

**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. 18-0047-AU-COI

**MEMORANDUM OPPOSING THE JOINT APPLICATION FOR REHEARING OF
OHIO POWER COMPANY, OHIO EDISON COMPANY, THE DAYTON POWER AND
LIGHT COMPANY, DUKE ENERGY OHIO, INC., THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY**

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I. INTRODUCTION

On January 1, 2018, provisions of the Tax Cuts and Jobs Act of 2017 (“TCJA”) became effective. One of those provisions lowers the federal corporate income tax rate to 21%.

The Public Utilities Commission of Ohio (“Commission”) opened this investigation on January 10, 2018 “to study the impacts of the [TCJA] on the Commission’s jurisdictional rate-regulated utilities, and determine the appropriate course of action to pass benefits on to ratepayers.” Entry, ¶ 1 (Jan. 10, 2018). It also ordered all utilities to establish a deferred liability to record the estimated reduction in federal income tax. *Id.*, ¶ 7.

On February 9, 2018, the six rate regulated electric distribution utilities (“EDUs”), Ohio Power Company, Ohio Edison Company, The Dayton Power and Light Company, Duke Energy Ohio, Inc., The Cleveland Electric Illuminating Company, and The Toledo Edison Company, jointly sought rehearing of the Commission’s Entry and present three assignments of error. While the EDUs “agree that it is necessary and appropriate” for the

Commission to consider the effects of the TCJA, they seek in the first two assignments of error either clarification or, “if necessary,” modification of the Commission’s order directing the EDUs and other utilities to record a deferred liability so that this order “is without prejudice to the outcome of these proceedings as well as any other rider or ratemaking proceeding.” Joint Application for Rehearing of Ohio Power Company, Ohio Edison Company, The Dayton Power and Light Company, Duke Energy Ohio, Inc., The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 4 (Feb. 9, 2018) (“Application for Rehearing”). In the third assignment of error, the Application for Rehearing seeks a determination that the order to record the estimated federal income tax savings is unreasonable and unlawful if it is intended to form the basis to change base rates or riders. *Id.* at 2.

The EDUs’ first and second assignments of error do not demonstrate that the order requiring the EDUs to track tax savings is unlawful or unreasonable. Further, none of the assignments of error is ripe for decision. Accordingly, the Commission should deny the EDUs’ Application for Rehearing.

II. ARGUMENT

A. Assignments of Error 1 and 2 do not demonstrate that the Commission order directing them to track tax savings is unlawful or unreasonable

A party seeking rehearing has the burden to demonstrate that the order is unreasonable or unlawful. R.C. 4903.10. Neither the first nor second assignment of error satisfies that requirement.

In the first assignment of error, the EDUs seek a clarification that the order directing them to record tax savings is preliminary, temporary, and without prejudice to the outcome of this or another proceeding and relates to retail rates. *Id.* at 2. In the second assignment

of error, the EDUs seek clarification that the “directive does not predetermine the outcome of any future rate proceeding.” *Id.*

Both assignments of error are premised on the apparent concern that the Commission may require the EDUs to retroactively return tax savings to customers. As they note in support of the first assignment of error, their concern is the “retrospective” effect of the “directive.” *Id.* at 5. Similarly, they complain about the potential for “retroactive ratemaking” in their argument in support of the second assignment of error. *Id.* at 7.

All parties share an interest in the Commission taking steps to address the tax law changes in a lawful and reasonable manner. If the Commission has erred in issuing an order regarding accounting changes, then the Commission should correct that error as it is permitted to do. *In re Ohio Power Co.*, 144 Ohio St. 3d 1 (2015) (the Commission may alter its orders so long as the new order is lawful and reasonable).

The EDUs’ concerns about the order’s effects on past or future rates and revenue collections, however, do not demonstrate that the order is unreasonable or unlawful. As the Supreme Court of Ohio has stated in *Elyria Foundry Co. v. Public Utilities Commission of Ohio*, 114 Ohio St. 3d 305 (2007) (“*Elyria Foundry*”), an accounting order is distinct from a ratemaking order. The accounting order does not affect or predetermine rates, retroactively or otherwise. While the EDUs may wish to have the Commission self-impose premature limits on the scope of this investigation,¹ this Application for Rehearing fails to state a ground for the Commission to do so. R.C. 4903.10.

¹ The EDUs recognize that their Application for Rehearing is an attempt to preemptively shape the issues to be addressed by the Commission. Application for Rehearing at 4 (“Although some parties may claim that the EDUs are getting ahead and addressing merit issues, the reality is that implementing the accounting directive involves some understanding (or assumptions) about the manner and extent of how tax reform

B. The assignments of error are not ripe and should be denied

In the first and second assignments of error, the EDUs attempt to constrain the scope of the “accounting directive” as a means of presenting their concerns regarding retroactive ratemaking. In their third assignment of error, the EDUs present arguments for rehearing based on the assumption that the “accounting directive ... forms the basis for changing base rates or approved riders” and seek to frame the range of responses the Commission may direct in response to the tax rate reduction. Application for Rehearing at 7. For example, the EDUs assert that the Commission’s authority to adjust existing tariffs “may” be limited based on the terms of the authorization of a rider. *Id.* at 8. Further, they assert that “[i]t would violate the ESP statute to modify riders adopted in an ESP without the utility’s consent or outside of the comprehensive ESP process.” *Id.* at 9. Then, they assert that “[b]ase rates for EDUs can only be changed prospectively as part of a proceeding under R.C. 4909.18.” *Id.* at 9. Finally, they add that the “accounting directive” must be applied in a way that is consistent with normalization rules. *Id.* at 11.²

As discussed above, the premise of the EDUs’ Application for Rehearing that the “accounting directive” has a rate effect is not correct. As the EDUs themselves state, an order directing them to track the tax savings is not a ratemaking order. *Id.* at 6. Given that the order directing the EDUs to track tax savings has no rate effect, the Commission

impacts will be reflected in rates.”) As *Elyria Foundry* makes clear, a decision about the effect of the tax reduction on rates is not dependent to the accounting order.

² Compounding the problem with the EDUs’ premature application for rehearing is the inclusion of several faulty legal claims. For example, the EDUs argue that the Commission’s authority to adjust base rates is limited to the procedures under R.C. Chapter 4909. This claim ignores the Commission’s authority to adjust rates based upon a complaint or its own investigation under R.C. 4905.26. At this point, however, the Commission is not required to engage the arguments presented in support of the EDUs’ third assignment of error because they are not ripe.

should deny the Application for Rehearing because the assignments of error are not ripe for decision.

Under the ripeness doctrine, a tribunal will not decide a matter if it is required to engage in abstract disagreements over administrative policies. *State ex rel. Elyria Foundry Co. v. Industrial Comm'n*, 82 Ohio St. 3d 88 (1988). “The basic principle of ripeness may be derived from the conclusion that judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.” *Euvard v. The Christ Hospital*, 141 Ohio App. 3d 572, 576 (2001) (internal quotation marks omitted).

The ripeness doctrine applies to Commission proceedings. For example, in a complaint case brought by Cincinnati Gas and Electric Company against a city that was initiating the process to set public way fees, the utility included counts challenging the anticipated fees. Because the city had not yet authorized the fees, the Commission concluded that those counts were not ripe for decision. Because the counts were not ripe, the Commission dismissed them. *In the Matter of the Complaint of the Cincinnati Gas and Electric Company v. City of Forest Park*, Case No. 05-75-EL-PWC, Opinion and Order at 9 (Mar. 7, 2006).

Similarly, the EDUs’ third assignment of error presents claims that are not ripe for review. The Commission ordered rate-regulated utilities to record as a deferred liability the estimated reduction in federal income tax resulting from the TCJA. It did not order any change in rates or riders in the Entry, and whether the Commission will order a rate change or a modification of a rider for a particular company is uncertain if prior experience is any guide. In response to the Tax Reform Act of 1986, for example, the Commission

elected to exempt several utilities from rate adjustments for a variety of reasons. *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Reform Act of 1986 on Regulated Ohio Utility Companies*, Case No. 87-831-AU-COI, Finding and Order (Sept. 9, 1987). As no rate change is ordered in the Commission's order opening this proceeding and orders directing future changes, prospective or retrospective, remains uncertain, the EDUs' third assignment of error raises issues that are hypothetical, abstract, and remote.

Additionally, the EDUs will have opportunities to address the effects of the tax rate change on their rates in this and other proceedings. In fact, the EDUs have presented nearly identical arguments regarding the effect of the tax rate change on rates and riders in comments filed in this proceeding on February 15, 2018. For example, Ohio Power argued that changes in rates should be prospective only, that changes in riders should conform to the requirements established in the ESP process, and that base rates should be changed only through base rate proceedings. Comments of Ohio Power Company at 3-6 (Feb. 15, 2018).

Further, the implementation of rate changes is in fact already being addressed in individual rate proceedings. See, e.g., *In the Matter of the Application of Ohio Gas Company for an Increase in Gas Distribution Rates*, Case Nos. 17-1139-GA-AIR, et al., Joint Stipulation and Recommendation (Jan. 26, 2018); *In the Matter of the Update to the Distribution Modernization Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 17-2280-EL-RDR, Staff Review and Recommendation (Feb. 1, 2018); *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider FBS and Rider*

EFBS, Case No. 18-40-GA-RDR, Letter from Elizabeth H. Watts to Barcy McNeal (Feb. 6, 2018) (seeking delay in rate adjustment because rates from Columbia Gas Transmission described in the application were subject to change due to the enactment of the TCJA). The point is simple: the EDUs will have multiple opportunities in this and other proceedings to address the concerns with the “accounting directive” when there are concrete factual and legal issues before the Commission. There is no need to address those issues in the abstract through a grant of rehearing in this proceeding.

III. CONCLUSION

The EDUs’ Application for Rehearing does not provide a reasoned basis for clarification or rehearing of the Commission’s order for the EDUs to record the estimated reduction in federal income tax resulting from the TCJA. Therefore, the Commission should deny the application for rehearing.

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 *Memorandum Opposing the Joint Application for Rehearing of Ohio Power Company, Ohio Edison Company, The Dayton Power and Light Company, Duke Energy Ohio, Inc., The Cleveland Electric Illuminating Company, and The Toledo Edison Company* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 20th day of February 2018, *via* electronic transmission.

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