

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Implementation of the)	Case No. 18-1185-EL-UNC
Tax Cuts and Jobs Act of 2017.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Approval of Tariff)	Case No. 18-1186-EL-ATA
Amendments.)	

**DUKE ENERGY OHIO'S MEMORANDUM CONTRA MOTION
TO ESTABLISH A PROCEDURAL SCHEDULE**

I. Introduction

On July 25, 2018, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed an application (Application) in the above-captioned proceedings to establish a rider to credit its electric customers with the benefits of the Tax Cuts and Jobs Act of 2017 (TCJA). Since the filing of the Company's Application, numerous interested parties have sought intervention, including the Ohio Energy Group (OEG).¹ On December 17, 2018, the Staff of the Commission filed a Review and Recommendation supporting the Company's Application. With Staff's submittal and given that the Company's request is not for an increase in rates, the Application is decisional. And with the Commission's approval, the Duke Energy Ohio may begin the prompt return of benefits under the Tax Act to its electric distribution customers. Through a misplaced filing, the OEG now attempts to delay this process, arguing it should receive a greater share of TCJA proceeds than

¹ Application; Motion to Intervene and Memorandum in Support of Industrial Energy Users-Ohio (July 27, 2018), Motion to Intervene and Memorandum in Support of The Ohio Manufacturers' Association Energy Group (July 31, 2018), Motion to Intervene of the Kroger Co. and Memorandum in Support (July 31, 2018), Motion to Intervene by the Office of the Ohio Consumers' Counsel and Memorandum in Support (August 3, 2018), Motion to Intervene and Memorandum in Support on Behalf of Ohio Partners for Affordable Energy (August 7, 2018), Ohio Energy Group's Motion to Intervene and Memorandum in Support (August 8, 2018), and Motion to Intervene of the Ohio Cable Telecommunications Association and Memorandum in Support (August 14, 2018).

what current base distribution rate allocations would allow, and thus runs afoul of the Commission's expectations for a deliberate resolution.²

On December 19, 2018, more than four months after having first intervened in this proceeding, OEG filed its Motion to Establish a Procedural Schedule (Motion). Through this Motion, the OEG contends that a protracted hearing process is necessary so as to explore remedies for potential subsidies that may have existed in distribution rates going back as much as fifty years.³ More specifically, the OEG is attempting, through arguments alleging unfair rate design from prior distribution rate cases long since decided, to justify reallocating credits resulting from the TCJA to its member companies and away from all other customers. As discussed in greater detail below, there is no legitimate basis upon which to either reallocate credits or further delay implementation of the crediting mechanism. The OEG's claims are unfounded and unreasonable, and it would have this Commission believe that OEG's clients are somehow unfairly subsidizing other customers. Such is not the case. The Commission has authority to approve the Company's Application without a hearing under R.C. 4909.18 and should exercise such authority to provide these TCJA benefits to electric distribution customers as soon as practical. The forum for addressing OEG's concern was through one of the many base distribution rate cases that have occurred over the last fifty years. In at least the last two base distribution rate cases filed by Duke Energy Ohio since 2012, OEG intervened but was silent on cost of service allocations and made no contention that its clients were subsidizing other customers.⁴ OEG's motion should be denied.

² *In re: 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-CIO, Finding and Order at 18 (Oct. 24, 2018).

³ Motion to Establish a Procedural Schedule of the Ohio Energy Group at 3.

⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 12-1682-EL-AIR, *et al.* (June 7, 2012), and *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et al.* (January 31, 2017).

II. Argument

In its Motion, the OEG's justification for a procedural schedule is to address what it erroneously believes is an unreasonable allocation methodology for flowing the benefits of the TCJA back to Duke Energy Ohio's electric *distribution* customers. The OEG argues that providing the TCJA benefits back to customers based upon current, Commission-approved, distribution rate allocations is unreasonable because the accumulated deferred income taxes (ADIT) resulting from book accounting/tax accounting differences were collected over the 40- to 50-year useful lives of thousands of assets included in distribution rate base.⁵ The OEG speculates that over this five-decade period, some distribution rate schedules *may* have been paying a disproportionate share of taxes and, as a result, some other allocation method should be used to flow back TCJA benefits to somehow make up for this purported past inequity.⁶ The Commission should not allow OEG to now raise issues of rate design that have been long-since settled by this Commission.

Any allegation that one rate class has subsidized another as a result of Commission-approved new base rates is one that should have been addressed at the time of the rate case establishing such rates. If the OEG believed that one or more of its customers was unfairly subsidizing other rate classes based upon historical distribution rate allocations, the process for challenging existed within the rate case proceeding where that allocation was approved by the Commission. Consequently, even if the OEG's claims are accurate and provable, it is nonetheless barred under the doctrine of res judicata and collateral estoppel from seeking to relitigate in this proceeding the historical issues relating to subsidization among the customer classes that were authorized by the Commission in base rate proceedings long ago. Further, the OEG may file a complaint under R.C. 4909.24 if it believes that the current "rates, charges, or classifications are

⁵ OEG Motion at 3.

⁶ Id.

unreasonable or unjustly discriminatory.” Seeking such relief in this proceeding, however, is improper.

Aside from being legally unsupportable, the OEG’s claim is also impractical. The 40- to 50-year timeline of tax subsidies suggested by OEG is complicated because the federal income tax rates changed more than once in that time frame, most significantly with the Tax Reform Act of 1986. At times over that 40- to 50-year period, Ohio also had a state income tax, adding even further difficulty in attempting to unpack unprovable and alleged rate subsidies. Even if the Commission considered indulging OEG’s theory of making up for 50 years of rate subsidy, there is no practical way to estimate which rate groups paid more or less than their share of income taxes going back 40 to 50 years. And, even if it could be done, it is not possible to consider without inviting substantial additional delay in getting the benefits of the TCJA to customers. Such a process would, even as the OEG suggests, require testimony, discovery, a hearing, and likely a briefing schedule, all creating delay before the Commission could even issue an order and customers receive benefits. Simply put, there is no practical way to review the Company’s rates over the last half century to determine to what extent, if any, one distribution customer class may have subsidized another without inviting *substantial* delay. And, as noted above, even if there were subsidies existing over that time, res judicata would prohibit any changes as those matters have already been litigated and concluded. The OEG is simply seeking to receive a greater portion of the savings than what the Company’s current Commission-approved rate structures would otherwise allow its members to receive. The Commission should not be lured into such a trap.

The OEG’s argument regarding historic subsidies that may have existed is also irrelevant for several reasons. First, Duke Energy Ohio’s electric distribution rates have been unbundled for

nearly twenty years.⁷ During that time, the Company has had no less than four base distribution rate proceedings wherein all the Company's rates were reviewed by the Commission, including the existence and perpetuation of any subsidies between and among classes.⁸ Second, to the extent any of the OEG's interests are related to customers receiving transmission-level service, such issues are irrelevant to this proceeding for *distribution-related* TCJA benefits. Finally, the OEG's argument that there is approximately \$224 million in EDITs created due to the TCJA ignores the fact that there are separate EDITs related to the transmission function, approximately \$66 million, that will eventually flow to all customers through transmission rates, as provided for under R.C. 4928.05.

The Company's revenue requirement for network integrated transmission service (NITS) is determined under Attachment H-22 of PJM's Open Access Transmission Tariff (OATT), which is under the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC). It is expected that the FERC will require transmission providers to refund EDITs as part of their formula rates; consequently, the transmission share of EDITs recorded on Duke Energy Ohio's books will flow back to Duke Energy Ohio's customers through the Company's Base Transmission Rider (Rider BTR). To the extent the OEG is suggesting that transmission customers are not receiving a fair share of EDITs is simply wrong and willfully ignores the data provided in the Company's Application and the responses to data requests provided by the Company.

⁷ *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues*, Case No. 99-1658-EL-ETP, *et al.* (December 28, 1999).

⁸ *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59-EL-AIR, *et al.* (January 18, 2005), *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR, *et al.* (June 25, 2008), *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 12-1682-EL-AIR, *et al.* (June 7, 2012), and *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et al.* (January 31, 2017).

Finally, the OEG maintains that its requested, protracted debate should not be objectionable to the Company as it concerns an issue that is revenue-neutral to Duke Energy Ohio. This argument wrongly assumes that Duke Energy Ohio has no interest in ensuring fair and equitable treatment among its customers and is otherwise agnostic to the date on which an order in this proceeding may be issued. As set forth in its Application, Duke Energy Ohio proposed implementing its crediting mechanism on an expedited basis. Now, however, through its request, the OEG is attempting to inject significant delay. Duke Energy Ohio's application in this proceeding results in a fair and equitable resolution of the TCJA issues for all its distribution customers and should be approved without further delay caused by an evidentiary hearing process where one class is trying to receive a greater portion of benefits to the detriment of others.

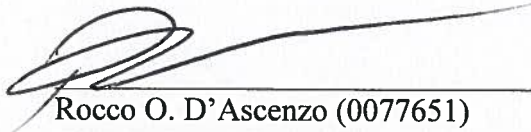
III. Conclusion

The rationale advanced by the OEG to delay the refund of EDITs should be summarily rejected by the Commission because it is barred by res judicata, contrary to the authorized base rate adjustments occurring over the last twenty years, and impractical. Indeed, it would be impossible to determine with any degree of accuracy, what subsidies may have existed over the time period suggested by OEG in any reasonable and factual manner without dissecting nearly half a century of the Company's approved rate design.

For the reasons set forth herein, Duke Energy Ohio respectfully requests that the Commission deny the motion by the OEG and not invite any additional delay in approving the benefits of the TCJA to commence flowing back to customers as a reduction and credit to base electric distribution rates.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in dark ink, appearing to read 'Rocco O. D'Ascenzo', is written over a horizontal line.

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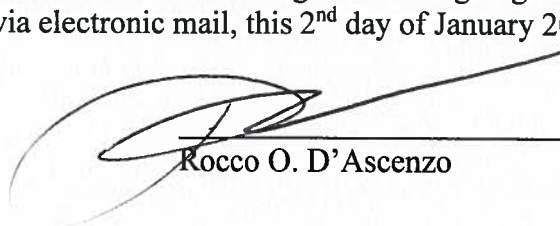
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CERTIFICATE OF SERVICE

The undersigned certifies that notification of the filing of the foregoing document is being made upon the persons listed below via electronic mail, this 2nd day of January 2019.



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Summary: Memorandum Duke Energy Ohio's Memorandum Contra Motion to Establish a Procedural Schedule electronically filed by Mrs. Debbie L Gates on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco O. Mr. and Kingery, Jeanne W