

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)
Investigation of the Financial Impact of the) Case No. 18-0047-AU-COI
Tax Cuts and Jobs Act of 2017 on)
Regulated Ohio Utility Companies.)

**MERIT BRIEF
BY
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August 13, 2018

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. BACKGROUND AND PROCEDURAL HISTORY.....	1
III. STANDARD OF REVIEW	3
IV. RECOMMENDATIONS.....	4
A. The PUCO has broad authority under R.C. 4905.13 to require Ohio’s utilities to establish a deferred tax liability.....	5
B. Utilities must be required to establish a deferred tax liability so that customers receive the full benefits of the TCJA.....	6
C. If the PUCO applies the six-factor test in this case, it should find that each factor supports requiring Ohio’s utilities to continue to maintain a deferred tax liability, effective January 1, 2018.....	7
1. The current rates or revenues that Ohio’s utilities collect from customers will be sufficient to cover the costs associated with the deferred tax liability.....	8
2. The reduction of the federal corporate tax rate is a material change warranting the establishment of a deferred tax liability, effective January 1, 2018.....	9
3. The reason for the deferral is outside the utility’s control.....	9
4. The expense reductions are atypical and infrequent.....	10
5. Customers will be significantly and adversely harmed if the PUCO does not require Ohio’s utilities to establish a deferred tax liability, effective January 1, 2018.....	10
6. The PUCO can ensure that Ohio utilities return to customers the money that customers have overpaid (and will pay) for the utilities’ federal corporate tax obligations.....	12
V. CONCLUSION.....	12

all 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.”³

Ohio’s electric distribution utilities (the “Electric Utilities”⁴) challenged the PUCO’s ruling in a joint application for rehearing.⁵ In short, the Electric Utilities are looking for ways to keep the tax savings from the TCJA for themselves, or at a minimum, substantially delay returning that money to customers.⁶ To date, the PUCO has wisely rejected that view and declared that the tax savings belong to customers:

- “[T]he 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.”⁷
- “[I]rrespective 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.”⁸

At the same time, however, the PUCO granted the Electric Utilities’ Application for Rehearing in part with respect to the Accounting Directive. The PUCO found that although the Electric Utilities are not *entitled* to a hearing on the Accounting Directive, the PUCO has the discretion to hold a hearing on the issue.⁹ Thus, it ordered all utilities

³ *Id.* ¶ 7 (citing R.C. 4905.13 as authority for this accounting treatment). This portion of the PUCO’s order shall be referred to as the “Accounting Directive.”

⁴ The Electric Utilities are Ohio Edison Co., the Cleveland Electric Illuminating Company, the Toledo Edison Company, Ohio Power Company (“AEP”); Duke Energy Ohio, Inc.; and the Dayton Power and Light Company (“DP&L”).

⁵ Joint Application for Rehearing of Ohio Power Company, Ohio Edison Company, the Dayton Power and Light Company, Duke Energy Ohio, Inc, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (Feb. 9, 2018) (the “Application for Rehearing”).

⁶ *See generally* Second Entry on Rehearing (Apr. 25, 2018); AEP Ex. 1; Duke Ex. 1.

⁷ Second Entry on Rehearing ¶ 15 (Apr. 25, 2018) (emphasis added).

⁸ *Id.* ¶ 21.

⁹ Second Entry on Rehearing ¶¶ 29-31.

to continue complying with the Accounting Directive, but also directed 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.”¹⁰

The answer to that question is yes. Utilities should be required to establish a deferred tax liability because that will facilitate the PUCO’s stated goal of passing all TCJA tax savings to customers. This is the just and reasonable result for consumers.

III. STANDARD OF REVIEW

Generally, the PUCO will approve deferrals when it finds that there are “both exigent circumstances and good reason demonstrated before such amounts should be treated differently from ordinary utility expenses.”¹¹ To accomplish this, the PUCO has used a number of factors to determine whether to authorize a utility to defer a regulatory asset. While no factor is determinative, the PUCO has applied these factors over its history of considering deferrals. The factors—adjusted to reflect that this case is for a regulatory liability (which protects consumers) as opposed to a regulatory asset (which benefits utilities)—are as follows:

1. Whether the utility’s current rates or revenues are insufficient to cover the costs associated with the deferral;
2. Whether the expense reductions are material;
3. Whether the reason for the deferral is outside the utility’s control;
4. Whether the expense reductions are atypical and infrequent;

¹⁰ *Id.* ¶ 31.

¹¹ *In re Joint Application of [FirstEnergy] for Approval of a Generation Charge Adjustment Rider*, Case No. 05-704-EL-AAM, Opinion & Order at 9 (Jan. 4, 2006).

5. Whether the financial well-being of customers¹² will be significantly and adversely affected if the deferral is not required; and
6. Whether the PUCO can encourage the utility to do something it would not otherwise do by requiring a deferral.¹³

While the PUCO can use these factors as a framework to consider whether Ohio's utilities should be required to record a deferred tax liability, the guiding principle in *this case* is whether the deferral is necessary to protect customers and guarantee that any tax savings from the TCJA will be passed back to them. In particular, here the PUCO should adjust factor 5 to focus on the financial well-being of customers as opposed to the financial integrity of the utility. Because the deferred liability will protect customers and facilitate the return to customers of the tax savings, the PUCO should continue to require Ohio utilities to comply with its January 10, 2018 Entry requiring the deferral.

IV. RECOMMENDATIONS

Ohio's rate-regulated utilities should be required to record a deferred tax liability. The PUCO has broad authority under Title 49 of the Ohio Revised Code to require utilities to conduct the accounting treatment necessary to record the amounts that have been and will be collected under the former 35% tax rate. As OCC witness Willis stated: "By lowering the corporate FIT rate from 35% to 21%, customers should save money . . . which should be accounted for in the deferred tax liability."¹⁴ The corporate income tax

¹² Staff proposes that this factor be whether the financial integrity of the utility will be significantly and adversely affected if the PUCO requires the deferral. But this would make the factor largely the same as the first factor (whether the utility's current rates or revenues are insufficient to cover the costs associated with the deferral). the fifth factor should focus on the financial well-being of customers, not the utility.

¹³ See *In re Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods*, Case No. 17-2118-GA-AAM, Finding & Order ¶ 24 (Apr. 18, 2018); Staff Ex. 1, Testimony of Jonathan J. Borer at 5-7 (the "Borer Testimony").

¹⁴ Willis Testimony at 5.

rate reduction has far-reaching implications, and the PUCO, by ordering the deferred liability tax treatment, has taken steps to protect consumers from the effective date of the tax rate reduction.

Now that the rate has changed to 21%, the utilities have an excess amount of accumulated deferred income tax (“ADIT”) on their books. Utilities also need to adjust their existing rates and riders so that they charge customers at the lower 21% rate beginning January 1, 2018 (the effective date of the TCJA). For such amounts to eventually be returned the customers, the PUCO should require the utilities to establish a deferred tax liability.

A. The PUCO has broad authority under R.C. 4905.13 to require Ohio’s utilities to establish a deferred tax liability.

In its January 10, 2018 Entry, the PUCO directed the public utilities in Ohio to record a deferred liability under R.C. 4905.13. Under R.C. 4905.13, the PUCO is vested with the power to establish a system of accounts for public utilities.¹⁵ The Supreme Court of Ohio has held that R.C. 4905.13 provides the PUCO with broad discretion to establish the system of accounts for utilities and to prescribe the manner in which the accounts must be kept.¹⁶ In *Elyria Foundry Co. v. Public Utilities Commission*, the Court determined that the PUCO’s accounting practices are distinct from the ratemaking statutes and that PUCO has broad discretion over utility accounting practices.¹⁷ The

¹⁵ R.C. 4905.13.

¹⁶ 114 Ohio St.3d 305, ¶ 18-19 (2007).

¹⁷ *Id.* ¶ 19.

Court relied upon its precedent to uphold PUCO accounting orders that do not affect current rates and where any ratemaking effect will be reviewed in a later proceeding.¹⁸

In this case, the PUCO ordered Ohio’s rate-regulated utilities to create an accounting deferral to record their deferred tax liability.¹⁹ This deferral does not affect current rates being charged to customers. Additionally, the ratemaking effect of this deferral will be reviewed in this proceeding. Thus, the PUCO is vested with broad authority to establish a deferred tax liability account.

B. Utilities must be required to establish a deferred tax liability so that customers receive the full benefits of the TCJA.

Under R.C. 4905.22, utilities are required to charge just and reasonable rates. Additionally, under R.C. 4905.26, the PUCO can investigate any situation where the PUCO believes “that any rate, fare, charge, toll, rental, schedule, classification, or service . . . is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law” And in response to any such investigation, the PUCO can modify rates to prevent them from continuing to be unjust and unreasonable.²⁰ As the Court has determined: “If, after an investigation and hearing pursuant to [R.C. 4905.26], the commission determines that existing rates are unjust and unreasonable, it must follow that the commission can then remedy the situation by ordering that new rates be put in effect.”²¹ In this case, the utilities must be required to establish a deferred tax liability for new rates to be put in effect if existing rates are found to be unjust and unreasonable.

¹⁸ *Id.* (citing *Consumers’ Counsel v. PUCO* 63 Ohio St. 3d 522 (1992); *Dayton Power & Light Co.*, 4 Ohio St. 3d (1983)).

¹⁹ Entry ¶¶ 7, 10 (Jan. 10, 2018).

²⁰ *Ohio Consumers’ Counsel v. PUCO*, 58 Ohio St.2d 153, 157 (1979).

²¹ *Id.*

Additionally, under R.C. 4909.16, the PUCO has authority to temporarily amend any existing rates when it “deems it necessary to prevent injury to the . . . interest of the public.” Whether it is necessary to amend rates under R.C. 4909.16 is “within the sound discretion of the commission.”²² Notably, the statute broadly allows the PUCO to reduce “any existing rates.”²³ This means the PUCO can rely on R.C. 4909.16 to reduce base rates and rider rates, including electric utilities’ distribution riders approved as part of an electric security plan. But to ensure that customers receive the benefits of these reductions from the effective date of the TCJA (January 1, 2018), the PUCO must require utilities to establish a deferred tax liability as of that date.

C. If the PUCO applies the six-factor test in this case, it should find that each factor supports requiring Ohio’s utilities to continue to maintain a deferred tax liability, effective January 1, 2018.

Consistent with PUCO precedent, the PUCO Staff has recommended that the PUCO analyze six primary factors when determining whether to authorize a utility to defer a regulatory liability in this case.²⁴ These factors are not determinative,²⁵ and ultimately, the PUCO must do what is just and reasonable for consumers.

The PUCO should continue to consider these factors as a framework and not a strict test.²⁶ As applied, the factors in this case demonstrate that the PUCO should require

²² *Seneca Hills Serv. Co. v. PUCO*, 56 Ohio St.2d 410, 413 (1978).

²³ R.C. 4909.16 (emphasis added).

²⁴ *See supra* § II. *See also* Borer Testimony; Tr. at 137:20-24.

²⁵ *See, e.g.*, Tr. at 64:2-6 (cross-examination of Duke witness Wathen) (“Q. And not all those factors have to be passed for the Commission to grant a deferral, does it? A. In some cases, none have to be passed. In some deferral cases, they haven’t addressed any of the factors.”).

²⁶ Tr. at 137:11-13 (cross examination of Staff Witness Borer) (“it’s establishing a sort of a framework for evaluating deferrals so that there’s some sort of standard that could be applied”).

Ohio's rate-regulated utilities to establish a deferred tax liability, effective January 1, 2018.

This is not the first time a tax cut has been passed affecting utility rates. Nor is it the first time the PUCO has considered whether it has the authority to adjust rates to account for a change in taxes.²⁷ The Court has held that the PUCO has a duty to consider the tax rate that utilities will actually be assessed.²⁸ The PUCO has a duty to ensure that utilities are not over-collecting from customers for taxes that the utility will not actually pay.²⁹

1. The current rates or revenues that Ohio's utilities collect from customers will be sufficient to cover the costs associated with the deferred tax liability.

Ohio utilities have been charging and continue to charge customers rates based on a 35% federal corporate income tax rate.³⁰ Utility rates should be sufficient to cover the deferral associated with the reduction of the federal corporate tax rate to 21%.³¹ If a utility's rates are not sufficient to cover the costs associated with the deferred tax liability, then that utility can file a rate case under R.C. Chapter 4909.³² It is not the PUCO's responsibility to determine (outside of a rate or complaint case) if each utility's

²⁷ See, e.g., *In re Application of the Cleveland Electric Illuminating Co. for Authority to Amend and Increase its Filed Schedules*, Case No. 86-2025-EL-AIR, 1987 Ohio PUC LEXIS 28 (Dec. 16, 1987); *In re Application of Ohio Power Co. to Increase Certain Filed Schedules*, Case No. 78-676-EL-AIR, 1979 Ohio PUC LEXIS 2 (Apr. 16, 1979).

²⁸ *E. Ohio Gas Co. v. PUCO*, 133 Ohio St. 212 (1938).

²⁹ *Id.*

³⁰ The Omnibus Budget Reconciliation Act of 1993 increased the federal corporate income tax rate from 34% to 35%. Some utilities may be charging a 34% federal income tax if their rates were not adjusted following the 1993 tax increase.

³¹ Borer Testimony at 5.

³² Willis Testimony at 9.

current revenues are sufficient or insufficient.³³ The PUCO already determined in each utility's most recent base rate case that revenues sufficiently cover expenses and provide an opportunity for a reasonable return on investment.³⁴

2. The reduction of the federal corporate tax rate is a material change warranting the establishment of a deferred tax liability, effective January 1, 2018.

Ohio's ratemaking formula allows federal income taxes to be recovered on a dollar-for-dollar basis in the revenue requirements of each utility's base rates and riders. For base rates, however, that rate setting is prospective in nature, meaning that rates set today are a proxy intended to collect future costs of service (including income tax costs) from the utility's customers. Nevertheless, current and deferred income taxes are directly affected by the federal corporate tax rate, which decreased by 40%.³⁵

Further, utilities are holding a significant amount of money as excess ADIT. This excess ADIT can exceed tens or hundreds of millions of dollars.³⁶ This is a material amount. And a deferred tax liability in the tens or hundreds of millions of dollars is a material change. This factor of the PUCO's framework for considering whether to authorize or require a deferral is met.

3. The reason for the deferral is outside the utility's control.

The reason for the deferral is the lowering of the federal corporate tax rate from 35% to 21% under the TCJA. Congress passed, and the President signed, the TCJA into law in December 2017. The TCJA became effective on January 1, 2018. Neither the

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

utilities nor their customers had any control over the federal corporate tax rate or passage of the TCJA.³⁷ But proper accounting treatment is necessary to protect consumers from being over-charged and shareholders from being unjustly enriched.

4. The expense reductions are atypical and infrequent.

The expense reductions associated with the TCJA are both atypical and infrequent. As noted by PUCO Staff witness Borer, major overhauls to the federal income tax rate are quite rare.³⁸ The last major change to the corporate tax rate occurred in 1986.³⁹ An event that occurs every 30 years is neither typical nor frequent. The PUCO acted promptly to protect consumers by ordering Ohio utilities to capture the tax reduction benefits for consumers from the effective date of the TCJA, January 1, 2018. It is action the PUCO has taken many times before when a utility's expenses atypically or infrequently increased rather than decreased.⁴⁰ The PUCO's authority to establish deferral accounting in this case should not be questioned because it was exercised to protect and benefit consumers rather than the utility.

5. Customers will be significantly and adversely harmed if the PUCO does not require Ohio's utilities to establish a deferred tax liability, effective January 1, 2018.

Customers will be significantly and adversely harmed if the PUCO does not require utilities to establish a deferred tax liability, effective January 1, 2018. Customers should save money resulting from the TCJA in four ways: (1) reduction in utilities'

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 5-6.

⁴⁰ *See, e.g.*, Case No. 16-2464-EL-AAM, Order (May 3, 2017) (deferred asset for DP&L); Case No. 15-855-EL-AAM, Order (Feb. 10, 2016) (deferred asset for Duke); Case No. 08-1338-EL-AAM, Order (Jan. 7, 2009) (deferred asset for AEP).

federal income tax expense, which reduces rates, (2) return of excess ADIT, (3) lower gross revenue conversion factor adjustments to revenue requirements for base rates and riders, and (4) lower charges for riders containing a pre-tax rate of return.⁴¹ If the PUCO does not require Ohio's rate-regulated utilities to establish a deferred tax liability, customers may not see the full benefits of the tax cuts.

Additionally, even if the PUCO requires utilities to establish a deferred tax liability, customers will be harmed if the PUCO does not also including a carrying cost component to the deferred tax liability.⁴² The deferred tax liability is a customer-supplied source of funds for utilities.⁴³ Therefore, utilities should be required to compensate customers for the use of their money until the full amount of the deferred tax liability is returned.⁴⁴

PUCO Staff witness Borer proposes that this factor be whether “the financial integrity of *the utility* [will] be significantly and adversely affected if the deferral is required.”⁴⁵ But in this case, where the PUCO's focus is on ensuring that customers receive the benefits of the reduction in federal income tax rates, this factor should focus on customers. As OCC witness Willis stated: “Certainly, these tax savings resulting from the TCJA should not be used to boost earnings at customer expense.”⁴⁶ Here, there is no doubt that customers will be harmed if utilities are not required to enter a deferred

⁴¹ Willis Testimony at 5.

⁴² Willis Testimony at 6-7.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Borer Testimony at 7 (emphasis added).

⁴⁶ Willis Testimony at 11.

liability because it could prevent them from ultimately receiving the benefits of lower tax rates under the TCJA.⁴⁷

6. The PUCO can ensure that Ohio utilities return to customers the money that customers have overpaid (and will pay) for the utilities' federal corporate tax obligations.

The PUCO has previously considered whether to authorize a utility to defer a regulatory asset based upon whether the PUCO “could encourage the utility to do something it would not otherwise do through the granting of deferral authority.”⁴⁸ Without a PUCO order, some Ohio utilities will simply keep the tax savings for themselves and their shareholders. In this case, the PUCO can encourage and require Ohio utilities to return to customers tax money that is rightfully theirs and not allow it to be used to fund a utility program or project. Customers deserve the benefits of the TCJA, including reduced federal income tax expenses, excess ADIT, gross revenue conversion factor reduction, and adjustments to the tax components of all existing rates and utility riders.⁴⁹ This money belongs to customers, not the utilities. It should be returned to customers without further delay.

V. CONCLUSION

The PUCO has required Ohio utilities to establish a deferred tax liability, effective January 1, 2018. It should reaffirm that holding here. The PUCO has also

⁴⁷ If the PUCO does consider the financial standing of the utility, it should conclude that (i) a utility’s financial integrity cannot be harmed by a regulatory liability because a regulatory asset is an accounting mechanism and not a ratemaking mechanism, and (ii) if a utility has concerns about its financial integrity, it can file a rate case. *See Willis Testimony* at 9.

⁴⁸ *In re Duke*, Case No. 14-1160-EL-UNC, Opinion & Order at 7 (Apr. 27, 2016).

⁴⁹ *Willis Testimony* at 9.

repeatedly stated its intent to return to customers all tax savings under the TCJA. Requiring Ohio utilities to continue recording a regulatory liability for those savings is a necessary step toward achieving that goal. The PUCO should reject utilities' attempts to keep customers' money for themselves. If utilities are not required to return the deferred tax liability for these amounts, the utilities (and their shareholders) would receive an unjust and unreasonable windfall funded by customers because of the TCJA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief was served on the persons stated below via electronic service, this 13th day of August 2018.

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Case No(s). 18-0047-AU-COI

Summary: Brief Merit Brief by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Healey, Christopher Mr.