BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan	)	Case No. 16-481-EL-UNC
In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan	)	Case No. 17-2436-EL-UNC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017	)	Case No. 18-1604-EL-UNC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change	)	Case No. 18-1656-EL-ATA

POST HEARING BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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I. INTRODUCTION

The four above-captioned cases concerning the Toledo Edison Company, Ohio Edison Company, and Cleveland Electric Illuminating Company (collectively, the Companies) arose in three different years, concern two completely different subjects, and, without good cause, were unjustly and unreasonably consolidated into one proceeding. When the Public Utilities Commission of Ohio (Commission) ordered all rate-regulated utilities to file applications "not for an increase in rates" under R.C. 4909.18 to implement remaining issues related to the Tax Cuts and Jobs Act of 2017 (TCJA), the Commission instructed utilities to follow the example of the Ohio Power Company (AEP Ohio) in filing an application to address the impacts of the TCJA.[1] Contrary to that directive, the Companies failed to follow the example of AEP Ohio[2] and file a standalone application to pass tax savings on to customers. Instead, the Companies rushed to submit a Stipulation that combines several cases in order to extract additional benefits for the Companies as part of the process whereby customers were supposed to receive tax savings that were owed to them.[3] A Supplemental Stipulation was subsequently filed on January 25, 2019.[4]

The flawed process that led to the Stipulation and Supplemental Stipulation (collectively, the Settlement) pending before the Commission resulted in unjust and unreasonable charges, provisions that insufficiently protect customers, and a rate design that does not fairly and reasonably distribute the burden of funding the Companies' grid modernization endeavors. As

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1 See *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, Entry at ¶¶ 29-30 (October 24, 2018).

2 See *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, 18-1007-EL-UNC, Ohio Power Company's Motion for a Procedural Schedule and Request for Expedited Ruling (June 8, 2018).

3 See Stipulation and Recommendation (November 9, 2018) (Stipulation); Motion to Consolidate (November 13, 2018).

4 See Supplemental Stipulation and Recommendation (January 25, 2019) (Supplemental Stipulation).

such, the Settlement should be modified to ensure that customers are only charged just and reasonable rates, are protected in the event that a charge is deemed to be unlawful, and that the rate design implemented by the Settlement justly and reasonably assigns the customer obligations associated with grid modernization.

Pursuant to the Attorney Examiners' direction at the close of hearing,[5] the Ohio Manufacturers' Association Energy Group (OMAEG) hereby submits its initial post-hearing brief urging the Commission to reject or, alternatively, modify the settlement for the reasons specified herein.

II. PROCEDURAL HISTORY

On January 10, 2018, the Commission ordered all rate-regulated utilities to record on their books a deferred liability to account for the reduction in the utilities' federal income tax obligation resulting from the Tax Cuts and Jobs Act of 2017 (TCJA).[6] Since issuing that Order, the Commission has been clear that the savings resulting from the TCJA must be returned, in full, to customers. On October 24, 2018, the Commission stated that, "[a]s an initial matter, we once again find it necessary to note that we intend all benefits resulting from the TCJA will be returned to customers."[7] In pursuit of that goal, the Commission directed all rate-regulated utilities that had not already done so to file an application to pass tax savings resulting from the TCJA on to customers.[8]

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5 Tr. Vol. II at 321.

6 See *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 (Commission Tax Investigation), Entry at ¶ 7 (January 10, 2018).

7 Commission Tax Investigation, Finding and Order at ¶ 27 (October 24, 2018).

8 Id. at ¶ 29.

The Companies filed an application to pass tax savings on to customers on October 30, 2018.[9] However, the Companies immediately tied the fate of their application to return TCJA savings to customers to the fate of two applications to extract additional, exorbitant monies from customers under the guise of modernizing the grid. Notably, the stated need for collecting such additional monies to modernize the grid is the same rationale that the Commission approved and adopted for the collection of the distribution modernization rider (DMR) that the Companies are currently collecting from customers.[10] These grid modernization cases were not previously related to the TCJA, but the Companies nonetheless tethered them to the TCJA tax refund filing in hopes of having the cases resolved quickly together. Fewer than two weeks after the Companies filed their TCJA Application as directed by the Commission in its October 24, 2018 Finding and Order in the Commission Tax Investigation case, the Companies filed the Stipulation, which purports to address tax savings *and* resolve the Companies' grid modernization applications.[11] Unlike the settlement filed in the Ohio Power Company's (AEP Ohio) tax proceeding,[12] the Companies' settlement was far from unanimous.[13] As noted above, a Supplemental Stipulation was then filed on January 25, 2019, adding three additional parties. Importantly, however, the Supplemental Stipulation specifically states that those three additional

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9 See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017*, Case No. 18-1604-EL-UNC, Application (October 30, 2018) (TCJA Application).

10 See *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at ¶¶ 118-19 (October 12, 2016) (ESP IV Fifth Entry on Rehearing) ("Rider DMR will not only further grid modernization technologies throughout the state of Ohio, it will also bolster the several policies set forth in R.C. 4928.02, specifically by improving reliability by reducing the number and length of outages, provide new options to customers, and allow new suppliers to enter the market"); see also Tr. Vol I at 155-63.

11 Stipulation.

12 See *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, Joint Stipulation and Recommendation (September 26, 2018).

13 Stipulation at 31.

parties are signatory parties to "all terms and conditions of the Stipulation except the terms and conditions of Sections V.B through V.I. related to grid modernization."[14]

Despite the differing subject matters of these cases, the Companies moved to consolidate them into a single proceeding on November 13, 2018.[15] Their motion was granted only two days after it was filed, before any party had a chance to exercise its rights under the Commission's rules to oppose the Companies' motion.[16] Therefore, OMAEG filed an interlocutory appeal of the decision to grant consolidation in this matter.[17] On the first day of hearing, the Attorney Examiners denied certification of the interlocutory appeal.[18]

The Commission conducted a hearing on the Settlement on February 5 and 6, 2019.[19] At the close of hearing, the Attorney Examiners established a March 1, 2019 deadline for the filing of initial post-hearing briefs.[20]

III. STANDARD OF REVIEW

It is well established that a stipulation is merely a recommendation and that it is not binding on the Commission.[21] The Commission "may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing."[22] The

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14 Supplemental Stipulation at 10.

15 Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion to Consolidate (November 13, 2018) (Motion to Consolidate).

16 See Entry (November 15, 2018); see also Ohio Adm. Code 4901-1-12.

17 See Interlocutory Appeal, Request for Certification to Full Commission, and Application for Review (November 20, 2018).

18 Tr. Vol. I at 15.

19 See Tr. Vol. I-II.

20 Tr. Vol. II at 321.

21 *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379 (1978); *see also* Ohio Adm. Code 4901-1-30(E) ("No stipulation shall be considered binding upon the commission").

22 Id.

Commission has established and used the following criteria in evaluating whether a settlement is reasonable and merits adoption:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?[23]

As further explained below, the Settlement proposed in this proceeding fails each prong of this test.

IV. ARGUMENT

A. The Attorney Examiners Erred in Granting the Companies' Request for Consolidation of These Proceedings.

Pursuant to Ohio Adm. Code 4901-1-15(F), a party that is adversely impacted by a procedural ruling issued under Ohio Adm. Code 4901-1-14 that files an interlocutory appeal that is not certified by the attorney examiner may raise the propriety of such ruling as a distinct issue for the Commission's consideration in the party's initial brief. The Companies' motion to consolidate these proceedings was granted on November 15, 2018, only two days after it was filed and before any party had an opportunity to respond to said motion.[24] OMAEG, therefore, filed an interlocutory appeal of that decision on November 20, 2018.[25] The Attorney Examiners denied certification of OMAEG's interlocutory appeal on the first day of hearing. [26]

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[23] See, e.g., *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 48-49 (March 31, 2016).

[24] See Entry (November 15, 2018).

[25] See Interlocutory Appeal, Request for Certification to Full Commission, and Application for Review (November 20, 2018).

[26] Tr. Vol. I at 15.

Accordingly, OMAEG respectfully requests that the Commission find that the Attorney Examiners erred in granting consolidation of these proceedings and, subsequently, erred in not certifying OMAEG's interlocutory appeal of that decision.

As OMAEG argued in its interlocutory appeal, consolidation of these matters was inappropriate given the completely divergent subject matters at issue. Typically, the Commission uses consolidation as a tool when there are common issues and efficiencies to be gained.[27] Until the Companies decided to tie these cases to each other, there was no evidence to indicate that the cases were related. On one hand, the Companies had an application to return tax savings to customers that they had been ordered to file by the Commission, and, on the other, they had two requests to collect additional charges from customers over and above the amounts approved in the Companies' latest ESP proceeding. Requests to collect new charges for grid modernization are in no way related to a request to return money to customers at the direction of the Commission pursuant to a change in federal tax law that was effective over one year ago. And returning customers money due to a change in federal tax law should not be held hostage to increasing customers' bills to pay for unsubstantiated, expensive grid modernization projects.

In asserting that these matters should be consolidated, the Companies focused on the fact that the Stipulation addresses all of these cases.[28] According to the Companies, consolidation will "prevent undue waste and expense from the duplication of efforts across four individual dockets that are all related to the Stipulation."[29] While it may be true that the Companies and

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[27] *In the Matter of the Inquiry into the 1989 Long-Term Forecast Report of the Ohio Gas Company*, Case No. 89-0874-GA-GCR, et al., Opinion and Order (June 26, 1989) ("[C]onsolidation of the hearings is appropriate because common issues exist between these proceedings and the consolidation will enhance the efficiency of the proceedings.")

[28] See Motion to Consolidate at 5 (November 13, 2018).

[29] Id.

Staff quickly reached the Stipulation that artificially tied these cases together, the Stipulation does not change the reality that these cases do not concern issues that are in any way related.

Ultimately, these cases should not have been consolidated. Doing so did not create efficiency and only added unnecessary complexity whereby parties were tasked with litigating unrelated—but individually complicated—issues at the same time on an expedited basis. As such, OMAEG asks that the Commission find that the Attorney Examiners erred in granting consolidation of these matters.

B. The Settlement Is Not the Product of Serious Bargaining Among Capable, Knowledgeable Parties.

The first factor in the Commission's analysis of whether a settlement should be adopted is whether the settlement is the product of serious bargaining among capable, knowledgeable parties. The Settlement reached in the consolidated cases was not. Rather, it was obtained through a rushed process that did not fully involve all interested stakeholders. Thus, the settlement fails to satisfy this criterion.

As noted above, fewer than two weeks elapsed between the time that the Companies filed their TCJA Application to pass tax savings on to customers and the time that the first Stipulation was filed in this case. Testimony at hearing revealed that the shortened time period was due in large part to the fact that Commission Staff (Staff) had already reached a deal with the Companies prior to the Companies filing their TCJA Application and without stakeholder input or involvement from all parties to the proceeding.[30] Companies witness Fanelli admitted that the Companies began discussions with Staff regarding these consolidated matters in June 2018, four months before the Companies filed their TCJA Application with regard to tax savings.[31]

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[30] Tr. Vol. I at 34-35.

[31] Id.

The rushed process used to arrive at this settlement violates the Supreme Court of Ohio's long standing precedent regarding the exclusion of parties with significant interests from settlement negotiations regarding Commission proceedings.[32] Specifically, the Court has held that the exclusion of parties from settlement negotiations is of "grave concern" and that such exclusion violates the Commission's own standards for settlement negotiation.[33] The Companies' four-month exclusive negotiation with Staff was followed by less than a fortnight of negotiations with the parties. As Mr. Fanelli testified, the first all-party meeting was scheduled for November 1, 2018, and the original Stipulation was filed on November 9, 2018.[34] Thus, by the Companies' own admission, the parties were afforded barely more than a week to arrive at an extensive settlement of four separate cases. The parties were simply not afforded sufficient time to fully understand the proposal to resolve four complex cases and evaluate a structural agreement four months in the making before being asked to sign onto the Settlement.

The expedited process that this case followed further inhibited both the "serious bargaining" and "knowledgeable parties" requirements of the Commission's first prong of its stipulation analysis.[35] The depth and complexity of these issues requires more than a week to seriously bargain. Considering the number of parties involved in this case, it is not feasible to expect that all of the issues contained in the Settlement could be seriously bargained in such a short timeframe, especially considering that the parties would be required to weigh issues related to grid modernization alongside issues related to the tax proceeding. Moreover, due to the

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[32] See *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, fn.2, 1996-Ohio-224, 661 N.E.2d. 1097 (1996).

[33] See id.

[34] Id. at 35.

[35] See, e.g., *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 48-49 (March 31, 2016).

extremely limited timeframe between the time the Companies began this case and the Settlement, the parties were required to conduct this bargaining without the aid of discovery responses from the Companies on the Settlement, or even sufficient time to serve discovery and receive responses under the Commission's rules.[36]

Specifically, the Settlement concerned not only the full implementation of the effects of the TCJA but also the deployment of 700,000 advanced meters[37] and the recovery of $516 million in capital investment.[38] These are complex issues and it is difficult to imagine that the parties, many of whom would have been involved in other cases and had other issues to attend to, could have become fully knowledgeable on all of the different facets in this case in such a short time period.

Accordingly, the Commission should find that the Settlement fails the first prong of the analysis, as it is not the product of serious bargaining by capable, knowledgeable parties.

C. The Settlement Does Not Benefit Ratepayers or the Public Interest.

The rushed Settlement that stemmed from the process described above resulted in an agreement that includes unjust and unreasonable charges, deploys an inadequate rate design, and does not sufficiently protect customers against charges deemed to be unlawful. The Commission should modify the Settlement to ensure that just and reasonable charges are established, that a fair rate design is utilized, and that appropriate tariff language is adopted to fully protect customers if a rate is deemed to be unlawful by requiring refunds. Until those revisions are made, the Settlement fails to satisfy the requirement that it benefits ratepayers and is in the public interest.

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[36] See Ohio Adm. Code 4901-1-17.

[37] Stipulation at 14.

[38] Id. at 25.

i. The Commission Should Modify the Settlement to Ensure that the Refund Language Adequately and Fully Protects Customers.

The Stipulation that was originally filed by the parties provided for the recovery of capital costs associated with grid modernization through the Advanced Metering Infrastructure/Modern Grid Rider (Rider AMI), but did not provide for tariff language for that rider that would fully protect customers in the event that a Commission audit or the Supreme Court of Ohio determined that charges collected under Rider AMI were imprudent, unreasonable, or unlawful.[39] While the deficiency was partially rectified through the Supplemental Stipulation, the refund language is still insufficient and does not properly and reasonably protect customers. The Supplemental Stipulation provided that the following language concerning reconciliation be included in the Rider AMI tariff:

> This Rider is subject to reconciliation including, but not limited to, increases or refunds. Such reconciliation shall be based *solely* upon *the results of audits* ordered by the Commission in accordance with the July 18, 2012 Opinion and Order in Case No. 12-1230-EL-SSO, and the March 31, 2016 Opinion and Order in Case No. 14-1297-EL-SSO and upon the Commission's orders in Case Nos. 18-47-AU-COI, 16- 481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC and 18-1656-EL-ATA.[40]

One improvement to this language would be to explicitly provide that refunds can result from orders of the Supreme Court of Ohio. As the language is currently written, it is unclear whether a determination by the Court that the Companies had unlawfully collected from customers could actually result in a refund to those customers. Several utilities in the state have filed tariffs that address this concern by explicitly contemplating reconciliation or refunds as a result of Court decisions. For example, Vectren Energy Delivery of Ohio, Inc. (Vectren) has tariff language included with its Uncollectible Expense Rider that provides:

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[39] See Stipulation at 10-14.

[40] Supplemental Stipulation at 3-4 (emphasis added).

> The Uncollectible Expense Rider is updated annually. The Company's actual uncollectible expense for the applicable Rate Schedules, including carrying charges, shall be reconciled annually, with any over or under collection being reflected as a charge or credit in a subsequent update of the Rider Rate. The charge or credit may include Customer refunds if the Commission or Supreme Court of Ohio determines, as a result of an audit of the annual period in which the Rider Rate was in effect, that the Company's charge was unlawful or unreasonable or included imprudent amounts.[41]

Columbia Gas of Ohio has tariff language in its Infrastructure Development Rider that provides:

> This Rider is subject to annual reconciliation or adjustment, including but not limited to, increases or refunds. Such annual reconciliation or adjustment shall be limited to the infrastructure development expenses upon which the rate to recover those expenses was calculated, if determined to be unlawful, unreasonable, or imprudent by the Commission in the docket those rates were approved or the Supreme Court of Ohio.[42]

The Ohio Gas Company's Uncollectible Expense Rider has refund and reconciliation language that states:

> In addition to the periodic update and reconciliation process, the Uncollectible Expense Rider may also include Customer refunds if the Commission or Supreme Court of Ohio determines, as a result of the Commission's biennial audit of the rider, that the Company's Uncollectible Expense Rider was unlawful or unreasonable or included imprudent amounts.[43]

The language noted above embraces the possibility that the Supreme Court of Ohio could determine that the charge is unlawful, unreasonable, or included imprudent amounts. These utilities, and others, have used similar language in other riders as well, and in doing so, have

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[41] See Vectren Energy Delivery of Ohio, Inc. Tariffs, P.U.C.O. No. 3, Sheet No. 39, Tenth Revised Page 1 of 1, Uncollectible Expense Rider (effective August 9, 2018).

[42] Columbia Gas of Ohio, Inc. Tariffs, P.U.C.O. No. 2, Seventh Revised Sheet No. 30c, Infrastructure Development Rider ("IDR") (effective with meter readings on or after October 17, 2018).

[43] Ohio Gas Company Tariffs, P.U.C.O. No. 2, First Revised Sheet No. 13, Page 1 of 1, Uncollectible Expense Rider (effective August 1, 2018);

ensured that customers are appropriately protected.[44] Modifying the language is important, because, if used in this Settlement, it would explicitly preclude the Companies from arguing that the refund was not a result of a Commission audit determination that a charge was imprudent, unreasonable, or unlawfully collected and is, therefore, not permitted.

Another flaw in the Settlement's language is the inclusion of the word "solely." The use of the word "solely" in the Companies' reconciliation and refund language is unjust and unreasonable and inconsistent with other utilities' tariff language. In addition to precluding refunds as the result of Supreme Court decisions as discussed above, the word "solely" unnecessarily limits which Commission proceedings can in fact result in refunds of unreasonable or unlawfully collected charges to customers. A comparison of this language with language designed to serve a similar purpose that has been used by other utilities in the state demonstrates that the issues mentioned above regarding the inclusion of the word "solely" could arguably prevent customers from receiving refunds, even in the event of an audit or Court order that the Companies had unlawfully collected from customers under Rider AMI.

Moreover, the enumeration of specific cases that can result in a refund forecloses the possibility that the Commission could issue a refund were it to decide that one was appropriate in a docket not listed in the Settlement's language. For instance, the Commission could order an audit in a new proceeding in future years, or open a new docket in the event that the Supreme Court of Ohio issues a decision on appeal and remands to the Commission. In this event, an

[44] See, e.g., Columbia Gas of Ohio, Inc. Tariffs, P.U.C.O. No. 2, Eighteenth Revised Sheet No. 29 (effective with meter readings on or after June 29, 2018); Columbia Gas of Ohio, Inc. Tariffs, P.U.C.O. No. 2, Fourteenth Revised Sheet No. 28, Demand Side Management Rider (effective with meter readings on or after May 1, 2018); Suburban Natural Gas Company Tariffs, Section V, Ninth Revised Sheet No. 2A, Uncollectible Expense Rider (effective January 23, 2019); Suburban Natural Gas Company Tariffs, Section V, Seventh Revised Sheet No. 6, PIP Plan Tariff Base Rate Rider (effective September 14, 2018); Ohio Gas Company Tariffs, P.U.C.O. No. 2, First Revised Sheet No. 12, Page 1 of 1, Percentage of Income Payment Plan ("PIPP") Rider (effective August 1, 2018).

audit or related proceeding could be conducted in a docket that is not explicitly listed in the language provided in the Settlement, the Companies could then argue that the Commission would be precluded from ordering a refund by a combination of this language and the Supreme Court of Ohio's decision in *Keco Indus. V. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

Comparing the Settlement language to that used in other utility tariffs demonstrate that this result is avoidable. For example, one rider from the Dayton Power and Light Company (DP&L) includes this language:

> This Rider is subject to reconciliation, including but not limited to, refunds to customers, based upon the results of audits as approved and ordered by the Commission.[45]

The language referenced above is far more reasonable than the Settlement's language because it does not use the word 'solely' and does not tie the possibility of a refund to specific cases. In situations involving audits or related proceedings occurring in dockets not enumerated in the tariff refund language restated above, the other utilities' language would allow reconciliation and refunds generally, as those refunds are not confined to specific dockets when the Commission or Court determines that such action is appropriate.

Companies Witness Fanelli was asked about the refund language included in the Settlement on cross-examination.[46] While Mr. Fanelli attempted to explain a situation by which the Settlement's refund language may still be able to lead to customer refunds as a result of audits in different cases,[47] his specific word choice is revealing. He stated that in the event that the Commission determined that the Companies have over collected or unlawfully collected from

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[45] The Dayton Power and Light Company Tariffs, P.U.C.O. No. 17, Fifth Revised Sheet No. D37, Distribution Modernization Rider, Page 2 of 2 (effective November 1, 2018).

[46] See Tr. Vol. I at 123-30.

[47] Id. at 125-26.

customers in a docket not listed in the Rider AMI tariff refund language, and under specified circumstances, "this tariff language *could* apply."[48] The Commission should not settle for a mere possibility that customers will be protected. Instead, to eliminate all doubt of the applicability of the refund language and the Commission's ability to issue refunds when charges were over collected or were deemed to be unlawful, the Commission should modify the language and remove the list of specific cases and the word 'solely.'

Neither the Companies nor any other signatory party offer a persuasive or compelling justification for this ambiguity-creating language. Companies Witness Fanelli simply testifies that the language is permissible because the same language is already in tariffs approved by the Commission previously.[49] The fact that the Companies have used reconciliation and refund language that insufficiently protects customers in the past is not a justification for the Commission adopting that same language here. In fact, more recent Commission precedent argues in favor of modifying the Companies' tariff language to be more consistent with the refund language adopted by the Commission for the other utilities. Pursuant to the Commission's own precedent, the Commission should be asking whether the language, as part of the settlement package, benefits ratepayers and the public interest,[50] not whether the language is the same as or similar to language that the Companies used in older, outdated filings.

Ratepayers and the public interest would undeniably benefit from more clear, unambiguous language that explicitly allows for reconciliation and refunds where deemed appropriate instead of language that leaves the Companies room to engage in interpretive exercises that could result in customers being denied refunds when the Commission or the

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48 Id. (emphasis added).

49 Tr. Vol. I at 130.

50 See, e.g., *In the Matter of the Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017, et al.*, Case Nos. 18-1007-EL-UNC, et al., Finding and Order at ¶ 14 (October 3, 2018).

Supreme Court of Ohio has already determined that the Companies over collected from customers or collected imprudent, unreasonable, or unlawful charges. Accordingly, the Commission should modify the reconciliation and refund tariff language related to Rider AMI to properly and reasonably protect customers.

ii. The Commission Should Modify the Settlement to Eliminate Unjust and Unreasonable Grid Modernization Charges.

The Companies have failed to demonstrate that the excessive grid modernization charges in an amount up to $516 million are just and reasonable and not duplicative of similar charges already being collected from customers. The record does not demonstrate that costs recovered from customers are just and reasonable or that the magnitude of that cost recovery ($516 million[51]) is justified by the benefits that customers will actually receive from the Companies' grid modernization efforts.

Environmental Law and Policy Center (ELPC) Witness Volkmann explained how the purported benefits of the grid modernization efforts at issue in this case are overstated and based upon flawed data.[52] He also explains that the Companies' cost-benefit analysis is flawed.[53] As noted previously, the Supplemental Stipulation's signatory parties added a footnote that made it clear that they were not to be considered a signatory party to the terms and conditions of the Stipulation related to grid modernization. Further, the Supplemental Stipulation adds another footnote to the Stipulation, stating that "The Office of the Ohio Consumers' Counsel and NOPEC take no position on whether Grid Mod I produces a positive cost-benefit analysis for

[51] Stipulation at 25.

[52] See ELPC Ex. 32, Direct Testimony of Curt Volkmann, Public Redacted Version at 9-18; ELPC Ex. 33C, Direct Testimony of Curt Volkmann, Confidential Version at 9-18.

[53] Id. at 5-22.

consumers, but agree not to oppose Attachment B for purposes of the Original Stipulation and Supplemental Stipulation."[54]

The abundant lack of clarity regarding the benefits that this massive investment will provide demonstrates that the Companies have not sustained their burden and proven that the increase in charges to customers for grid modernization through the Rider AMI are just and reasonable as required by Ohio law.[55] Specifically, R.C. 4905.22 states that [a]ll charges made or demanded for any service rendered, or to be rendered, 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." The Commission has held that the utility has the burden of proof in cases such as these, and that when the burden of showing that rates would be just and reasonable is not met, the application is rejected.[56]

Furthermore, there has been no demonstration that the grid modernization charges authorized by the Settlement are not duplicative of those already collected under Rider DMR approved by the Commission in ESP IV.[57] In that Order, the Commission stated that the Rider DMR funds would provide benefits such as improved reliability, providing new options to customers, and reducing the number and length of outages.[58] In this case, Companies Witness Fanelli states that the grid modernization funds will be used to provide similar benefits, such as improved system reliability, faster restoration, reduction of end-use energy consumption,

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54 Supplemental Stipulation at 8.

55 R.C. 4909.18.

56 See *In the Matter of the Application of Duke Energy Ohio for a Charge Pursuant to Section 4909.18, Revised Code, et al.*, Case No. 12-2400-EL-UNC, et al., Opinion and Order at 49 (February 13, 2014).

57 ESP IV Fifth Entry on Rehearing at ¶ 119.

58 Id.

allowing customers to make informed choices about energy usage, and better enabling the Companies to make future grid modernization investments.[59]

The Commission should not permit the Companies to repeatedly return to customers with their hands out, promising the same benefits without any explanation of why the money previously collected from customers was insufficient or has not already been used to provided those same benefits. Customers were assured that revenue collected from Rider DMR would bring these purported improvements and benefits,[60] and now, three years and hundreds of millions of dollars into Rider DMR, the Companies again claim that an additional half-billion dollars is needed to provide similar benefits. As the Companies have not made a showing that these charges are not duplicative of those that are currently being collected from customers, the Settlement is unjust and unreasonable insofar as it asks customers to pay repetitive charges in order to receive the same or similar benefits as those that were promised three years ago.

The Companies failed to sustain their burden to demonstrate that the excessive grid modernization charges authorized in the Settlement in an amount up to $516 million are just and reasonable and not duplicative of similar charges already being collected from customers. Accordingly, the Settlement should be rejected.

iii. <u>The Commission Should Modify the Rate Design Provided for in the Settlement for the Allocation of the Tax Savings Such that It Properly Assigns Benefits to Each Customer Class.</u>

The process that led to the Settlement demonstrates that the Companies are less interested in using a rate design that fairly benefits all of their customers than they are in manipulating the Settlement to increase the number of signatory parties. This priority for unanimity over fairness led to a rate design that disproportionately benefits residential customers at the expense of

[59] Companies Ex. 2, Direct Testimony of Santino L. Fanelli at 9-10.

[60] ESP IV, Fifth Entry on Rehearing at ¶ 119.

commercial and industrial customers. As such, the rate design adopted to allocate the tax savings does not benefit ratepayers or the public interest.

The initial Stipulation provided that the rate design for the return of tax benefits under the Settlement would be as follows:

> The amount included in the new credit mechanism for current tax savings not reflected in riders will be allocated to residential and non-residential rate schedules based on the allocation factors contained in the Companies' last base rate cases and the EDIT amortizations will be credited to customers in the following manner: one-half of the EDIT amount will be allocated to residential and non-residential rate schedules based on the basis of the 4CP methodology. The 4CP methodology shall be based on the Companies' 4CP for the 2017 calendar year. One-half of the EDIT amount to be credited to customers shall be allocated to residential and non-residential rate schedules based on 2017 kilowatt-hour sales. Those allocations shall remain fixed for the term of the credit mechanism. The credit mechanism for the EDIT amount will not terminate when new base rates become effective. The resulting amounts shall be returned to customers as a credit that shall be calculated on the basis of dollars per kWh.[61]

This rate design uses factors that have already been established through the Companies' base rate case and then amortizes half of the excess accumulated deferred income tax (EDIT) amortization using the 4 CP method and the other half using actual 2017 kilowatt-hour sales. The Settlement, however, did not retain these reasonable terms when additional parties were added and revisions to the allocation of the tax savings were made through the Supplemental Stipulation. Instead, it implemented a new rate design, which provided additional benefits to residential customers over other customers.[62]

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[61] Stipulation at 9.

[62] See Supplemental Stipulation at 2, Supplemental Attachment E.

OCC Witness Willis explained that this modification to the rate design would result in residential customers receiving $125.9 million more of an $808 million rate reduction.[63] Put another way, the Supplemental Stipulation shifted more than 15.58% of the rate reduction (which had previously been determined by already-established allocation and usage factors) from commercial customer classes to residential customers. Mr. Willis admitted on cross-examination that this substantial increase of the residential customers' share of the total benefits of the Settlement means a reduction in the share of the benefits received by other customer classes.[64] This sort of cost-shifting from one customer class to another in an attempt to lure parties into agreeing to the Settlement does not benefit ratepayers and is not in the public interest.

The Commission has already stated its disapproval for this sort of approach to settlement, whereby individual parties are afforded additional benefits in order to entice those parties to sign onto a stipulation. In one case, the Commission warned parties that these provisions are "strongly disfavored," even stating that it is "highly likely" that those provisions would be stricken from future stipulations.[65] Accordingly, in this case, the Commission should find that the rate design that was concocted in order to expand the list of signatory parties does not benefit customers and is not in the public interest and strike the provision from the Settlement. The Supplemental Stipulation is unjust and unreasonable inasmuch as it fails to fairly allocate the benefits resulting from the TCJA to the Companies' customers. As such, it fails to satisfy the requirement that the Settlement benefits ratepayers and is in the public interest.

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63 OCC Ex. 1, Direct Testimony of Wm. Ross Willis at 5.

64 Tr. Vol. II at 315.

65 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand at 12 (February 11, 2015).

D. The Settlement Violates Important Regulatory Practices and Principles.

The Settlement violates several important state policies and regulatory principles that have long been relied upon by the Commission. The Ohio General Assembly has codified several state policies that should guide the regulation of electric utilities in the state in R.C. 4928.02. These policies include ensuring the availability of reasonably priced electric service, encouraging cost-efficient access to information regarding the operation of the transmission and distribution systems, and protecting consumers from market deficiencies. The Settlement violates these principles while also ignoring principles of fundamental fairness by unjustly and unreasonably increasing customers' costs for unsubstantiated grid modernization projects, providing disproportionate benefits to some customers at the expense of other customers, and exposing consumers to the possibility of being left without recourse in the event that unlawful charges are collected.

i. The Settlement Fails to Ensure Nondiscriminatory and Reasonably Priced Electric Service.[66]

When the Commission directed rate-regulated utilities to file applications to ensure that customers received the benefits of the TCJA, it surely intended to adhere to this principle by ensuring that utility customers are not paying for tax obligations that no longer exist. Had the Companies simply filed their TCJA Application as directed without tying it to a separate measure to extract additional, exorbitant costs from customers for unsubstantiated grid modernization programs that have not been proven to meet a cost-benefit analysis, they would have not violated this important principle. As it is though, the Companies have (again) sought to collect money from customers for grid modernization—to the tune of up to $516 million[67]—even

[66] R.C. 4928.02(A).

[67] Stipulation at 10.

though they already have established a Distribution Modernization Rider (Rider DMR) that has allowed for the collection of hundreds of millions of dollars.[68] As explained previously, the costs authorized under the Settlement for grid modernization appear to be duplicative of costs that are already being collected. Collecting money for the same projects (or potentially the same projects) through duplicative avenues denies customers reasonably priced electric service.

Given that the Commission stated that Rider DMR funds could be used for distribution modernization (although the Commission did not require), the Companies should be required to demonstrate that customers' funds will not be used to fund the same projects through Rider AMI. The Companies have not explained whether the dollars already collected from customers have been used, either in whole or in part, to provide the benefits that the Companies aver the Settlement is necessary to achieve as envisioned by the Commission's prior order. OMAEG and its members, like other customers of the Companies, understand the importance of grid modernization. But the Companies' approach to this issue appears to be an endless stream of requests for more money to achieve the same benefits rather than a deliberate plan to concretely ensure those benefits in fact occur. As this Settlement continues to subject customers to hundreds of millions of dollars for modernization efforts with no end in sight, it violates the important regulatory principle of ensuring reasonably priced service, as established by the General Assembly.

Additionally, the rate design created by the Settlement is discriminatory, unfairly shifting costs to non-residential customers in violation of the state policy and principles of fundamental fairness and for the sole purpose of increasing the number of signatory parties on this flawed

[68] See The Cleveland Electric Illuminating Company Tariffs, P.U.C.O. No. 13, Sheet 132 3rd Revised Page 1 of 1, Distribution Modernization Rider (effective January 1, 2019); Ohio Edison Company Tariffs, P.U.C.O. No. 11, Sheet 132 3rd Revised page 1 of 1, Distribution Modernization Rider (effective January 1, 2019); Toledo Edison Company Tariffs, P.U.C.O. No. 08, Sheet 132 3rd Revised page 1 of 1, Distribution Modernization Rider (effective January 1, 2019).

Settlement. As discussed above, the Companies agreed to modify the original Stipulation to shift additional benefits to residential customers at the expense of other customers. This unjust and unreasonable maneuver should be rejected because in addition to causing commercial and industrial customers to unjustly and unreasonably pay more for electric service, it demonstrates a desire on behalf of the Companies and other signatory parties to disregard fairness and reasonableness in establishing rates, riders, charges, and credits in order to obtain a longer list of signatory parties.

In all rate-related matters, the Commission should focus on setting just and reasonable rates, rather than on adding additional non-opposing parties. The original Stipulation, despite its many flaws, at least attempted to do this by tying TCJA savings to rate design principles that have already been established. But through the Supplemental Stipulation, the Companies agreed to abandon a fair, neutral dispersion of the tax savings in this case in favor of a cost shift to residential customers to get certain intervening parties on board with the Settlement. This unfair cost shift is unjust, unreasonable, and discriminatory in violation of Ohio law. It is also an arbitrary method of ratemaking that the Commission should reject in favor of more sound ratemaking principles.

ii. The Settlement Fails to Ensure Cost-Effective and Efficient Access to Information.[69]

As noted above, the Companies are already collecting money for distribution modernization. This Settlement increases that collection, in part, to allow the Companies to implement advanced meters and supporting communications networks.[70] Given that customers have already been paying for distribution modernization or the potential to modernize the grid,

[69] R.C. 4928.02(E).

[70] Stipulation at 11.

perhaps with an expectation that these sort of endeavors would have already been completed or at least commenced, the Settlement is not ensuring cost-effective and efficient access to information regarding the operation of the distribution system in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers as envisioned by the state policy.[71] As noted above, the Companies refuse to allow customers to exit the endless cycle of repeatedly financing modernization efforts, each time making the same promises of benefits to customers.

iii. The Settlement Fails to Facilitate the State's Effectiveness in the Global Economy.[72]

By unreasonably and unjustly charging customers for exorbitant rates related to grid modernization, and by failing to ensure non-discriminatory and reasonably priced electric service, the Settlement fails to facilitate the State's effectiveness in the global economy as required by the policy of the state. As explained by Mr. Volkmann, and discussed above, the benefits to customers are overstated. But in addition to the exaggeration of benefits, the Settlement increases the cost of electric service for customers by imposing additional charges related to grid modernization. This makes Ohio a less attractive place for companies and businesses to locate, expand, or operate in Ohio, therefore impeding Ohio's effectiveness in the global marketplace.

iv. The Settlement Fails to Protect Customers.

The Settlement before the Commission also fails to protect the Companies' customers. As noted previously, customers are insufficiently protected by this Settlement. The loopholes in the refund language in Rider AMI could allow the Companies to avoid issuing refunds or

[71] R.C. 4928.02(E).

[72] R.C. 4928.02(N).

subjecting their collection to reconciliation on a technicality. Without adequate language that absolutely protects customers from unjust, unreasonable, or unlawful charges, customers are not protected by this Settlement, in violation of state policy.

V. CONCLUSION

The Settlement before the Commission is a rushed attempt to address multiple, unrelated issues in one fell swoop. The Companies should have focused on the Commission's TCJA directives independently of other issues or, alternatively, allowed for a settlement process that would have permitted the parties to fully consider the matters at issue. The Settlement that resulted from this warped process fails to establish just and reasonable rates, utilizes an unjust and unreasonable rate design for the allocation of tax savings, and failed to adequately protect customers from unlawful charges. As such, the Commission should reject or modify the Settlement as it was not a product of serious bargaining among all knowledgeable parties, does not benefit ratepayers and the public interest, and violates important regulatory principles and practices as set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail March 1, 2019.

/s/ Brian W. Dressel_____
Brian W. Dressel

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