

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power)	
Company for Authority to Establish a Standard)	Case No. 16-1852-EL-SSO
Service Offer Pursuant to Section 4928.143,)	
Revised Code, in the Form of an Electric)	
Security Plan.)	

In the Matter of the Application of Ohio Power)	
Company for Approval of Certain Accounting)	Case No. 16-1853-EL-AAM
Authority.)	

**MOTION TO PROTECT CONSUMERS BY REOPENING PROCEEDING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

To provide AEP's 1.2 million customers with better rate outcomes for their electric bills, the Public Utilities Commission of Ohio ("PUCO") should act now to protect consumers regarding the federal Tax Cuts and Jobs Act of 2017 and an Ohio Supreme Court decision involving the refundability of charges. Under OAC 4901-1-12 and 4901-1-34, the PUCO may reopen a proceeding any time before the issuance of a final order, for good cause shown. OCC moves the PUCO to reopen this proceeding, in the interest of having a complete record before it, when setting rates customers will pay over the next six years. The reasons for doing so are more fully discussed in the accompanying memorandum in support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION TO REOPEN PROCEEDING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

AEP's proposed electric security plan ("ESP") is pending before the Public Utilities Commission of Ohio ("PUCO"). However, two very important matters for consumers occurred after the record closed in this case. First, the federal taxes that AEP pays were materially lowered.¹ Second, consumers were put at risk of losing an opportunity for refunds regarding improper charges.² To protect consumers, both of these matters need the PUCO's immediate attention in this case.

This case involves the charges that consumers will pay over the next six years under AEP's ESP. In our filed briefs we discussed reasons why the PUCO should not approve AEP's electric security plan, which is the subject of a non-unanimous settlement. We raised many concerns about the numerous charges to customers and explained how the settlement does not meet the PUCO's three-part settlement standard.

¹ The Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

² *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion 2018-Ohio-229 ("FirstEnergy").

But after briefs were filed, two important developments occurred. Reopening the proceeding should assist the PUCO by allowing a complete record to be developed on these issues that affect the rates customers will pay over the next six years under AEP's electric security plan.

Under the settlement AEP and others signed, AEP appears to be not required to give its 1.2 million consumers the savings derived from the lowered federal corporate tax rate.³ Also, customers may be foreclosed from receiving refunds of any charges later determined to be improper, given the Court's ruling in the recent *FirstEnergy* appeal. If either of these consequences is not addressed now, customers will be harmed and the public interest will not be served.

Although the PUCO has opened up a much needed investigation into the effects of the federal tax cut,⁴ many utilities, including AEP, have commented that the PUCO has only limited power in that forum to adjust customers' rates. For instance, according to AEP, "the Commission may lack authority to selectively modify one component of the rider (e.g., requiring that a rider be modified to reflect tax reform impacts) without an existing basis in the rider tariff."⁵ And more directly, AEP claims that "[i]t would violate the ESP statute to modify riders adopted in an ESP without the Company's consent or outside of the comprehensive ESP process."⁶ AEP also claims that the PUCO's authority is limited when it comes to changing base rates to reflect the tax savings: "[t]he

³ See Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

⁴ *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.

⁵ *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, Comments of Ohio Power Company filed February 15, 2018 ("AEP Comments") at 4.

⁶ *Id.* at 5.

Commission is not permitted to unilaterally engage in single-issue ratemaking or change base rates without following the statutory process required in R.C. Chapter 4909."⁷ The current forum, where the PUCO will be reviewing AEP's electric security plan, provides the PUCO with clear authority to modify riders to reflect the tax reform impacts. The PUCO could, in ruling upon AEP's electric security plan, require the eighteen rider tariffs that are under review to include language allowing tax refunds and other refunds, as part of what AEP considers to be the "comprehensive ESP process."

And the PUCO could, in its review of AEP's electric security plan, adjust base rates for the effects of the new taxes. Unfortunately for Ohio consumers, single-issue ratemaking is permissible in an electric security plan.⁸ In fact electric security plans have frequently been a vehicle for utilities to address base distribution rates. AEP's electric security plan is no different. As part of the settlement, AEP has agreed to file a base distribution case by June 1, 2020, in order "to help address concerns about some of the distribution riders becoming excessive"⁹ The PUCO should relook at this provision in the settlement, in light of the new tax law.

Dealing with the tax reform benefits in this pending case is also consistent with the approach AEP itself urged in its comments, when it argued that "[t]he most appropriate manner in which to address tax reform impacts for each utility, including AEP Ohio, is through separate, individualized proceedings – and not in this generic all-utility docket."¹⁰ Based on AEP's own view, the PUCO should in this AEP-specific

⁷ Id.

⁸ See R.C. 4928.143(B)(2)(h).

⁹ Stip. at p. 4., §C1.

¹⁰ See Comments of Ohio Power Company at 1.

proceeding look at the appropriateness of both riders and base rates in light of the new tax law.

Apart from the concern that customers will not get the benefit of reduced taxes is our concern that AEP's eighteen riders, which could be in place for the next six years, are not explicitly made subject to refund to consumers. If they are not, consumers could be seriously harmed if AEP makes improper charges to its customers. This anti-consumer scenario could be just around the corner for AEP and its consumers, given FirstEnergy's recent success in avoiding a \$43 million refund of renewable energy charges to consumers.¹¹

II. RECOMMENDATIONS

A. The PUCO should grant this motion to reopen, for protection of more than a million AEP consumers.

The standard for reopening proceedings can be found in OAC 4901-1-34:

- (A) The commission, the legal director, the deputy legal director, or the attorney examiner assigned to a case may, upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order.
- (B) A motion to reopen a proceeding shall specifically set forth the purpose of the requested reopening. If the purpose is to permit the presentation of additional evidence, the motion shall specifically describe the nature and purpose of such evidence, and shall set forth facts showing why such evidence could not, with reasonable diligence, have been presented earlier in the proceeding.

OCC's motion meets the standards in OAC 4901-1-34 and should thus be granted.

¹¹ See *FirstEnergy*.

1. OCC's Motion to Reopen meets the two standards of OAC 4901-1-34(A).

There has been no final order issued here. OCC therefore meets the first standard in OAC 4901-1-34(A), as it is filed before a final order. OCC also shows good cause to reopen this proceeding. As described more fully below, two matters important to consumers and the rates they will pay over the next six years, occurred after the record closed in this case. First, the federal tax rate was lowered from 35% to 21%.¹² This is a significant reduction in the tax obligation faced by AEP and it should be passed through to its consumers. Second, as a result of *FirstEnergy*, consumers were put at risk of paying imprudently incurred charges.¹³

The PUCO should hear parties on these two matters in this case because they affect the rates in AEP's extended ESP. And they should be taken into account when the PUCO is reviewing the settlement and determining whether it benefits the public and the public interest.

2. OCC's Motion to Reopen meets the two standards of OAC 4901-1-34(B).

OAC 4901-1-34(B) requires a movant to show that the supplemental information could not have been presented earlier with reasonable diligence. Historically, the PUCO has focused on whether the party seeking to reopen the record had a fair opportunity to present the information at hearing or in comments.¹⁴ There has been no "fair opportunity" for OCC or any other party to address either the lower federal taxes or the

¹² See Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

¹³ See *FirstEnergy*.

¹⁴ See *In the Matter of the Petition of Numerous Subscribers of the Seven Mile Exchange of Cincinnati Bell Telephone Company, Complainants, v. Cincinnati Bell Telephone Company, Respondent, Relative to a Request for Two-way, Nonoptional, Extended Area Service Between the Seven Mile and Cincinnati Exchanges of Cincinnati Bell Telephone Company*, Entry on Rehearing (May 20, 1992).

risk of paying imprudently incurred charges. Both matters arose only after the evidentiary hearing.

The other standard in OAC 4901-1-34(B) is that the movant must “specifically describe the nature and purpose of such evidence” for supplementing. OCC has met that standard by describing the specific information that the PUCO should accept for supplementing, as described in the following sections.

B. The Rates Customers are Charged By AEP Should Reflect The Lower Federal Corporate Tax Rates, Which Became Effective January 1, 2018.

The Tax Cuts and Jobs Act of 2017 lowered the corporate income tax rate from 35% to 21%.¹⁵ The lower tax rates became effective January 1, 2018.¹⁶ But AEP’s proposed rates here do not reflect the significantly lower tax burden.¹⁷

Because the tax cuts were effective January 1, 2018, the record should be reopened so that parties may address if, and how, the lower tax rate should be accounted for in consumers’ rates that will be authorized in this proceeding. As proposed, AEP’s rates would deprive consumers of the benefit flowing from the reduced taxes. Under the settlement AEP could wrongfully retain that tax reduction benefit. The utilities, including AEP, are elsewhere challenging the PUCO’s jurisdiction to change rates in the PUCO’s generic investigation.

It would be unfair and would harm consumers if they pay rates that are overstated because of (and in spite of) the reduced taxes utilities will pay from 2018 forward. Under the settlement standard, it would not benefit customers or serve the public interest. And

¹⁵ See Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

¹⁶ See Id.

¹⁷ Of course, they could not. The legislation establishing the lower rates did not pass until after the record closed in this case. And the lower rates did not become effective until after the record closed.

allowing the utility to keep the benefits of the reduced taxes is contrary to PUCO practice.¹⁸ The PUCO should reopen the record in this case so that parties may address if, and how, the lower tax rate established by the Tax Cuts and Jobs Act should be accounted for and reflected in rates consumers will pay over the next six years under AEP's extended ESP. The PUCO should not depend upon its generic investigation to adequately protect consumers, especially given the opposition expressed by the utilities so far.¹⁹

C. AEP's Riders Charged to Customers That Are Approved In this Proceeding Should Include An Explicit Provision That the Rates Are Charged Subject To Refund.

On January 24, 2018, the Supreme Court issued a decision in an appeal of the PUCO's Order in FirstEnergy's alternative energy rider case.²⁰ The PUCO audited FirstEnergy's rider and, based on the audit, ordered it to return more than \$43 million in imprudently incurred charges to customers.²¹

On appeal, the Court determined that the automatic approval of FirstEnergy's quarterly filings constituted PUCO approval of new rates.²² The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject to refund.²³ Thus, even though the order approving FirstEnergy's alternative energy rider stated that it could only collect prudently incurred costs,²⁴ the Court held that the PUCO's order that

¹⁸ See, e.g., *East Ohio Gas Co. v. PUCO*, 133 Ohio St. 212 (1938); *Gen. Tel. Co. v. PUCO*, 174 Ohio St. 575 (1963).

¹⁹ See, e.g., AEP Comments.

²⁰ *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229.

²¹ See *id.*, ¶10.

²² See *id.*, ¶18.

²³ *Id.*, ¶19.

²⁴ See *id.*, ¶8.

FirstEnergy refund the overcharges to customers involved unlawful retroactive ratemaking.²⁵

In reaching this decision, the Court relied on the “filed rate doctrine” of R.C. 4905.32. The Court stated that because FirstEnergy had collected costs from customers under a “filed” rate schedule, the PUCO was prohibited from later ordering a disallowance or refund of those costs.²⁶ The Court noted that although FirstEnergy was entitled to collect only prudently incurred costs from customers, “there can be no remedy in this case because the costs were already recovered.”²⁷

The Court’s decision has far-reaching harmful ramifications for consumers who pay utility charges that include riders that are updated periodically and automatically approved. Numerous riders have quarterly updates that are subject to automatic approval. Unless the PUCO takes action to conform these riders to the Court’s decision, any subsequently conducted review of the riders could be rendered meaningless.²⁸ Consumers could be overcharged for utility service without any way to be reimbursed,²⁹ resulting in an unfair windfall for utility companies.³⁰

²⁵ *Id.*, ¶20.

²⁶ *Id.*, ¶18.

²⁷ *Id.*

²⁸ *See id.*, ¶85 (dissent of Justice French).

²⁹ Even though the gridSMART Phase 2 rider currently provides a credit to consumers (see Quarterly Update, Attachment 2), a prudency review could show that consumers may be entitled to a larger credit.

³⁰ *See FirstEnergy*, ¶18.

All of the riders at issue in AEP's extended ESP could be affected by the Court's *FirstEnergy* decision.³¹ Unless the PUCO conforms them to the Court's decision, it could be argued that each periodic review of the riders results in a "filed" rate that cannot be adjusted for consumers' protection based on the PUCO's review. This should not happen, as it would thwart the original intent of the PUCO in reviewing the riders. Consumers could be harmed. It would not benefit customers or be in the public interest to allow riders at issue in this proceeding, to go untreated.

Regarding the settlement of AEP's extended ESP, the PUCO should take action to protect consumers before the riders in the extended ESP become effective. The PUCO should reopen the record in this case so that parties can address how to ensure consumers are protected from any adverse consequences of the Court's *FirstEnergy* decision.

III. CONCLUSION

Two very important matters to consumers occurred after the record closed in this case. To protect consumers, both of these matters need the PUCO's immediate attention in this case. The PUCO should reopen the record in this case so that it may hear the parties on the offsetting of consumers' rates for the reduction in federal corporate income taxes, and on how consumers are at risk of losing the opportunity for refunds of any of the charges in the case that later may be deemed improper by the Supreme Court or otherwise.

³¹ They are all subject to some form of review, whether it be prudence or financial/true-up or both. The subject riders are Distribution Investment Rider, Residential Distribution Credit Rider, Renewable Generation Rider, PPA Rider, Smart City Rider, PowerForward Rider, Energy Efficiency and Peak Demand Reduction Cost Recovery Rider, Economic Development Rider, Generation Energy and Generation Capacity Riders, Auction Cost Reconciliation Rider, gridSMART Phase 2 Rider, Basic Transmission Cost Rider, Competition Incentive Rider, SSO Credit Rider, Pilot Throughput Balancing Adjustment Rider, Storm Damage Recovery Rider, Alternative Energy Rider, and Enhanced Service Reliability Rider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served via electronic transmission upon the parties this 2nd day of March 2018.

/s/ William Michael

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