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 CONTRA THE ELECTRIC DISTRIBUTION UTILITIES' JOINT APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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TABLE OF CONTENTS

Page

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BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The passing of the Tax Cuts and Jobs Act of 2017[1] provides a rare opportunity for across-the-board rate reductions for Ohio utility consumers. The Public Utilities Commission of Ohio ("PUCO") has taken a first step to protect consumers by initiating this Commission-Ordered Investigation. Consumers—not utilities or their shareholders—should reap the benefits of lower federal tax rates under the Tax Cut Act because it is consumers who pay for utilities' tax obligations through their monthly utility bills.

The PUCO's January 10, 2018 Entry (the "Entry") in this case is lawful and reasonable. In addition to setting an initial procedural schedule, it seeks to protect consumers by requiring Ohio utilities to record a deferred liability in the amount of the estimated reduction in federal income tax resulting from the Tax Cut Act.[2]

[1] H.R. 1, 115th Cong. (2017) (hereinafter the "Tax Cut Act").

[2] Entry ¶ 7 (the "Accounting Directive").

Ohio's major electric distribution utilities (the "Electric Utilities"[3]) filed an application for rehearing (the "Electric Utility AFR") regarding the Entry.[4] The PUCO should deny the Electric Utility AFR because (i) it focuses mainly on issues that were not decided by the Entry and therefore are not properly raised in an application for rehearing, and (ii) the PUCO's Accounting Directive was otherwise lawful and reasonable.

II. RECOMMENDATIONS

A. The Electric Utilities' ratemaking arguments are not properly raised in an application for rehearing because the Entry only decided issues related to accounting matters and the procedural schedule in this case.

By law, a party may seek rehearing of a PUCO order if the party believes that the order is "unreasonable or unlawful."[5] The PUCO has the authority to abrogate or modify the order if, upon rehearing, it "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."[6] An application for rehearing, however, is limited to "matters determined in the proceeding."[7]

Rather than address the issues actually decided in the Entry, the Electric Utilities used their application for rehearing as a forum to argue the merits of potential future decisions in this Commission Ordered Investigation. The Entry did just two things. First, it set an initial procedural schedule that allowed interested parties to file comments by

[3] The Electric Utilities are Ohio Power Co., Ohio Edison Co., the Dayton Power & Light Co., Duke Energy Ohio, Inc., the Cleveland Electric Illuminating Co., and the Toledo Edison Co.

[4] No other party—including other utilities throughout the State of Ohio—objected to the PUCO's January 10, 2018 Entry.

[5] R.C. 4903.10(B).

[6] *Id.*

[7] R.C. 4903.10.

February 15, 2018.[8] The Electric Utilities do not object to this.[9] Second, the Entry ordered all Ohio utilities to record a deferred liability in the amount of the estimated reduction in federal income tax resulting from the Tax Cut Act.[10] The Electric Utilities take the PUCO to task for this aspect of the Entry, but over the years these same utilities have readily accepted and benefitted from accounting entries that established deferred assets. The Entry did not purport to change rates, it did not require any utility to amend any of its tariffs, it did not require any utility to file any application to change any rate, and it did not predetermine the substance of any issues related to the Tax Cut Act.

Yet the Electric Utilities' application for rehearing is focused on the merits of whether, to what extent, and in what manner the PUCO can or cannot order Ohio utilities to reduce customers' rates as a result of the Tax Cut Act. The Entry does not decide any of these issues, so the Electric Utilities' discussion of them in an application for rehearing on the Entry is improper.[11]

The PUCO should disregard each of the following arguments from the Electric Utility AFR as being outside the scope of the issues decided by the Entry:

1. On page 7, the Electric Utilities argue that the PUCO "cannot retroactively establish rates as of January 1, 2018." The Entry does not do so. The Accounting Directive does not establish any rates. Thus, this argument is not properly made in an application for rehearing regarding the Entry.

2. On page 7, the Electric Utilities argue that utilities must charge their filed rates and that the PUCO can only change rates

[8] Entry ¶ 9.

[9] *See generally* Electric Utility AFR.

[10] Entry ¶ 7.

[11] *See In re Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation & Remediation Costs*, Case No. 16-1106-GA-AAM, Entry on Rehearing ¶ 15 (Feb. 8, 2017) (denying assignment of error in application for rehearing as "clearly beyond the scope of the Commission's finding and order").

prospectively, and they cite the Ohio Supreme Court's retroactive ratemaking decision in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.* But again, the Entry does not order any utility to change any rates, so this argument is not properly made in an application for rehearing regarding the Entry.

3. On page 7, the Electric Utilities argue that the PUCO cannot modify rates in this Commission Ordered Investigation proceeding. The Entry does not purport to modify rates, so this argument is not properly made in an application for rehearing regarding the Entry.[12]

4. On page 8, the Electric Utilities argue that the PUCO "may lack authority to selectively modify one component of [a] rider (*e.g.*, requiring that a rider be modified to reflect tax reform impacts) without an existing basis in the rider tariff." The Entry does not modify any riders, so this argument is not properly made in an application for rehearing regarding the Entry.[13]

5. On page 9, the Electric Utilities argue that it would violate the electric security plan statute if the PUCO were to modify any rider that was approved as part of an electric security plan. But again, the Entry does not modify any riders, so this argument is not properly made in an application for rehearing regarding the Entry.[14]

6. On page 9, the Electric Utilities argue that the PUCO can only modify riders to account for the impacts of the Tax Cut Act in a separate proceeding that "comprehensively reviews offsetting changes in other expense or carrying charge components." The Entry does not modify any riders, so this argument has nothing to do with the Entry and therefore is not properly made in an application for rehearing regarding the Entry.[15]

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[12] The Electric Utilities fail to cite any authority prohibiting the PUCO from modifying rates in a Commission Ordered Investigation. In fact, the PUCO has such authority under both R.C. 4905.26 and R.C. 4909.16, as discussed in more detail in OCC's comments filed in this case on February 15, 2018. *See* Comments and Recommendations to Reduce Ohioans' Utility Bills as a Result of the Federal Tax Cuts and Jobs Act of 2017 by the Office of the Ohio Consumers' Counsel (the "OCC Comments") at 2-6.

[13] This argument is nonetheless meritless, as the PUCO has the authority to modify riders that are unjust and unreasonable under both R.C. 4905.26 and R.C. 4909.16. *See* OCC Comments at 2-6.

[14] The PUCO has the authority to modify riders that are unjust and unreasonable under both R.C. 4905.26 and R.C. 4909.16, including riders approved in an electric security plan case. *See* OCC Comments at 2-6.

[15] This argument fails in substance as well. The PUCO has the authority to modify any rate that is unjust and unreasonable under R.C. 4905.26 and R.C. 4909.16. Neither of these statutes requires the PUCO to "comprehensively review offsetting changes in other expense or carrying charge components," as the Electric Utilities suggest.

7. On pages 9-11, the Electric Utilities argue that utilities' base rates can only be changed in a proceeding under R.C. 4909.18 as opposed to this Commission-Ordered Investigation. But the Entry does not change any utility's base rates, so this argument is not properly made in an application for rehearing regarding the Entry.[16]

8. On page 11, the Electric Utilities argue that the regulatory liability created pursuant to the Entry may only be addressed in a pending rate case if the utility consents and if no staff report had been filed before the Entry. The Entry does not say anything about how the regulatory liability will be treated in pending rate cases, so it is not proper for the Electric Utilities to raise this issue in their application for rehearing.[17]

The Electric Utilities' application for rehearing focuses primarily on issues that the PUCO might decide in the future, not issues that the PUCO has in fact decided in its January 10, 2018 Entry. An application for rehearing is not the place for such speculation. *See* R.C. 4903.10 (application for rehearing may only address "matters determined in the proceeding"). The PUCO should not address any of the Electric Utilities' many arguments that relate to issues not determined in the Entry.

B. The PUCO can enter an accounting order under R.C. 4905.13 without advance notice to utilities or a hearing.

The Electric Utilities argue that the PUCO's Accounting Directive, if not categorized as "interim," would violate R.C. 4905.13 because they did not receive advance notice or a hearing regarding the directive.[18] This argument fails because the PUCO had the authority to order the Accounting Directive without notice or a hearing.

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[16] Again, this argument fails because the PUCO has the authority to modify unjust and unreasonable base rates as a result of the reduction in tax liabilities under the Tax Cut Act. *See* OCC Comments at 2-6.

[17] Regardless, the Electric Utilities' claim that a utility must "consent" to addressing the tax issue in a pending rate case finds no support in the law (as evidenced by their failure to cite any support for this standard). Nor is the PUCO prohibited from addressing the tax issue in a pending rate case where a Staff report has already been filed. *See* OCC Comments at 8-10.

[18] Electric Utility AFR at 5-6.

i. R.C. 4905.13 does not require notice.

Nothing in R.C. 4905.13 requires notice to utilities before the PUCO enters an accounting order. The word "notice" does not appear in this statute.[19] The PUCO is prohibited from reading additional words into statutes.[20] And the General Assembly knows how to provide for notice in a statute: it has explicitly done so in numerous other statutes pertaining to utilities regulation.[21] Simply put, the plain language of R.C. 4905.13 refutes the Electric Utilities' claim that they are entitled to notice in advance of a PUCO accounting order.

ii. The PUCO routinely enters accounting orders without a hearing.

The entry of an accounting order without a hearing should not be foreign to the Electric Utilities—they benefit from such orders all the time. The PUCO routinely enters accounting orders without holding a hearing, and in substantially all such cases, it is the

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[19] *See generally* R.C. 4905.13.

[20] *See State ex rel. Ganoom v. Franklin Cnty. Bd. of Elections*, 148 Ohio St. 3d 339, 342 (2016) ("we may not include language in a statute that the General Assembly omitted"); *Soltesiz v. Tracy*, 75 Ohio St. 3d 377, 481 (1996) (where General Assembly omits a term from a statute, it is not a court's place to "insert words not used").

[21] *See, e.g.,* R.C. 4903.083(A) ("Notice of such hearing shall be published..."); R.C. 4903.10(B) ("Notice of such rehearing shall be given..."); R.C. 4905.21 ("The commission shall thereupon cause reasonable notice of the application to be given, stating the time and place fixed by the commission for the hearing of the application."); R.C. 4905.73(B) ("if the commission finds, after notice and hearing..."); R.C. 4905.81(G) ("upon not less than fifteen days' notice of the time and place of the hearing..."); R.C. 4905.91(A)(1) ("The commission shall adopt these rules only after notice and opportunity for public comment."); R.C. 4905.95(A)(1) ("The public utilities commission ... shall provide reasonable notice and the opportunity for a hearing..."); R.C. 4909.08 ("the public utilities commission ... shall give notice ... to such public utility or railroad..."); R.C. 4909.10 ("the commission shall give ... at least thirty days' written notice specifying the time and place of hearing..."); R.C. 4909.13 ("Such hearings shall be had upon the same notice..."); R.C. 4909.15(F) ("Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard..."); R.C. 4909.153 ("The notice shall be in writing and shall be given at least fifteen days prior to the hearing."); R.C. 4909.19(A) ("the public utility shall forthwith public notice of such application..."); R.C. 4909.24 ("the commission shall give the railroad and the complainants ten days' notice of the time and place such matters will be considered and determined"); R.C. 4928.06(E)(2) ("after reasonable notice and opportunity for hearing..."); R.C. 4928.08(D) ("after reasonable notice and opportunity for hearing...").

utility that benefits because the accounting order permits the utility to create a deferred asset. *See, e.g.,* Case No. 16-2464-EL-AAM, Order (May 3, 2017) (accounting order for DP&L without a hearing); Case No. 15-855-EL-AAM, Order (Feb. 10, 2016) (accounting order for Duke without a hearing); Case No. 14-2042-EL-AAM, Order (Apr. 8, 2015) (accounting order for DP&L without a hearing); Case No. 12-2281-EL-AAM, Order (Feb. 13, 2013) (accounting order for DP&L without a hearing); Case No. 11-3399-EL-AAM, Order (Oct. 26, 2011) (accounting order for DP&L without a hearing); Case No. 10-913-EL-AAM, Order (Nov. 10, 2010) (accounting order for Duke without a hearing); Case No. 08-1209-EL-AAM, Order (Feb. 19, 2009) (accounting order for DP&L without a hearing); Case No. 08-1338-EL-AAM, Order (Jan. 7, 2009) (accounting order for AEP without a hearing); Case No. 08-1301-EL-AAM (Dec. 19, 2008) (accounting order for AEP without a hearing).

The PUCO has, for many years, approved accounting orders for the benefit of utilities without a hearing. It should not now allow utilities to demand a hearing when the PUCO is ordering them to record deferred liabilities to protect consumers.

iii. The Electric Utilities are estopped from arguing that R.C. 4905.13 requires a hearing.

The PUCO should bar the Electric Utilities, by the doctrine of judicial estoppel, from arguing that R.C. 4905.13 requires a hearing in this case. "Judicial estoppel precludes a party from taking a position inconsistent with a position that it successfully and unequivocally asserted in a prior judicial proceeding."[22] It applies "when a party

[22] *City of Independence v. Office of the Cuyahoga Cnty. Executive*, 142 Ohio St. 3d 125, 132 (2014).

demonstrates that an opposing party took a contrary position under oath in a prior proceeding and that the court accepted the prior position."[23]

Each of the Electric Utilities has previously argued that R.C. 4905.13 does not require a hearing. In *In re Application of the Dayton Power and Light Co. for Authority to Modify its Accounting Procedures*,[24] DP&L sought authority to create a deferred asset, and stated in its application that "no hearing is required on this application."[25] The PUCO approved DP&L's request without a hearing.[26] On rehearing, OCC argued that the PUCO erred by approving DP&L's accounting request without a hearing.[27] DP&L opposed OCC's application for rehearing and again unambiguously argued: "The Commission was not required to hold a hearing in this accounting case."[28] DP&L also noted that the PUCO "has approved many deferral applications without hearing."[29] The PUCO denied OCC's application for rehearing. In its Entry on Rehearing denying OCC's application for rehearing, the PUCO ruled in favor of DP&L and concluded:

> Although Section 4905.13, Revised Code, provides that a hearing may be held in these proceedings, that statutory provision vests the Commission with discretion to determine whether a hearing is necessary. The Commission does not generally hold hearings on applications to modify accounting procedures.[30]

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[23] *Id.*

[24] Case No. 04-1645-EL-AAM.

[25] *Id.*, Application ¶ 6 (Oct. 27, 2004).

[26] *Id.*, Finding & Order (June 1, 2005).

[27] *Id.*, Application for Rehearing by the Office of the Ohio Consumers' Counsel at 8 (July 1, 2005) ("The Commission erred when it granted DP&L accounting authority to defer PJM administrative costs without conducting a hearing...").

[28] *Id.*, Memorandum of the Dayton Power & Light Co. Contra Application for Rehearing of the Office of the Ohio Consumers' Counsel at 4 (July 11, 2005).

[29] *Id.*

[30] *Id.*, Entry on Rehearing ¶ 8 (July 13, 2005).

The PUCO plainly found, as DP&L argued, that R.C. 4905.13 does not require a hearing.[31]

In *In re Joint Application of Columbus Southern Power Co. and Ohio Power Co. for Authority to Modify their Accounting Procedures*,[32] AEP sought to modify its accounting procedures. OCC moved to intervene, and AEP opposed OCC's intervention.[33] In its memorandum contra OCC's motion to intervene, AEP unequivocally took the position that the PUCO does not need to hold a hearing in a case involving a request for an accounting order: "the Commission is not required to conduct a hearing in this case...."[34] And indeed, in that case, the PUCO approved AEP's request for a deferral without holding a hearing.[35]

In *In re Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods*,[36] Duke sought approval of a deferral and argued, in its application, that "the Commission may ... approve this Application without a hearing."[37] The PUCO approved Duke's request for accounting authority but did not hold a hearing.[38]

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[31] *See also In re Application of the Dayton Power & Light Co. for Authority to Modify its Accounting Procedures*, Case No. 08-1209-EL-AAM, Application ¶ 11 (Nov. 7, 2008) ("no hearing is required on this application"); Order (Feb. 19, 2009) (deferral request approved without a hearing).

[32] Case No. 08-1338-El-AAM.

[33] *Id.*, Columbus Southern Power Company's & Ohio Power Company's Memorandum Contra OCC's Application for Rehearing (Feb. 17, 2009).

[34] *Id.* at 6.

[35] *In re Joint Application of Columbus Southern Power Co. and Ohio Power Co. for Authority to Modify their Accounting Procedures*, Order (Jan. 7, 2009).

[36] Case No. 13-2418-GA-AAM.

[37] *Id.*, Application ¶ 10 (Dec. 20, 2013).

[38] *Id.*, Finding & Order (Oct. 1, 2014).

And in *In re Application of Ohio Edison Co., the Cleveland Electric Illuminating Co., and the Toledo Edison Co. for Authority to Modify their Accounting Procedures*,[39] the FirstEnergy companies sought an accounting order and argued that "the Commission can approve this Application without a hearing."[40] The PUCO agreed with FirstEnergy, approving its application without a hearing and finding: "Although Section 4905.13 provides that a hearing may be held in these proceedings, the Commission does not believe that a hearing is necessary for conducting an evaluation of the application."[41]

The test for judicial estoppel is met in this case. Each of the Electric Utilities has unequivocally argued that R.C. 4905.13 does not require a hearing before the PUCO can enter an accounting order. And in each case, the utility was successful. The PUCO should find that the Electric Utilities are estopped from now arguing the opposite—that the PUCO's January 10, 2018 Accounting Directive was defective because it was entered without a hearing.

C. The Accounting Directive does not violate the significantly excessive earnings test statute.

The Electric Utilities argue that the PUCO "can only refund [Tax Cut Act] impacts that drive significantly excessive over-earnings and the accounting directive may violate the SEET statute."[42] The Electric Utilities cite nothing to support these bare assertions because there is no support for them.

Under R.C. 4928.143(F), a utility is required to provide a refund to customers if its earnings from an electric security plan are "significantly in excess of the return on

[39] Case No. 04-1931-EL-AAM.

[40] *Id.*, Application ¶ 7 (Dec. 30, 2004).

[41] *Id.*, Finding & Order ¶ 8 (May 18, 2005).

[42] Electric Utility AFR at 9.

common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk." This is commonly referred to as the significantly excessive earnings test, or SEET.

The SEET statute says nothing at all about taxes. Nor does it say that in the context of an electric security plan the PUCO is stripped of its general authority to ensure that rates are just and reasonable. Rates are currently unjust and reasonable because customers continue to pay their utilities' taxes at a rate of 35% while the utilities, effective January 1, 2018, enjoy a substantially lower rate of 21%. There is simply no way to interpret the SEET statute as preempting the PUCO's power to reduce rates when they become unjust and unreasonable as a result of a change in tax laws.[43]

Likewise, it is not clear how the Accounting Directive could possibly violate the SEET statute. First, even the Electric Utilities question their own position, as they merely posit that the accounting directive "may" violate the SEET statute.[44] Regardless, there is no conflict between the SEET statute and the Accounting Directive. The Accounting Directive merely requires utilities to enter a deferred liability—an accounting entry. This has nothing to do with the PUCO's future analysis of whether electric security plan rates are excessive.

The PUCO should reject the Electric Utilities' attempt to deny customers the right to reduced rates as a result of the Tax Cut Act under the guise of the unrelated SEET statute.

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[43] *See* OCC Comments at 2-6 (explaining that the PUCO has broad authority under R.C. 4905.26 and R.C. 4909.16 to modify rates, including rates approved in an electric security plan case, to ensure that they are just and reasonable).

[44] Electric Utility AFR at 9.

III. CONCLUSION

The PUCO's January 10, 2018 Entry was lawful and reasonable. It set a procedural schedule and ordered utilities to record a deferred liability for the benefit of customers. Contrary to the Electric Utilities' application for rehearing, the Entry did not modify any Ohio utility's rates. The PUCO should deny the Electric Utilities' application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 20th day of February 2018.

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Summary: Memorandum Memorandum Contra The Electric Distribution Utilities' Joint Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Healey, Christopher Mr.