

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INITIAL BRIEF SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

BACKGROUND

In December of 2017 the Tax Cuts and Jobs Act (TCJA) became law and the TCJA notably reduced the federal corporate income tax from 35 percent to 21 percent. With this mandated reduction in taxes paid by utilities, the rates that customers were paying beginning on January 1, 2018, were based on compensating the utility company at a tax rate of 35 percent instead of 21 percent. The Public Utilities Commission of Ohio (PUCO or Commission) “opened a case to study the impacts of the TCJA on the Commission’s jurisdictional rate-regulated utilities, and determine the appropriate course

of action to pass benefits on to ratepayers[.]”¹ The Commission requested comments from interested parties to discuss the components of utility rates that needed to be reconciled because of the TCJA. Some of those topics included revenue requirements, the levels of tax expense recovered through current base rates, riders containing a federal corporate tax component, and accumulated deferred income taxes (ADIT).² The PUCO also asked that commenters recommend the methodology of how the benefits should be passed back to ratepayers. Importantly, the Commission directed that utilities, effective January 1, 2018, record on their books as a deferred liability, the estimated reduction in federal income tax resulting from the TCJA.³

In the Commission’s general TCJA docket, it ordered that all Ohio rate-regulated utility companies file applications not for an increase in rates in newly initiated proceedings to pass along to the tax saving from the TCJA to the consumers.⁴ The Commission noted that it intended “all benefits resulting from the TCJA [to] 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.”⁵ On December 21, 2018, Duke initiated this case to begin crediting its gas customers with the full benefit of the TCJA’s impact on rates and riders.⁶

¹ *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*, Case No. 18-47-AU-COI, Entry at 1 (January 10, 2018) (general TCJA case).

² *Id.* at 2.

³ *Id.*

⁴ *Id.* at 18.

⁵ *Id.*, Opinion and Order at 16 (October 24, 2018).

⁶ Duke Application at 3 (December 21, 2018), Duke Ex. 1.

The Office of the Ohio Consumer's Counsel (OCC) agrees with Staff on issues regarding the return of TCJA money to customers. Duke agrees with the following issues from the Staff's Review and Recommendation: (1) the Stub period⁷ shall be credited over a twelve month period; (2) carrying charges will be based upon Duke's most recently approved long-term debt rate and applied to the monthly balance of the Stub period deferrals; (3) the carrying charges stop accruing once the refund riders become effective; (4) the normalized/protected EDITs include balances that must be amortized pursuant to the average rate assumption method (ARAM); (5) the amortization of excess accumulated deferred income tax (EDITs) related to rider accelerated main replacement program (AMRP) and rider advance utilities (AU) shall be recognized when their next annual filings are made; (6) the amortization of EDITs shall be grossed up using a gross revenue conversion factor based on prevailing tax rates; and (7) rider GTCJA shall be allocated to each rate class based upon the percentage of base rates used in Duke's most recent rate case.⁸

ARGUMENT

- A. Duke should include the reduction in the federal income tax rate as a credit to customers in the GTCA rider because that is a transparent way of showing customers the benefits of the TCJA**

⁷ The reduction of the federal income tax rate (FIT) from January 1, 2018 until such time as a mechanism to pass back TCJA tax savings is implemented..

⁸ Staff's Review and Recommendations at 3 - 5 (April 17, 2019), Staff Ex. 1.

The issues of disagreement between the Staff and Duke are the manner in which to flow the refund to customers and also the date upon which to base the EDIT balances. Staff's recommendations are consistent with past Commission decisions and Staff's recent positions on these issues. Beginning with the methodology to refund the FIT, Duke's application proposed to revise all of its base rates to reflect the lower FIT, and this would in turn reduce base rates by 5.3558 percent; however, Staff recommended that the FIT refund be incorporated in rider GTCA.⁹ The Company plans to establish the GTCA to flow back tax refunds during the Stub period and EDIT refunds, but objects to adding the overall 5.3558 percent reduction to this rider. Duke claims that it would have to create two riders to calculate the FIT because the rate design of the GTCJA rider differs from the rate design necessary to flow FIT savings back to customers.¹⁰ Staff and OCC recommend using the GTCJA to refund the FIT and believe that flowing the FIT refund through the GTCJA rider makes the entire tax transaction more transparent and understandable to the customer.¹¹ By including this 5.3558 percent credit in the GTCA, there will be a specific line item on the customer's bill that will explain what the credit is.

Duke claims that because of the necessity for two different calculations for the FIT and the EDIT refunds Duke will have to create two separate riders. This, as claimed by Duke witness Wathen will "place additional administrative and financial burden on the Company by requiring significant changes to its billing system ...it would be impossible

⁹ Borer Direct Test. at 3, Staff Ex. 2

¹⁰ Wathen Direct Test. at 19, Duke Ex. 2.

¹¹ Borer Direct Test. at 3, Staff Ex. 2, Adkins Direct Test. at 7, OCC Ex. 1.

for the Company to include this base rate reduction in its proposed Rider GTCJA.”¹² As pointed out by OCC’s witness Adkins, Duke will have to create Rider GTCJA in either case and should be able to add the FIT reduction to Rider GTCJA.¹³ Mr. Adkins also stated that “Duke currently has 14 riders in its gas tariffs that are collected from customers either through direct charges or volumetrically.”¹⁴ Duke is obviously very familiar with performing calculations that call for volumetric and per customer charges. Collecting the FIT through Rider GTCJA is no different. And modifying the tax refund Rider GTCJA should not cause Duke to incur additional expenses nor to create two separate riders.

Duke claims that this methodology does not follow Commission precedent because it would be “irrational to assert that the Columbia Gas mode is reasonable for Columbia Gas but not for Duke Energy Ohio[.]”¹⁵ And further, Duke’s witness Wathen states that “[t]here is no meaningful difference in the circumstances for the three utilities¹⁶ to justify a different approach for one.”¹⁷ On the other hand, Mr. Wathen repeats throughout his testimony that there is no one-size-fits-all approach,¹⁸ citing the Commission’s TCJA general case.¹⁹ It is difficult to understand which side Duke is choosing – there is a no one-size-fits-all; therefore, each case presents different

¹² Wathen Direct Test. at 19, Duke Ex. 2.

¹³ Adkins Direct Test. at 7, OCC Ex. 1.

¹⁴ *Id.*

¹⁵ Wathen Direct Test. at 18, Duke Ex. 2.

¹⁶ The three utilities that are referred to in this sentence are Duke, Dominion, and Columbia.

¹⁷ *Id.*

¹⁸ Wathen Direct Test. at 15, 16, and 18, Duke Ex. 2.

¹⁹ *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, Finding and Order at 16 (October 24, 2018).

circumstances that justify different treatment, or follow one case (Columbia Gas of Ohio, Inc.) when Duke chooses to. However, in most Commission cases, including Duke Energy Ohio (electric company), the FIT refund goes back to customers through a credit rider,²⁰ as is recommended by Staff and OCC in this case. The customers receive the same refund amount whether done through a reduction to base rates or passed through the GTCA rider as a credit. Putting all refunds related to the Tax Cuts and Jobs Act of 2017 should be returned to customers through the same rider.

B. The balances for EDIT that will be passed back to customers should be based on Duke's EDIT balance on December 31, 2017.

The remaining disagreement in this case involves the Staff's recommendation that balances for EDIT²¹ that are to be refunded to customers should be based upon Duke's EDIT balances recorded on its balance sheet as of December 31, 2017.²² As explained by Mr. Borer, using the EDIT balances as of December 31, 2017 ensures that 100 percent of the EDIT will be refunded to customers.²³ Because Duke's accumulated deferred income taxes became excess on the effective date of the TCJA, January 1, 2018; it is reasonable that in order to determine the accurate EDIT to be passed back to customers would be the latest balance before the law became effective – December 31, 2017.²⁴ Duke's witness

²⁰ *In the Matter of the Application of Duke Energy Ohio, Inc., for Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1185-EL-UNC, Finding and Order at 2, 6 (February 20, 2019), *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, Opinion and Order at 13 (July 17, 2019), *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, Finding and Order at 3, 6, 12 (October 3, 2018).

²¹ Not related to Duke's AMRP and AU riders.

²² Borer Direct Test. at 5, Staff Ex. 2.

²³ *Id.* at 5.

²⁴ Adkins Direct Test. at 8, OCC Ex. 1.

Wathen believes that the appropriate EDIT balance to use should be March 31, 2012, the date certain of the Company's test year in its most recent rate case.²⁵ However, Staff's recommended EDIT balance date of December 31, 2017 ensures that the full balance of normalized EDIT will be returned to customers. Capturing the full EDIT balance as of December 31, 2017 is consistent with the Commission's directives regarding the TCJA refunds - as stated by the Commission, it "intends that *all* tax impacts resulting from the TCJA will be returned to customers[.]"²⁶

Although current base rates do not include the EDIT balances, the underlying capital investments will be incorporated into customer rates when the Company files its next base rate case.²⁷ In order to recognize timing differences between taxable income and pre-tax accounting income (book/tax differences), regulated utilities such as Duke have adopted the principle of comprehensive interperiod income tax allocation, and the "purpose of interperiod tax allocation, also known as tax normalization, is to allow both the utility and the ratepayers to recognize the full tax benefits of book/tax differences such as accelerated depreciation."²⁸ The ratemaking treatment of tax normalization means that tax deferrals act as interest-free loans from the federal government. For example, Duke has taken advantage and gained the benefit of deductions such as accelerated depreciation for income tax purposes after the date certain of the last rate case.²⁹ And

²⁵ Wathen Direct Test. at 9, Duke Ex. 2.

²⁶ *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*, Case No. 18-47-AU-COI, Second Entry on Rehearing at 6 (April 25, 2018) (emphasis added).

²⁷ Borer Direct Test. at 6, Staff Ex. 2.

²⁸ *Id.* at 6 – 7.

²⁹ Adkins Direct Test. at 8, OCC Ex. 1.

because the customers will fund the investments, it is proper to recommend that the customers recognize, over the life of the investments, the same tax benefits of accelerated depreciation as recognized by the Company.³⁰ If Duke does not refund the EDIT, then Duke will realize a permanent tax savings which will never be realized by the customers unless the EDIT balance is based upon December 31, 2017.³¹

Duke also asserts that Staff's recommendation of using December 31, 2017 as the balance date for determining the EDIT refund is inconsistent with prior Commission cases. Duke points to the recent Columbia case, where the Staff and many other parties signed an agreement determining that the date certain of the company's last rate case was the appropriate date for establishing balances for EDIT purposes.³² That case was not solely a tax case and involved many other issues, many other parties, and millions of dollars of investment in Columbia's capital expenditure program. And that settlement specifically provided that the Stipulation should not be cited as precedent in any future proceeding for or against any signatory party.³³ Other than the stipulated Columbia case, December 31, 2017 has been recommended by Staff and approved by the Commission several times,³⁴ and, in some cases, the utility company itself has recommended December 31, 2017 as the EDIT balance date in their applications for approval of tax

³⁰ Borer Direct Test. at 7, Staff Ex. 2.

³¹ *Id.* at 7.

³² Wathen Direct Test. at 12, Duke Ex. 2.

³³ Adkins Direct Test. at 8, OCC Ex. 1.

³⁴ *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, Stipulation and Recommendation at 9 (November 9, 2018), *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, Finding and Order at 5 (October 3, 2018).

refund riders.³⁵ Even Duke itself has recommended December 31, 2107 as the EDIT balance date in its electric tax case.³⁶ Staff recommends that the Commission order Duke to use December 31, 2017 for flowing EDIT refunds through the GTCJA rider.

CONCLUSION

Staff recommends that the Commission order Duke to reflect the FIT reduction resulting from the TCJA as a credit to customers through the GTCA rider rather than a reduction in base rates. By flowing this refund back through the GTCJA rider, customers can easily understand that they are receiving a refund of taxes because there will be a line item on each customer's bill, showing the tax credit. In order to fairly capture the other EDIT savings associated with the TCJA, the Commission should mandate that the EDIT that will be credited to customers be based upon Duke's EDIT balance of December 31, 2017.

Respectfully submitted,

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³⁵ Wathen Direct Test. at 13, Duke Ex. 2.

³⁶ *Id.*

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**On Behalf of the Staff of
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CERTIFICATE OF SERVICE

This is to certify that the foregoing **Initial Brief** has been served upon all of the parties of record in the above-captioned cases by electronic mail and/or U.S. mail, postage pre-paid, this 11th day of September, 2019.

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Summary: Brief electronically filed by Mrs. Tonneta Y Scott on behalf of PUCO