BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

March 7, 2018

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I. INTRODUCTION

On February 15, 2018, numerous parties filed comments in this case on: 1) those components of utility rates that the Commission will need to reconcile with the Tax Cuts and Jobs Act of 2017 ("TCJA"), which reduced the federal corporate income tax rate from 35 percent to 21 percent effective January 1, 2018; and 2) the process and mechanics for how the Commission should do so.[1] Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies") appreciate the opportunity to reply to the comments of certain parties, including: 1) Environmental Defense Fund, Ohio Environmental Council, Environmental Law & Policy Center, Natural Resources Defense Council, and Sierra Club ("Environmental Advocates"); 2) Northeast Ohio Public Energy Council ("NOPEC"); 3) Northwest Ohio Aggregation Coalition ("NOAC"); 4) The Office of the Ohio Consumers' Counsel ("OCC"); and 5) the Ohio Energy Group ("OEG").

In their initial comments, the Companies explained why the impacts of the TCJA need to be considered for each utility individually. They also described the appropriate treatment of the impacts of the TCJA on their retail rates pursuant to their Commission-approved Electric Security Plan ("ESP") IV case,[2] which includes the Companies' base distribution rate freeze through May 31, 2024. While the Companies will not repeat their initial comments here, the benefits to customers of the base distribution rate freeze cannot be overstated. Since 2009, customers have benefitted from predictable distribution rates and protection from increases in the Companies' costs of providing distribution service. Customers can count on those benefits for another six years. In addition, the Companies' initial comments detailed their proactive efforts to update riders

[1] Case No. 18-47-AU-COI, Entry at ¶ 4.

[2] Case No. 14-1297-EL-SSO.

to reflect the impacts of the TCJA. Customers have already started to realize the benefits of these efforts starting on March 1, 2018, and the total of which is almost $40 million of annual savings to customers.

In these Reply Comments, the Companies will respond to and rebut suggestions made by other parties that are either not relevant to the scope of this proceeding, have already been addressed by the Commission, or are otherwise not applicable to the Companies. The Companies respectfully recommend that the Commission reject these suggestions.

II. THE ELECTRIC DISTRIBUTION UTILITIES THAT FILED COMMENTS AGREE THAT THE IMPACT OF THE TCJA SHOULD BE DETERMINED ON A CASE-BY-CASE BASIS.

As an initial matter, the electric distribution utilities that filed comments agree that each utility faces different circumstances, and that the TCJA will impact them in varying ways and degrees. For example, as the Companies indicated in their initial comments, the Companies have a base distribution rate freeze until May 31, 2024, and the impact of the TCJA on base distribution rates can be addressed in the next base distribution rate proceeding.[3] Since this is not the case for other utilities, those other utilities will require different approaches to identifying the TCJA's impacts. Because different utilities face different circumstances, the Companies encourage the Commission to adopt a flexible approach in this proceeding.

III. THE COMPANIES HAVE TAKEN ALL NECESSARY ACTIONS TO INCORPORATE THE IMPACT OF THE TCJA IN THEIR DISTRIBUTION MODERNIZATION RIDER.

A. Comments that the Commission should reconsider Rider DMR are outside the scope of this proceeding.

In their initial comments, the Environmental Advocates argue that the Commission should re-evaluate the impact of its Fifth Entry on Rehearing in the Companies' ESP IV case ("Fifth

[3] Companies' Comments at 12.

Entry"),[4] which approved the Distribution Modernization Rider ("Rider DMR").[5] As the Commission indicated in its Fifth Entry, the purpose of Rider DMR is to address a need for credit support for the Companies in order to "ensure that the Companies have access to capital markets in order to make investments in their distribution system."[6] The Environmental Advocates have not demonstrated how the TCJA would change the Commission's rationale in approving Rider DMR. Moreover, this proceeding's purpose is not to re-evaluate the Commission's rationale for approving a utility's riders. For that reason, the Commission should reject the Environmental Advocates' comment on this issue.

B. OEG's claim that the Companies did not make an appropriate adjustment to Rider DMR reflecting the TCJA is incorrect.

OEG argues that the Companies did not make an appropriate adjustment to Rider DMR to reflect the TCJA.[7] This is incorrect. As explained in the Companies' reply comments in Case No. 17-2280-EL-RDR, the Companies proactively updated Rider DMR on January 12, 2018, to flow the benefits of the lower federal income tax rate back to customers starting March 1, 2018. On February 28, 2018, the Commission approved the proposed Rider DMR rates as filed by the Companies.[8] Staff correctly found that Rider DMR "accurately reflect[s] the new tax rates."[9] The new Rider DMR rates, which became effective March 1, 2018, reflect a reconciliation of the lower income tax rate *as of January 1, 2018*. Accordingly, customers are already receiving the benefit

[4] Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing, (October 12, 2016).

[5] Environmental Advocates Comments at 2.

[6] Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at 87-88.

[7] OEG Comments at 10.

[8] Case No. 17-2280-EL-RDR, Commission Order dated February 28, 2018.

[9] Case No. 17-2280-EL-RDR at Staff Review and Recommendation. Notably, the OCC filed objections to Staff's Review and Recommendation on this issue. After the Companies' filed a reply, the OCC withdrew this portion of their objections.

of a lower income tax rate in Rider DMR. Thus, the Commission should disregard OEG's comment.

IV. OTHER PARTIES' COMMENTS REGARDING CERTAIN RIDERS OF THE COMPANIES ARE PREMATURE OR MISPLACED.

A. It is premature to pursue any changes to the Companies' Rider NMB.

The Companies recover non-market based services costs, including transmission costs, through their Commission-approved Non-Market Based Services Rider ("Rider NMB"), which is updated and reconciled annually. The underlying costs recovered in Rider NMB are charged to the Companies pursuant to rates which are approved by the Federal Energy Regulatory Commission ("FERC") and set forth in the PJM Interconnection LLC Open Access Transmission Tariff ("OATT"). These rates are outside of the Companies' responsibility and control. Any changes to the rates in the PJM OATT as a result of the TCJA, including any guidance issued by FERC, will eventually be reflected in the costs incurred by the Companies and reconciled in Rider NMB.[10]

OEG recommends that the Commission should attempt to mitigate the difference between the timing of the changes in transmission rates and the reflection of those changes in Rider NMB by directing each utility: 1) to estimate the revenue requirement equivalent of annual savings in income tax expense and amortization of excess Accumulated Deferred Income Taxes ("ADIT"); and 2) to make an interim adjustment to reduce their retail transmission cost recovery rider rates. OEG argues that this approach will be revenue-neutral to the utilities, is consistent with the Commission's rules on transmission cost recovery, and will help to smooth out rate impacts to customers over the 2018-2020 period.[11]

[10] OEG Comments at 5-7.

[11] *Id*. at 7-8.

OEG's proposed approach, however, is premature and should be rejected. The Companies do not have enough information to be able to accurately estimate the impact of the TCJA on the PJM OATT transmission rates. It is not known what actions FERC will take to address the TCJA's impacts or when FERC might take those actions. Given this uncertainty, moving forward immediately to seek an adjustment to Rider NMB would knowingly create an inappropriate under-recovery for the Companies, and could create additional volatility for customers. Instead, the Companies will wait to see how FERC addresses the TCJA's impacts before proceeding with any adjustment to their Rider NMB. Once there is clarity around how changes to the PJM OATT transmission rates may impact the Companies' transmission costs, the Companies will work with Commission Staff to determine what interim changes to Rider NMB, if any, should be pursued. An interim filing would be appropriate only if it reflects a reduction in PJM's charges being billed to the Companies.

B. The Companies have filed to include all applicable changes to Rider DCR.

In its comments, OEG includes recommendations for how the impacts of the TCJA should be treated in distribution investment riders across the state, which would include the Companies' Delivery Capital Recovery Rider ("Rider DCR").[12] As approved by the Commission in the Companies' ESP IV, Rider DCR provides the Companies an opportunity to earn a return of and on plant in service which was not included in the rate base from the Companies' last distribution rate case, less growth in accumulated depreciation reserve and ADIT associated with plant in service since the Companies' last distribution rate case. This specific calculation of Rider DCR has been in place since its inception in 2012. Rider DCR includes an after-tax equity return and ADIT, which would be impacted by the TCJA.

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[12] *Id.* at 2.

OEG recommends how the impacts of the TCJA should be incorporated into the distribution investment riders, including impacts on federal income tax expense and ADIT since January 1, 2018.[13] OEG's recommendation, however, fails to recognize that on January 12, 2018, the Companies filed updates to their Rider DCR which incorporated the impacts of the TCJA, consistent with the terms and conditions authorized by the Commission in the Companies' ESP IV. Moreover, the Companies' Rider DCR filing is currently being audited in Case No. 17-2009-EL-RDR. As such, any review or recommendations as to the impact of the TCJA should be addressed in that proceeding. Therefore, OEG's recommendation is outside the scope of this proceeding and should be rejected.

V. OTHER PARTIES' RECOMMENDATIONS TO INSTITUTE NEW RESTRICTIONS OR REPORTING REQUIREMENTS ON THE COMPANIES ARE NOT APPROPRIATE.

A. No new restrictions can be placed on the Companies' spending outside of the ESP IV.

The Environmental Advocates argue that, should the Commission not refund the entirety of any benefits of the TCJA, the Commission should ensure that the utilities spend any tax savings on special projects.[14] As explained in the Companies' initial comments, the impacts of the TCJA on their retail rates are prescribed by their Commission-approved ESP IV. Instituting new restrictions on the Companies for any retained funds associated with the TCJA would be inappropriate, and would contradict the ESP IV.

[13] *Id.* at 8-9.

[14] Environmental Advocates Comments at 5-6.

B. The Companies will document all calculations and workpapers supporting the applicable adjustments to their riders impacted by the TCJA.

NOPEC argues that utilities should be required to provide proposed calculations of the difference between pre-TCJA and post-TCJA obligations and to flow through the difference to customers.[15]

This recommendation is unnecessary and should be rejected. As the Companies explained in their initial comments, all applicable riders impacted by the TCJA will be updated. The calculations supporting the necessary adjustments to these applicable riders will be documented in workpapers that will be filed by the Companies or otherwise made available to Staff for review. NOPEC has not demonstrated how any other information is necessary or helpful to the Commission. Therefore, the Commission should not require any further information from the utilities.

VI. PARTIES' ARGUMENTS THAT ALL RIDERS AND BASE RATES SHOULD BE SUBJECT TO REFUND ARE INAPPLICABLE TO THE COMPANIES AND COULD VIOLATE THE RULE AGAINST RETROACTIVE RATEMAKING.

The Environmental Advocates and OCC argue that all riders and base rates should be subject to refund to reflect the TCJA.[16] As the Companies indicated in their initial comments, they will update all applicable riders for the impacts of the TCJA and have already take proactive actions to do so. Therefore, no further modification of the Companies' riders to make them "subject to refund" as a result of the TCJA is necessary.[17] And the Companies' base distribution

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[15] NOPEC Comments at 8.

[16] Environmental Advocates Comments at 5; OCC Comments at 6-8.

[17] Further, this Commission has ruled on no fewer than three occasions "that Rider DMR should not be subject to refund as this would be counterproductive to the purpose of the rider and impose additional risks on the Companies." Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing at 33.

rates are frozen until May 31, 2024, which means that no adjustments up or down, by refund or otherwise, are reasonable or possible.

The Companies' proactive modification of its riders substantially benefitted customers and avoided a violation of the rule against retroactive ratemaking. It is well established that utilities are permitted to charge only the filed and approved rates, and the Commission is authorized to change those rates only prospectively. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957). Therefore, the Commission can modify rates and riders only prospectively in a rate proceeding (not a generic industry proceeding) and, in the meantime, the rates and riders are implemented using the terms and conditions that were previously approved by the Commission. Once rates are established, they are not adjusted until new rates are set in a future proceeding. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976). In light of the Companies' immediate response to the TCJA, which has resulted in nearly $40 million in annual savings for their customers, the Environmental Advocates and OCC's recommendation is unnecessary and unreasonable and should be rejected.

VII. THE COMMISSION SHOULD REJECT OCC'S PROPOSAL THAT CUSTOMERS SHOULD RECEIVE AN INTERIM CREDIT REFLECTING A CHANGE IN ADIT.

OCC argues that all Ohio public utilities should estimate the amount of excess ADIT resulting from the TCJA and should immediately begin providing a monthly credit to customers based on that estimate.[18] OCC's recommendation, however, overlooks that the Companies have already updated, or will update, all applicable riders for the TCJA's impacts, including any applicable impacts on ADIT. OCC's recommendation also overlooks provisions of the

[18] OCC Comments at 13-14.

Companies' Commission-approved ESP IV, under which the Companies are in a base distribution rate freeze through May 31, 2024. The TCJA fits none of the specific exceptions to the base distribution rate freeze that are allowed under ESP IV. As the Companies' initial comments explained, a one-off adjustment to one of the many ESP IV benefits to reflect the TCJA's impacts would disrupt the balance of interests among parties, as well as the rate stability and other customer benefits provided by the base distribution rate freeze and associated provisions. This disruption would be contrary to the Commission's approval of ESP IV and regulatory policy. Under ESP IV, tthere are no other changes to the Companies' retail rates to be implemented. Therefore, OCC's proposal has no bearing on the Companies during the ESP IV period, and the Commission should reject OCC's proposal as it relates to the Companies.

VIII. R.C. 4909.16 IS INAPPLICABLE TO THIS INVESTIGATION.

OCC argues that R.C. 4909.16 grants the Commission "broad authority" to modify rates and "immediately order utilities to modify all rates."[19] As the Companies' initial comments indicated, R.C. 4909.16 only grants the Commission authority to make temporary changes to rates in response to an emergency, *i.e.*, when the 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." Additionally, the Commission cannot grant emergency relief under R.C. 4909.16 if the emergency request is filed merely to circumvent, and as a substitute for, permanent rate relief under R.C. 4909.18.[20] These conditions are not satisfied here because there is no emergency and, absent extraordinary relief, the Companies would not be imperiled. The mere adjustment of the federal corporate income tax rate in the TCJA does not constitute an

[19] OCC Comments at 4-6.

[20] *In the Matter of 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 (Sept. 2, 2009).

emergency and does not satisfy the requirements for a rate change under R.C. 4909.16. The Commission should reject this suggestion.

IX. COMMENTS REGARDING THE SIGNIFICANTLY EXCESSIVE EARNINGS TEST ARE OUTSIDE OF THE SCOPE OF THIS PROCEEDING

At the end of each year, pursuant to R.C. 4928.143(F), the Companies file the results of their significantly excessive earnings test ("SEET"), in which the Commission considers whether each utility's earnings are significantly in excess of the return on equity earned by a group of companies that face comparable business and financial risk ("peer group"). OEG argues that the SEET should be updated going forward to reflect the circumstances presented by the TCJA.[21] Specifically, OEG states that the standard deviation methodology that has been used in prior SEET cases results in a threshold at which the utility's earnings would be deemed significantly excessive ("SEET Threshold") that is too high and no longer appropriate because the utilities no longer own generation. As an alternative, and without demonstrating its methodology, OEG suggests that the SEET Threshold could be set at 200 basis points above the mean return on equity earned by the peer group, since "publicly-traded companies with comparable business and financial risk to Ohio's electric utilities will all enjoy the benefits of the TCJA."[22]

Specific recommendations as to how the SEET should be administered are outside of the scope of this proceeding and are premature. As an initial matter, by claiming that the standard deviation methodology for the SEET Threshold is no longer applicable because the utilities no longer own generation, OEG overlooks the fact that the Commission Staff has employed this methodology in the Companies' recent SEET cases and the Commission has accepted it, even though the Companies have not owned generation in over a decade. In addition, it is not clear that

[21] OEG Comments at 11-13.

[22] *Id.* at 13.

the peer group "will all enjoy benefits of the TCJA," or that any impacts from the TCJA would warrant a change to the calculation of the SEET Threshold that has been accepted by the Commission in recent years. Clearly, instituting changes to the administration of the SEET is beyond the scope of this proceeding.

X. ANY CLAIMS SUGGESTING THAT THE COMPANIES' APPROACH IN THIS PROCEEDING IS UNLAWFUL SHOULD BE DISREGARDED.

A. The Companies' approved ESP IV dictates the appropriate treatment of the impacts of the TCJA in retail rates.

In their initial comments, NOAC asserts – without citing any legal authority – that under Ohio law the Companies must be required to only include in retail rates the level of income tax expenses paid to the IRS.[23] As an initial matter, NOAC's comments are unfounded legally because single-issue ratemaking for tax adjustments generally is not authorized.[24] Also, NOAC's claims ignore well-established ratemaking practices. It is not practical for regulated utility retail rates to reflect exactly the amount of income tax expenses paid to the IRS every year, for several reasons. First, amounts owed to the IRS could include activity that is not jurisdictional for setting regulated rates, such as jobbing and contracting revenues and expenses. Second, base rates are established based on an annual test period and remain in place until the next case. Naturally, expenses could change from levels established in the test year. Third, there could be timing differences between when the taxes are recognized as expense and included in retail rates, compared to when the taxes are paid to the IRS. As a final matter, NOAC overlooks the fact that the treatment of income taxes in the Companies' retail rates is dictated by their Commission-approved ESP IV. The Companies'

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[23] NOAC Comments at 1-2: "[t]he appropriate course of action is to require the utility to identify each tax charge and reduce it to just what the company paid to the IRS. The concept is simple and Ohio law is clear. Utilities may only collect for an expense like taxes. By law, the company cannot collect more than that tax itself."

[24] *See Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 186, 429 N.E.2d 444 (1981) (rejecting excise tax adjustment clause).

initial comments explained in detail the applicable TCJA impacts. For these reasons, NOAC's assertions that the Companies' approach to addressing TCJA impacts is counter to Ohio law are unfounded, and should be disregarded by the Commission.

B. There are no reasonable grounds to conclude that the Companies' rates are unjust and unreasonable under R.C. 4905.26.

In its Comments, NOPEC "proposes that the [Commission] issue an entry under R.C. 4905.26 finding that reasonable grounds exist that Ohio's regulated utilities' rates are unjust and unreasonable."[25] OCC likewise asserts that the Commission should open a complaint proceeding under R.C. 4905.26.[26] Attempting to support its argument that rates do not need to "be changed in a separate proceeding,"[27] OCC incorrectly relies on *In re the Commission's Investigation into the Policies & Procedures 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* where the Commission ordered the Companies to amend their line extension tariff.[28] This case is clearly not applicable because it neither involved an element of base rates nor was a result of a new law. Rather, it involved the Commission's investigation into formal and informal complaints regarding the Companies' (along with AEP and Mon Power) line extension practices.[29] Moreover, a Commission complaint under R.C. 4905.26 would require the Commission to not only bear the burden of proof[30] but also conduct a full base rate case in order to determine whether a utility's rate is unjust or unreasonable. OCC and NOPEC

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[25] NOPEC Comments at 8.

[26] OCC Comments at 4-6.

[27] *Id.* at 3.

[28] Case No. 01-2708-EL-COI, Opinion & Order (Nov. 7, 2002).

[29] *Id.* at 5.

[30] *Grossman v. Pub. Util. Comm.*, 5 Ohio St. 2d 189 (1966).

have also not demonstrated that there are reasonable grounds for such a complaint under R.C. 4905.26. For these reasons, the Commission should reject NOPEC and OCC's call for a complaint under R.C. 4905.26.

XI. CONCLUSION

The Companies thank the Commission for the opportunity to provide reply comments on this important topic.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 7, 2018, the foregoing document was filed on the Public Utilities Commission of Ohio’s Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document,

/s/ *Carrie M. Dunn-Lucco*
One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company