

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 OHIO POWER COMPANY

In its January 10, 2018 Entry in this case, the Public Utilities Commission of Ohio (“Commission”) directed utilities to file public comments related to the Tax Cuts and Jobs Act of 2017 (“TCJA”) discussing: (1) “those components of utility rates that the Commission will need to reconcile with the TCJA” and (2) “the process and mechanics for how the Commission should do so.” Entry at ¶ 4 (Jan. 10, 2018) (the “January 10 Entry”). Interested parties filed comments on February 15, 2018. By Entry, the Attorney Examiner established an opportunity to file reply comments by March 7, 2018.

As it noted in its initial comments, Ohio Power Company (“AEP Ohio” or the “Company”) expects that customers will benefit from tax reform through retail utility rates. Each utility in Ohio is uniquely situated, however, and this undertaking is significant and complex. Therefore, the manner in and process by which those benefits are realized should be thorough, methodical, and individually tailored. The most appropriate manner in which to address tax reform impacts for each utility, including AEP Ohio, is through separate, individualized proceedings – and not in this generic all-utility docket. The Company respectfully submits the following reply comments.¹

¹ The Company, along with the other electric distribution utilities (“EDU”), jointly filed an application for rehearing in this docket on February 9, 2018; the points raised in the Application for Rehearing are referenced, in part, in these comments but should be fully

A. A one-size-fits-all approach to this complex and multi-faceted issue is inappropriate and ineffectual; instead, utility-specific solutions should be pursued in utility-specific rate proceedings.

AEP Ohio agrees that it is necessary and appropriate for the Commission to “consider the impacts of the Tax Cuts and Jobs Act of 2017 [(TCJA)] and determine the appropriate course of action to pass benefits resulting from the legislation on to ratepayers.” January 10 Entry at ¶ 1. And there is little doubt that retail customers will realize benefits from tax reform through retail utility rates. But AEP Ohio submits that the details and timing of reflecting tax reform benefits in retail rates must be achieved in a manner that is consistent with each utility’s individual circumstances and existing rate plans and commitments. This means that the Commission should seek to adopt a flexible (but consistent) approach rather than a one-size-fits-all approach.

Utilities are permitted only to charge the filed and approved rates, and the Commission is authorized to change those rates only prospectively. *Keco Industries, Inc. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957). Therefore, the Commission can only modify rates and riders 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). The Commission should not engage in ratemaking in this industry-wide proceeding.

Like the EDUs in their rehearing application and initial comments, other commenters reiterate the 1980’s tax reform experience and recommend that the Commission again facilitate

incorporated when considering the Company’s position in this docket. In presenting these reply comments, the Company fully reserves all of its positions as reflected in the Application for Rehearing.

utility-specific solutions based on negotiations or individual utility rate proceedings. (*See, e.g.*, NOPEC Cmt. at 6-8; Northeast/Orwell/Brainard/Spelman Cmt. at 1-3; IEU Cmt. at 5-6; Ohio Gas Cmt. at 3-5; OPAE Cmt.) While this generic investigation proceeding is not well-suited to achieve such productive results – and AEP Ohio doubts that the Commission intends to try and resolve rate issues for each utility in this docket – the Commission can achieve significant progress in this docket by establishing the general principles upon which the individual utilities can pursue rate changes. For example, the Commission should confirm that the regulatory liability established through the accounting directive in the January 10 Entry will only cover jurisdictional impacts of the TCJA directly related to discrete cost of service items currently reflected in base rates (*e.g.*, test year tax expense levels, tax components of gross up factors, ADIT impacts); and that the regulatory liability will not encompass impacts of the TCJA being reflected in rider mechanisms. Moreover, the Commission in this docket can establish the ground rules and general process for utilities to pursue rate proceedings to reflect such TCJA impacts.

In sum, the Commission should facilitate utility-specific solutions based on negotiations or individual utility rate proceedings. Such individual utility rate proceedings include a future base rate case under R.C. Chapter 4909,² an electric security plan proceeding under R.C. 4928.143, a self-complaint proceeding under R.C. 4905.26 or an application not for increase under R.C. 4909.18. But each utility's plan for pursuing rate changes to reflect the appropriate

² OCC also argues (at 11-12) that the TCJA categorically renders public utility rates unjust and unreasonable under R.C. 4905.22 because all utilities will allegedly earn an after-tax return on equity that is too high. This claim is a gross generalization that is completely lacking in factual support. And it ignores any other cost changes that may have occurred since the utility's last base rate case or that are not otherwise captured in adjustable rate mechanisms. Stated differently, OCC's attempt to engage in selective single-issue ratemaking is inappropriate and should be ignored or rejected.

retail TCJA impacts should be developed with Staff and other stakeholders through mutual discussions.

B. Some TCJA impacts will automatically flow through riders, but they should do so only in accordance with the existing terms of the approved rider mechanism.

The existing terms and conditions of many riders may automatically reflect some of the TCJA impacts. The Commission should adhere to the statutorily-defined process to make additional changes to rates (including rates in riders). Absent a hearing process and findings supported by substantial evidence, the Commission should not modify riders in order to reflect the impacts of the TCJA. *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, ¶ 17-19. Depending on the nature of the rider, the terms and conditions under which it was approved – and whether it was created as part of a comprehensive Electric Security Plan (ESP) – the Commission may lack authority to selectively modify one component of the rider (*e.g.*, requiring that a rider be modified to reflect tax reform impacts) without an existing basis in the rider tariff. Further, the financial impacts of the TCJA may vary when it comes to being reflected in retail rates.

The EDUs indicated in their comments and in their joint rehearing application that existing rider mechanisms incorporating TCJA impacts will be implemented in due course. And as the Commission is well aware, tax-related rider rate adjustments are already occurring through normal implementation of the rider mechanisms or being provided for through voluntary tariff language revisions. Indeed, the Commission has recently approved tariff language that will ensure that appropriate TCJA impacts are reflected through existing rider mechanisms. *See, e.g.*, Case No. 14-1696-EL-RDR, Finding and Order at ¶ 11 (Feb. 21, 2018) (regarding AEP Ohio’s Distribution Investment Rider); Case No. 17-1156-EL-RDR, Finding and Order at ¶ 11 (Feb. 28, 2018) (regarding AEP Ohio’s gridSMART Phase 2 Rider); Case No. 15-1052-EL-RDR, Second

Quarter Tariff Filing (Feb. 28, 2018) (regarding AEP Ohio's Auction Cost Reconciliation Rider and Alternative Energy Rider). It would be unlawful and unreasonable for the Commission to reverse course and unilaterally or retroactively modify approved rider mechanisms in a way that captures TCJA impacts that are not organically reflected in the rider.

The Office of the Ohio Consumers' Counsel's (OCC) argument (at 14-15) under Section II.F, which seeks riders with tax components to be reduced to reflect the new corporate tax rate, in part, could fit within the approach outlined here by AEP Ohio. But only if OCC's recommendation is limited to tax components currently flowed through approved riders – and the timing is consistent with the rider mechanism or is voluntarily proposed by the utility subject to reconciliation. In any case, such solutions should be addressed in utility-specific rider dockets, not here. To the extent OCC's recommendation involves unilateral or retroactive modification of approved rider mechanisms, it should be rejected.

For many of the reasons discussed above, the Commission also should reject OCC's recommendation that the Commission order all utilities to immediately update all rate-related tariffs to include sweeping, overbroad refund language. (OCC Cmt. at 6-8.) In addition to violating the rule against retroactive ratemaking, *see In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.* at ¶ 15, 18-20, OCC's refund proposal is overbroad in both scope and the duration of a utility's refund obligation. As noted above, tax-related rider rate adjustments are already occurring through voluntary processes that are appropriately tailored for the specific riders in question. Similar adjustments to base rates can and should occur through future base rate proceedings.³

³ OCC's assertion that utilities will intentionally underestimate tax impacts of the TCJA in the deferred liabilities they have created pursuant to the Commission's January 10 Entry is

Ohio Energy Group's (OEG) Basic Transmission Cost Rider (BTCR) credit idea (OEG Cmt. at 7-8) may have some merit if properly applied. AEP Ohio's retail BTCR rates are based, in part, on transmission costs that are passed through from the FERC-approved Open Access Transmission Tariff (OATT). Because the OATT rates are established and updated based on a ratemaking formula that incorporates ADIT impacts, the BTCR will ultimately reflect the pertinent TCJA impacts relating to the OATT. As AEP Ohio has indicated in its recent BTCR filing, the Company plans to initiate an update to the OATT prior to the normal time for updating the rate – and AEP Ohio already committed to flowing that impact through the BTCR. *See* Case No. 18-96-EL-RDR, Application at ¶ 16 (Jan. 16, 2018). OEG's recommendation is essentially to introduce a credit through the BTCR in advance of the OATT being updated in order to smooth out rate impacts. AEP Ohio is open to such a mechanism – and agrees with OEG that it is consistent with O.A.C 4901:1-36-03 if properly implemented to avoid multiple potential changes to BTCR rates over a short period of time. In any case, OEG's BTCR recommendation should only be addressed in AEP Ohio's current BTCR docket, not here.⁴

In sum, the Commission should continue down the path of implementing approved rider mechanisms without unilateral or retroactive modification of the approved rider mechanisms. This approach is already yielding significant TCJA benefits for customers.

completely baseless and ignores both the Commission's and its Staff's oversight over those deferrals and the voluntary process that is already occurring for riders.

⁴ Indeed, OEG has filed comments in the pending BTCR docket to advance this proposal and the Company plans to reply to the proposal in due course. Case No. 18-96, OEG Cmts. (Feb. 26, 2018).

C. AEP Ohio's approved rider mechanisms do not accommodate flow through of excess ADIT impacts associated with the TCJA or amortization of the regulatory liability created by the Commission's January 10 Entry; those matters must be addressed in a future base rate proceeding or other through mutual settlement or voluntary utility rate proceeding.

OCC and OEG both make recommendations to immediately credit excess ADIT impacts associated with the TCJA based a provisional projection – and OEG's proposal is even broader. OCC argues (at 13-14) that utilities should file an estimate within 20 days and implement monthly credit right away, then file a final calculation of excess ADIT impacts within 90 days. Aside from OCC's false premise that ADIT impacts can be finalized within a few months, OCC's proposal also fails to connect excess ADIT to any existing riders or rate mechanisms. OEG also makes a broad proposal (at 9) that includes excess ADIT impacts and amortization of the regulatory liability created as a result of the Commission's January 10 Entry. While OEG's proposal is categorically directed at distribution investment riders, there is no basis in AEP Ohio's approved DIR mechanism to reflect excess ADIT impacts or amortization of the TCJA regulatory liability.⁵ Also, both proposals ignore the fact that rate base will be going up due to the reduction of ADIT (which is an offset to rate base).

Excluding impacts that will flow through approved rider mechanisms, the remaining regulatory liability established as a result of the January 10 Entry must be implemented in connection with a process that modification of base rates in accordance with the appropriate process. Establishing base rates under R.C. Chapter 4909 must be done prospectively and as part of a comprehensive review of the Company's costs in accordance with the traditional ratemaking

⁵ The other aspect of OEG's proposal relating to flowing reduced tax expense through the DIR is more acceptable, as discussed above.

formula and process found in R.C. Chapter 4909. Only upon investigation, hearing, and determination that existing rates of public utility are unjust or unreasonable, can the Commission establish new rates to be substituted for existing rates, and the new rates shall have prospective effect only. *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997).⁶ In terms of rate impact, the net impact of the gross dollar amount created in the regulatory liability that the Commission has ordered in this proceeding will be determined with the other cost changes presented at the time of the future rate case.

Because none of AEP Ohio's approved riders include a component that reflects excess ADIT impacts, the regulatory liability (including ADIT impacts) must be addressed in a base rate proceeding where other cost changes are comprehensively reviewed. Accordingly, OCC's and OEG's proposals to flow through ADIT impacts and amortize the TCJA regulatory liability must be rejected.

D. OCC's recommendation to rely upon the emergency ratemaking statute, R.C. 4909.16, should be rejected as unlawful and unreasonable.

OCC argues, without citation to any authority, that the Commission can temporarily modify rider rates under its emergency ratemaking authority contained in R.C. 4909.16. (OCC Cmt. at 4-6.) No case law or Commission decision appears to support that assertion, either as to rider rates generally or those approved as part of an ESP. AEP Ohio submits that R.C. 4909.16 has no application to rates not established pursuant to Chapter 4909.

⁶ Although the Commission also has the authority to commence a "reverse rate case" under R.C. 4905.26, as OCC points out (*see* OCC Cmt. at 2-4), AEP Ohio does not believe that approach would be appropriate here because that process would place a burden on the Commission and, in light of the fact that all utilities are affected by the TCJA, would be a daunting and time-consuming task. In any case, the Commission still has to follow R.C. 4909.15 in such a reverse rate case.

Moreover, there is no factual basis for the Commission exercise temporary emergency ratemaking authority as to base rates here. The Ohio Supreme Court has repeatedly found that R.C. 4909.16 is a delegation of police power to the Commission, the exercise of which is valid only if it “bears a real and substantial relation to the public health, safety, morals or general welfare of the public.” *Inland Steel Dev. Corp. v. Pub. Util. Comm.*, 49 Ohio St.2d 284, 290, 361 N.E.2d 240 (1977), quoting *Benjamin v. Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957). A change in the tax law clearly does not constitute an emergency to public health, safety, morals, or welfare justifying application of the statute in this circumstance.

E. Other commenters improperly raise issues that are simply beyond the scope of this proceeding.

The sole focus of this proceeding is “to consider the impacts of the [TCJA] and determine the appropriate course of action to pass benefits resulting from the legislation on to ratepayers.” January 10 Entry at ¶ 1. The Commission should decline invitations by certain commenters to inappropriately reevaluate past, final orders in other proceedings. (*See* Environmental Advocate Cmt. at 2-4 (regarding AEP Ohio’s PPA Rider and energy efficiency rider cost caps).) The Commission’s substantive prior decisions on those issues are final and are not subject to reconsideration – especially in this proceeding. To the extent that the Environmental Advocates argue that tax impacts of the TCJA on OVEC and energy efficiency costs should be reflected in AEP Ohio’s PPA Rider and Energy Efficiency and Peak Demand Reduction Rider, respectively, AEP Ohio agrees, and the Company submits that those tax impacts should be addressed in individual proceedings – not in this generic investigation docket. But the Commission should reject arguments that seek to broaden the scope of this proceeding and revisit past substantive decisions creating riders and/or deciding their mechanics.

The Commission should also decline to consider OEG's arguments regarding the methodology that the Commission should apply on a going-forward basis to determine whether an electric distribution utility operating under an ESP had significantly excessive earnings in a given year. (*See* OEG Cmt. at 12-13.) That issue is also beyond the narrow scope of this docket, and OEG can raise it in future cases if it so chooses.

Respectfully submitted,

/s/ Steven T. Nourse

Steven T. Nourse (0046705)

Counsel of Record

Christen M. Blend (0086881)

American Electric Power Service Corporation

1 Riverside Plaza, 29th Floor

Columbus, Ohio 43215

Telephone: (614) 716-1608

Fax: (614) 716-2950

Email: stnourse@aep.com

cmblend@aep.com

Counsel for Ohio Power Company

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply Comments* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 7th day of March 2018, via electronic transmission.

/s/ Steven T. Nourse

Steven T. Nourse

Amy.Spiller@duke-energy.com;
bbingaman@firstenergycorp.com;
campbell@whitt-sturtevant.com;
cdunn@firstenergycorp.com;
cblend@aep.com;
christopher.healey@occ.ohio.gov;
cmooney@ohiopartners.org;
dstinson@bricker.com;
dsawmiller@nrdc.com;
Elizabeth.Watts@duke-energy.com;
fdarr@mwncmh.com;
gkrassen@bricker.com;
Jeanne.Kingery@duke-energy.com;
jkylernohn@BKLawfirm.com;
jfinnigan@edf.org;
joliker@igsenergy;
josephclark@nisource.com;
KathyBuckley@verizon.com;
Bojko@carpenterlipps.com;
kboehm@BKLawfirm.com;
Kevin.moore@occ.ohio.gov;
mleppla@theoec.org;
mfleisher@elpc.org;
whitt@whitt-sturtevant.com;

mpritchard@mwncmh.com;
mkurtz@BKLawfirm.com;
mlozich@securustechologies.com;
mnugent@igsenergy.com;
michael.schuler@aes.com;
mwhelan@egas.net;
neil.waggoner@sierraclub.org;
paul@carpenterlipps.com;
glover@whitt-sturtevant.com;
randell.griffin@aes.com;
rocco.dascenzo@duke-energy.com;
selisar@mwncmh.com;
sseiple@nisource.com;
stnourse@aep.com;
trhayslaw@gmail.com;
william.wright@ohioattorneygeneral.gov;

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Summary: Comments - Reply Comments of Ohio Power Company electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company