legitimate recognition of Component D as proposed in VEDO's Application. Even if it were true that VEDO had received a more-favorable-than-expected result from settlement in the *Rate Case*, which VEDO disputes, it is inappropriate for Staff to attempt to rewrite the terms of the *Rate Case* Stipulation to somehow tie those favorable terms to its preferred outcome on Component D. Staff's position is untenable and inequitable and should be rejected.

As VEDO explained in its initial brief, Staff has admitted that utilities are entitled to receive an incremental return on Normalized EDIT.[15] In its Staff Report in this case, the only distinction it made, without explanation, was that a base rate case was the appropriate mechanism to recover that return.[16] In other cases and in its initial brief here, Staff elaborated that such returns could also be recovered through existing riders through which the effects of the amortization of EDIT would naturally occur, such as the Company's DRR.[17] Staff's argument now seems to be that because VEDO received a favorable outcome via the *Rate Case* Stipulation, it is not entitled to the incremental return. Staff makes a direct connection between those "significant" benefits in the *Rate Case* Stipulation and the fact that it will not now agree to the relief to which it has already admitted VEDO has a right to pursue, and which Staff admits is reasonable to reflect in rates.[18] Staff states that to grant the relief now would be inconsistent with the position it

[15] VEDO Br. at 7.

[16] Staff Report at 5.

[17] *See*, *e.g.*, Staff Br. at 4. Staff also ignores that AEP Ohio's DIR would not, in due course, have flowed through all of the EDIT and the associated incremental return until Staff, AEP Ohio, and other parties modified the DIR mechanics in the AEP Ohio tax case stipulation. *See Tax COI*, Reply Comments of AEP Ohio at 7 (March 7, 2018) (Regarding EDIT not related to DIR assets "there is no basis in AEP Ohio's approved DIR mechanism to reflect excess ADIT impacts or amortization of the TCJA regulatory liability.").

[18] *See id*. at 6.

has held in prior proceedings to only allow such recovery through existing mechanisms such as base rate cases or existing riders.[19]

VEDO disputes several of Staff's assertions in its brief on this point. First, VEDO disagrees with Staff's general framing of the outcome of the *Rate Case* as "significantly" beneficial to the Company. VEDO came in for a distribution base rate case because it asserted, and Staff and the Commission agreed, that it was underearning.[20] Any benefits derived from the *Rate Case* Stipulation were negotiated to achieve a fair rate of return for the services provided. If the *Rate Case* Stipulation somehow provided more benefits to the Company than it deserved, the Commission would not have approved it.

Further, the benefits that Staff highlights as "significantly" benefiting the Company are not special or unique to VEDO; they are in fact routine.[21] Rider rate caps are regularly reset when companies request the extension or continuation of infrastructure programs and the corresponding recovery mechanism. In both AEP Ohio's most recent ESP, Case No. 13-2385-EL-SSO, and the extension of that ESP in Case No. 16-1852-EL-SSO, for instance, AEP Ohio's DIR was extended and the rate caps were reset.[22] The Commission approved the continuation of Dominion's PIR rider in Case No. 15-362-GA-ALT and reset the rate caps.[23] The same outcome occurred as well for Columbia's IRP in Case No. 16-2422-GA-ALT.[24] The reset of the DRR rate caps is therefore not a unique circumstance

[19] *Id*.

[20] *Rate Case*, Application at 5-6 (Mar. 30, 2018); *Rate Case* Staff Report at 7; *Rate Case*, Opin. & Order at 81 (Aug. 28, 2019).

[21] Staff Br. at 6.

[22] *See* Case No. 13-2385-EL-SSO, Opin. & Order at 47; Case No. 16-1852-EL-SSO, Opin. & Order at 79-80, 86.

[23] *See* Case No. 15-362-GA-ALT, Opin. & Order at 1, 4-6.

[24] *See* Case No. 16-2422-GA-ALT, Opin. & Order at 1, 8-9.

that should be viewed as taking what the parties agreed was an overall reasonable compromise to be some significant windfall for VEDO, as Staff's brief here suggests. Similarly, the creation of a CEP rider for recovery of related expenditures and to reduce regulatory lag is not unique to VEDO. Columbia Gas has a CEP rider, and both Dominion and Duke are in the process of acquiring approval for CEP riders as well.[25] In fact, in a brief filed this week, Staff opposed an argument presented by the Office of the Ohio Consumers' Counsel ("OCC") that is essentially Staff's argument here. OCC presented a reasonableness argument against approval of Dominion's CEP Rider, and Staff responded that the creation of a CEP rider was not a benefit vis a vis standard ratemaking:

> OCC begins its critique of the Company's application by stating that "Dominion wants the PUCO to use alternative ratemaking under a 2011 law instead of using the longstanding traditional ratemaking that is fairer to consumers." As DEO pointed out in its Initial Brief, much of the intervenors' opposition both to the Application and the Stipulation stems from a "wholesale rejection of Ohio's alternative-regulation laws." Fairness, in this instance, is not in the eye of the beholder. The General Assembly adopted R.C. 4929.111 specifically to allow companies to recover capital expenses associated with system reliability improvements. And it provided for this process for approving such applications. The legislature has determined that this process is "fair" – there simply is no basis for claiming that traditional ratemaking is somehow "fairer."[26]

As Staff acknowledges through these statements, the creation of VEDO's CEP Rider in the *Rate Case* Stipulation is not some extraordinary windfall to the Company that could or should be viewed as a basis to ignore reasonable and lawful outcomes in this case. Moreover, while Dominion and Columbia are or will be getting a return on the deferred balance and a return on the assets themselves in their respective CEP Riders, VEDO will

[25] *See generally In re Columbia Gas of Ohio, Inc.*, Case No. 17-2202-GA-ALT; *In re Dominion Energy Ohio*, Case No. 19-468-GA-ALT; *In re Duke Energy Ohio, Inc.*, Case No. 19-791-GA-ALT.

[26] *In re Dominion*, Case No. 19-468-GA-ALT, Reply Brief of PUCO Staff at 2 (Oct. 19, 2020).

only recover a return on its deferred balance.[27] Thus, VEDO's CEP Rider is less of a benefit than Dominion's inherently fair CEP Rider.

The second issue with Staff's argument is that it portrays the *Rate Case* Stipulation almost as a windfall for the Company, without any reference to the very significant concessions made by VEDO from its application to reach settlement. For instance, VEDO agreed to a revenue requirement and rate of return far less than what it proposed and what was supported in the *Rate Case* application. Additionally, VEDO agreed to come in for another distribution base rate case by the end of 2024. As with every Stipulation approved by the Commission, the *Rate Case* Stipulation was the product of serious negotiations by the parties and represented a compromise package that was not intended to reflect any party's litigation positions or the positions they would have taken absent its execution.[28]

It is also inappropriate for parties to interpret the *Rate Case* Stipulation, especially in ways inconsistent with the plain language of the settlement agreement. Agreements that are unambiguous are to be applied, and parties' interpretations through parol evidence or otherwise of unambiguous documents is inappropriate.[29]

Moreover, Staff's interpretation is inconsistent with its own recommendation and the plain language of the settlement agreement. Again, Staff recommended that all EDIT

[27] Testimony of J. Cas Swiz at Exhibit JCS 1.2 at pg. 9 of 172.

[28] *Rate Case* Stipulation at 24.

[29] *See*, *e.g.*, *Bellman v. Amer. Intl. Group*, 2007-Ohio-2071, ¶ 7, 113 Ohio St.3d 323 (the parol evidence rule "assumes that the formal writing reflects the parties' minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document * * * were not intended by the parties to survive," citing Black's Law Dictionary at 1150); *see also Sunoco Inc. v. Toledo Edison Co.*, 2011-Ohio-2720, 129 Ohio St.3d 397 (reversing PUCO decision and finding it was "unlawful for the commission to rely on matters outside the written agreement of the parties.").

associated with the TCJA be recovered through a credit mechanism as opposed to being embedded in base rates.[30] The Stipulation also acknowledged that VEDO had filed the application in this proceeding, including Component D, and the parties agreed that all EDIT and related issues would be resolved separately on a stand-alone basis here. As the issue is framed in Staff's initial brief, Staff would have the Commission believe that parties, including VEDO, agreed to certain benefits in the *Rate Case* Stipulation in lieu of the benefits that would be derived from Component D of the Application in this proceeding. But Staff does not point to any provision of the *Rate Case* Stipulation that would support that assertion or framing, and in fact such a provision does not exist. Staff cannot sign a settlement agreement in one proceeding, wherein the parties agree to entirely defer the resolution of an issue to a wholly separate proceeding, then attempt to use the provisions of the first settlement to influence the outcome of the second proceeding.

Finally, Staff and OCC argue that the rider created in this proceeding is not the appropriate mechanism to recover the return, but instead VEDO should wait for its next rate case.[31] Staff goes so far as to say that the various beneficial outcomes of the *Rate Case* "significantly outweigh any potential negative impact that may result from the inability to recover" the Incremental Return either through existing mechanisms or the rider created here.[32] Staff's attempt to rewrite the provisions of the *Rate Case* Stipulation to explain its position in this case is not in keeping with the Commission's long-standing

[30] *Rate Case* Staff Report at 19.

[31] OCC Br. at 5; Staff Br. at 6.

[32] Staff Br. at 5-6.

principles regarding settlements. Any arguments concerning the purported benefits derived in the *Rate Case* should be disregarded.

B. Approval of the incremental return is in line with Commission precedent.

As mentioned above, and as discussed at length in VEDO's initial brief, Staff's stated "consistently held position" as originally presented in its Staff Report in this case is actually inconsistent with its positions in several of the previously decided tax case proceedings.[33] Staff's initial brief asserts that because "the amortization of EDIT will not naturally occur in the DRR and CEP riders" it is inappropriate to recognize here. But that outcome is exactly what happened in the AEP Ohio tax case when all of AEP Ohio's EDIT, including amounts beyond the DIR assets, was included in the DIR and AEP Ohio was authorized to reflect the same incremental return on amortization of Normalized EDIT that VEDO seeks here.[34] Again, VEDO is following the exact path that the Commission directed VEDO to follow in the *Tax COI.*

OCC also attempts to argue that rejecting VEDO's request is consistent with past precedent.[35] As VEDO argued in its initial brief, this is just factually incorrect. AEP Ohio was granted recovery of incremental returns through its DIR.[36] Staff stated in its Staff Report on Dominion's application that Dominion would "have the opportunity to recover this incremental revenue requirement in the PIR and AMR riders."[37] Columbia was

[33] VEDO Br. at 7-8.

[34] *See Tax COI*, Reply Comments of AEP Ohio at 7 (March 7, 2018) (Regarding EDIT not related to DIR assets "there is no basis in AEP Ohio's approved DIR mechanism to reflect excess ADIT impacts or amortization of the TCJA regulatory liability.").

[35] OCC Br. at 5.

[36] VEDO Br. at 7.

[37] *Id*.

authorized to reflect reductions in both Normalized and Non-Normalized EDIT for all EDIT amounts associated with its IRP Rider.[38]

C. Adoption of Staff and OCC's position would result in a windfall to customers.

According to OCC, money collected by utilities from customers to pay federal taxes, when those payments are deferred according to tax regulations, acts as an "interest-free" loan to the utility from customers.[39] Those deferred tax payments are not interest free loans from customers, but are rather treated as and more accurately described as a loan from the federal government.[40] The taxes VEDO collected through rates based on a federal corporate income tax rate of 35% were legitimately collected in accordance with regulatory practices and principles and the Commission's orders setting such rates.

Obviously, with the passage of the TCJA, the federal corporate income tax rate changed, and VEDO has been working since to effectively and efficiently return VEDO's future tax savings (i.e. the EDIT) back to customers. But nothing in that law, and nothing in the Commission's orders directing utilities to return those savings, requires utilities to return more to customers than the level at which VEDO received a benefit. VEDO's request in this case, to recover an incremental return on rate base associated with the EDIT, is a reasonable request and despite OCC's assertions, does not result in a

[38] *Id*. at 8.

[39] OCC Br. at 2.

[40] *18 CFR Parts 154, 260, & 284 Interstate & Intrastate Natural Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate Am. Forest & Paper Ass'n*, 2019 FERC LEXIS 714, *52, 167 F.E.R.C. P61,051 (F.E.R.C. April 18, 2019) (As explained by FERC, "ADIT is not money owed to past or future ratepayers, but rather deferred taxes that are ultimately owed to the government.").

"windfall" to the Company.[41] Staff itself has asserted that the Company is entitled to recover this return.[42] Staff merely disagrees with the mechanism proposed (as well as the distinction between base rate amounts and rider amounts).

III. CONCLUSION

Since the passage of the TCJA, VEDO has sought to efficiently and effectively return all tax savings back to customers. VEDO first attempted to do so through its distribution rate case, only to be told that it was best to do so through a separate proceeding. Therefore, VEDO opened this proceeding and attempted again to create an effective mechanism for the return of tax savings to customers while recognizing the cost of doing so not through base rates, only to be told that it must return to the very type of proceeding it had been told to leave in the first place. VEDO's request in this proceeding is reasonable, it is consistent with past Commission practice, and it follows the model set forth by the Commission for these types of applications. The Commission should approve VEDO's request for recovery of incremental return.

[41] *Id*. at 1.

[42] Staff Report at 5.

Respectfully submitted,

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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 this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply Brief of Vectren Energy Delivery of Ohio, Inc.* was sent by, or on behalf of, the undersigned counsel for Vectren Energy Delivery of Ohio, Inc., to the following parties of record on this 23rd day of October 2020, *via* electronic transmission, hand-delivery or U.S. mail, postage prepaid.

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Summary: Reply Reply Brief of Vectren Energy Delivery of Ohio, Inc. electronically filed by Mr. Matthew R. Pritchard on behalf of Vectren Energy Delivery of Ohio, Inc.