BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Implementation of the Tax Cuts and Jobs Act of 2017.	)))	Case No. 18-1830-GA-UNC
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Tariff Amendments.	)))	Case No. 18-1831-GA-ATA

INITIAL BRIEF FOR CONVERTING FEDERAL TAX CUTS FOR DUKE INTO RATE CUTS FOR OHIO CONSUMERS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

A key initiative for the Office of the Ohio Consumers' Counsel ("OCC") has been to secure for consumers, in reductions to the utility rates they pay, their full share of Duke Energy Ohio's ("Duke") tax savings as a result of the Tax Cut and Jobs Act of 2017 ("TCJA" or "federal tax cuts"). The federal income tax rate that utilities such as Duke pay was reduced from 35% to 21% on January 1, 2018. Duke's current rates for natural gas customers, however, were set using the higher 35% federal income tax rate. As a result, Duke should refund to consumers the increment that it charged them for the higher tax rate after the lower tax rate became effective. Similarly, the lower federal income tax rate also caused some accumulated deferred income taxes recorded on Duke's financial statements to become "excess." This excess represents money collected from customers to pay future income taxes that, due to the new lower tax rates, Duke will no longer have to pay. This excess should be returned to consumers as expeditiously as possible, consistent with federal tax laws.

In this regard, OCC has consistently advocated that the most credible approach for transferring a utility's tax savings to its customers is to use a simple and straightforward process, such as a credit rider, that does not involve offsetting cost increases from unrelated utility programs. In other words, utilities should not use this occasion for consumers to receive rate reductions as an opportunity to increase their rates for some other program.

Duke's proposal to return reductions from the federal tax cuts is a good first step to help start this process for its approximately 430,000 natural gas customers. But it should be modified as recommended by the Staff of the Public Utilities Commission of Ohio ("PUCO") and OCC. Consumers deserve to benefit as soon as possible, and in the most transparent way possible, from the reduction in Duke's federal income taxes. They will if the PUCO adopts the recommendations of its Staff and OCC. It should do so.

II. BACKGROUND

On October 24, 2018, in Case No. 18-047-AU-COI, the PUCO ordered that "all Ohio rate-regulated utility companies should be directed to file applications 'not for an increase in rates,' pursuant to R.C. 4909.18, in a newly initiated proceeding, to pass along to consumers the tax savings resulting from the TCJA (hereafter the "18-047 Order")."[1] In response to the PUCO's directive, on December 21, 2018, Duke stated that it "initiates this instant docket with a proposal to commence crediting its natural gas distribution customers with the full benefit of the TCJA's impact on base rates and riders, to the extent not already reflected in those rates."[2] Duke proposed to pass back the federal tax

[1] PUCO Finding and Order in Case No. 18-047-AU-COI at 18 (October 24, 2018).

[2] Duke Application at 2 (December 21, 2018).

savings to customers through: (1) a reduction to current tariffed base gas distribution rates; (2) creation of a new rider entitled “Rider Gas TCJA” or “Rider GTCJA” (“tax savings rider”) to pass back excess accumulated deferred income taxes; and (3) modification of its existing Riders AMRP and AU to refund excess deferred income taxes associated with investments recovered through those riders.[3]

On April 17, 2019, the PUCO Staff filed its Review and Recommendations in this case (“Staff Report”). The Staff made several recommendations in four general categories in response to Duke’s Application: (1) “Reduction in the FIT Recommendations,” (2) “EDIT Recommendations”; (3) “Rate Design of EDIT and Stub Period,” and (4) “True-Up of Pass Back Amounts and Actual TCJA Savings.”[4] As discussed in greater detail below, the Staff’s recommendations are consistent with OCC’s goals of simplicity, transparency, and expeditiously returning tax savings to consumers. OCC concurs with and supports all of the PUCO Staff’s recommendations made in the Staff Report.

But Duke has identified areas in the Staff Report with which it disagrees. The first area of disagreement is that Duke proposes to reflect the federal tax cuts as a 5.3558% reduction to the base rates charged consumers rather than through a credit rider, as proposed by OCC and the PUCO Staff. Duke proposes to accomplish this by amending its base rate tariffs.[5] Duke maintains that OCC’s and PUCO Staff’s recommended method will cause it to incur expenses to create two separate riders.[6]

[3] *Id.*

[4] *See* PUCO Staff’s Review and Recommendations (April 17, 2019).

[5] Duke Application at 5-6.

[6] Duke Comments at 7-8.

The second area of disagreement is that Duke proposes that the amount of excess deferred income taxes to be passed back to customers should be based on balances that existed on the date certain (March 31, 1012) of its most recent base rate case.[7] In contrast, OCC and PUCO Staff recommend that balances for excess deferred income taxes that will be passed back to consumers should be based on Duke's excess deferred income tax balance recorded on its balance sheet as of December 31, 2017.[8] Duke argues that OCC's and the PUCO Staff's recommendation to base excess deferred income tax refund amounts on balances at December 31, 2017 is inconsistent with a settlement agreement approved in Case No. 17-2202-GA-ALT. In that settlement, OCC and PUCO Staff agreed that computing excess deferred income taxes to be refunded by another utility, Columbia Gas of Ohio ("Columbia"), to consumers would use the date certain balance from Columbia's most recent rate case.[9]

III. RECOMMENDATIONS

A. Duke should pass back savings from the federal income tax rate reduction through a credit rider to benefit consumers.

Consumers deserve to benefit as soon as possible, and in the most transparent way possible, from the reduction in federal income taxes. Having Duke reflect the reduced federal income taxes from the federal tax cut as a direct credit to customers (via the tax savings rider) is the most transparent way of demonstrating to customers that they are receiving the benefits of the lower federal income tax rates resulting from the TCJA.[10]

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[7] Duke Comments at 13. Duke's most recent base rate case was Case No. 12-1685-GA-AIR.

[8] Staff Report at 4. Duke's second, third, and fourth areas of disagreement with the Staff Report have been collapsed into one summary since they involve the same Staff recommendation.

[9] *Id.* at 11.

[10] Direct Testimony of Kerry J. Adkins filed July 31, 2017 (OCC Ex. 1) at 7.

Duke is concerned with transparently giving the benefits of the federal tax cut to consumers through the tax savings rider. It believes that it will be necessary to create two riders. Duke's concern is a reach.

Duke will be creating the tax savings rider no matter what.[11] And it should be a relatively straightforward process for Duke to add the federal income tax reduction to the tax savings rider. It collects rates from customers via direct customer charges and/or volumetrically. In fact, Duke currently has 14 riders in its gas tariffs that are collected from customers either through direct charges or volumetrically.

According to OCC Witness Adkins, "Duke is very familiar with riders and collecting rates from customers via direct customer charges and/or volumetrically."[12] Modifying the tax savings rider as OCC and PUCO Staff recommends should not cause Duke to incur additional costs.[13] There is no need to create two riders, especially given that doing so would eliminate the transparency of reflecting the FIT reduction through tax savings rider.[14]

Further, as OCC Witness Adkins pointed out, it has been the PUCO's policy in recent years to consider and resolve base rate case matters in base rate cases while addressing single issues in single-issue related cases.[15] This case involves a single issue

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See* Hearing Transcript at 54.

(federal taxes), therefore passing back all savings resulting from the federal tax cuts in the tax savings rider is consistent with the PUCO's practices.[16]

To benefit consumers quickly and transparently, Duke should be required to give customers the benefit of the federal tax cuts through a credit rider, the tax savings rider.

B. In order for consumers to receive all tax savings from the federal tax cuts, balances for excess deferred income taxes should be based on Duke's balance on December 31, 2017 rather than the date certain in Duke's last rate case.

Throughout its investigation of the federal tax cuts, the PUCO has repeatedly emphasized that *all tax savings* must be returned to customers:

- "[T]he Commission intends that all tax impacts resulting from the [federal tax cuts] will be returned to customers."[17]
- "[W]e will be guided by one central principle: all tax savings resulting from the [federal tax cuts] should be returned to ratepayers."[18]
- All utility proposals will be "required to pass all tax savings on to customers."[19]
- "[W]e once again find it necessary to note that we intend all benefits resulting from the [federal tax cuts] will be returned to customers. Customers should receive the savings derived from this change, as these savings were never meant to compensate the utilities or increase their respective rates of return, but merely reflect the reality that utilities are required to pay federal income taxes."[20]

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[16] *See id.*; *see also Cleveland Electric Ill. Co. v. PUCO*, 42 Ohio St.2d 403 (1975) (the PUCO should follow its precedent except where the need to depart from the precedent is clear and the prior decision was in error).

[17] Case No. 18-47-AU-COI, Second Entry on Rehearing ¶15 (April 25, 2018).

[18] *Id.* ¶21.

[19] Case No. 18-47-AU-COI, Third Entry on Rehearing ¶43 (December 19, 2018).

[20] Case No. 18-47-AU-COI, Finding & Order ¶26 (October 24, 2018).

As a result of this stated policy goal, the PUCO ordered all Ohio utilities to "file an application not for an increase in rates, pursuant to R.C. 4909.18, to reflect the impact of the federal tax cuts on their current rates by January 1, 2019, unless exempted or otherwise directed in this Finding and Order."[21] The PUCO did not say *some* tax savings resulting from the federal tax cuts. It did not say only savings produced by selectively recalculating base rates that were set more than six years ago. The PUCO said *all* savings.

Duke proposes that the balance of excess deferred income taxes that should be returned to consumers should be based on less than all tax savings, using the balance as of Duke's last base rate case.[22] Duke ignores the fact that it continued to accrue accumulated deferred income taxes after the date certain from its last base rate case and that such accumulated deferred income taxes became excess with the effective date of the federal tax cuts, January 1, 2018. It is logical therefore that the balance for determining the excess deferred income taxes that will be passed back to customers would be the latest balance immediately before the law became effective in so that consumers receive *all* savings from the reduction in federal income taxes.[23] Duke took advantage and gained the benefit of accelerated depreciation for income tax purposes after the date certain of its last rate case.[24] Therefore, OCC's and PUCO Staff's recommendation that the excess deferred income taxes balance at December 31, 2017 is the proper balance to use to

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[21] Case No. 18-47-AU-COI, Finding & Order ¶35 (October 24, 2018).

[22] Duke Comments at 13.

[23] *Id.* at 8.

[24] *Id.*

determine the total excess deferred income taxes that should be passed back to customers should be adopted by the PUCO.[25]

As explained by OCC Witness Adkins, Duke's reliance on the settlement approved in Case No. 17-2202-GA-ALT" to use the balance as of its last rate case is misplaced.[26] That settlement, like most if not all others, provides:

> This Stipulation is entered into as an overall compromise and resolution of all of the issues *in this proceeding*. This Stipulation does not necessarily represent the position any Signatory Party would have taken absent the execution of the Stipulation. *This Stipulation shall not be cited as precedent in any future proceeding for or against any Signatory Party, if the Commission approves the Stipulation without material modification.*[27]

"In short," explained OCC Witness Adkins, "the settlement in Case No. 17-2202-GA-ALT was based on the facts and circumstances of that case alone, based on the settlement's terms as a package, and is not to serve as precedent in other cases."[28]

IV. CONCLUSION

OCC's and the PUCO Staff's recommendations would expeditiously provide Duke's natural gas consumers with the bill reductions they are due as a result of Duke's federal tax savings. The PUCO should therefore adopt these recommendations.

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[25] *Id.*

[26] *Id.*

[27] Case No. 17-2202-GA-ALT, Settlement (filed October 25, 2018) at ¶27 (italics added).

[28] *Id.* at 9.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Initial Brief was served via electronic transmission to the persons listed below on this 11th day of September 2019.

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