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

REPLY COMMENTS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. REPLY COMMENTS 2

A. OCC's Global Recommendations for Consumer Protection Regarding the Federal Corporate Tax Rate Cuts and How those Cuts are Reflected in Rates that Ohioans pay..2

1. The benefits of the Tax Cut Act should be returned to customers through bill reductions. The PUCO should not adopt parties' requests to divert the benefits for other purposes. 2

2. Customers should fully and promptly receive the benefits of the Tax Cut Act as of its effective date, January 1, 2018. 5

3. To the detriment of Ohioans, Some Ohio utilities want to keep charging customers the old, substantially higher tax rate so that the utilities can earn more profit. The PUCO should not allow this. 7

4. To ensure the benefits of the tax cuts are fully and promptly passed on to consumers, the PUCO can order rate reductions in this COI proceeding. 8

5. The PUCO should protect consumers' right to receive the benefits of the Tax Cut Act by ordering all rates subject to refund. 9

B. OCC's Reply to Utility Parties' Initial Comments that are Generally Intended to Delay, Redirect, or Stop altogether the Return of the Tax Cuts to Consumers 10

1. The PUCO should not adopt AEP's initial recommendations because to do so would unjustly enrich utilities and harm consumers. 10

2. The PUCO should not adopt FirstEnergy's initial recommendations because to do so would unjustly enrich utilities and harm consumers. 13

a. The "rate freeze" in FirstEnergy's electric security plan does not prohibit the PUCO from reducing customers' rates as a result of the Tax Cut Act..13

b. The "Incremental Tax Provision" in FirstEnergy's ESP does not preempt the PUCO's authority to protect consumers by reducing rates under R.C. 4909.16....................................18

c. Allowing FirstEnergy to continue overcharging customers for its taxes would be bad policy. 20

d. The PUCO should not allow FirstEnergy to keep overcharging customers for taxes for another six years.....22

3. The PUCO should reject Duke's initial recommendations because adopting them would unjustly enrich utilities and harm consumers................................22

4. The PUCO should reject DP&L's initial recommendations because adopting them would unjustly enrich utilities and harm consumers................................24

a. DP&L's due process concerns are unfounded: the PUCO has not suggested that it will deny any party due process in this case, and DP&L has a pending base rate case in which its base rates may be reduced to protect consumers. 24

b. DP&L has the same opportunity as every other party to make recommendations to the PUCO in this tax COI. 24

c. The PUCO should give no weight to DP&L's complaints regarding its current base rates. 25

d. DP&L's Distribution Modernization Rider already provides DP&L with a customer-funded subsidy to pay off debts and otherwise improve its finances. It does not need a further subsidy in the form of overcharging customers for its taxes...26

e. To protect customers, the PUCO should adjust DP&L's decoupling rider to reflect the new federal income tax rate. 27

f. DP&L should not be permitted to overcharge customers for pole attachment rates...28

g. DP&L's contributions in aid of construction should use the lower federal income tax rate as of January 1, 2018..........29

5. Vectren's rates should be adjusted so that consumers are protected by a full and prompt reduction in rates due to the tax cuts effective January 1, 2018. 29

6. Dominion's rates should be adjusted so that consumers are protected by a full and prompt reduction in rates due to the tax cuts effective January 1, 2018. 30

7. Columbia Gas's rates should be adjusted so that consumers are protected by a full and prompt reduction in rates due to the tax cuts effective January 1, 2018. 31

8. Ohio Gas's rates should be adjusted so that consumers are protected by a full and prompt reduction in rates due to the tax cuts effective January 1, 2018. 33

9. The PUCO should reject the recommendations of Northeast Ohio Natural Gas, Orwell Natural Gas, Brainard Gas, and Spelman Pipeline Holdings so that consumers are protected and receive a full and prompt reduction in rates to reflect the tax cuts effective January 1, 2018. 34

C. OCC's Response to Non-Utility Parties' Initial Comments 35

1. OEG is incorrect in its analysis that the PUCO lacks the authority to reduce utilities' base distribution rates to reflect the lower federal income tax rate that utilities now pay. 35

a. OEG misplaced its reliance on The PUCO's use of the SEET process as a means to protect consumers because the SEET process lacks protections to guarantee that customers will receive the benefits of the Tax Cut Act. 36

b. The PUCO should require transparency in implementing OPAE's request that utilities demonstrate the basis for rate reductions. 37

III. CONCLUSION 38

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
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

In 2017, the corporate federal income tax rate was 35%. In 2017, utilities charged their customers (not their shareholders) 35% for their federal income taxes through base rates and riders. In 2018, the corporate federal income tax rate is 21%. But in 2018, Ohio utilities, in most instances, are charging customers rates that reflect the old 35% assessment. Any reasonable person can see that this is unfair to Ohio consumers.

Yet numerous parties (utilities) in this case believe that not only should utilities be permitted to pocket the amounts they have overcharged customers so far in 2018, but they should be permitted to continue charging customers the old 35% tax rate for years to come, all in the name of increasing utility profits. Any reasonable person can see that it is unfair to unjustly enrich utilities at the expense of Ohio consumers.

Customers are looking only to be treated fairly in the utility regulatory process. This case does not need to be complicated. The Public Utilities Commission of Ohio ("PUCO") should order all Ohio utilities to return to customers any amounts they have overcharged them in 2018. The PUCO should order all Ohio utilities to stop charging the old 35% rate immediately and to charge only the current 21% rate. Any reasonable person can see that this is the only fair outcome for Ohio consumers.

II. REPLY COMMENTS

A. OCC's Global Recommendations for Consumer Protection Regarding the Federal Corporate Tax Rate Cuts and How those Cuts are Reflected in Rates that Ohioans pay.

1. The benefits of the Tax Cut Act should be returned to customers through bill reductions. The PUCO should not adopt parties' requests to divert the benefits for other purposes.

As the Office of the Ohio Consumers' Counsel ("OCC") explained in its initial comments, the most efficient and fairest way to provide customers with the full benefits of the Tax Cuts and Jobs Act of 2017 (the "Tax Cut Act" or "TCJA") is through utility bill credits.[1] In their initial comments, however, other parties have proposed that customers' money should not be returned to customers but should instead be used for other purposes:

- Duke, DP&L, and Dominion suggested that the PUCO not provide immediate refunds to customers but should instead delay such refunds to protect utility cash flows or improve utility credit ratings.[2]
- Duke Energy suggested that tax savings be used for future utility investments.[3]
- The environmental parties recommended that the benefits of the Tax Cut Act be refunded in their entirety to customers, but, if the PUCO does not adopt that approach, the savings should be used for grid modernization or other conservation projects.[4]

[1] OCC Comments at 16-18.

[2] Initial Comments of Duke Energy Ohio, Inc. at 14 (Feb. 15, 2018) (the "Duke Comments"); Comments of the Dayton Power and Light Company at 3-4 (Feb. 15, 2018) (the "DP&L Comments"); Comments of the East Ohio Gas Company d/b/a Dominion Energy Ohio at 4-5 (Feb. 15, 2018) (the "Dominion Comments").

[3] Duke Comments at 15.

[4] Comments of Environmental Defense Fund, Ohio Environmental Council, Environmental Law & Policy Center, Natural Resources Defense Council, and Sierra Club at 1, 5-6 (Feb. 15, 2018) (the "Environmental Comments").

- Duke Energy, Dominion, Ohio Gas Company, and Industrial Energy Users-Ohio proposed that tax savings be used to eliminate existing regulatory assets.[5]

- DP&L proposed that it be permitted to keep the tax savings to pay down debts to its parent company.[6]

- DP&L, Northeast Ohio Natural Gas Corp., Orwell Natural Gas Co., Brainard Gas Corp., Spelman Pipeline Holdings, LLC, and Ohio Gas Company proposed that utilities be permitted to keep the tax savings to increase utility profits.[7]

The PUCO should not adopt these proposals. Holding out for *potential* future benefits for customers is not just or reasonable when the PUCO can ensure that customers see those benefits now. There is no reason to delay providing customers with the benefits of the Tax Cut Act. Utilities have been subject to the lower 21% tax rate since January 1, 2018, so any further delay only exacerbates the problem and is unreasonable.[8]

Some of these proposals go one step further. Various utilities want to simply keep the tax savings to boost their bottom line. They argue that the PUCO should consider their alleged recent inability to earn their authorized rate of return, but their message is clear: they want to keep customers' tax overpayments as shareholder profits. The PUCO should reject these unfair and unreasonable and unlawful proposals. These proposals seem to disregard the fact that the taxes are paid by utility customers and not shareholders. They also unjustly discriminate against customers and in favor of utility

[5] Duke Comments at 15; Dominion Comments at 4-5; Comments of Ohio Gas Company at 7 (Feb. 15, 2018) (the "Ohio Gas Comments"); Comments of Industrial Energy Users-Ohio at 8 (Feb. 15, 2018) (the "IEU Comments").

[6] DP&L Comments at 3-4, 16-17.

[7] DP&L Comments at 2-3, 13-17; Initial Comments of Northeast Ohio Natural Gas Corp., Orwell Natural Gas Co., Brainard Gas Corp., and Spelman Pipeline Holdings, LLC at 2-3 (Feb. 15, 2018) (the "Joint Gas Utilities Comments"); Ohio Gas Comments at 7.

[8] *See* OCC Comments at 16-18 (explaining that it is inequitable to delay providing savings from the Tax Cut Act to customers).

shareholders, which violates R.C. 4905.26.[9] And they result in utility customers subsidizing utility shareholders in violation of state policy under R.C. 4928.02.[10]

The PUCO should also decline the invitation to use the tax savings to offset regulatory assets. While this proposal could, in theory, ultimately return some of the tax savings to consumers, it has at least three potential flaws. First, not all regulatory assets will ultimately be paid by customers. Not all regulatory assets are equal. The creation of a regulatory asset does not constitute ratemaking.[11] The PUCO has the authority to deny a utility the right to recover certain regulatory assets from customers. Thus, if a utility were permitted to use the tax savings as an offset, it may be offsetting costs that would never be paid by customers anyway, thus providing a windfall to the utility.

Second, to the extent those regulatory assets would be paid in the future, providing an offset instead of a bill credit delays the process of returning tax savings to consumers.

Third, using tax savings to offset regulatory assets potentially results in subsidization between customer classes. A utility's regulatory assets, if later paid for by customers, will be allocated to various customers classes and be paid according to some rate design. These allocations and rate designs may not be known right now, and crucially, they may be different than the allocation and rate design for the taxes that

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[9] *See* R.C. 4905.26 (party may file a complaint if rates are, among other things, "unjustly discriminatory").

[10] *See* R.C. 49028.02(H) ("It is the policy of the state to do the following throughout the state: ... Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa...").

[11] *See In re Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency & Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion & Order ¶ 60 (Sept. 27, 2017) ("the [Ohio Supreme] Court held that Commission approval of an accounting modification, such as a deferral, does not constitute ratemaking") (citing *Consumers' Counsel v. PUCO*, 6 Ohio St 3d 377 (1983)).

customers pay. Thus, using tax savings to offset existing regulatory assets could result in both inter-class and intra-class cross-subsidization.

In short, these proposals unnecessarily complicate the process and unfairly and unreasonably seek to delay or deny customers' right to receive the benefits of the Tax Cut Act. The PUCO should adopt the simplest and fairest approach: prompt and full bill reductions for customers.

2. Customers should fully and promptly receive the benefits of the Tax Cut Act as of its effective date, January 1, 2018.

The new, lower federal tax rate (21% instead of 35%) went into effect January 1, 2018.[12] Fairness and common sense require customers to receive lower rates as of January 1, 2018, not some future date. Several parties suggest in their comments that rates be adjusted in future proceedings.

Duke Energy discusses its "voluntary, proactive steps" to account for the Tax Cut Act in its Rider DCI, Rider DR-IM, and Rider AMRP filings.[13] DP&L notes that it will update its Energy Efficiency Rider "later in 2018," which will include the 21% tax rate.[14] Other parties have similarly proposed future adjustments to rider rates.[15] These utilities imply they have already filed updated riders reducing customers' rates to reflect the tax

[12] *See generally* Tax Cut Act.

[13] Duke Comments at 8-9.

[14] DP&L Comments at 17-18.

[15] *See* Comments of Vectren Energy Delivery of Ohio, Inc. at 2-3 (Feb. 15, 2018) (the "Vectren Comments") (stating that Vectren will adjust riders at some point in the future to reflect the reduction in tax rate effective January 1, 2018); Dominion Comments at 4-5 (stating that Dominion will update riders with new rates effective May 1, 2018); Comments of Columbia Gas of Ohio, Inc. at 4-5 (Feb. 15, 2018) (the "Columbia Comments") (stating that Columbia will incorporate the tax reduction in its upcoming Rider DSM/Rider IRP filing and will work with parties to address the tax issue in its pending Capital Expenditure Program docket); IEU Comments at 7 (proposing that riders be adjusted during their typical periodic filings).

savings under the Tax Cut Act, suggesting that there is nothing more to be done in this Commission-Ordered Investigation ("COI") with respect to those riders

But there is more to be done. Duke, for example, proposes that its new Rider DCI and Rider DR-IM rates be effective April 2018 and its Rider AMRP rates be effective May 2018.[16] It does not appear that Duke plans to provide customers the benefits of the Tax Cut Act beginning January 1, 2018. And in FirstEnergy's recent DMR case, the PUCO found that the issue of adding refund language to utility tariffs may be appropriately addressed in this tax COI docket, not in individual utility tariff filing dockets.[17]

While OCC supports a proactive approach by utilities to reduce rider rates to account for the Tax Cut Act, the PUCO should require all such rates to include the benefits of the Tax Cut Act starting on January 1, 2018. In the alternative, to the extent the new rider rates only include savings as of a later date, the PUCO should address the gap—that is, the time period from January 1, 2018 to whenever the new rider rate goes into effect—through a separate bill reduction mechanism in this COI.

For those utilities with pending rider filings or rider filings coming up in the very near future, it makes sense to adjust those rider rates to account for the Tax Cut Act. But the PUCO should not permit utilities to keep any tax savings that accrue between January 1, 2018 and the effective date of such new rider rates. If it does, then customer money earmarked for utility taxes will effectively be converted to a utility windfall.

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[16] Duke Comments at 9. *See also In re Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM for 2016 Grid Modernization Costs*, Case No. 17-1403-EL-RDR, Memorandum Contra Motion of Duke Energy Ohio, Inc. to Amend Rider DR-IM for 2016 Grid Modernization Costs by the Office of the Ohio Consumers' Counsel (Feb. 27, 2018).

[17] *In re Application of [FirstEnergy] to Modify Rider DMR Rates*, Case No. 17-2280-EL-RDR, Finding & Order ¶ 17 (Feb. 28, 2018).

3. To the detriment of Ohioans, Some Ohio utilities want to keep charging customers the old, substantially higher tax rate so that the utilities can earn more profit. The PUCO should not allow this.

The FirstEnergy utilities want to keep charging customers at the old tax rate of 35% for at least six more years.[18]

DP&L wants to keep overcharging customers at the old tax rate, potentially forever.[19] It also wants to take customers' money that was earmarked for taxes and use it instead to pay off the debts of its parent company.[20]

AEP wants to keep charging customers the old tax rate until at least its next base rate case, which may not be for over two more years.[21]

Northeast Ohio Natural Gas Corp., Orwell Natural Gas Co., Brainard Gas Corp., and Spellman Pipeline Holdings, LLC want to keep charging customers the old tax rate indefinitely to improve their returns on equity.[22]

Ohio Gas Company wants to keep any tax overpayments made to it by customers to increase its rate of return.[23]

These proposals have at least two things in common. One, they are patently unfair to consumers who have paid and continue to pay the utility taxes. And two, the PUCO should not give them the time of day. The reduction in federal income tax rates is not a

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[18] FirstEnergy Comments at 4-6 (arguing that the PUCO cannot adjust FirstEnergy's base rates until May 31, 2024 at the earliest).

[19] DP&L Comments at 15 (arguing that there are "compelling reasons not to make a single-issue downward rate adjustment" for DP&L because DP&L is allegedly "not earning a fair rate of return").

[20] DP&L Comments at 17.

[21] Comments of Ohio Power Co. at 3 (Feb. 15, 2018) (the "AEP Comments") (arguing that base rates can only be adjusted in a base rate case, which AEP will file by June 1, 2020).

[22] Joint Gas Utilities Comments at 2.

[23] Ohio Gas Comments at 7.

golden ticket for utilities to overcharge customers in the name of utility profits. Every Ohio utility has a fair opportunity to earn a reasonable rate of return under the statutory scheme provided by the Ohio General Assembly.[24] If a utility believes it is not earning enough, it can file an application with the PUCO under any applicable law that might permit a rate increase. Or it can, through good management and decision-making, improve its business operations the same as any non-monopoly. The reduction in federal tax income rates is not a bailout for utilities that want to make more money for their shareholders or to make amends for poor decision making at the expense of customers.

4. To ensure the benefits of the tax cuts are fully and promptly passed on to consumers, the PUCO can order rate reductions in this COI proceeding.

Several parties have argued that the PUCO should not or cannot adjust rates in this COI proceeding and instead must do so in separate, individual utility rate proceedings.[25] OCC agrees that *some* utility rates can more efficiently and appropriately be reduced through separate rate proceedings, including, for example, Duke and DP&L's pending base rate cases.[26] But the PUCO has the authority under R.C. 4905.26 and R.C. 4909.16 to adjust rates in this COI proceeding, and it should in fact exercise that

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[24] *See In re Application of Columbus S. Power Co. & Ohio Power Co. for Authority to Establish a Standard Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan*, Case No. 11-346-EL-SSO, Opinion & Order at 32 (Aug. 8, 2012) (a utility "should have an opportunity to earn a reasonable rate of return," but "there is not a right to a guaranteed rate of return").

[25] AEP Comments at 1-6; FirstEnergy Comments at 2-3 (riders can be adjusted through periodic rider update filings), 10-11 (PUCO cannot adjust rates outside an ESP case or rate case under R.C. 4909.18); Duke Comments at 12 (rates can only be adjusted in a rate proceeding, not a COI).

[26] *See* OCC Initial Comments at 8-10.

authority to ensure that customers receive the benefits of the Tax Cut Act as soon as possible.[27]

5. The PUCO should protect consumers' right to receive the benefits of the Tax Cut Act by ordering all rates subject to refund.

In its initial comments, OCC recommended that the PUCO require that all rate-related tariffs include language that the tariff charges are subject to refund.[28] OCC was concerned, among other things, that utilities might (a) dispute that the PUCO has authority to order utilities to reduce charges to consumers for taxes and (b) challenge the common-sense proposal that customers should pay utilities taxes at the actual rate that the utilities are paying.[29]

Other parties' initial comments confirm that OCC was right to be concerned. Ohio utilities have aggressively proposed that they be permitted, for a whole host of alleged reasons, to delay or deny customers the benefits of the Tax Cut Act.[30] While parties can reasonably disagree about the manner and timing of rate reductions, no party can in good faith claim that it is fair for utilities to continue charging customers a tax rate that no longer exists.

If the initial comments to this case are any indication, Ohio's electric distribution utilities (and to a lesser extent, some other parties) are prepared to dig their heels in and fight against what is right and just for Ohioans. If the PUCO orders an Ohio utility to

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[27] *See* OCC Initial Comments at 2-6 (citing, for example, *Lucas County Commissioners v. PUCO*, 80 Ohio St. 3d 344 (1997), where the Ohio Supreme Court concluded that the PUCO, under R.C. 4905.26, "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 and unreasonable").

[28] OCC Initial Comments at 6-8.

[29] *Id.*

[30] *See* section II.A.i above.

reduce its rates as a result of this COI, the utility could appeal to the Supreme Court of Ohio ("Court") and potentially delay rate relief by posting an appellate bond. Without tariff language providing that the rates are subject to refund, the Court could conclude, as it did in the recent *FirstEnergy* decision, that customers have no remedy, even when they succeed on appeal.[31] The PUCO can prevent this unjust result by requiring all utility rates with a tax component to be subject to refund.[32]

B. OCC's Reply to Utility Parties' Initial Comments that are Generally Intended to Delay, Redirect, or Stop altogether the Return of the Tax Cuts to Consumers[33]

1. The PUCO should not adopt AEP's initial recommendations because to do so would unjustly enrich utilities and harm consumers.

AEP argues that some riders will be automatically adjusted to account for the Tax Cut Act but that the PUCO cannot adjust any other riders in this COI.[34] The law does not support this argument. As OCC explained in its initial comments, the PUCO has the authority under R.C. 4905.26 and 4909.16 to adjust riders in this COI proceeding, including lowering such rider rates to reflect changes to federal tax rates under the Tax Cut Act.[35]

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[31] *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Op. 2018-Ohio-229 (Jan. 24, 2018).

[32] *See also In re Application of [FirstEnergy] to Modify Rider DMR Rates*, Case No. 17-2280-EL-RDR, Finding & Order ¶ 17 (Feb. 28, 2018) (finding that this tax COI is an appropriate place for the PUCO to consider adding refund language to utility tariffs).

[33] OCC's replies to certain arguments are included above in OCC's global recommendations. OCC's failure to reply to any specific argument made by parties in their initial comments does not constitute OCC's agreement with those comments, and OCC reserves the right to respond to those issues as appropriate in this and any other applicable proceedings.

[34] AEP Comments at 4.

[35] *See* OCC Initial Comments at 2-6.

AEP argues that it would "violate the ESP [electric security plan] statute to modify riders adopted in an ESP without [AEP]'s consent or outside the comprehensive ESP process."[36] AEP does not explain this argument beyond bare citations to R.C. 4928.143 and *In re Ohio Power Co.*, 40 N.E.3d 1060, ¶ 30 (2015). But nothing in this statute or case supports AEP's broad conclusion. R.C. 4928.143 establishes the PUCO's authority to approve electric security plans, but it does not in any way restrict the PUCO's authority under R.C. 4905.26 and 4909.16 to modify rates that are "in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law." Indeed, the majority of the ESP riders are distribution riders based on collecting the cost of distribution service and investment, which includes taxes. The PUCO has traditional jurisdiction over distribution charges, regardless of their origin.

Likewise, *In re Ohio Power Co.* addresses a utility's right to withdraw an electric security plan under certain circumstances, but it does not address the PUCO's more general authority to regulate just and reasonable rates under R.C. 4905.26 and 4909.16. And we cannot forget the PUCO's authority under R.C. 4905.22 to ensure that charges demanded for service rendered shall be "just and reasonable." The PUCO should reject AEP's claim that its electric security plan is judgment proof in this COI.

AEP argues that it is entitled to keep as shareholder profits any tax savings under the Tax Cut Act, except in the limited circumstance where such profits result in significantly excessive earnings under the significantly excessive earnings test ("SEET") statute.[37] But again, the law does not support this self-serving claim. To accept AEP's

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[36] AEP Comments at 5.

[37] AEP Comments at 5.

claim would result in the involuntary transfer of wealth between customers and AEP shareholders, something that is unjust, unreasonable, and discriminatory.

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 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. Notably, the SEET is limited to an earnings review strictly tied to the "adjustments" or the provisions of the electric security plan. A federal tax cut is not an "adjustment" to a utility's electric security plan unless specifically identified and approved as part of the PUCO review under R.C.4928.143(C)(1).

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 (under 4905.22) to ensure that rates are just and reasonable. Rates are currently unjust and reasonable because customers continue to pay their utilities' taxes, mostly through distribution charges (based on cost of service) when the cost of service has declined substantially under a much lower federal tax component. 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.[38]

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[38] *See* OCC Initial 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).

AEP also argues that base rates can only be changed as part of a proceeding under R.C. 4909.18.[39] OCC has already refuted this argument: the PUCO has the authority to adjust base rates under R.C. 4905.26 and 4909.16 when they become unjust and unreasonable as a result of a change in federal tax law.[40]

2. The PUCO should not adopt FirstEnergy's initial recommendations because to do so would unjustly enrich utilities and harm consumers.

a. The "rate freeze" in FirstEnergy's electric security plan does not prohibit the PUCO from reducing customers' rates as a result of the Tax Cut Act.

FirstEnergy spends the bulk of its initial comments explaining why, in its view, the PUCO cannot adjust its base rates to allow customers to benefit from the Tax Cut Act. In short, FirstEnergy argues that the PUCO cannot reduce its base rates to account for the Tax Cut Act because of a "rate freeze" approved in its most recent electric security plan case.[41] In short, FirstEnergy is wrong.

The settlement in FirstEnergy's most recent ESP case provides that "no proceeding shall commence whereby an adjustment to the base distribution rates of [FirstEnergy] would go into effect prior to June 1, 2024."[42] As FirstEnergy acknowledges, however, this "rate freeze" is limited. Most importantly, the settlement

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[39] AEP Comments at 5-6.

[40] *See* OCC Initial Comments at 2-6.

[41] FirstEnergy Comments at 4-12.

[42] *In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer Pursuant to R.C. § 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO ("*FirstEnergy ESP*"), Third Supplemental Stipulation and Recommendation at 13.

provides that the freeze applies "except in the case of an emergency pursuant to the provisions of Ohio Revised Code 4909.16."[43]

Here, the PUCO has the authority under R.C. 4909.16 to reduce FirstEnergy's base rates to account for the Tax Cut Act. R.C. 4909.16 provides:

> When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to of affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.

By its plain language, R.C. 4909.16 provides the PUCO with broad authority to determine when and how it should be applied.

In particular, the PUCO can invoke R.C. 4909.16 whenever it "deems it necessary to prevent injury to the business or interests of the public or of any public utility or part of any public utility of this state in case of any emergency to be judged by the commission." This language is telling for at least two reasons. First, by using the phrases "when the public utilities commission deems it necessary" and "to be judged by the commission," the General Assembly signaled its deference to the PUCO in deciding when the statute applies and when it doesn't.[44] Second, R.C. 4909.16 can used to protect the business of utilities, but it can also be used to prevent injury to the public interest. In other words,

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[43] *Id.*

[44] *See also Montgomery Cnty. Bd. of Comm'rs v. PUCO*, 28 Ohio St. 3d 171, 179 n.7 (1986) (Wright, J. concurring) ("This court has repeatedly upheld the commission's broad statutory authority under R.C. 4909.16 to order rate relief in the event of an emergency.").

while a utility may request a rate increase under R.C. 4909.16 to prevent harm to its business in an emergency, so too can the PUCO reduce rates under R.C. 4909.16 to reduce customers' rates.

In arguing that the PUCO cannot use R.C. 4909.16 to lower its rates as a result of the Tax Cut Act, FirstEnergy misstates the law. FirstEnergy states in its comments that the PUCO can only invoke R.C. 4909.16 if there is "clear and convincing evidence that, absent extraordinary emergency relief, the [FirstEnergy] Companies will be financially imperiled or their ability to render service would be impaired."[45] This is simply not what R.C. 4909.16 says.[46]

In offering this as the relevant standard of review, FirstEnergy attempts to modify the plain language of R.C. 4909.16 to permit emergency rate increases only. According to FirstEnergy, the only question the PUCO must ask when deciding whether an emergency exists is whether the utility will be harmed. But R.C. 4909.16 also applies where the public interest would be harmed.[47]

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[45] FirstEnergy Comments at 6-7.

[46] It also grossly mischaracterizes the precedential value of the case FirstEnergy relies upon, *In re Akron Thermal Ltd. Partnership*, Case No. 00-2260-HT-AEM. The *Akron Thermal* case involved a utility's request for an emergency rate increase to avoid financial distress in advance of filing a new rate case. No parties intervened in the *Akron Thermal* case, and it was resolved by stipulation between the utility and the PUCO Staff. It thus has no precedential effect on any case, let alone a fundamentally different case involving the impact of federal tax law on every Ohio utility.

[47] R.C. 4909.16 ("to prevent injury to the ... interests of the public..."). *See also In re the Commission's Consideration of Solutions Concerning the Disconnection of Gas & Elec. Service in Winter Emergencies*, Case No. 14-1371-GE-UNC, Finding & Order (Sept. 10, 2014) (invoking the public interest aspect of R.C. 4909.16 to order utilities to reconnect customers to maintain winter service); *In re the Commission's Consideration of Solutions Concerning the Disconnection of Gas & Elec. Service in Winter Emergencies*, Case No. 17-1829-GE-UNC, Finding & Order (Sept. 13, 2017) ("the Commission again finds it necessary and prudent to invoke the emergency provisions of R.C. 4909.16 in order to prevent injury to affected residential customers and support the public interest").

Indeed, in support of its version of the law, FirstEnergy relies on a single case, *In re Akron Thermal Limited Partnership,*[48] that could not be more different than the present Commission-Ordered Investigation. In *Akron Thermal*, a small utility (providing steam and hot water to under 100 customers) sought an emergency rate increase to maintain cash flows while the utility prepared to file a request for a permanent rate increase in the near future.[49] No parties intervened in Akron Thermal's case, and it was resolved through a settlement signed only by the utility and the PUCO Staff.[50] The PUCO summarized the factors it considers when a utility requests an emergency rate increase and approved the stipulation under its three-prong test.[51]

The distinctions between *Akron Thermal* and the present federal tax Commission-Ordered Investigation make *Akron Thermal* entirely irrelevant here. First, *Akron Thermal* involved a utility's request for a rate increase. Thus, the PUCO was considering, under R.C. 4909.16, whether there it was "necessary to prevent injury to the business ... of any public utility." In contrast, the current Commission-Ordered Investigation regarding federal taxes applies the part of R.C. 4909.16 that the PUCO uses "to prevent injury to the ... interests of the public." The PUCO's analysis of whether an emergency exists in the present case focuses on whether utilities will get a windfall if they do not reduce rates as a result of the Tax Cut Act. This is the opposite of the situation faced in *Akron Thermal*, where emergency rates were implemented to protect the utility's financial interest.

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[48] Case No. 00-2260-GT-AEM.

[49] *Id.*, Opinion & Order at 4 (Jan. 25, 2001).

[50] *Id.*

[51] *Id.* at 6-7.

Second, because the *Akron Thermal* case was resolved through an uncontested settlement in a case where no party intervened, it provides no precedential value.[52]

Indeed, the PUCO can, and has, relied on R.C. 4909.16 to lower rates in a Commission-Ordered Investigation. In *In re Commission Investigation of Tolco Utilities, Inc. Relative to its Rates and Regulations*,[53] for example, the PUCO found that utility customers would be harmed where a utility charged rates that were unreasonable.[54] The PUCO thus found that an emergency existed, and to prevent injury to customers, it ordered the utility to immediately lower its rates under R.C. 4909.16 (and the complaint statute, R.C. 4905.26).[55]

The PUCO should do the same here. If the PUCO does not order FirstEnergy to reduce its base rates to reflect the new 21% tax rate, then FirstEnergy's customers will continue to pay the higher 35% rate for at least six more years.[56] That is unjust and unreasonable and should not be allowed.

FirstEnergy's customers will be harmed if they continue to pay unjust and unreasonable rates. And FirstEnergy's customers will continue to pay unjust and unreasonable rates if FirstEnergy is permitted to keep charging them 35% for taxes while FirstEnergy's obligation is only 21%. This emergency affects every one of FirstEnergy's

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[52] *See In re the Commission's Investigation into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Opinion & Order at 10 (June 28, 2001) ("a stipulation from one case cannot serve as precedent and is not binding on the Commission in a separate contested case").

[53] Case No. 89-982-ST-COI, 1989 Ohio PUC LEXIS 648, at *3 (July 6, 1989).

[54] *Id.*

[55] *Id.*

[56] *FirstEnergy ESP*, Third Supplemental Stipulation and Recommendation at 13 (providing that FirstEnergy cannot file a rate case with new rates effective before June 1, 2024).

two million customers and the distribution rates that they pay. The PUCO should act under R.C. 4909.16 to reduce rates to reflect the revised tax rates.

b. The "Incremental Tax Provision" in FirstEnergy's ESP does not preempt the PUCO's authority to protect consumers by reducing rates under R.C. 4909.16.

In further support of its rate freeze argument, FirstEnergy points to what it calls the "Incremental Tax Provision" from its most recent ESP case.[57] But this argument is a non-sequitur: the Incremental Tax Provision has no impact on the PUCO's authority to reduce rates under R.C. 4909.16.

The Incremental Tax Provision is found in the Third Supplemental Stipulation filed in FirstEnergy's most recent ESP case.[58] It provides, in its entirety: "The Signatory Parties agree that recovery of new or incremental taxes authorized after May 31, 2014, shall continue for the entire Stipulated ESP IV period."[59] From this, FirstEnergy jumps to the conclusion that (i) the Incremental Tax Provision allows tax increases but not tax decreases, (ii) the Incremental Tax Provision is an exception to the base rate freeze, and (iii) the PUCO cannot rely on the emergency rate statute, R.C. 4909.16, to reduce customers' rates as a result of the Tax Cut Act. Upon closer examination, however, FirstEnergy's argument falls apart.

First, the plain language of the Incremental Tax Provision is vague and ambiguous. What makes a tax "new"? "Incremental" to what? "Recovery" by whom? "Authorization" by whom? None of these questions are answered by the words the

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[57] FirstEnergy Comments at 7-9.

[58] *FirstEnergy ESP*, Third Supplemental Stipulation and Recommendation at 17.

[59] *Id.*

stipulating parties chose in the Third Supplemental Stipulation. Nor do the PUCO's orders in the *FirstEnergy ESP* case shed any light on the meaning. FirstEnergy cites pages 29 and 121 of the order approving the stipulation in the *FirstEnergy ESP* case.[60] Page 29 merely recites the language of the Incremental Tax Provision.[61] And page 121 is the PUCO's generic language approving the stipulation with modifications.[62] The PUCO did not analyze the Incremental Tax Provision, discuss or describe it, state whether or not it could be used to address tax decreases, identify the standards under which a request to apply the Incremental Tax Provision might be evaluated, or otherwise say anything at all about the Incremental Tax Provision. The PUCO certainly did not conclude that because of this provision, the PUCO was abandoning its right to review and reduce unjust and unreasonable rates under R.C. 4909.16.

Second, FirstEnergy cites the cross-examination testimony of its witness, Eileen Mikkelsen.[63] Ms. Mikkelsen testified at hearing in the *FirstEnergy ESP* case that FirstEnergy would rely on the Incremental Tax Provision to increase rates if FirstEnergy were faced with a tax increase, but that it would not rely on the Incremental Tax Provision to decrease rates if FirstEnergy were faced with a tax decrease.[64] But this is irrelevant. The fact that <u>FirstEnergy</u> would not <u>voluntarily</u> seek to reduce rates says nothing about whether the <u>PUCO</u> could <u>require</u> FirstEnergy to do so. As discussed at

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[60] FirstEnergy Comments at 8.

[61] *FirstEnergy ESP*, Opinion & Order at 29 (Mar. 31, 2016) ("The Signatory Parties agree that recovery of new or incremental taxes authorized after May 31, 2014, shall continue for the entire Stipulated ESP IV period.").

[62] *Id.* at 121 ("ORDERED, That the Stipulated ESP IV, as modified by the Commission, be adopted and approved.").

[63] FirstEnergy Comments at 8.

[64] *Id.* at 8.

length in these comments and OCC's initial comments, the PUCO has the authority to do so under R.C. 4909.16, so FirstEnergy's witness's admission that FirstEnergy prefers higher rates over lower ones is meaningless in this tax case (but otherwise telling).

The PUCO should reject FirstEnergy's strained interpretation of the Incremental Tax Provision and find that it has the authority, under R.C. 4909.16, to order FirstEnergy to reduce its base rates (and rider rates) to incorporate the new, lower federal income tax rate.

c. Allowing FirstEnergy to continue overcharging customers for its taxes would be bad policy.

FirstEnergy argues that modifying its base distribution rates "would be bad policy."[65] The opposite is true: it would be bad policy to allow FirstEnergy to keep charging its customers 35% for taxes while FirstEnergy's obligation is only 21%.

FirstEnergy's argument is premised on the alleged "balance of interests agreed upon and approved by the Commission in ESP IV."[66] Leaving aside the potential that FirstEnergy's ESP IV is overturned on appeal,[67] the PUCO would not disrupt any balance of interests by ordering FirstEnergy to lower the amount of taxes it charges customers. In fact, doing so would preserve the balance of interests between FirstEnergy and its customers.

According to FirstEnergy, it "generally [has] agreed to bear the risk of increasing costs for eight years."[68] Thus, says FirstEnergy, the PUCO should not now decrease the

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[65] *Id.* at 10.

[66] *Id.*

[67] *See In re Application of Ohio Edison Co., the Cleveland Elec. Illuminating Co., & the Toledo Edison Co. for Authority to Provide for a Standard Serv. Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Ohio Supreme Court Case No. 2017-1664.

[68] FirstEnergy Comments at 10.

amount that it charges customers for its taxes. But FirstEnergy's claim that it is bearing the risk of increasing costs for eight years is simply untrue.

First, while FirstEnergy will not file a case requesting new base rates effective before June 1, 2024, customers will continue to pay numerous riders to FirstEnergy. And time will only tell how many more rider charges are added to FirstEnergy's tariff sheets in the next six years. Thus, FirstEnergy will not bear the risk of increasing costs for six[69] more years, as it has numerous ways to continue charging customers higher rates through its various riders. Moreover. FirstEnergy never established that the distribution rates are expected to increase over the next seven years. In fact, the rate freeze benefits FirstEnergy by allowing it to continue earning in excess of its authorized rate of return without any ability for the PUCO to examine, through a base rate case, the rates that have been in effect since 2008.

Second, FirstEnergy is permitted to file a request for a base rate increase effective prior to June 1, 2024 with the agreement of the PUCO Staff.[70] Thus, it remains to be seen whether FirstEnergy will continue to bear any risk of increasing costs for six more years.

Third, as FirstEnergy admits in its comments, it is explicitly <u>not</u> willing to bear the risk of any increase to its taxes. Under the "Incremental Tax Provision" in its ESP case, FirstEnergy claims that it can increase charges to customers if tax rates go up, despite the so-called rate freeze.[71] In one breath, FirstEnergy argues that it should not be

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[69] The PUCO approved FirstEnergy's ESP about two years ago, so there are six years remaining on its eight-year term.

[70] *FirstEnergy ESP*, Third Supplemental Stipulation and Recommendation at 13 ("Notwithstanding the abovementioned commitment, the Companies are also not precluded with Staff agreement to file a base distribution rate case that would go in effect prior to June 1, 2024.").

[71] FirstEnergy Comments at 8.

required to reduce rates to account for the Tax Cut Act because it is bearing the risk of cost increases. In the next breath, however, FirstEnergy not only admits, but proudly announces the opposite—that it refuses to bear the risk of any tax increase. The PUCO should not allow FirstEnergy to play both sides of this game, to the detriment of customers. When tax rates go down, customers should pay the lower rate.

d. The PUCO should not allow FirstEnergy to keep overcharging customers for taxes for another six years.

FirstEnergy concludes by arguing that the PUCO should do nothing to address tax overcharges in base rates for six more years, when FirstEnergy files a base distribution rate case.[72] For all the numerous reasons identified in these reply comments and in OCC's initial comments, it would not be just and reasonable to allow FirstEnergy to continue charging customers 35% for its taxes while its obligation is actually 21% for six more days, let alone six more years. The PUCO should not accept FirstEnergy's invitation to keep charging customers a non-existent tax rate for six more years. That would be unjust and unreasonable.

3. The PUCO should reject Duke's initial recommendations because adopting them would unjustly enrich utilities and harm consumers.

In lieu of concrete recommendations, Duke's initial comments generally provide broad discussion of policy issues for the PUCO to consider in addressing the Tax Cut Act. For example, Duke suggests that "no single change established by the [Tax Cut Act] should be viewed in isolation" but instead, "all of the changes that affect public utilities should be viewed together, including the consideration of potential impacts on Duke

[72] *Id.* at 12.

Energy Ohio's current and projected financial position and cash flow, particularly with respect to the timing of the implementation of these changes."[73] In a section titled "Other TJCA Considerations for the Commission," Duke asserts that (i) the implementation of the new tax law "has the potential to adversely affect the Company's cash flow needed to fund ongoing operations and new infrastructure investments," (ii) "[a]n immediate flow-back resulting from tax reform would significantly lower the Company's cash expectations, which would impact its credit metrics, including coverage ratios, and could result in the need to issue additional debt or equity," and (iii) a "blanket directive that each regulated utility refund cash that it may or may not be able to do without impacting its financial health would be unwise and adverse to the Commission's stated goal of 'ensuring' the financial health of these same utilities."[74]

It's not clear what Duke is asking the PUCO to do with this information. Duke's sole recommendation in this regard is that the PUCO should "look beyond the just the [sic] reductions in tax expenses afforded under the TCJA and to focus on [the] bigger picture of TCJA, being mindful of its responsibility to stand for all stakeholders, as it relates to the reasonableness of the utility's rates and ensuring that utilities are given the opportunity to earn a fair, reasonable, and just return."[75] But whatever Duke might be asking for here, it is too much and unwarranted.

Utilities do not charge customers for the utility's tax obligations to improve cash flows or to increase utility rates of return; they charge customers for the utility's tax obligations to pay the utility's tax obligations. When tax rates go up, charges to customers

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[73] Duke Comments at 2.

[74] *Id.* at 12-14.

[75] *Id.* at 14.

for taxes should go up. When tax rates go down, charges to customers for taxes should go down. It is not any more complicated than that. The PUCO should reject Duke's (and other utilities') attempts to conflate issues that are not at all related. Charges to customers for utility taxes are a dollar-for-dollar flow-through. That is all they are. A utility's cash flows and rate of return have no bearing on this analysis and deserve no consideration.

4. The PUCO should reject DP&L's initial recommendations because adopting them would unjustly enrich utilities and harm consumers.

a. DP&L's due process concerns are unfounded: the PUCO has not suggested that it will deny any party due process in this case, and DP&L has a pending base rate case in which its base rates may be reduced to protect consumers.

DP&L argues that changes to its base rates require "due process and a decision supported by substantial evidence."[76] OCC agrees. DP&L has a pending base rate case.[77] The PUCO should, and indeed must, reduce DP&L's base rates to account for the new 21% federal income tax rate in that base rate case.[78] DP&L will be afforded due process in that case. Its apparent concern that the PUCO will deny it due process is baseless.

b. DP&L has the same opportunity as every other party to make recommendations to the PUCO in this tax COI.

DP&L argues that "DP&L, Staff, and intervenors should have the opportunity to propose alternative approaches for applying the benefits of the tax rate change."[79] It is not clear what DP&L is asking for here. The PUCO opened this COI for precisely this

[76] DP&L Comments at 11.

[77] PUCO Case No. 15-1830-EL-AIR.

[78] OCC Initial Comments at 8-10.

[79] DP&L Comments at 16.

purpose and invited all parties to file comments and reply comments. DP&L has the same opportunity as all other parties to make any proposal it would like in its comments and reply comments.

c. The PUCO should give no weight to DP&L's complaints regarding its current base rates.

DP&L complains that it would be unfair to require it to pass tax savings on to its customers because (i) "there have been other changes since 1991 in costs and revenues that more than offset the decreased tax liability from the TJCA," (ii) DP&L has allegedly "under-recovered tax expense for decades" because the federal income tax rate at the time of its last rate case (in 1991) was 34%, but the federal income tax rate increased to 35% in 1994, and (iii) DP&L has been "put in a position where it is currently not earning a fair rate of return."[80]

But the PUCO should reject DP&L's plea. As DP&L acknowledges, its base rates have been in effect since 1991.[81] DP&L filed a new base rate case in late 2015—24 years after its last one.[82] But no one told DP&L to wait that long between rate cases. DP&L alone has decided when to file—or not file—its base rate case. If DP&L's rates were unjustly and unreasonably low between 1991 and 2015 (as a result of failure to collect sufficient tax revenues or otherwise), then DP&L could have filed a base rate case at any time to address this issue. But it chose not to. The obviously explanation for why DP&L did not file a base rate case is because DP&L was earning a return that its shareholders were satisfied with.

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[80] DP&L Comments at 15.

[81] DP&L Comments at 15.

[82] PUCO Case No. 15-1830-EL-AIR (the "DP&L Rate Case").

Furthermore, at least as recently as 2013, DP&L admitted that its base distribution revenues were adequate and that it expected those base distribution revenues to continue to be adequate for years to come.[83] The PUCO should not buy into DP&L's suggestion that it has been struggling financially for many years when DP&L recently admitted that its distribution business was performing adequately.

In any case, the PUCO should not allow DP&L to voluntarily wait 24 years between rate cases and then claim that the substantial delay between rate cases somehow justifies DP&L overcharging customers for taxes going forward. DP&L, like any other business, must live with the business decisions that it makes, including its decision to go decades without a base rate case. The PUCO should not use federal income tax rate reductions as a means to inflate DP&L's financial bottom line at the expense of customers.

d. DP&L's Distribution Modernization Rider already provides DP&L with a customer-funded subsidy to pay off debts and otherwise improve its finances. It does not need a further subsidy in the form of overcharging customers for its taxes.

DP&L argues that the PUCO should not require it to reduce rates as a result of the Tax Cut Act because it will hurt DP&L's ability to (i) pay down debts it owes to its parent entity, (ii) increase its credit rating, and (iii) invest in grid modernization.[84] But DP&L's customers are already unreasonably subsidizing DP&L through its Distribution

[83] *See In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 12-426-EL-SSO, Tr. at 117 (Apr. 1, 2013) (cross-examination testimony of DP&L witness Craig Jackson, stating that DP&L's distribution revenues were adequate at the time and were expected to be adequate through the end of 2017).

[84] DP&L Comments at 4, 17.

Modernization Rider for precisely these purposes.[85] The utility should not be able to hijack more customer funds to pay for these expenses again. Enough is enough.

A utility collects taxes from its customers to pay its taxes. Those funds should either (i) be used to pay taxes, or (ii) returned to customers. The PUCO should not allow DP&L to commandeer those funds for the unrelated purpose of improving DP&L's overall financial condition (including funding for its unregulated parent company), especially when customers are already set to pay over $100 million a year in subsidies through the Distribution Modernization Rider (which does not have a tax component).

e. To protect customers, the PUCO should adjust DP&L's decoupling rider to reflect the new federal income tax rate.

DP&L's Decoupling Rider is tied to base distribution revenues that include a tax component.[86] Thus, the amount that DP&L charges its customers under the Decoupling Rider should reflect the new 21% federal income tax rate. DP&L, however, argues that the Decoupling Rider should continue using the old nonexistent 35% tax rate because, according to DP&L, it "is currently under-collecting its base distribution rates by a significant amount, which also means that DP&L is not collecting enough lost distribution revenues either."[87]

This argument is flawed for at least three reasons. First, there is no such thing as "under-collecting base distribution rates." DP&L is charging customers the base distribution rates that the PUCO approved in DP&L's most recently-approved base rate

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[85] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 13 (Oct. 20, 2017) (Distribution Modernization Rider designed to improve cash flows, pay down debts it owes to DPL Inc., and make capital expenditures for grid modernization).

[86] DP&L Comments at 18.

[87] *Id.*

case, as it is required to do by law. It is not "under-collecting" anything; it is collecting the amount the PUCO approved, along with a fair and reasonable rate of return. Second, even if it were under-collecting base distribution rates (whatever that might mean), it is irrelevant. As described throughout these reply comments, the Tax Cut Act should not be used as an opportunity for utilities to overcharge customers for taxes and then use those overcharges to increase profits or to recover costs for its poor business decisions. Third, if DP&L believes it should collect more through its base distribution rates, its remedy is to file a base distribution rate case—not to take advantage of customers through a change in federal tax law. The PUCO should reject DP&L's self-serving request that its Decoupling Rider be used as another mechanism by which customers pay a subsidy to DP&L.

f. DP&L should not be permitted to overcharge customers for pole attachment rates.

DP&L argues that it should be permitted to continue charging customers the old nonexistent 35% income tax rate for pole attachment charges because the pole attachment rates do not generate a significant amount of revenue.[88] The size of the overcharge is irrelevant. Customers should not be overcharged for utility taxes, regardless of the size of the overcharge. If the pole attachment rate is not covering the costs of providing service, DP&L has the opportunity to seek an increase in that rate, just like it may seek to increase rates on other rate schedules.[89]

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[88] *Id.* at 19.

[89] *See* R.C. 4909.18; 4905.26.

g. DP&L's contributions in aid of construction should use the lower federal income tax rate as of January 1, 2018.

DP&L states in its initial comments that it has already modified its internal processes to compute contributions in aid of construction at the 21% federal income tax rate.[90] DP&L should be required to provide documentation of this change, including confirmation that the change took place effective January 1, 2018. To the extent the effective date of this change is after January 1, 2018, then DP&L should record a regulatory liability in the amount that was overcharged starting January 1, 2018 and should return those overcharges to customers.

5. Vectren's rates should be adjusted so that consumers are protected by a full and prompt reduction in rates due to the tax cuts effective January 1, 2018.

In its comments, Vectren made two main points: (i) Vectren can update riders with its next annual filing, and in the meantime, it will record a regulatory liability for any over-recovery; and (ii) Vectren will file a base rate case by March 30, 2018, and the tax impact on base rates can be addressed in that case.[91] While OCC appreciates that this utility has not sought to redirect its customers funds (unlike most other utilities), its proposal should include a tool to catch the rate reductions as of January 1, 2018.

For example, OCC agrees that Vectren should update its riders in its next filing, but all savings from January 1, 2018 should be included in the reconciliation.[92] In addition, OCC agrees that the tax impact on base rates can be address in Vectren's future rate case, but, in the interim, base rate reductions beginning January 1, 2018 should be

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[90] *Id.* at 20.

[91] Vectren Comments at 2-3.

[92] *See* section II.A.ii above.

provided to customers. These measures will ensure, as the federal government intended, that customers realize the full benefit of the Tax Cut Act.

6. Dominion's rates should be adjusted so that consumers are protected by a full and prompt reduction in rates due to the tax cuts effective January 1, 2018.

Dominion submitted comments that express a number of recommendations to the PUCO. First, Dominion recommends that the PUCO should balance short-term customer benefits with longer-term implications, including the potential effect of the Tax Cut Act on utility credit ratings.[93] But Dominion gives no specific recommendation regarding how these credit rating concerns should impact the PUCO's decision in this proceeding. In any event, the recommendation is without merit.

Any concerns that have allegedly been expressed by credit rating agencies are not cause to alter the Tax Cut Act's effect on utility rates. If Dominion desires to modify another aspect of its natural gas service to increase its credit rating, it is free to file an application with the PUCO under any applicable law governing natural gas service rates. Notwithstanding that concern, Dominion rates (as well as all other utilities rates) should now be implemented with a 21% corporate federal income tax rate.

Second, Dominion recommends that it can address the Tax Cut Act's impact on certain riders through upcoming filings, which ordinarily result in new rates being implemented in May.[94] OCC generally agrees with this recommendation provided the rider filings include savings from January 1, 2018 onward. The PUCO's directive in this proceeding was to establish a regulatory liability starting January 1, 2018 on for this

[93] Dominion Comments at 4.

[94] *Id.* at 5.

exact reason. The PUCO should continue with this course of action and order that all riders be updated with lower rates from the beginning of the year.[95]

Third, Dominion recommends that base rate implications should be addressed through regulatory assets and liabilities and resolved in Dominion's next rate case.[96] OCC generally agrees that the tax impact can be address in a future base rate case, but, in the interim, base rate reductions beginning January 1, 2018 should be provided to customers. This is the only way to ensure that the full benefits of the Tax Cut Act are immediately provided to customers.

Fourth, Dominion recommends that it provide an assessment of its excess ADIT to the PUCO Staff around third quarter 2018.[97] OCC generally encourages the PUCO to direct utilities to provide ADIT impacts on an expedited basis.[98] This will ensure that the Tax Cut Act issue is resolved in a timelier manner and is not subjected to protracted proceeding. This will also allow customers to receive the rate reduction that they deserve as quickly as possible.

7. Columbia Gas's rates should be adjusted so that consumers are protected by a full and prompt reduction in rates due to the tax cuts effective January 1, 2018.

Columbia Gas submitted comments that include a number of recommendations to the PUCO. First, Columbia recommends that through its pending alternative rate case, Case No. 17-2202-GA-ALT, Columbia will make a proposal to provide a monthly base

[95] *See* section II.A.ii above.

[96] *Id.*

[97] *Id.*

[98] *See* OCC Initial Comments at 13-14.

rate bill credit to customers, which will include excess ADIT.[99] This will be filed by October 15, 2018.[100] Columbia will continue these bill credits for 12 months, after which its customer charge and variable rates will be reduced to account for the new tax rate going forward.[101] While OCC supports Columbia's goal of reducing rates to address the Tax Act, OCC is concerned that Columbia's recommended plan will not return money to customers in a reasonable amount of time. OCC encourages the PUCO to direct utilities to determine the appropriate ADIT adjustments in an expedited manner so that customers receive the benefits of the Tax Cut Act as soon as possible.[102]

Second, Columbia states that it will make a proposal to reduce its Infrastructure Replacement Program ("IRP") and Demand-Side Management ("DSM") rates in its upcoming application in Case No. 17-2374-GA-RDR.[103] This reduction will reflect the change from 35% to 21%. With respect to excess ADIT resulting from the IRP, Columbia proposes to pass these savings back to customers through its 2019 IRP rates.[104] OCC recommends that all rider rate adjustments include savings beginning January 1, 2018. OCC also recommends that with respect to the IRP, the rate cap should be adjusted downward to reflect the new 21% federal tax rate.[105] Customers should not be forced to

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[99] Columbia Comments at 3.

[100] *Id*.

[101] *Id*. at 4-5.

[102] *See* OCC Initial Comments at 13-14.

[103] Columbia Comments at 4-5. Columbia in fact filed this application on February 27, 2018. *See* Case No. 17-2374-GA-RDR.

[104] Columbia Comments at 4-5.

[105] *See In re Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation*, Case No. 16-2422-GA-ALT, Application for Rehearing by the Office of the Ohio Consumers' Counsel at 6-7 (Mar. 2, 2018).

wait until 2019 to receive the rate decrease that the federal government ordered through the Tax Cut Act.

8. Ohio Gas's rates should be adjusted so that consumers are protected by a full and prompt reduction in rates due to the tax cuts effective January 1, 2018.

In its comments, Ohio Gas states that it has already addressed the tax impact on its base rates through a joint settlement in its recent rate case (Case No. 17-1139-GA-AIR).[106] While this is true, the rate case did not comprehensively address Ohio Gas's ADIT. To this end, Ohio Gas states that it does not believe that amortization of its excess ADIT will result in lower rates for consumers.[107] If the PUCO finds that a further rate reduction is needed, however, Ohio Gas recommends that the amount should be used to offset its current regulatory assets, rather than providing a credit to customers.[108] Ohio Gas's recommendation cannot be verified because it did not provide any calculations or additional details to support the bare assertion that amortizing its ADIT will not reduce rates. The PUCO should not accept this conclusion without evidence to support it. Instead, OCC recommends that the PUCO order Ohio Gas to show or clarify why its excess ADIT would not decrease rates for customers. This will ensure that the rates are properly calculated. In addition, if the PUCO finds that Ohio Gas's ADIT does result in a rate reduction, those benefits should be passed on to customers through lower rates, not as an offset to regulatory assets.[109]

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[106] Ohio Gas Comments at 6-7.

[107] *Id.* at 6.

[108] *Id.* at 6-7.

[109] *See* section II.A.i above; OCC Initial Comments at 16-18.

Finally, Ohio Gas recommends that it should not be required to enter an accounting liability under the PUCO's January 10, 2018 entry because it is already earning a low rate of return.[110] This argument has no merit. As OCC stated earlier, the Tax Cut Act reduced the corporate federal income tax from 35% to 21%. Ohio Gas's rates must now be calculated with a 21% tax rate. Ohio Gas's return on equity, before or after its recent rate case, are a distinct and separate matter. If Ohio Gas believes that it is no longer earning a just and reasonable return on its investment, then it is free to request a rate increase through another base rate case. In the meantime, the Tax Cut Act is federal law and must be implemented accordingly.

9. The PUCO should reject the recommendations of Northeast Ohio Natural Gas, Orwell Natural Gas, Brainard Gas, and Spelman Pipeline Holdings so that consumers are protected and receive a full and prompt reduction in rates to reflect the tax cuts effective January 1, 2018.

Northeast Ohio Natural Gas Corp., Orwell Natural Gas Co., Brainard Gas Corp., and Spelman Pipeline Holdings, LLC (the "Joint Gas Utilities") submitted joint comments. The Joint Gas Utilities comments state that they should be exempt from any rate reduction due to the Tax Cut Act because even with those savings, the companies will not have excessive returns on equity.[111] Further, the Joint Gas Utilities argue that several of the utilities may have unreasonably low returns on equity.[112] This argument has no merit. The Tax Cut Act reduced the corporate federal income tax from 35% to 21%. The Joint Gas Utilities' rates must now be calculated with a 21% tax rate. The Joint Gas

[110] Ohio Gas Comments at 7.

[111] Joint Gas Utilities Comments at 2.

[112] *Id*. at 2.

Utilities' returns on equity are a distinct and separate matter. The Tax Cut Act should not be used to bolster utility earnings at customers' expense. If a utility believes that it is no longer earning a just and reasonable return on its investment, then it is free to request a rate increase through a base rate case. The Tax Cut Act is now federal law and must be implemented accordingly.

C. OCC's Response to Non-Utility Parties' Initial Comments

1. OEG is incorrect in its analysis that the PUCO lacks the authority to reduce utilities' base distribution rates to reflect the lower federal income tax rate that utilities now pay.

Ohio Energy Group ("OEG") questions the PUCO's authority to reduce utility base distribution rates as a result of the Tax Cut Act, stating that the PUCO's "legal authority to flow through [Tax Cut Act] savings associated with base distribution rates may be limited."[113] As OCC has explained in detail in these reply comments and in its initial comments, the PUCO has clear authority under R.C. 4905.26 and 4909.16 to (i) determine that utilities' base rates are unjust and unreasonable as a result of the reduction in federal income tax rates under the Tax Cut Act, and (ii) order a remedy by requiring utilities to reduce charges to customers.[114] OEG's concern that the PUCO may not have authority to reduce base rates is therefore unfounded.

[113] Comments of the Ohio Energy Group Regarding Effects on Retail Rates of Tax Cuts and Jobs Act at 11 (Feb. 15, 2018) (the "OEG Comments").

[114] *See* OCC Initial Comments at 2-5.

a. OEG misplaced its reliance on The PUCO's use of the SEET process as a means to protect consumers because the SEET process lacks protections to guarantee that customers will receive the benefits of the Tax Cut Act.

In light of its (misplaced) concern regarding the PUCO's authority to reduce rates, OEG notes that the significantly excessive earnings test, or SEET, could be a "last line of defense" to "ensure that the Ohio utilities do not unduly retain the tax savings...."[115] But as OEG acknowledges, the SEET process is deeply flawed.

For example, OEG concedes that some revenues are excluded from the SEET.[116] Excluding revenues that potentially include recovery for federal income tax would allow utilities to keep the benefits of the Tax Cut Act and pass them on to shareholders, not customers. Even if those revenues were included, SEET does not trigger refunds until the utility has earned a return that is "significantly in excess" of the return earned by comparable companies.[117] And as OEG correctly concludes, the PUCO has applied a threshold in recent SEET cases that "is so high as to largely be irrelevant."[118] In other words, utilities could be allowed to keep a large portion, if not all, of the Tax Cut Act savings before being required to refund any to customers.

Because the PUCO has the authority under R.C. 4905.26 and R.C. 4909.16 to provide relief to customers, there is no need to fall back on the SEET as a last line of defense, especially where the SEET provides virtually no protection for customers as

[115] OEG Comments at 11.

[116] *Id.* at 11-12.

[117] R.C. 4928.143(F).

[118] OEG Comments at 12.

currently applied. The PUCO should reduce rates to reflect utilities' tax savings and should not rely on the SEET to protect customers.[119]

b. The PUCO should require transparency in implementing OPAE's request that utilities demonstrate the basis for rate reductions.

OCC agrees with Ohio Partners for Affordable Energy's ("OPAE") recommendation that utilities should be required to file requests for rate reductions and include financial information.[120] OPAE also recommends that the utilities be required to submit financial information to the PUCO Staff, including, among other things, operating income statements and supporting tax workpapers and before and after deferred income taxes and accumulated investment tax credits.[121] OCC agrees with this recommendation but clarifies that (i) the information should be made available to all parties, not just the PUCO Staff, and (ii) the information should be filed on the docket and available to the public, consistent with R.C. 4905.07, R.C. 4901.12, and Ohio Administrative Code 4901-1-24(D).

Under R.C. 4905.07, "all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." The PUCO has noted that R.C. 4901.12[122] and R.C. 4905.07 "provide a strong presumption in favor of disclosure, which the party claiming

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[119] Of course, to the extent utilities do in fact earn significantly excessive earnings, they should be required to provide a refund to customers consistent with R.C. 4928.143.

[120] OPAE Comments at 6.

[121] Ohio Partners for Affordable Energy's Motion to Intervene and Memorandum in Support and Comments at 6 (Feb. 15, 2018) (the "OPAE Comments").

[122] Under R.C. 4901.12, all proceedings of the PUCO, all documents, and all records are public records.

protective status must overcome."[123] Ohio Administrative Code 4901-1-24(D) specifies that any protective order "shall minimize the amount of information protected from public disclosure." To ensure a fair, open process, all interested parties should have the opportunity to review utilities' financial information and rate reduction applications.

III. CONCLUSION

This case is about customers timely receiving the benefits of the lower federal income tax rates under the Tax Cut Act because otherwise customers are being overcharged for utility service. That is not just or reasonable. Customers, not shareholders, pay the tax burdens of utilities. Customers, not shareholders, should get the benefits of lower taxes that utilities will pay under the Tax Cut Act.

Contrary to the numerous utility comments, this is not a case about utility profits. It is not about infrastructure development. It is not about cash flows, or utility debts, or credit ratings, or rates of return. These issues distract from the real issue at stake: fair application of the Tax Cut Act to reduce customers' bills.

Ohio's utilities are looking for a way to convert their customers' dollars into utility shareholder dollars—plain and simple. The PUCO should reject these unlawful and unreasonable proposals. Instead, the PUCO should adopt OCC's recommendations, which are straightforward and fair to all parties, including customers and utilities.

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[123] *In re Joint Application of the Ohio Bell Tel. Co. & Ameritech Mobile Servs., Inc. for Approval of the Transfer of Certain Assets,* Case No. 89-364-RC-ATR, Opinion & Order (Oct. 18, 1990), 1990 Ohio PUC LEXIS 1138, at *5.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Reply Comments was served on the persons stated below via electronic transmission, this 7th day of March 2018.

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