

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

SECOND ENTRY ON REHEARING

Entered in the Journal on April 25, 2018

I. SUMMARY

{¶ 1} The Commission grants in part, and denies in part, the application for rehearing filed by Ohio Power Company, Duke Energy Ohio, Inc., The Dayton Power and Light Company, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company on February 9, 2018. The Commission also affirms that we intend that all impacts resulting from The Tax Cuts and Jobs Act of 2017 will be returned to customers, whether through this proceeding or through a case-by-case determination for each affected utility. Finally, pursuant to its discretionary authority to hold a hearing under R.C. 4905.13, the Commission directs the attorney examiner to schedule a hearing on the narrow question of whether the utilities should be required to establish a deferred tax liability, effective January 1, 2018.

II. PROCEDURAL HISTORY

{¶ 2} The Tax Cuts and Jobs Act of 2017 (TCJA), signed into law on December 22, 2017, provides for a number of changes in the federal tax system. Most notably, the federal corporate income tax rate is reduced from 35 percent to 21 percent, effective January 1, 2018.

{¶ 3} The Commission opened the above-captioned Commission-ordered investigation (COI) in order to study the impacts of the TCJA on the Commission's jurisdictional rate-regulated utilities and determine the appropriate course of action to pass benefits on to ratepayers.

{¶ 4} By Entry issued January 10, 2018 (January 10, 2018 Entry), the Commission invited all of the rate-regulated Ohio utilities, as well as other interested stakeholders, to file comments discussing the following: (i) those components of utility rates that the Commission will need to reconcile with the TCJA and (ii) the process and mechanics for how the Commission should do so. The Commission noted several components of utility rates that commenters could potentially discuss in response. Additionally, the Commission directed utilities to record on their books as a deferred liability, in an appropriate account, the estimated reduction in federal income tax resulting from the TCJA, effective January 1, 2018. The utilities were instructed to continue this treatment until otherwise ordered by the Commission.

{¶ 5} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission. The statute further requires that such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.

{¶ 6} On February 9, 2018, Ohio Power Company, Duke Energy Ohio, Inc., The Dayton Power and Light Company, and the FirstEnergy operating companies, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the EDUs) filed a joint application for rehearing of the Commission's January 10, 2018 Entry in this proceeding.

{¶ 7} On February 20, 2018, Ohio Partners for Affordable Energy (OPAE), Industrial Energy Users-Ohio (IEU-Ohio), the Ohio Consumers' Counsel (OCC), and The Kroger Co. (Kroger) filed memoranda contra the EDUs' application for rehearing. The Ohio Manufacturers' Association Energy Group (OMAEG) filed its memorandum contra on February 21, 2018, as well as a motion to accept the memorandum contra as timely filed or, in the alternative, to file out-of-time.

{¶ 8} On March 8, 2018, the Commission issued an Entry on Rehearing granting the joint application for rehearing filed by the EDUs for further consideration of the matters specified in the application for rehearing, as well as granting OMAEG's motion for leave to file out-of-time.

III. DISCUSSION

{¶ 9} In the application for rehearing, the EDUs raise three assignments of error with respect to the Commission's January 10, 2018 Entry. We have reviewed and considered all of the arguments raised in the EDUs' application and address them below. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Commission and should be denied.

{¶ 10} As a general matter, OP&E and IEU-Ohio state, in their memoranda contra the application for rehearing, that the EDUs will have multiple opportunities, in this proceeding and other proceedings, to address their concerns with the accounting directive. IEU-Ohio specifically notes the implementation of rate changes being addressed in individual rider update proceedings. See e.g., *In re Ohio Gas Co.*, Case Nos. 17-1139-GA-AIR, et al., Joint Stipulation and Recommendation (Jan. 26, 2018); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-2280-EL-RDR, Finding and Order (Feb. 28, 2018); *In re Duke Energy Ohio, Inc.*, Case No. 18-40-GA-RDR. OP&E also states that the EDUs could avoid any issues resulting from their continued collection of unjust, unlawful, and unreasonable rates and riders containing the wrong federal corporate income tax rate by immediately filing applications to reduce their rates and riders or file self-complaints under R.C. 4905.26.

{¶ 11} In their memoranda contra the application for rehearing, Kroger and OMAEG request that the Commission take certain steps for utilities that are not in a pending rate case and utilities that are currently in a pending rate case, with respect to TCJA. For utilities that are not in a pending rate case, OMAEG and Kroger request that the Commission implement new rates immediately rather than waiting for the utility to voluntarily file a new rate case

to give customers relief as soon as practicable. For utilities that are currently in a pending rate case, Kroger and OMAEG request that the Commission address the impact of the TCJA in those pending cases, stating that if the Commission does not resolve this investigation prior to the culmination of pending rate cases, and the changes in federal tax law are not addressed in those cases, customers will be deprived of the tax savings until a subsequent proceeding or the COI is resolved.

{¶ 12} In respect to these general arguments raised against the EDUs' application for rehearing, the Commission notes that the submitted comments, as well as any additional procedure we find necessary, will assist us in our determination as to the best course to address the recent reduction in the federal corporate income tax rate for all rate-regulated utilities under the Commission's jurisdiction. We agree that many of the EDUs' arguments raised in its application for rehearing are premature or do not directly speak to the accounting directive, but rather, our ratemaking authority, and are, thus, more appropriate matters to include in comments submitted in this proceeding. Moreover, we find that the regulatory liability is the appropriate balance between any immediate Commission action and identifying the most suitable long-term solution for the estimated federal income tax reduction resulting from the TCJA. We will not speak to these parties' specific recommendations at this time. The Commission continues to thoroughly review the comments submitted in response to the January 10, 2018 Entry and will notify the parties of any additional opportunity to be heard on these issues.

A. *First Assignment of Error*

{¶ 13} In the first assignment of error, the EDUs seek clarification that the accounting directive contained in ¶7 of the January 10, 2018 Entry is "preliminary, temporary, and without prejudice to the outcome of this proceeding or any subsequent related proceeding and only pertains to retail rates subject to the Commission's jurisdiction." The EDUs allege that if the Commission's accounting directive is not temporary and subject to revision, then the January 10, 2018 Entry's "retrospective directive" to establish a regulatory liability

would violate R.C. 4905.13, as the EDUs did not receive advance notice or a hearing regarding the directive. Finally, the EDUs contend that the Commission should also clarify that these deferrals should be updated as appropriate based on actual tax impact information during the pendency of this proceeding and should be implemented in a manner consistent with Generally Accepted Accounting Principles (GAAP) and Internal Revenue Service requirements.

{¶ 14} In response to the EDUs' first assignment of error, IEU-Ohio, Kroger, and OMAEG state that the EDUs have failed to demonstrate that the order is unreasonable or unlawful as required by R.C. 4903.10. OCC states that the January 10, 2018 Entry only decided issues related to accounting matters and the procedural schedule in this case. OMAEG further avers that additional clarification is unnecessary, as the Commission did not, at any point, indicate the outcome of this proceeding, or any other rate proceeding, is predetermined. OCC also argues that the Commission can enter an accounting order under R.C. 4905.13 without advance notice to utilities or a hearing, stating that R.C. 4905.13 does not require notice, the Commission routinely enters accounting orders without a hearing, and the EDUs are estopped from arguing that R.C. 4905.13 requires a hearing. OCC contends that each of the EDUs have previously argued that R.C. 4905.13 does not require a hearing and provides several instances in which the EDUs have argued that R.C. 4905.13 does not require a hearing before the Commission can enter an accounting order. IEU-Ohio argues that the first and second assignments of error are premised on the apparent concern that the Commission may require the EDUs to retroactively return tax savings to customers; however, this concern does not demonstrate that the order is unreasonable or unlawful as an accounting order is distinct from a ratemaking order, citing *Elyria Foundry Co. v. Public Utilities Commission of Ohio*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 19.

{¶ 15} The Commission finds that rehearing as to the EDUs' first assignment of error should be denied. In our January 10, 2018 Entry, we specifically described the deferred liability as an interim measure to handle the expected tax impacts resulting from the TCJA

on rate-regulated utilities under the Commission's jurisdiction prior to the ultimate determination in this proceeding. January 10, 2018 Entry at ¶ 7. Thus, no further clarification is necessary. In the January 10, 2018 Entry, we did not determine the actual amount to be returned to customers for any utility. However, the Commission intends that all tax impacts resulting from the TCJA will be returned to customers, whether through this proceeding or through a case-by-case determination for each affected utility; and the deferred liability for each utility should remain in place until this has been accomplished. We also note that such a determination will consider all comments already filed by interested stakeholders, as well as any future hearings or additional procedures we deem appropriate or necessary.

{¶ 16} Furthermore, while the Commission aims to achieve consistency with GAAP when possible, even if the accounting treatments ordered by the Commission could be interpreted as being inconsistent with GAAP, the Commission has full authority, pursuant to R.C. 4905.13, to issue accounting orders without reference to GAAP, and the EDUs, or any other rate-regulated utility, may not ignore or disobey the Commission's orders. *In re Ohio Edison Co.*, Case No. 89-1001-EL-AIR, Opinion and Order (Aug. 16, 1990) at 66. Utilities requiring further guidance should consult with Staff to ensure that their accounting treatment for the expected tax impacts is consistent with our directives and the Commission's prior accounting entries.

{¶ 17} With respect to arguments raised by the EDUs that our January 10, 2018 Entry was unlawful or unreasonable because it was issued without prior notice or hearing, these arguments will be addressed as part of the discussion of the EDUs' third assignment of error.

B. *Second Assignment of Error*

{¶ 18} In the second assignment of error, the EDUs seek clarification that the accounting directive does not predetermine the outcome of any future rate or rate

proceeding, stating that the Commission should confirm that it is not, through its accounting directive, making any determination regarding whether the amounts that utilities record as deferred liability during the pendency of this proceeding will be returned to customers. The EDUs note that the Commission's accounting orders are distinct from its ratemaking authority under R.C. Chapter 4909, citing *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 19.

{¶ 19} In response to the EDUs' second assignment of error, Kroger and OMAEG state that in the January 10, 2018 Entry, the Commission never indicates that any outcome—in this case or a future case—is predetermined. OCC reiterates its argument in the first assignment of error averring that the January 10, 2018 Entry did not purport to change rates, it did not require any utility to amend any of its tariffs, it did not require any utility to file any application to change any rate, and it did not predetermine the substance of any issues related to the TCJA. Further, IEU-Ohio reiterates its argument above and further states that an accounting order does not affect or predetermine rates, retroactively or otherwise.

{¶ 20} Consistent with our response to the EDUs' first assignment of error, the Commission agrees that our ratemaking authority under Chapter 4909 of the Revised Code is separate and distinct from our accounting orders, as authorized by R.C. 4905.13. It is well-established that accounting practices do not affect rates. The Supreme Court of Ohio has ruled that "we have never held and we do not hold today that accounting practice and the ratemaking provisions are functionally equivalent." *Dayton Power & Light Co. v. Pub. Util. Comm.*, (1983) 4 Ohio St.3d 91, 104. *See also, Ohio Consumers' Counsel v. Pub. Util. Comm.* (1983), 6 Ohio St.3d 377, 378 (noting the distinction between accounting practices under R.C. 4905.13 and the ratemaking provisions of R.C. Chapter 4909).

{¶ 21} As noted in the January 10, 2018 Entry, the Commission opened this COI in order to study the impacts of the TCJA on the Commission's jurisdictional rate-regulated utilities and determine the appropriate course of action to pass benefits on to ratepayers. While the Commission identified several areas upon which stakeholders could potentially

submit comments for the Commission's consideration, we at no time indicated what our ultimate determination would be in this proceeding. In fact, we even noted that utilities should continue recording this interim deferred liability until otherwise ordered by the Commission, clearly indicating more guidance as to these issues would eventually be provided. Further, we affirm that no determination has been made regarding the actual amount of the impact of the TCJA on any utility. Likewise, we have made no determination for any utility on whether carrying charges should be provided or whether such carrying charges should be calculated based upon long-term cost of debt or weighted-average cost of capital. However, irrespective of whether the final determination is made in this proceeding, or on a case-by-case basis in other proceedings, we will be guided by one central principle: all tax savings resulting from the TCJA should be returned to the ratepayers.

{¶ 22} While we recognize the fact that we have not ordered the immediate refund of the estimated reduction in federal income tax resulting from the TCJA to customers, the deferred liability will enable the Commission to take any appropriate action upon the conclusion of the COI, potentially including the passing on of benefits to ratepayers. Accordingly, rehearing as to the EDUs second assignment of error should also be denied.

C. Third Assignment of Error

{¶ 23} In its third assignment of error, the EDUs assert that, to the extent that the Commission's accounting directive in this generic industry-wide proceeding without advanced notice or hearing forms the basis for changing base rates or approved riders for individual EDUs, the January 10, 2018 Entry is unreasonable and unlawful. The EDUs further argue that the financial impacts of the TCJA should only be prospectively reflected in rates if a rider mechanism and associated tariff already provides for such reconciliation, or as part of a further base rate proceeding that results in comprehensive prospective rate changes for the following reasons: (1) some TCJA impacts will automatically flow through riders but only in accordance with the terms of the approved rider mechanism and tariffs; (2) changes in rider rates established under the Electric Security Plan (ESP) must conform to

the requirements established for the ESP process, including, but not limited to, the significantly excessive earnings test (SEET), which forms the basis for any potential customer refunds relating to significantly excessive earnings associated with ESP rate adjustments; (3) base rates for EDUs can only be changed prospectively as part of a proceeding under R.C. 4909.18; and (4) the accounting directive in the January 10, 2018 Entry must be applied in a way that is consistent with normalization rules.

{¶ 24} In response to the EDUs' third assignment of error, Kroger, OMAEG, and OPAE state that R.C. 4905.26 allows the Commission to initiate its own investigation of the rates currently being charged by utilities, and that 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." R.C. 4905.26. Further, Kroger and OMAEG aver that the EDUs incorrectly argue that rates for riders established through the ESP process under R.C. 4928.143 can only be changed through the ESP process and that base rates can only be changed prospectively through a rate proceeding under R.C. 4909.18. Rather, Kroger and OMAEG state that R.C. 4909.16 allows the Commission to "temporarily alter" existing rates of any public utility "for such length of time as the commission prescribes" in order to prevent injury to the public.

{¶ 25} Similar to their arguments regarding the first and second assignments of error, IEU-Ohio and OCC argue that the EDU's third assignment of error presents claims that are not ripe for review or beyond the scope of the January 10, 2018 Entry, stating that the Commission ordered rate-regulated utilities to record as a deferred liability the estimated reduction in federal income tax resulting from the TCJA. It did not order any changes in rates or riders, and whether the Commission will order a rate or change or a modification of a rider for a particular company is uncertain. IEU-Ohio states that as no rate change was ordered in the Commission's January 10, 2018 Entry, the EDUs' third assignment of error raises issues that are hypothetical, abstract, and remote. Further, OCC argues that the accounting directive does not violate the SEET, stating that the SEET statute cannot be

interpreted as preempting the Commission's power to reduce rates when they become unjust and unreasonable as a result of a change in tax laws.

{¶ 26} The Commission finds that rehearing on the EDU's third assignment of error should be granted, in part, and denied, in part. Our January 10, 2018 Entry did nothing to adjust the rates currently being charged to the EDUs' customers or the riders through which such charges are assessed. We have not determined, for any utility, the amount to be returned to customers, how that amount should be allocated among customer classes, or the rate design to return such amounts. Rather, we simply established a deferred liability, in an appropriate account, in order to preserve as many potential solutions as possible for the Commission's ultimate determination in this proceeding (or in other proceedings). The issues raised by the EDUs are precisely of the type we expected to, and did, receive during the comment period for this proceeding. We will not opine as to the merits of these arguments at this time.

{¶ 27} Further, the fact that the regulatory liability may impact future base rate proceedings does not undermine our order to create the regulatory liability in the January 10, 2018 Entry. As discussed above, the regulatory liability has no impact on current rates, and the Supreme Court of Ohio has upheld accounting modifications notwithstanding the fact that the accounting modification may impact current or later rate proceedings. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 19; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 6 Ohio St.3d 377, 379, 453 N.E.2d 673 (1983).

{¶ 28} With respect to claims by the EDUs that our order was unlawful or unreasonable because it was issued without prior notice or hearing, parties opposing rehearing argue that the EDUs should be estopped from making the argument that a hearing was necessary before the Commission entered its accounting directive in the January 10, 2018 Entry, because the EDUs have, on many occasions in the past, represented to the Commission that it was not necessary to hold a hearing prior to issuing an accounting order under R.C. 4905.13. However, these parties do not cite to any precedent where we

disallowed a party to change its litigation position in subsequent proceedings. We do not agree that the EDUs should be prohibited from making this argument in this proceeding notwithstanding prior representations by individual electric distribution utilities on whether R.C. 4905.13 requires a hearing before the Commission may issue an accounting order.

{¶ 29} Nonetheless, we agree with OCC that the Commission is well within its authority, pursuant to R.C. 4905.13, to enter an accounting order without advance notice to utilities or a hearing. Although R.C. 4905.13 provides that a hearing may be held, the statute vests the Commission with discretion to determine whether a hearing is necessary, and the Commission generally does not hold hearings on modifications to accounting procedures. *In re Dayton Power and Light Co.*, Case No. 04-1645-EL-AAM, Entry on Rehearing (July 13, 2005) at 4. We also agree with OCC that the EDUs have historically and routinely argued that no hearing is necessary prior to issuing an order pursuant to R.C. 4905.13. *E.g.*, *In re Duke Energy Ohio, Inc.*, Case No. 17-2118-GA-AAM, Application, (Oct. 12, 2017) at 4 (“The requested change in accounting procedure will not result in any increase in any rate or charge. The Commission may approve this application without a hearing.”); *In re Dayton Power and Light Co.*, Case No. 16-2464-EL-AAM, Application (Dec. 30, 2016) at 3 (“The requested deferral is an accounting procedure that does not result in an increase in any rate or charge. Therefore, no hearing is required on this application.”); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 04-1931-EL-AAM, Application (Dec. 30, 2004) at 3 (“The requested deferral is an accounting procedure that does not result in an increase in any rate or charge. Therefore, the Commission can approve this Application without a hearing.”), Memorandum Contra Applications for Rehearing (June 27, 2005) at 11-12. Any claim by the EDUs in this proceeding that a hearing is necessary before acting under R.C. 4905.13 represents a stark reversal of individual electric distribution utilities’ prior representations to the Commission, and it is notable that the EDUs make no attempt to distinguish prior cases where an electric distribution utility has

represented to the Commission that no hearing was necessary on an application submitted pursuant to R.C. 4905.13.

{¶ 30} The Commission, however, has consistently held that we may issue an accounting order under R.C. 4905.13 without holding a hearing. *E.g., In re Dayton Power and Light Co.*, Case No. 04-1645-EL-AAM, Finding and Order (Jun. 1, 2005), Entry on Rehearing (Jul. 13, 2005); *In re Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM, Finding and Order (Nov. 12, 2009); *In re Columbus S. Power Co. and Ohio Power Co.*, Case No. 08-1338-EL-AAM, Finding and Order (Jan. 7, 2009). We will not depart from or distinguish our prior holdings here. The January 10, 2018 Entry directed the utilities in this state to create a regulatory liability; the January 10, 2018 Entry did not result in any increase or decrease in any rate or charge. Accordingly, we will deny rehearing on any claim that the January 10, 2018 Entry is unjust, unreasonable, or unlawful because it was issued without prior notice and a hearing.

{¶ 31} Nonetheless, R.C. 4905.13 does authorize the Commission to hold a hearing on an accounting order *at our discretion*, and, on rehearing, we will exercise our discretion and grant rehearing to the extent the EDUs have requested a hearing. Accordingly, we direct the attorney examiner to schedule a hearing in this proceeding on the narrow question of whether the utilities should be required to establish a deferred tax liability, effective January 1, 2018. However, although we will hold a hearing on this narrow question, we have not stayed any portion of our January 10, 2018 Entry and all affected utilities should continue to comply with the January 10, 2018 Entry until otherwise ordered by the Commission.

{¶ 32} As we have consistently held throughout this Second Entry on Rehearing, the Commission has not yet determined the ultimate resolution of this proceeding, namely the appropriate treatment of the expected reduction in federal income tax accounted for under the regulatory liability. All interested stakeholders will have the opportunity to participate in this proceeding and contribute to the dialogue concerning these issues.

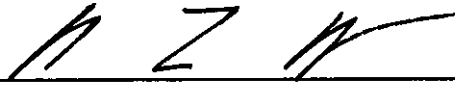
IV. ORDER

{¶ 33} It is, therefore,

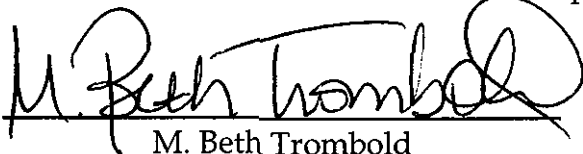
{¶ 34} ORDERED, That the EDUs' application for rehearing be granted in part, and denied in part, as set forth in this Second Entry on Rehearing. It is, further,

{¶ 35} ORDERED, That a copy of this Second Entry on Rehearing be served upon all public utilities (other than motor transportation companies) subject to the Commission's jurisdiction and all interested stakeholders of record.

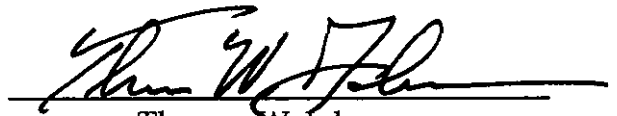
THE PUBLIC UTILITIES COMMISSION OF OHIO



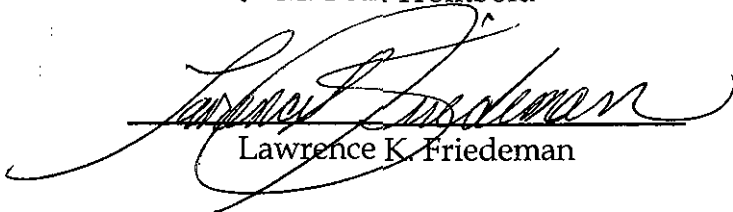
Asim Z. Haque, Chairman



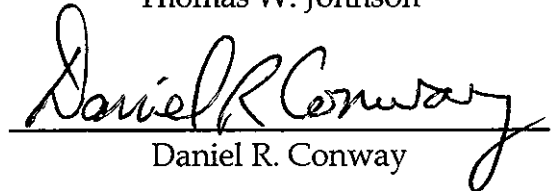
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman

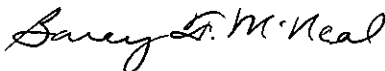


Daniel R. Conway

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Secretary