BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY COMMENTS OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

On December 20, 2017, the United States Congress took a substantial step to improve and stimulate the country's economy by putting more money in the hands of companies doing business here. Specifically, Congress enacted the Tax Cuts and Job Acts of 2017 (TCJA), which modified the federal tax system and became effective on January 1, 2018. One significant change by the TCJA was to lower the federal corporate income tax rate from 35% to 21% with the intent and purpose of giving tax relief to American companies, which would then result in savings to American consumers. The TCJA also effects certain tax calculations applicable to regulated public utilities, such as accumulated deferred income taxes (ADIT).

The TCJA tax reductions are particularly important to manufacturers, who are large consumers of utility services who also pay for the regulated utilities' tax obligations through their regulated utility rates. In proscribing the amounts that rate-regulated utilities can collect from customers, Ohio law mandates that the regulated utilities only collect rates from customers that are just and reasonable and not more than the charges allowed by law.[1] Specifically, R.C. 4905.22 states: "[a]ll charges made or demanded for any service rendered, or to be rendered,

[1] R.C. 4905.22.

shall be just, reasonable, and *not more than the charges allowed by law* or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, *or in excess of that allowed by law* or by order of the commission."[2] Additionally, for any charges established through Chapter 4928, Revised Code, the Public Utilities Commission of Ohio (Commission) must "ensure the availability to consumers of . . . reasonably priced retail electric service."

Through this proceeding, the Commission should enforce Ohio law, and, in doing so, ensure that cost relief resulting from the TCJA is passed on to Ohio's utility customers immediately or as soon as practicable. The Ohio Manufacturers' Association Energy Group (OMAEG) supports the comments offered by a number of entities that outline an effective, practical means through which that goal could be achieved. OMAEG opposes, however, comments filed on behalf of many utility companies that, if adopted as policy, would limit or delay cost relief to customers. Pursuant to the Entry issued on February 20, 2018 in this proceeding, OMAEG hereby files its reply comments.

II. PROCEDURAL HISTORY

On January 10, 2018, the Commission initiated this investigation in the above-captioned proceeding in order to investigate the financial impact of the TCJA on Ohio's regulated utility companies and to ensure that the tax relief received by Ohio utilities would be passed on to Ohio ratepayers.[3] Specifically, the Commission solicited comments from all of Ohio's rate-regulated utilities and other interested stakeholders discussing the impact that the TCJA will have on utility

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[2] Id. (emphasis added).

[3] Entry (January 10, 2018).

rates and possible mechanics and processes for addressing those impacts.[4] In that same Entry, the Commission also directed the utilities to record on their books their estimated reduction in federal income tax as a deferred liability in the appropriate accounts.[5]

Subsequently, Duke Energy Ohio, Inc. (Duke), The Ohio Power Company (AEP Ohio), The Dayton Power & Light Company (DP&L), The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, Ohio EDUs) applied for rehearing, challenging various provisions of the Commission's January 10, 2018 Entry.[6] Given that the Commission clearly and indisputably has the authority to order the COI and require all utilities to adjust their rates to pass on the benefits of the tax savings to Ohio ratepayers, the EDUs' Application for Rehearing was opposed by a number of parties, including OMAEG.[7]

Meanwhile, several parties filed comments on February 15, 2018 regarding the impact of the TCJA. After receiving those comments, the Commission solicited reply comments from all interested parties to be filed by March 7, 2018.[8]

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4 Id. at ¶¶ 4-5.

5 Id. at ¶ 7.

6 See Joint Application for Rehearing (February 9, 2018).

7 See, e.g., Ohio Manufacturers' Association Energy Group's Memorandum Contra Joint Application for Rehearing (OMAEG Memo Contra) (February 21, 2018); Memorandum Contra the Electric Distribution Utilities' Joint Application for Rehearing by the Office of the Ohio Consumers' Counsel (February 20, 2018); The Kroger Company's Memorandum Contra Joint Application for Rehearing (February 20, 2018); Memorandum Opposing the Joint Application for Rehearing by Industrial Energy Users-Ohio (February 20, 2018).

8 Entry at ¶ 5 (February 20. 2018).

II. DISCUSSION

A. The Commission Should Direct the Utilities to Implement Tax Reductions Resulting from the TCJA as Soon as Practicable.

Although comments from some utilities have suggested a need to address the impact of the TCJA on a utility-by-utility basis,[9] the Commission may, and should, decide in this proceeding general principles, policies, and procedures regarding how the TCJA will be implemented, under what authority it will be implemented, and the time frame within which it will be implemented. OMAEG recognizes that each utility regulated by the Commission may have distinct characteristics that need to be considered in implementing some of the impacts of the TCJA. As such, OMAEG does not necessarily oppose the ultimate use of individualized proceedings to implement the changes in the tax law on a micro level for each utility, per se. OMAEG does oppose, however, the use of a utility's purported individual circumstances as a mechanism by which utilities can delay passing benefits received from the TCJA for years into the future, as AEP Ohio and FirstEnergy propose.[10] As discussed in greater detail below, the Commission has authority and ample means to address the TCJA now, regardless of the concerns raised in comments filed by some of the utilities.

Moreover, the Commission should use this proceeding to establish broad policies and principles that it can use to achieve consistent results when addressing the TCJA with utilities on

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[9] See, e.g., Comments of the East Ohio Gas Company d/b/a Dominion Energy Ohio at 4 (February 15, 2018) (Dominion Comments); Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 1 (February 15, 2018) (FirstEnergy Comments); Comments of Ohio Power Company at 1 (February 15, 2018) (AEP Ohio Comments).

[10] AEP Ohio Comments at 3, 5 (arguing that base rates can only be changed through a proceeding under R.C. 4909.18 and stating that AEP Ohio is not obligated to file a Base Rate case until 2020); FirstEnergy Comments at 4-12 (arguing that the Commission should maintain the Companies' base rate freeze until 2024 and not adjust rates to account for the TCJA until that point).

an individual level in separate proceedings that should occur immediately or in the near future. For instance, the Commission should affirmatively conclude that the benefits utilities receive from the TCJA should immediately and directly flow to customers rather than allow the utilities to retain any monies resulting from the rate reductions in an attempt to bolster utilities' creditworthiness. Next, the Commission should find that it will use its statutory powers to require all utilities to immediately undertake efforts to pass the tax relief resulting from the TCJA onto customers where appropriate. Moreover, given that some utilities are currently in the midst of pending rate cases, the Commission should establish uniform procedures for addressing the impact of the new law in those pending cases, as OMAEG suggested in its Memorandum Contra the Electric Distribution Utilities' Application for Rehearing.[11] Finally, the Commission should conclude that it will reject the establishment and collection of new charges from customers—whether through a rider or through base rates—that do not incorporate the effect of the TCJA tax reductions.

Taking the steps proposed by OMAEG herein will allow the Commission to expeditiously resolve these issues as they apply to customers of each utility either through or contemporaneously with this investigation.

B. Under No Circumstances Should the Commission Permit Utilities to Use the TCJA to Bolster Their Own Creditworthiness or for Any Other Purpose that Does Not Result in Tax Savings to Customers.

The Commission should reject outright any attempt by a utility to retain the benefits of the TCJA in the name of maintaining creditworthiness. In their comments, Duke and DP&L make the argument that, rather than pass the benefits to customers through immediate reductions in rates, utilities should be permitted to use the benefits of the TCJA to improve their credit

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[11] See OMAEG Memorandum Contra at 8.

metrics so that access to capital markets is not jeopardized.[12]

However, DP&L does not offer evidence that it is currently having difficulty accessing capital as a result of its credit ratings.[13] DP&L also does not offer evidence to support the contention that passing the tax reduction benefits resulting from the TCJA on to customers would, in fact, cause its credit ratings to decline to a level that is below investment grade.[14] Indeed, DP&L only conclusorily states that "[a]ny reduction of free cash flow – including a rate reduction associated with tax reductions – will impair DP&L's ability to pay down debt, achieve an investment grade credit rating, and implement grid modernization."[15] Similarly, Duke notes that Duke Energy Corporation's credit *outlook* was downgraded to negative by Moody's due to the financial impact of the TCJA, but, importantly, does not state that its credit *rating* is in danger of falling below investment grade, as was the cited rationale by the Commission in the cases Duke cites.[16]

The Commission should reject the proposal to allow a utility to retain monies received from customers to pay tax liabilities that no longer exist. Utilities should also not be allowed to continue to charge customers rates based on taxes that the utilities will never be obligated to pay. Under no circumstances should Ohio's utility customers be forced to pay rates that include the collection of outdated and inflated federal tax obligations.

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[12] See Initial Comments of Duke Energy Ohio, Inc. at 12-15 (February 15, 2018) (Duke Comments); Comments of the Dayton Power & Light Company at 3-4 (February 15, 2018) (DP&L Comments).

[13] See DP&L Comments at 3-4.

[14] Id.

[15] Id. at 4.

[16] Duke Comments at 13-14.

C. The Commission Has Statutory Authority to Immediately Address the TCJA and Need Not Wait Until Each Respective Utility Files a New Base Rate Case to Pass Benefits onto Customers.

The Commission should use its statutory authority and act swiftly to pass the benefits resulting from the TCJA on to utility customers. A customer of an Ohio utility should not be forced to wait two, four, or, in some cases, six years to realize rate reductions as a result of the TCJA. In their comments, several utilities argue the exact opposite. Those utilities suggest that the Commission is constrained by Ohio law regarding the establishment of base rates and cannot adjust those rates downwards outside of a new base rate or electric security plan (ESP) case.[17]

These arguments are unsupported by Ohio law, which clearly gives the Commission authority to immediately address the changes brought about by the TCJA. As an initial matter, R.C. 4909.16 explicitly states that when the Commission deems it necessary to prevent injury to the interests of the public, it may "temporarily alter" existing rates of any public utility "for such length of time as the commission prescribes." Relevant to arguments set forth by some utilities that rates set through distribution rate cases or ESPs are untouchable by the Commission as those rates can only be changed prospectively through a rate proceeding under R.C. 4909.18, R.C. 4909.16 broadly gives the Commission power to change "*any* existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state."[18] Moreover, R.C. 4905.22 mandates that the regulated utilities only collect rates from customers that are just and reasonable and *not more than the charges allowed by law*.[19] To ensure that rates are just and reasonable, R.C. 4905.26 allows the Commission to initiate its own investigation of the rates

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[17] See, e.g., FirstEnergy Comments at 12 (arguing that the Companies are not required to address the TCJA in base rates until they file their next base distribution rate case in 2024); AEP Ohio Comments at 5-6 (contending that the Commission cannot adjust rates outside of a base rate case).

[18] R.C. 4909.16 (emphasis added).

[19] R.C. 4905.22 (emphasis added).

currently being charged by utilities and make adjustments as it deems necessary. Specifically, the Commission is authorized to determine whether any rate charged is "in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law . . ."[20] Additionally, for the reasons discussed above, arguments that customer refunds can only be accomplished through the Significantly Excessive Earnings Test are also erroneous.

As noted in OMAEG's Memorandum Contra,[21] the Supreme Court of Ohio has already rejected the position that the Commission cannot adjust rates to implement the findings it makes in a Commission investigation. Specifically, the Court found that prohibiting the Commission from actually adjusting rates it identifies as being in need of adjustment "strips [R.C. 4905.26] of its usefulness."[22] In reaffirming that holding, the Court similarly rejected the contention, made by AEP Ohio in its comments,[23] that rates can only be changed under R.C. 4909.18 when it held that the Commission "may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable."[24] In another case, the Court stated that "[w]e have repeatedly held that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding such as this, without compelling the affected utility to apply for a rate increase under R.C. 4909.18."[25] Importantly, when the Court made that statement, it was referring to a proceeding under R.C.

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20 R.C. 4905.26.

21 See OMAEG Memo Contra at 5-7; see also Comments and Recommendations to Reduce Ohioans' Utility Bills as a Result of the Federal Tax Cuts and Jobs Act of 2017 by the Office of the Ohio Consumers' Counsel at 2-6 (February 15, 2018) (OCC Comments).

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

23 See AEP Ohio Comments at 5 (stating that base rates can only be changed prospectively under R.C. 4909.18).

24 *Lucas County Commissioners v. Public Utilities Commission*, 80 Ohio St. 3d 344, 347 (1997).

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

4905.26, and not the R.C. 4909.18 proceeding or an ESP proceeding.[26]

The Supreme Court of Ohio has also rejected DP&L's argument[27] that the Commission must conduct hearings in order to modify rates set under an ESP.[28] Specifically, the Court held that the Commission may take "immediate action to protect the public" when it determines that doing so is necessary.[29] Ohio law unambiguously vests the Commission with the power to take any actions that it deems necessary to protect customers from being unfairly and unreasonably charged by utilities for tax expenses which no utility will ever be obligated to pay.

D. The Commission Should Reject Any Proposed Charge that Does Not Account for the TCJA.

The Commission's regular business has, of course, not been halted as a result of this proceeding. Utilities continue to file quarterly updates to riders and some utilities have active base rate cases ongoing before the Commission. Many utilities note that regular updates to Commission-approved riders will pass some of the TCJA relief on to customers. While the Commission has the authority, as discussed above, to modify rates set in prior proceedings to account for the TCJA, its task with regard to these pending matters is even simpler. Whether it is confronted with a pending case or a regular rider update, the Commission should not approve any charges based in any part on federal tax laws that no longer exist.

a. For Utilities that Are Currently in a Pending Rate Proceeding, the Commission Should Address the Impact of the TCJA in those Pending Proceedings.

For utilities that have a pending rate proceeding, the Commission should address these issues in those respective cases. If the Commission does not resolve this investigation prior to

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[26] Id.

[27] See DP&L Comments at 11-12.

[28] *Duff v. Public Utilities Commission of Ohio*, 56 Ohio St.2d 367, 377-78, 384 N.E.2d 264 (1978).

[29] Id.

the culmination of the pending rate proceedings, and the changes in federal tax law are not addressed in those proceedings, customers will be deprived of the tax savings until a subsequent proceeding or the Commission's investigation is resolved.

Addressing the tax changes now is also required by Ohio law. For example, the Supreme Court of Ohio has held that it is the Commission's duty to consider changes in tax laws that occur after the test period of a pending rate case.[30] Indeed, the Commission previously followed that directive from the Court when deciding an electric base rate case where the federal tax law had changed after the establishment of the test year. The Commission held that an approach that did not fully account for the new tax rate "misses the point" that a new tax law was in effect and that "rates are being set prospectively."[31] The Commission should not permit any utility currently in a pending rate proceeding to fail to fully account for the tax changes in its new rates, even if the Commission has not concluded this investigation at the time the rates are established.

Moreover, Ohio law regarding retroactive ratemaking and the as-filed rate doctrine would certainly be used by utilities that establish new rates in 2018 based on the old federal tax law in an attempt to prevent later refunds to customers to recognize the lower federal tax rates after the new rates are established through a rate proceeding that included expenses associated with taxes that were no longer in effect. The Commission has stated its intent to pass benefits from the TCJA on to ratepayers.[32] It would therefore be nonsensical to avoid the issues in pending cases that were initiated with the very purpose of establishing new rates. Ratepayers should not be forced to litigate these pending rate cases, have new rates set, and then have to wait for a second

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

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

[32] Entry at ¶ 2 (January 10, 2018).

rate proceeding or the conclusion of the Commission investigation in order to receive the benefits associated with the federal tax rate reductions that are already in effect now.

Some utilities have appropriately recognized the necessity of addressing these matters in pending rate proceedings. The Ohio Gas Company (Ohio Gas) has already addressed the TCJA through a stipulation in its pending case, filed less than three weeks after the Commission opened this matter, that proposes the incorporation of the 21% federal corporate income tax rate set by the TCJA.[33] Similarly, Vectren Energy Delivery of Ohio, Inc. stated in its comments that it intends to incorporate the new tax rates in its forthcoming base rate case.[34] Columbia recognized the need for utilities with pending applications that are impacted by the TCJA to file their proposed reductions to their base rates resulting from the TCJA in the same docket as their applications.[35] Columbia also noted its intent to adjust its base rates in its pending Capital Expenditure Program (CEP) proceeding simultaneously with establishing its new CEP Rider. The natural gas utilities demonstrate that it is exceedingly possible to address the issues presented in this proceeding in a pending rate proceeding, even if the test year for said rate proceeding would not include the impacts of the TCJA.

When it comes to rate cases, the Commission should not do as DP&L proposes and treat a utility's application in a rate case as if it is established fact.[36] The fact that DP&L, or any other utility, submits an application contending that it is under-collecting base rates from customers

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[33] See Comments of Ohio Gas Company at 5 (February 15, 2018) (Ohio Gas Comments), *In the Matter of the Application of the Ohio Gas Company for an Increase in Gas Distribution Rates, et al.*, Case Nos. 11-1139-GA-AIR, et al., Joint Stipulation and Recommendation at 4 (January 26, 2018).

[34] See Comments of Vectren Energy Delivery of Ohio, Inc. at 3 (February 15, 2018) (Vectren Comments).

[35] See Comments of Columbia Gas of Ohio, Inc. at 3 (February 15, 2018) (Columbia Comments).

[36] See DP&L Comments at 2.

does not render that contention true.[37] DP&L may be under-collecting from its customers, or it may not; that is an issue that will certainly be litigated in its pending rate case.[38] That issue does not, however, impact whether or not DP&L must account for the tax reductions in the TCJA in its rates currently being charged to customers. It also does not address whether the rates proposed to be charged to customers by DP&L account for the tax reductions of the TCJA. The Commission has authority to adjust rates as it deems necessary at this time. It can do so now or through DP&L's pending rate proceeding.

Similarly irrelevant is DP&L's contention that it has been charging customers based on a 34% federal corporate income tax rather than 35% since 1991.[39] The fact that DP&L chose not to file an application to adjust for the slightly higher tax rate does not change the Commission's authority to adjust rates based on the TCJA at this time.

b. The Commission Should Require All Rider Updates to Account for the TCJA.

In their respective comments, many utilities noted that some tax relief will come to customers more immediately in the form of regular adjustments to approved riders.[40] Indeed, some utilities have already demonstrated as much through filings made subsequent to the opening of this investigation.[41] OMAEG supports these efforts by the utilities to address the

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[37] See *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates, et al.*, Case No. 17-32-EL-AIR, et al., Application (March 1, 2017) and Staff Report (September 26, 2017) (Staff determining that Duke's base rates should be reduced despite Duke's application stating that they should be increased).

[38] See *In the Matter of the Application of the Dayton Power and Light Company for an increase in Electric Distribution Rates, et al.*, Case No. 15-1830-EL-AIR.

[39] DP&L Comments at 15.

[40] FirstEnergy Comments at 3-4; DP&L Comments at 17-18; Duke Comments at 9-11; AEP Ohio Comments at 4.

[41] Duke Comments at 10 (citing Duke's application to modify its Distribution Capital Investment Rider to reflect the TCJA); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, to Modify Rider DMR Rates*, Entry at ¶ 15 (February 28, 2018).

impacts of the TCJA through rider updates and expects that all future filings to establish new rates under rider mechanisms will account for the impact of the TCJA to the extent that doing so is practical. Should, however, a utility file for a prospective rate that does not account for the TCJA, the Commission should summarily reject that filing.

III. CONCLUSION

The Commission took the appropriate, proactive step in initiating this proceeding in order to address changes to the federal tax law as a result of the TCJA and recognizing the need to pass benefits resulting from the TCJA onto ratepayers. The Commission should use its authority to swiftly provide tax savings to ratepayers. In doing so, the Commission should consider and implement OMAEG's comments and suggestions detailed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via electronic mail on all parties of record on March 7, 2018.

/s/*Kimberly W. Bojko*

Summary: Comments Reply Comments Of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group