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. 18-47-AU-COI

REPLY COMMENTS OF
THE DAYTON POWER AND LIGHT COMPANY

The Dayton Power and Light Company ("DP&L" or the "Company"), consistent with paragraph 5 of the Attorney Examiner's February 20, 2018 Entry, hereby submits these Reply Comments with respect to the Commission-ordered investigation ("COI") of the Financial Impact of the Tax Cuts and Jobs Act of 2017 ("TCJA") on regulated Ohio utility companies.

I. There is Overwhelming Consensus that the Rate Effects of a Tax Change Must be Implemented Utility-by-Utility Based on the Individual Circumstances of Each Utility and the Particular Rates Involved.

It is nearly universally accepted in the Initial Comments, either expressly or implicitly, that the effects of the TCJA must be addressed individually on a utility-by-utility basis, as was done in 1987, the last time there was a major tax reform such as the TCJA.[1] In the 1987

[1] Comments of Oho Power Company ("AEP Comments") at p. 1 (manner and process should be "thorough, methodical, and individually tailored"); Comments of Columbia Gas of Ohio, Inc. ("Columbia Gas Comments") at p. 2 ("may need to be tailored to fit the circumstances of [each] utility"); Comments of The East Ohio Gas Company D/B/A Dominion Energy Ohio ("Dominion Comments") at p. 4 (should be addressed "on a utility-by-utility basis"); Initial Comments of Duke Energy Ohio, Inc. ("Duke Comments") at p. 12 ("it is inappropriate to conduct an industry-wide rate adjustment investigation," it should be "based upon the unique circumstances and rate structures of each utility"); Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy Comments") at p. 1 ("one-size-fits-all approach is not practical or appropriate to employ); Comments of Industrial Energy Users-Ohio ("IEU Comments") at p. 5 ("past Commission practice has been to address the effect of a tax change on a case-by-base basis"); Northeast Ohio Public Energy Council's Initial Comments at p. 6 (citing to 1987 precedent which addressed utilities individually); Initial Comments of Northeast Ohio Natural Gas Corporation, Orwell Natural Gas Corporation, Brainard Gas Corporation, and Spellman Pipeline Holdings, LLC at p. 1 (should "consider the unique characterizations of each individual utility"); Comments of Ohio Gas Company ("Ohio Gas Comments") at p. 3 ("should address each utility individually); Ohio Partners for Affordable Energy's Motion to Intervene and Memorandum in Support and

Commission ordered investigation of The Tax Reform Act of 1986 ("TRA"), the Commission ordered a "comprehensive review of all companies," which also allowed utilities to explain their individual reasons justifying "why their rates should not be reduced as a result of the TRA '86 tax rate changes."[2] The result of this COI was that 28 of the 40 utilities did not need to reduce their rates as a result of the tax reduction.[3] Six of which were because the estimated rate of return still did not exceed the rate of return authorized for those companies in their last rate case.[4]

There are very few parties proposing that sweeping across-the board rate reductions be ordered without due process. At no point have any of those parties identified precedent in which the PUCO imposed rate reductions across dozens of utilities without looking at specific circumstances for each utility and each rate. Nor should such a generic assessment be performed today.

As set forth in the Initial Comments of many commenters, each utility is uniquely situated to warrant an individual review of the TCJA impacts. For instance, DP&L's pending rate case demonstrates that the Company is underearning by over $65 million such that an automatic reduction for tax reductions would cause the Company to further underearn. Beyond that, DP&L has made specific commitments in its recently-approved ESP, which include foregoing payment of taxes to its ultimate parent company (AES Corporation) and to pay down

---

Comments at pp. 5-6 (citing to 1987 process that conducted individual investigations of each utility); Comments of Vectren Energy Delivery of Ohio, Inc. ("Vectren Comments") at p. 1 ("a one-size-fits-all mechanism is not appropriate");

[2] *In Re 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, Entry at ¶6 (June 9, 1987).

[3] 87-831-AU-COI, Finding and Order at ¶3 (September 9, 1987).

[4] Id.

debt, which will assist DP&L and DPL Inc. to reach investment grade credit ratings and enable grid modernization. Other examples supporting the need for individual assessments include Duke Energy, Ohio Gas and AEP. Duke Energy is also in the midst of a rate case, which may create a unique opportunity to address the TCJA. Other utilities, like Ohio Gas, recently filed a Stipulation that states that it accounts for the TCJA impacts.[5] AEP has explained that there are certain commitments in its ESP that should not be affected without complying with the due process afforded under 4928.143.[6] Beyond base rate cases and ESPs, this COI is much more sweeping; it reaches to all utility industries, some of which do not even have traditional regulated rates.[7] These comments filed in this docket indicate just a few of the extremely different situations in which each of the utilities find themselves, which warrant individual review.

The need for an individual review is further highlighted by some of the inaccuracies set forth in generalized arguments in this "all utilities" docket. For example, OEG asserts that the DMR Riders of both FirstEnergy and DP&L "specifically include a gross-up for income taxes at the 'prevailing' rate"[8] – that is not correct. In making this assertion, OEG cites exclusively to the language from the Commission's Fifth Entry on Rehearing in FirstEnergy's ESP IV.[9] DP&L's DMR, however, is not grossed up for taxes; it is simply a flat amount "designed to collect $105 million in revenue per year."[10] DP&L's DMR was part of a Stipulation and

[5] Ohio Gas Comments p. 5.

[6] AEP Ohio Comments at p. 5.

[7] Comments of the Ohio Telecom Association at p. 2; Comments of Securus Technologies, Inc. at p. 1.

[8] Comments of the Ohio Energy Group Regarding Effects on Retail Rates of Tax Cuts and Jobs Act ("OEG Comments") at p. 9.

[9] OEG Comments at p. 10.

[10] *In Re The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Opinion and order at p. 6 (October 20, 2017).

Recommendation that included other commitments that were tied to the commitments about how DMR revenues will be spent. And as previously mentioned, DP&L's ESP Stipulation also contained unique commitments from the parent company to forego income tax sharing payments and to make equity investments in DPL Inc. to help DP&L and DPL Inc. achieve investment grade credit ratings.[11] An OCC witness testified at the hearing about the vital importance that DP&L have an investment grade rating as an individual corporation, as an issuer of its own secured debt, and as a stand-alone corporation.[12]

For all of these reasons, the Commission should consider how the TCJA affects each utility on an individual basis, taking into account their procedural posture, financial circumstances, and existing commitments.

II. The PUCO Should Refrain from Engaging in Single-Issue Ratemaking in this Context.

As set forth in DP&L's Initial Comments, and echoed in a host of other Comments filed in this docket, the Commission should refrain from engaging in single-issue ratemaking under these circumstances.[13] A response to a single variable (single-issue ratemaking) is not authorized in Ohio except when explicitly authorized by statute.[14]

If the Commission does order a single-issue rate change, however, it should be made clear that any future income tax rate increases will be treated exactly the same way in reverse. Similarly, if the Commission were to engage in single-issue ratemaking prior to the exercise of

[11] 16-395-EL-SSO, Opinion and Order at pp. 5-6 (October 20, 2017).

[12] 16-395-L-SSO, Transcript, Volume IV, p. 696-697.

[13] Comments of The Dayton Power and Light Company at p.1; AEP Comments at p. 5; FirstEnergy at p. 10.

[14] *See Pike Natural Gas Co. v. Pub. Util. Com.*, 68 Ohio St.2d 181, 429 N.E.2d 444 (1981) (holding that an adjustment clause for changes in excise taxes were unauthorized by statute, that the power to change that rested with the General Assembly and that taking such changes into account without reference to other costs that may also be changing "could eliminate the regulatory framework, contained in R.C. 4909.15, that rates are to be based upon historic costs").

due process, it should make the rate change subject to refund. If at the end of a more comprehensive review it is found that the utility was under-earning, then the utility should be allowed to collect the sum of the rate decreases. For example, if it is determined that a utility was underearning, as indicated by the fact that the utility was entitled to a base rate increase, the rate reduction should be reversed. In short, the Commission should refrain from conducting improper single-issue ratemaking on an issue such as this, which falls squarely within the purview of a base rate case, and if the Commission does authorize such rate decreases, it should ensure that single-issue ratemaking approaches are consistently applied when costs go up as well as when they go down.

III. The PUCO Should Reject OCC's Proposal to Ignore Judicial Precedent and Due Process Requirements and Impose New Refund Language in Existing Tariffs that Have Been Approved and Are Filed Rates.

After citing to 4905.26, OCC encourages the PUCO to modify rates through this COI by ordering all utilities to reduce their charges.[15] But 4905.26, by OCC's own admission, requires an investigation and formal hearing process. Specifically, under a R.C. 4905.26 proceeding, "parties . . . shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses." OCC erroneously suggests that this Commission has previously conducted rate-making summarily in a COI case. However, OCC's case authority for this proposition does not support OCC's proposals.

OCC citations regarding PUCO power to reduce rates after investigation fall into two camps: (i) an investigation of the specific circumstances of individual utilities were examined and (ii) general policy-driven investigations that led to orders requiring utilities to make filings to

[15] 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 ("OCC Comments") at pp. 3-4.

modify tariffs regarding services. None of the three investigations cited by OCC however resulted in an order that changed rates in multiple previously approved utility tariffs without a searching inquiry into the specific circumstances of each utility. Moreover, two of the three cases involved an opportunity for extensive investigation that included testimony and a hearing. OCC cites the December 20, 1996 Order in Case No. 96-406; however, the Commission granted rehearing specifically stating that it was "not changing a rate or service"[16] and giving "utilities the option to file applications to amend their tariffs to implement CES consistent with the Commission guidelines or other similar serviced, or to ***go to hearing*** to have the utility explain why it should be exempt."[17] And *In Re the Commissions' Investigation into the Policies & Procedural of Ohio Power Co., Columbus S. Power Co., The Cleveland Elec. Illuminating Co., Ohio Edison Co., The Toledo Edison Co. & Monongahela Power Co. Regarding the Installation of New Line Extension*, involved an investigation of specifically identified line extension policies of specific utilities, not a generic docket for the entire industry that includes "all utilities." Case No. 01-2708-EL-COI, Opinion & Order (Nov. 7, 2002). The one investigation that did not first provide for a hearing involved a very unique circumstance where the Federal Communications Commission directed every incumbent telephone company to "provide to its respective state commission, by January 15, 1997, proposed tariffs offering individual central office coin transmission services to payphone service providers (PSPs) under nondiscriminatory, public, tariffed offering."[18] Thus, this case did not involve the PUCO's power conferred by state statute,

[16] *In Re Conjunctive Electric Service Guidelines, Proposed by Participants of the Commission Roundtable on Competition in the Electric Industry*, Case No. 96-406-EL-COI, Entry on Rehearing at p. 11 (February 27, 1997)).

[17] *In Re Conjunctive Electric Service Guidelines, Proposed by Participants of the Commission Roundtable on Competition in the Electric Industry*, Case No. 96-406-EL-COI 96-406, Entry at p. 1 (November 25, 1997).

[18] *In Re the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1010-TP-COI, Entry at p. 1 (December 19, 1996).

but was simply a docket opened to accommodate a federal action. There has there been no federal action expressly requiring utilities to update tariffs to reflect changes of the TCJA.

OCC also asks the PUCO to take an additional step to require all public utilities to update their already-filed tariffs to provide for retroactive refunds, [19] which similarly deprives utilities of their statutory rights. OCC's suggestion is much larger than a tax proposition, and is an overreach that would violate existing law as codified in Title 4909 and R.C. 4928.143 (among other possible statutes).

As discussed in many of the Initial Comments, Ohio law bars any sort of retroactive ratemaking. Several other intervening commenters, such as OEG, acknowledge that the PUCO has limited legal authority to flow through any TCJA savings that may exist because rates can be adjusted only prospectively.[20] Further, Ohio law requires a hearing and findings before any rate or schedule may be modified. R.C. 4909.15(E).

Finally, as many of the electric utilities explained in their Initial Comments, many of these rates were established pursuant to Electric Security Plans, approved pursuant to statutory provisions that also provide specific due process mechanisms by which such cases may be resolved and/or amended.[21] The OCC's proposal ignores those mechanisms and should be rejected accordingly.

IV. Any Order Directing a Process for Rate Changes Must be Workable Administratively.

As some of the Commenters cogently explained, there are multiple components that are potentially affected by the TCJA. Namely, these include: (1) corporate tax expenses, (2)

[19] OCC Comments at p. 6.

[20] OEG Comments at p. 11.

[21] *See*, R.C. 4928.143(C)(2).

accumulated deferred income tax ("ADIT") and (3) corresponding impacts to rate base.[22] Applying the TCJA changes to the first of the three (current income tax expense) is a fairly straight-forward calculation. However, due process and the general bar against single-issue ratemaking (absent statutory exceptions) requires that any reduction in tax expense be viewed as part of a greater context, which makes the calculation exceedingly more complicated and not something that should be summarily determined.

The computations for determining the amortization of any excess deferred tax, as other commenting parties have acknowledged, is a much more complicated process.[23] At a minimum, it requires the utilities to identify the taxes by vintage, and to flow back the excess by vintage in conformance with normalization requirements. Interestingly, however, IEU points out that there is no federal requirement to share excess deferred income taxes with customers.[24]

A flowthough of excess deferred taxes results in a reduction of the deferred income tax account, which in turn results in a partially offsetting increase to rate base, which must also be calculated.[25] Most of the non-utility commenters, seek an annual rate reduction to flow through over time the excess deferred tax, without noting the partially offsetting effect of increasing rate base resulting from the decreased size of the deferred tax reserve in rate base.

In addition to analyzing each of these complex components, the Commission and utilities will need to proceed with caution to ensure that the laws of normalization are not violated. Significantly, no party has argued for a flow-through mechanism that would violate

[22] IEU Comments at p. 2; Duke Comments at pp. 8-9.

[23] Dominion Comments at p. 3.

[24] IEU Comments at p. 4.

[25] IEU Comments at p. 2; Duke Comments at pp. 4-5, 9.

normalization rules as the consequences of a violation can be devastating. Several commenters have expressed this same concern.[26]

DP&L agrees with some of the other utilities that this is a major project that will take months to complete. It is unlikely that it can be completed any time before corporate tax returns are filed in October.[27] Given these complexities, and the need for due process outside of single-issue ratemaking, *see, infra*, OCC's suggested timeline of an estimate within 20 days and a final calculation in 90 days,[28] is administratively unworkable.

V. No Emergency Exists to Justify Dispensing with a Hearing as Otherwise Required by Law.

OCC errs in asserting that the PUCO has authority to modify rates without a hearing based on the emergency powers under R.C. 4909.16.[29] The very case to which OCC cites for its argument explains that "the existence of an emergency is a condition precedent to any grant of temporary rate relief under 4909.16."[30] There is no emergency here; the allegations made are that some rates are higher than they would be if recalculated using a different tax rate. OCC, however, has not identified any case suggesting that this statutory provision has ever been applied to reduce rates. To the contrary, because R.C. 4909.16 can only be at the request of an applicant, the PUCO has held that it can be used only by the utility because "we must first answer the threshold question of whether an emergency exists that ***imperils the public utility***." *Id.* at 15 (emphasis added).

---

[26] Dominion Comments at p. 3; Duke Comments at p. 2; Vectren Comments at p. 3.

[27] Columbia Gas Comments at p. 3.

[28] OCC Comments at p. 14.

[29] OCC Comments at pp. 4-6.

[30] *See, In Re the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, 2009 Ohio PUC LEXIS 681, Opinion and Order at *13 (September 2, 2009).

Even if the emergency rate doctrine could be applied against the utility, it would require an applicant to provide supporting evidence that "will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation." *Id.* Hence, emergency rate relief has been used very sparingly, and "will not be granted pursuant to Section 4909.16, Revised Code, if the emergency request is filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code." *Id.* OCC is trying to circumvent those requirements while providing no evidence of any immediate threat to anyone by continuing to charge existing, already approved rates. To the contrary, DP&L has some of the lowest electric rates in the state and has made certain tax commitments in its ESP that benefit all parties involved. Moreover, summarily granting such temporary relief for a single-issue (*see, infra*), without considering the larger impact to the utility's financial condition, could in fact create an emergency for the utility. *Id.*

Respectfully submitted,

/s/Michael J. Schuler
Michael J. Schuler (0082390)
*Counsel of Record
Randall V. Griffin (0080499)
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358 (Schuler)
Telephone: (937) 259-7221 (Griffin)
Facsimile: (937) 259-7178
Email: michael.schuler@aes.com
Email: randall.griffin@aes.com

Attorneys for The Dayton Power and Light Company

(willing to accept electronic service)

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 Comments were sent by, or on behalf of, the undersigned counsel to the following parties of record this 7th day of March, 2018, via electronic transmission:

bojko@carpenterlipps.com cambell@whitt-sturtevant.com cdunn@firstenergycorp.com cmblend@aep.com christopher.healey@occ.ohio.gov cmooney@ohiopartners.org dressel@carpenterlipps.com dsawmiller@nrdc.org dstinson@bricker.com fdarr@mwncmh.com gkrassen@bricker.com glover@whitt-sturtevant.com jeanne.kingery@duke-energy.com jfinnigan@edf.org jkylercohn@BKLlawfirm.com joliker@igsenergy.com josephclark@nisource.com	kathy.L.Buckley@verizon.com kevin.moore@occ.ohio.gov khoehrn@BKLlawfirm.com mfleisher@elpc.org rnkurtz@BKLlawfirrn.com mleppla@theoec.org mlozich@securustechnologies.com mnugent@igsenergy.com mpritchard@mwncmh.com mwhelan@egas.net neil.waggoner@sierraclub.org paul@carpenterlipps.com rocco.dascenzo@duke-energy.com selisar@mwncmh.com sseiple@nisource.com stnourse@aep.com trhavslaw@gmail.com whitt@whitt-sturtevant.com

/s/ Michael J. Schuler
Michael J. Schuler (0082390)

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/7/2018 4:15:28 PM

in

Case No(s). 18-0047-AU-COI

Summary: Reply Comments electronically filed by Mrs. Jessica E Kellie on behalf of The Dayton Power and Light Company