

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)
Investigation of the Financial Impact of the) Case No. 18-47-AU-COI
Tax Cuts and Jobs Act of 2017 on Regulated)
Ohio Utility Companies)

**THE KROGER COMPANY'S MEMORANDUM CONTRA 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**

I. INTRODUCTION

In December 2017, the United States Congress acted to boost the national economy by reducing the burden of taxes on companies that do business here. Specifically, Congress enacted the Tax Cuts and Job Acts of 2017 (TJCA), which significantly changed federal tax law and became effective on January 1, 2018. The TCJA lowered the federal corporate income tax rate from 35% to 21%. On its face, this change gives needed tax relief to American business. In turn, that tax relief will benefit customers of those businesses because the companies that received the tax relief can pass those savings onto their consumers. The tax reductions are even more important for customers, especially large consumers, of regulated utilities that fund utilities' tax obligations through the regulated rates paid each and every month.

Ohio provides that the regulated utilities can only collect rates from customers that are just and reasonable, and that they cannot collect more than the charges allowed by law¹. Specifically, under R.C. 4905.22, "[a]ll charges made or demanded for any service rendered, or to be rendered,

¹ R.C. 4905.22.

shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.” R.C. 4905.22 (emphasis added).

The Public Utilities Commission of Ohio (“Commission”) should not allow utilities to collect the same rates from their customers that they did be for the TJCA, which would, in effect require customers to pay utilities to cover tax obligations that no longer exist. On January 10, 2018, the Commission instituted its Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies to ensure that the tax relief received by Ohio utilities translates into rate savings for Ohio customers in accordance with Ohio law.² The Commission should swiftly continue with the process outlined in its January 10, 2018 Entry.³ The Commission has legal authority to order the COI and, ultimately, to require all utilities to pass the tax savings they received under the TJCA to their customers.

Ohio’s major electric utilities are attempting to keep all the benefits of the TCJA to themselves. They ask the Commission to excuse them from passing those benefits onto Ohio customers. The 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 (collectively, the EDUs) seek to delay and stall the rate relief owed to customers as a result of the TCJA for as long as possible. In essence, the EDUs want to take their 14% cut in the corporate tax rate now, but have the Commission to order that customers cannot reap those same benefits until some unknown date in the future when they file a new rate case.

² See Entry (January 10, 2018) (Commission Entry).

³ See *id.*

Adopting the EDUs' suggestions would violate Ohio and Federal law and be unfair and unreasonable for Ohio customers, who should not be required to continue paying electric service rates based upon a tax law that no longer exists.

The approach by the EDUs in this case is completely at odds with how their counterparts across the country reacted to the enactment of the TCJA. Below is a sampling of how utilities and commissions in other states have addressed this change in federal law:

- Arkansas: Order that all investor-owned utilities in Arkansas to “prepare and file an analysis of the ratemaking effects of the [Tax Cuts and Jobs Act] on its revenue requirement” and to “make adjustments to each affected entry [pending before the Commission] to incorporate changes incurred by the passing of the [Tax Cuts and Job Act].”
- Arizona: The Arizona Corporation Commission stated that “it is imperative that this Commission and the regulated utilities work together to pass the tax savings onto the ratepayers.”
- California: The California Public Utilities Commission ordered all electric and gas utilities to track their savings from the tax law and refund the savings to customers.
- Connecticut: The Public Utilities regulatory authority opened a rate adjustment proceeding to consider adjustments that may be appropriate for customers in light of the change in federal tax law.
- Delaware: Each rate-regulated utility was ordered to file an application addressing the changes in the tax law.
- Florida: Established a generic docket to investigate the changes in the tax law.
- Dozens of other states have taken a similar approach without provoking the outright resistance to pass savings onto customers that the EDUs demonstrate here.⁴

⁴ See *In the Matter of an Investigation of the Effect on Revenue Requirements Resulting from Changes to Corporate Income Tax Rates Under the Tax Cuts and Jobs Act of 2017*, Docket No. 18-006-U (Arkansas Public Service Commission) (Jan. 12, 2018); *Re: Federal Income Tax Reform Rate Adjustment*, Docket No. AU-00000A-17-0379 (Dec. 20, 2017) (Arizona Corporation Commission); San Francisco Chronicle, *California utilities' tax breaks will go to customers, regulators say*, (Jan. 16, 2018) <https://www.sfchronicle.com/business/article/California-lawmaker-says-utilities-tax-breaks-12502397.php> (accessed Feb. 20, 2018); Connecticut Public Utilities Regulatory Authority, *PURA Opens Rate Adjustment Proceeding After Federal Tax Cuts and Jobs Act*, (Jan. 3, 2018) <http://www.ct.gov/pura/cwp/view.asp?A=4144&Q=600002&pp=12&n=1>; *In the Matter of the Regulatory Impact of the Tax Cuts and Jobs Act of 2017 on Rate Regulated Utilities and Customers*, PSC Docket No. 17-1239 (Public Service Commission of Delaware), Order No. 9164 (Dec. 29, 2017); Florida Public Service Commission, Docket No. 20180013-PU, Document No. 00994-2018 (Feb. 6, 2018); see also *In the Matter of Public Utilities Commission*

Instituting a Proceeding to Investigate the Impacts of The Tax Cuts and Jobs Act of 2017, Docket No. 2018-0012 (Public Utilities Commission of the State of Hawaii), Order No. 35241 (Jan. 26, 2018) (Opening a proceeding “to investigate the impacts of the Tax Cuts and Jobs Act of 2017” on certain regulated utilities); *Petition Of Indiana Michigan Power Company, An Indiana Corporation, For (1) Authority To Increase Its Rates And Charges For Electric Utility Service Through A Phase In Rate Adjustment; (2) Approval Of: Revised Depreciation Rates; Accounting Relief; Inclusion In Basic Rates And Charges Of Qualified Pollution Control Property, Clean Energy Projects And Cost Of Bringing I&M’s System To Its Present State Of Efficiency; Rate Adjustment Mechanism Proposals; Cost Deferrals; Major Storm Damage Restoration Reserve And Distribution Vegetation Management Program Reserve; And Amortizations; And (3) For Approval Of New Schedules Of Rates, Rules And Regulations*, Cause No. 44967 (Indiana Utility Regulatory Commission) (Jan. 3, 2018) (Ordering Petitioner to “update any schedules submitted in this proceeding that are impacted by the [Tax Cuts and Jobs] Act.”); *In re: Tax Cuts and Jobs Act of 2017*, Docket No. INU-2018-0001 (Iowa Utilities Board), Order Initiating Investigation (Jan. 18, 2018) (Initiating an investigation “to gather information concerning the effect of the [Tax Cuts and Jobs Act] on utilities that are subject to rate regulation by the Board...to determine whether the retail rates of each utility are still just and reasonable.”); *In the Matter of: An Investigation of the Impact of the Tax Cuts and Job Act on the Rates of Atmos Energy Corporation, Delta Natural Gas Company, Inc, Columbia Gas of Kentucky, Inc, Kentucky-American Water Company, and Water Service Corporation of Kentucky*, Case No. 2017-00481 (Kentucky Public Service Commission) (Jan. 5, 2018) (Ordering “investigations into the impacts of the recent corporate tax rate reduction for each of the five utilities named as parties to this case.”); *In the matter, on the Commission’s own motion, to consider changes in the rates of all of the following Michigan rate-regulated electric, steam, and natural gas utilities to reflect the effects of the federal Tax Cuts and Jobs Act of 2017: Alpena Power Company, Consumers Energy Company, Detroit Thermal, LLC, DTE Electric Company, DTE Gas Company, Indiana Michigan Power Company, Northern States Power Company, Upper Peninsula Power Company, Upper Michigan Energy Resources Corporation, Wisconsin Electric Power Company, Presque Isle Electric & Gas Co-Op, Michigan Gas Utilities Corporation, and Semco Energy Gas Company*, Case No. U-18494 (Michigan Public Service Commission), Order (Dec. 27, 2017) (Ordering utilities to “apply regulatory accounting treatment, which includes the use of regulatory assets and regulatory liabilities, for all impacts resulting from the Tax Cuts and Jobs Act of 2017” and to “outline the preferred method to flow the benefits of those impacts to ratepayers.”); *In the Matter of the Application of Pub. Serv. Co. of New Mexico for Revision of Its Retail Elec. Rates Pursuant to Advice Notice No. 533 Pub. Serv. Co. of New Mexico, Applicant.*, Case No. 16-00276-UT (New Mexico Public Regulation Commission) (Jan. 10, 2018) (Ordering utility to “make an adjustment to the illustrative cost of service for the [] rate increases to account for the following changes to the calculation of [] corporate income taxes and cost of debt.”); Public Utility Commission of Oregon, *Public Utility Commission Receiving Applications To Pass Tax Cut Savings To Utility Customers*, (Dec. 29, 2017) <http://www.puc.state.or.us/Pages/news/2017/201709.aspx> (accessed Feb. 20, 2018); *Investigation of Revenue Requirement Impacts of the New Federal Tax Legislation Titled: “An act to provide for reconciliation pursuant to titles II and V of the concurrent resolution of the budget for fiscal year 2018”*, Docket Nos. 17-035-69, 17-057-26, 17-2201-01, 17-040-01, 17-2180-01, 17-043-01, 17-2303-02, 17-576-01, 17-053-01, 17-054-01, 17-2419-01, 17-2302-02, 17-052-02, 17-046-02, and 17-042-02, Notice of Comment Period (Dec. 21, 2017) (Public Service Commission of Utah) (Opening dockets “to investigate the revenue requirement impacts of the new federal tax legislation....”); Washington Utilities and Transportation Commission, *State regulators: Utilities must pass federal tax cut savings on to customers*, (Jan. 8, 2018) <https://www.utc.wa.gov/aboutUs/Lists/News/DispForm.aspx?ID=495> (accessed Feb. 20, 2018) (Directing “regulated companies to track federal tax savings resulting from the passage of the federal Tax Cuts and Jobs Act to ensure those savings will benefit utility customers.”); *In the Matter of the Commissioner’s Consideration of Its Own Motion of the Effect of the Tax Cuts and Jobs Act of 2017 on the Propriety of Rates Charges by Public Utilities and Telecommunications Companies Providing Service In Wyoming*, Docket No. 90000-134-XO-17 (Record No. 14915) (Public Service Commission of Wyoming), Order Requiring Wyoming Public Utilities And Telecommunications Companies To Account For Financial Benefits Associated With Passage Of The Tax Cuts And Jobs Act Of 2017 As Deferred Regulatory Liabilities (Dec. 29, 2017) (Ordering that the “currently approved rates of each public utility and telecommunications company charged for services rendered on and after January 1, 2018, shall be subject to refund and adjustment commensurate with the difference between its federal income tax liability under the law in effect on December 31, 2017, and the law in effect on and after January 1, 2018.”).

The Kroger Company (Kroger) supports the protection of customers that the Commission has demonstrated here. Conversely, Kroger is opposed to the EDUs' in their Joint Application for Rehearing. Kroger asks the Commission to continue its review, and upon completing it, expeditiously pass the federal tax savings onto customers. As such, Kroger asks the Commission to deny the EDUs' Joint Application for Rehearing and continue towards the resolution described in its January 10 Entry towards reducing customers' utility rates in step with the federal tax changes.

II. ARGUMENT

A. The EDUs Ask the Commission to Make Unnecessary Requests for Clarification

The EDUs, in their first two assignments of error, never assert that the Commission made a legal error, as required by R.C. 4903.10. Instead, the EDUs ask the Commission to clarify a few parts of the January 10, 2018 Entry. Namely, they want the Commission to state that the accounting directive in its January 10 Entry is “preliminary, temporary, and without prejudice to the outcome of this proceeding or any subsequent related proceeding and only pertains to retail rates subject to the Commission’s jurisdiction.”⁵ The EDUs also ask the Commission to clarify that nothing in its Entry will “predetermine the outcome of any future rate or rate proceeding.”⁶

The requested clarifications are not necessary to implement the Commission’s accounting directive. Kroger believes that the January 10 Entry speaks for itself when it directs the utilities to “record on their books as a deferred liability, in an appropriate account, the estimated reduction in federal income tax resulting from the TCJA.”⁷ In its Entry, the Commission never indicates that

⁵ Joint Application for Rehearing at 5.

⁶ Id. at 6.

⁷ Entry at ¶ 7.

any outcome—in this case or a future case—is predetermined. As such, the Commission should deny rehearing on these two assignments of error. To the extent that the Commission feels that clarification is necessary, however, Kroger does not oppose such a clarification, so long as it does not change any of the substance of the January 10, 2018 Entry.

B. Even Though the EDUs Present Arguments that Are Not Ripe for Review at this Time the Commission has a Sufficient Legal Basis to Order a Reduction in Any Rates Charged to Customers by Utilities.

The EDUs incorrectly argue that rates for riders established through the ESP process under R.C. 4928.143 can only be changed through the ESP process. They further contend that base rates can only be changed prospectively through a rate proceeding under R.C. 4909.18. R.C. 4909.16 states that the Commission may “temporarily alter” existing rates of any public utility “for such length of time as the commission prescribes” in order to prevent injury to the public. Moreover, Ohio law only *allows* utilities to collect from customers rates that are just and reasonable, and not more than the charges allowed by law.⁸ Additionally, R.C. 4905.26 allows the Commission to initiate its own investigation of the rates currently being charged by utilities. Specifically, the Commission is authorized to determine whether any rate charged is “in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law . . .”⁹ R.C. 4905.26 further allows the Commission to make adjustments as it deems necessary based on those investigations.¹⁰

The Supreme Court of Ohio has already stated that the EDUs’ position that the Commission cannot conclude such an investigation by adjusting rates that it ultimately determines are unjust,

⁸ R.C. 4905.22.

⁹ R.C. 4905.26.

¹⁰ *Id.*

unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law, is unsupported by Ohio law. The Court held that prohibiting the Commission from actually adjusting rates it identifies as being in need of adjustment “strips [R.C. 4905.26] of its usefulness.”¹¹ It then reaffirmed that holding on a number of subsequent occasions. This includes a case where the Court directly addressed the argument, that R.C. 4909.18 prevents the Commission from adjusting rates based on its own investigation.¹² In a later case, the Court stated that “[w]e have repeatedly held that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding such as this, without compelling the affected utility to apply for a rate increase under R.C. 4909.18.”¹³

Even the Supreme Court case the EDUs cite states directly that the EDUs’ position is incorrect. In *Lucas County Commissioners v. Public Utilities Commission*, 80 Ohio St. 3d 344, 347 (1997), the Court reaffirmed that the Commission “may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable.” There, the Court was referring to a proceeding under R.C. 4905.26, and not an ESP proceeding (which the EDUs now argue is the only permissible ways to adjust rates).¹⁴ Accordingly, the Commission should follow this clear Supreme Court precedent and deny the Joint Application for rehearing on this issue.

The Commission has correctly identified the need to study the impact that the TCJA has on public utility rates charged to customers. The EDUs agree that there exists a need to “resolve these issues.”¹⁵ Yet, the EDUs contend that any necessary changes to base rates should not be

¹¹ *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*, 58 Ohio St. 2d 153, 157 (1979).

¹² OCC Comments at 3.

¹³ *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*, 2006-Ohio-4706 at ¶ 29, 110 Ohio St. 3d 394.

¹⁴ See 80 Ohio St. 3d at 347.

¹⁵ Joint Application for Rehearing at 12.

implemented until the each respective utility's next base rate case. In addition to the legal reasons that counter the position that the Commission is required to wait for a base rate case, practicality and fairness demand an expeditious resolution of this issue. As such, the Commission should take the following steps:

1. For Utilities that Are Not in a Pending Rate Case, the Commission Should Implement New Rates Immediately, and not Wait for Utilities to File a New Rate Case

Ohio's public utility customers should not be forced to wait for their public utilities to voluntarily file a rate case before they receive the full financial benefit of the TCJA. It would be an unacceptable solution to the TCJA to deny the customers of those utilities access to the relief Congress has already provided for them until a new rate case is commenced and completed. The Commission should exercise its authority to give these customers relief as soon as the Commission determines what the impact of the tax law on public utility rates ought to be.

2. For Utilities that Are Currently in a Pending Rate Case, The Commission Should Address the Impact of the TCJA in Those Cases

Meanwhile, for utilities that have a pending base rate case, the Commission should address these issues in those respective cases. If the Commission does not resolve this investigation prior to the culmination of pending rate cases, and the changes in federal tax law are not addressed in those cases, customers may be placed into a bind where they are unable to access tax relief (absent a second Commission investigation) until the utility's next rate case.

Addressing the tax changes now is also required by Ohio law. The Supreme Court of Ohio has held that it is the Commission's duty to consider changes in tax laws that occur after the test period of a pending rate case.¹⁶ Indeed, the Commission previously followed that directive from

¹⁶ See *East Ohio Gas CO. v. Public Utilities Commission*, 133 Ohio St. 212 (1938)

the Supreme Court when in an electric base rate case when federal tax law had changed and was now different than during the test year. The Commission held that an approach that did not fully account for the new tax rate “misses the point” that a new tax law was in effect and that “rates are being set prospectively.”¹⁷ The Commission should not permit any utility currently in a pending rate case to fail to fully account for the tax changes in its new rates, even if the Commission has not concluded this investigation at the time the rates are set.

Moreover, Ohio law regarding retroactive ratemaking and the as-filed rate doctrine may prevent a later accounting for these lower tax rates when the new rates were established through a rate case that concluded after the tax law went into effect. The Commission has stated its intent to pass benefits from the TCJA on to ratepayers.¹⁸ It would therefore be nonsensical to avoid the issues in cases initiated with the unambiguous intent to set new rates. Ratepayers and other stakeholders should not be forced to litigate these pending rate cases, have new rates set, and then have to wait for a new rate case or Commission investigation in order to get the benefit of tax rates that are already set by law now, when the base rate case is pending.

III. CONCLUSION

Although the specifics of this issue require careful study by the Commission, utilities, and stakeholders, the bigger picture here is not that complicated. Congress passed a new federal tax law to provide benefits to American people and business. Ohio law gives the Commission the authority to ensure that ratepayers to Ohio’s public utilities receive those benefits. The Commission recognized as much and initiated this proceeding and issued an accounting directive to ensure that ratepayers receive these benefits. The EDUs fail to offer a valid legal basis for the

¹⁷ *In re Application of the Toledo Edison Company for an Increase in Rates for Electric Service*, 86-2026-EL-AIR, Entry on Rehearing (December 16, 1987).

¹⁸ Entry at ¶ 2 (January 10, 2018).

Commission to change course in its attempt to benefit customers. For that reason, and the reasons stated above, the Commission should deny the EDUs' Joint Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/Angela Paul Whitfield

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Summary: Memorandum Contra Joint Application for Rehearing electronically filed by Ms. Cheryl A Smith on behalf of The Kroger Co.