**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 POST HEARING BRIEF OF DUKE ENERGY OHIO, INC.

## I. INTRODUCTION

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) initiated this proceeding in response to a Public Utilities Commission of Ohio (Commission) directive to begin flowing the benefits of the federal Tax Cuts and Jobs Act of 2017 (TCJA) back to natural gas customers.[1] In its application in these proceedings, Duke Energy Ohio proposed to do this via a twofold process: both decreasing natural gas base rates and creating a discrete rider (Rider GTCJA).[2]

The Staff of the Commission (Staff) recommended accepting the Company's proposal, subject to several modifications.[3] Duke Energy Ohio and Staff agreed on most aspects of rate design, including but not limited to the calculation of the deferral for the reduced FIT rate since January 1, 2018 (Stub Period deferral), the amortization of protected EDITs, and Staff's

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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, Finding and Order, at p. 18 (Oct. 24, 2018) (directing rate regulated utilities to file applications to pass back TCJA benefits).
[2] *See* Application of Duke Energy Ohio, Inc., to Establish a Rider to Credit Its Natural Gas Customers with the Benefits of the Tax Cuts and Jobs Act (Dec. 21, 2018) (Application).
[3] Review and Recommendations of the Staff of the Public Utilities Commission of Ohio (Apr. 17, 2009) (Review and Recommendations).

recommendation to true-up Rider GTCJA annually with regard to credits for Excess Accumulated Deferred Income Taxes (EDIT) amortization. The remaining material disputes involve how the benefits flow through to customers and whether or not customers should only receive the benefits of excess deferred income taxes for plant and certain deferrals that are actually reflected in base rates.

For the reasons given by the Company in its comments earlier in this docket,[4] the Commission should reject two of Staff's recommended modifications:[5] (1) including the proposed base rate decrease as a component of Rider GTCJA, instead of the administratively simpler proposal from the Company to adjust base rates, and (2) using the Company's balance sheet as of December 31, 2017, as the basis for calculating the balances for both "normalized" (also referred to as "protected") and "non-normalized" (also known as "unprotected") EDITs, instead of the date of the last base rate case, March 31, 2012, as proposed by the Company (EDIT Date recommendation).

Additionally, the Commission should consider excluding any direct refund for the Stub Period deferral from its order in this case, and permit the Company to make a proposal in a separate proceeding for a more optimal solution that allocates those amounts to existing deferred costs. Although Staff's recommendation regarding the Stub Period deferral was reasonable and consistent with the Company's initial application, it is now apparent that it would create unnecessary rate volatility for customers and, therefore, may not be optimal.

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[4] Duke Energy Ohio, Inc.'s, Comments on the Staff Review and Recommendation, at pp. 7-8, 9-15 (May 10, 2019) (Duke Energy Ohio's Comments or the Company's Comments).
[5] The Company has agreed to other modifications. *See id.* at pp. 9, 15, 16-17.

In all regards, except the three items listed above, Duke Energy Ohio requests that the Commission accept its proposal as modified by Staff's remaining recommendations. In its entirety, this would consist of:

- Reduction in the federal corporate income tax (FIT) rate – the Company will pass back the FIT rate reduction via a 5.3558 percent reduction to base rates, and *not* via the Rider GTCJA;

- Normalized EDIT – the Company will amortize normalized EDIT based on Average Rate Assumption Method (ARAM). The monthly amortization of normalized EDIT will be based on the Company's balance sheet, as of March 31, 2012, the date certain of the last base rate case. The amortization of Rider AMRP and Rider AU-related EDIT will be recognized in the respective riders and begin at the time of the next filing for each rider. The rider amortizations will be based on the respective rider EDIT balances as of March 31, 2012;

- Non-normalized EDIT – Non-normalized EDIT will be based on the Company's balance sheet as of March 31, 2012, and be amortized over 72 months, beginning with the first month the rider is effective;

- EDIT Gross-Up – Amortization of both normalized and non-normalized EDITs will be grossed up, using a gross revenue conversion factor based on the prevailing tax rates;

- EDIT Amortization Rate Design – Credit for amortization of both normalized and non-normalized EDITs will be allocated to each rate class based on the percentage of base rates as reflected in the most recent base rate case on a per bill basis, except for IT customers. For IT customers, the credit will be based on volumetric consumption. The billing determinants for the rate calculations will be the billing determinants filed in the most recent Rider AMRP update filing.

- Stub Period deferral – The disposition of this deferral will not be addressed in this proceeding. The Company will initiate a separate proceeding to propose how this deferral could be allocated to net out existing deferred costs to promote rate stability for customers.

## II. DISCUSSION

### 1. The Company's proposed base rate adjustment is both accurate and consistent with the Commission's actions in other TCJA cases.

No party in this proceeding has challenged the reasonableness or accuracy of the Company's proposed 5.3558 percent reduction to base rates. Indeed, Staff tacitly acknowledged that this percentage would accurately reflect the impact of the reduced FIT (from 35 percent to 21 percent), and gave no justification whatsoever in its Review and Recommendation for recommending that the Commission reject the proposal.[6]

In its Application and through the testimony of Company witness, William Don Wathen, Duke Energy Ohio clearly explained how a 5.3558 percent reduction to natural gas base rates would fully pass through to customers the impact of the lower FIT rate relying on the Commission's most recently approved base revenue requirement calculation for natural gas service.[7] Incorporating the FIT rate reduction into base rates is the most obvious and straightforward solution, given that the FIT rate reduction going forward will apply in the exact same manner to each customer. Furthermore, federal corporate income tax is an ongoing and ever-present element of every investor-owned utility's cost of providing service and should continue to be reflected in base rates. And the Company's proposal was fully transparent—the Company provided revised tariffs in its Application with the applicable rate schedules where the impact of the FIT rate reduction would be visible to customers.[8]

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[6] Review and Recommendations, p. 3 (recommending that "the 5.3558 percent reduction . . . be credited through the Rider GTCJA").
[7] Application, Attachment 2, pp.1-2; Duke Energy Ohio Ex. 2 (Testimony of William Don Wathen Jr.), pp. 5-6.
[8] *See generally id.*, Attachment 1; Attachment 2.

Contrary to the testimony of Staff witness Jonathan Borer, implementing the simpler method of applying a percentage reduction to natural gas base rates conforms with the Commission's treatment of other utility cases involving the TCJA. Mr. Borer filed written testimony asserting that only a single utility had made its FIT rate adjustment in base rates, asserting that "[t]he Columbia Gas Case has been the only TCJA-related case in which the FIT adjustment has been reflected as a base rate reduction," and that the Company was "incorrect to suggest" otherwise.[9] Mr. Borer's analysis was misleading, as he demonstrated himself by affirming during the hearing that "there are other cases . . . in which the FIT adjustment was reflected as a base rate reduction."[10] Mr. Borer also misstated the nature of the Columbia Gas Case.[11] Columbia Gas initially filed that case as an application to implement a new rider for a construction expenditure program.[12] Through negotiations, all TCJA matters related to Columbia Gas were settled as part of that case but Columbia Gas did not file a separate "single issue TCJA case[]" to only address the TCJA matters. As Mr. Borer himself testified, "the issues involved [in the Columbia Gas Case] were not limited to the narrow scope of the TCJA."[13]

In addition to the Columbia Gas Case,[14] the Commission has permitted at least three other utilities to pass back the FIT reduction via base rate adjustment: The Dayton Power and Light Company (DP&L), Vectren Energy Delivery of Ohio, Inc. (VEDO), and Ohio Gas Company. In

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[9] Staff Ex. 2 (Testimony of Jonathan J. Borer), p. 4.
[10] Hearing Tr., p. 63. Mr. Borer stated that his written testimony "need[ed] to be clarified" and that by "TCJA-related" he had actually meant "single issue TCJA cases." *See id.*, pp. 61-63.
[11] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism,* Case No. 17-2202-GA-ALT, Opinion and Order (Nov. 28, 2018) (Columbia Gas Case).
[12] Columbia Gas Case, Application of Columbia Gas of Ohio, Inc., p.1 (Dec. 1, 2017).
[13] Testimony of Jonathan J. Borer, p. 5.
[14] Columbia Gas Case, Opinion and Order, pp. 20-21 (Nov. 28, 2018).

Case No. 15-1830-EL-AIR, *et al.*, the Commission approved a stipulation that included a base rate adjustment to account for the lower FIT and pass back the benefits to DP&L customers.[15] The TCJA adjustment was not merely an afterthought thrown into a larger settlement—the Commission praised it specifically for "recogniz[ing] and return[ing] to ratepayers the benefits of the lower corporate income tax rate instituted by the TCJA," and called it the "[m]ost important" way in which the stipulation "benefit[ed] ratepayers and the public interest."[16]

Likewise, just two weeks ago, in Case No. 18-298-GA-AIR, *et al.*, the Commission approved a stipulation that adjusted base rates for the reduced FIT for VEDO customers.[17] In his testimony in support of the stipulation, Staff witness David M. Lipthratt had listed the TCJA adjustment as the second in a list of "key benefits" of the stipulation.[18] Thus, approving Duke Energy Ohio's proposal to pass back the FIT reduction via a base rate adjustment would be consistent with prior Commission practice.

Finally, for the Ohio Gas Company, Case No. 17-1139-GA-AIR, *et al.*, the Commission approved yet another stipulation that incorporated the lower FIT rate into base rates.[19]

Thus, to date, the Commission has permitted at least four major utilities to adjust base rates to reflect the lower FIT rate as a result of the TCJA. Staff did not oppose this treatment in any of

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[15] *In the Matter of the Application of The Dayton Power and Light Company for an Increase in its Electric Distribution Rates*, Case No. 15-1830-EL-AIR, *et al.*, Order, pp. 23-24, 37 (Sept. 26, 2018) (summarizing TCJA adjustment).
[16] *Id.*, p. 37.
[17] *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Increase in Gas Rates*, Case No. 18-298, *et al.*, Order, p.70 (Aug. 28, 2019).
[18] *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Increase in Gas Rates*, Case No. 18-298, *et al.*, Staff Ex. 1 (Testimony of David M. Lipthratt), pp. 3-4.
[19] *In the Matter of the Application of Ohio Gas Company for an Increase in Gas Distribution Rates*, Case No. 17-1139-GA-AIR, *et al.*, Opinion and Order, p.8 (Feb. 21, 2018).

the cases and actively supported it in two of the four.[20] Thus, all of these utilities' customers gained the full benefit of the lower FIT rate in a simple and straightforward manner.

2. **It would be inconsistent with Commission practice in other TCJA-related cases to require a separate rider in this case on the basis of increased "transparency," as advocated by Staff and OCC.**

Between the base rate adjustments described above, and the riders described in this section, at least seven different major utilities have received Commission approval to refund at least a portion of the impact of the lower FIT rate in customer rates without any separate line item on customers' bills indicating the TCJA-associated amount for transparency. And transparency was not mentioned as an issue in Staff's Review and Recommendations. As far as Duke Energy Ohio is aware, the first indication of any concern for transparency, as it relates to the impact of the lower FIT rate on base rates, was when witnesses for the Staff and the OCC raised transparency in their filed testimony in this case.[21]

Staff and OCC allege that customers will benefit from shifting the impact of the FIT rate reduction from a simple base rate reduction to the Rider GTCJA; supposedly from increased transparency for the customer[22] by being able to see a "specific line item on the customer's bill to reflect the [FIT rate] reduction."[23] Staff acknowledged that increased transparency was the only benefit it saw that justified putting the FIT reduction in the Rider GTCJA.[24] However, neither Staff nor the OCC witness explained why an adjustment to base rates was insufficiently transparent in

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[20] *See* Hearing Tr., pp. 63-67; Columbia Gas Case, Staff Report, p.8 (Sept. 14, 2018) (supporting base rate adjustment); *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Increase in Gas Rates*, Case No. 18-298, Staff Ex. 1 (Testimony of David M. Lipthratt), p.4.
[21] Transparency was not mentioned in the Staff Review & Recommendations, or in OCC comments.
[22] OCC Ex. 1 (Testimony of Kerry J. Adkins), p. 7; Testimony of Jonathan J. Borer, p. 3.
[23] Testimony of Jonathan J. Borer, p. 3.
[24] Hearing Tr., p. 60-61.

this particular case, given that both Staff and the Commission agreed with precisely this method of passing back the FIT reduction for other utilities.

As Duke Energy Ohio pointed out in its comments,[25] the revised proposed tariffs and attached schedule[26] would have made the impact of the FIT rate reduction fully transparent to customers. Insofar as the purpose of transparency is to enable customers to know all the components of their rate in order to make an informed decision between providers, this purpose would be fully served by the Company's proposal. Although the customer would not see a separate line item on the monthly bill, the tariffs would be publicly available on the Commission's website and elsewhere, for easy access by customers.

Both Staff and the Commission have previously accepted FIT reduction methods that, like the base rate reduction proposed by the Company here, did not provide customers a discrete "line item" on their bill "to reflect the [FIT] reduction."[27] As described above, three utilities have passed back the FIT reduction impact via adjustments to base rates as part of rate cases. Another utility, Columbia Gas, was allowed to adjust base rates even though it had no pending rate case before the Commission. When confronted with these cases, Mr. Borer made no attempt to assert that the other utilities' proposals provided any more transparency than the Company's proposal here. He admitted that Staff had not "found the need to evaluate on transparency of . . . the tax reduction" or "express[ed] its concerns" regarding transparency in these cases,[28] demonstrating that the benefit from any added transparency is negligible.

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[25] Duke Energy Ohio's Comments, pp. 7-8.
[26] *See generally* Application, Attachment 1; Attachment 2.
[27] Testimony of Jonathan J. Borer, p. 3.
[28] Hearing Tr., pp. 64-65 (specifically referring to the Dayton Power & Light case), 67-68 (regarding Vectren).

Similarly, in an additional three cases, the Commission has permitted utilities to incorporate at least a portion of the FIT rate reduction impact into an existing rider, where the amount of the TCJA adjustment will be combined with other costs and the customer would not see the specific amount he or she is saving due to the FIT rate reduction.[29] Mr. Borer conceded that there would be no discrete line item depicting these TCJA savings and that the TCJA savings would be "rolled into the revenue requirements of those riders."[30] The Company's proposal here would be no less transparent than these other arrangements already approved by the Commission.

And even in this very case, Staff and OCC evince no concern for transparency when recommending that the Company refund a portion of the EDIT liability through existing riders. Staff and OCC have both recommended including in the revenue requirement calculation for Duke Energy Ohio's Rider AMRP and Rider AU, the amortization of EDITs associated with those riders.[31] While it is true that customers will still enjoy the benefit of the EDIT refund, there would be no line item on their bill for the amount of the EDIT refund, which would be included in the ultimate Rider AMRP or Rider AU rate. On cross-examination, Staff's witness Borer could not provide any reasonable basis for advocating that the FIT benefit be made transparent by including

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[29] *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, p.5-6 (Oct. 3, 2018) (providing that the Distribution Investment Rider will serve as "the rider mechanism" for delivering TCJA savings); *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, Application of Duke Energy Ohio, Inc., to Establish a Rider to Credit Its Electric Customers With the Benefits of the Tax Cuts and Jobs Act, p.5 (July 25, 2018) (proposing that TCJA savings be delivered via Rider DCI); *Id.*, Finding and Order (Feb. 20, 2019) (approving application, as modified by Staff's Review and Recommendation); *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, p.8 (Nov. 9, 2018) (explaining that EDIT adjustment would be reflected through Rider DCR); *Id.*, Opinion and Order, p. 1 (July 17, 2019) (approving and adopting stipulation).
[30] Hearing Tr., p. 73.
[31] Review and Recommendations, p. 3; Comments on Duke's Application and the PUCO Staff's Recommendations for Converting Duke's Federal Tax Cuts Into Rate Cuts for Ohio Consumers by the Office of The Ohio Consumers' Counsel, p.6 (May 13, 2019).

it in Rider GTCJA while simultaneously advocating that the refund of EDITs associated with Riders AMRP and AU be included in those rider rates.[32] Staff and OCC's recommendations to return part of the TCJA benefits in this non-transparent manner demonstrates that they do not consistently consider transparency on the customer's bill a priority.

To the extent that Staff and OCC propound maximizing transparency in this proceeding, they seem to seek it for its own sake rather than any possible concrete benefit to the customer. For example, increased transparency might be of use if the precise amount of TCJA impact might actually influence a customer's decision-making. But in this case, neither Staff nor OCC mentions anything that a customer might do differently upon knowing the precise rate impact of the FIT reduction each year. Under these circumstances, any supposed transparency offered by placing the FIT impact into Rider GTCJA would offer zero practical benefit to customers and therefore would not justify even a small amount of incremental additional costs.

**3. Incorporating the FIT rate reduction into Rider GTCJA would impose an unnecessary burden on the Company, which Staff and OCC failed to consider.**

As the Company has already explained in its comments, moving the FIT reduction to Rider GTCJA would unnecessarily require the Company perform additional calculations for billing.[33] As Mr. Wathen further explained, "the Company cannot simply add this credit to its proposed Rider GTCJA because the rate design is different than what is being proposed in Rider GTCJA."[34] The Staff's proposal does not necessarily require a new rider but it does require the Company to maintain additional rate tables and perform additional calculations.

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[32] Hearing Tr., pp. 93-94.
[33] Duke Energy Ohio's Comments, p. 8.
[34] Testimony of William Don Wathen Jr., p.19.

Although Staff and OCC sought to deny or downplay any possibility of their preferred proposal increasing customer costs,[35] neither could identify any tangible basis for their blithe assurances. Mr. Borer testified that "Staff didn't believe that [its proposal to place the FIT adjustment into Rider GTCJA] would have any incremental costs,"[36] and Mr. Adkins testified to the same.[37] But Mr. Borer admitted that he did not have any "knowledge of what IT or other administrative requirements might come into play with making the changes to the billing system."[38] And Mr. Adkins likewise admitted that he had no "personal knowledge" about how the Company's billing system worked.[39] Neither witness had ever worked at a utility or set up a utility billing system.[40] The best they could muster was that Duke Energy Ohio was a "very sophisticated utility" that "has riders all the time."[41] Given that neither Mr. Adkins nor Mr. Borer had any personal knowledge of the potential costs involved, the Commission should credit the testimony of Mr. Wathen, who has extensive experience in rate design.[42]

4. **Including EDITs based on the balance as of the date certain in the Company's last base rate case is the most logical and reasonable approach.**

With regard to normalized and non-normalized EDITs, the Company has proposed to refund "the balances due to its natural gas customers as of the date certain of its last base natural gas rate proceeding," March 31, 2012.[43] The Company has proposed to calculate its EDIT refund liability by "[s]tarting with the revenue requirement model that produced the agreed-to base

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[35] Hearing Tr., pp. 45-47 (Mr. Adkins), p.74 (Mr. Borer).
[36] Hearing Tr., p. 74,
[37] Hearing Tr., p. 53.
[38] Hearing Tr., pp. 75:10-13, 76:3.
[39] Hearing Tr., p. 43.
[40] Hearing Tr., p. 41 (Adkins); pp. 58-59 (Borer).
[41] Hearing Tr., pp. 44-45 (Adkins).
[42] Testimony of William Don Wathen Jr., pp. 1-2.
[43] Application, p.3.

revenue requirement . . . in that last rate proceeding," and multiplying the ADIT balances from Schedule B-6 by 40 percent (because the new FIT rate of 21 percent is a 40 percent reduction from the old 35 percent FIT rate).[44] Using the rate base approved in that revenue requirement model is the most reasonable, efficient, logical approach because it (1) ensures that customers' refunds will be commensurate with costs that customers have actually borne—as opposed to costs they may (or may not) someday bear and (2) virtually eliminates any possibility of error or uncertainty in the proper amount of the refund and, correspondingly, any need for later true-ups. Staff's proposal, on the other hand, would require the Company to prematurely issue refunds that are not and may never be "owed" to customers.

a. <u>Using the date certain from the last base rate case will ensure that customers receive precisely what they are owed.</u>

As Mr. Wathen testified, "it is the Company's intention to ensure that customers receive all of the benefits of the TCJA that they are owed."[45] For purposes of calculating the return component in the currently approved base rates, the Company's rate base was based on its actual investment in utility plant, net of accumulated deferred income taxes, with certain adjustments, as of March 31, 2012.[46] Thus, current base rates being charged to customers recover a return only on the balances of the Company's investments as of March 31, 2012. The Company's proposed approach is the most logical and reasonable because it refunds customers based on actual costs they have already incurred by paying base rates. As it relates to both the EDITs included in base

[44] *Id.*, Attachment 3, p.3
[45] Testimony of William Don Wathen Jr., p.30.
[46] *See In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, *et al.*, Entry, p.3 (July 2, 2012) (setting date certain of March 31, 2012).

rates and the EDITs in the riders,[47] the magnitude of these amounts is completely final and uncontroversial—the amounts were thoroughly documented in detailed schedules in a base rate case, agreed to by all parties, and in the riders, all of which have been approved by the Commission.[48]

Staff recommended that the Commission require the Company to refund EDITs based on balances as of December 31, 2017, because this "would ensure that the full balance . . . as of December 31, 2017, is returned to customers."[49] The word "returned," like the word "refund," suggests that customers have already borne some of the costs associated with the taxation of these assets at the former higher FIT. However, this is not necessarily the case.

As Mr. Borer himself affirmed, he "recommend[s] . . . that customers begin to collect refunds of tax balances before they've paid for any costs associated with those investments."[50] Mr. Borer agreed that Duke Energy Ohio's capital investments made for assets, other than AMRP or AU, placed into service between April 1, 2012, and December 31, 2017, "would not have been incorporated in customers' base rates" and, therefore, that "customers are not currently paying for any of those investments."[51] Mr. Borer acknowledged "the underlying capital investments" will not be "incorporated into customer rates" until "the Company files for its next base rate case,"[52]

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[47] The Company also proposed to refund EDITs associated with investments made under its AMRP and AU Riders because customers have been paying for these investments and customers, therefore, are rightly owed a refund for these income taxes that they have actually paid. *See* Application, pp. 5-6.
[48] *See In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, *et al.*, Staff Ex. 2 (Direct Testimony of Wm. Ross Willis, in Support of Joint Stipulation and Recommendation) (Apr. 22, 2013).
[49] Review and Recommendations, p. 3 (discussing normalized EDITs, but presumably applying the same rational to non-normalized EDITs).
[50] Hearing Tr. 83.
[51] Hearing Tr., pp.80-81.
[52] Testimony of Jonathan J. Borer, p.6.

which means that the customers will not "pay for the underlying investments" until that as-yet-unknown date. Requiring the Company to "refund" tax benefits associated with investments for which the customers have thus far paid nothing—and for which they may not pay for years or at all—contradicts both rate recovery principles and the common-sense meaning of the term "refund."

b. Staff's own example demonstrates that Staff's recommendation will sometimes result in customers receiving refunds of amounts that they will never "ultimately" pay in rates.

In his filed testimony, Mr. Borer attempted to provide a more detailed justification for the December 31, 2017, date, the core of which was that it would prevent the Company from "realiz[ing] a permanent tax savings, which will never be realized by the ratepayer."[53] However, Mr. Borer overlooks a key point: during the time that the Company is realizing a tax savings, it is also recovering nothing from ratepayers for a return on the asset, any income taxes associated with such return, any depreciation expense, or any property taxes associated with the asset. Until the Company begins recovering a return on the asset, customers stand to receive a "permanent" benefit from its use without paying any costs since the asset was placed in service. These savings significantly exceed the "permanent" tax savings suggested by Mr. Borer.

Mr. Borer's own sample calculation of tax savings on an asset placed into service in 2012 (after March 31, the date certain used for the most recent base rate case) proves that the customer does indeed realize a benefit from the Company's carrying of an asset that has not yet been incorporated into base rates.[54] In his example, Mr. Borer assumes that the asset has an approximate

[53] *Id.*, p.7.
[54] Mr. Borer's attachment does not specify when in 2012 the asset went into service, but Mr. Borer clarified at the hearing. Hearing Tr., p. 88-89.

50-year book life depreciating in book value by $624,000 per year.[55] Thus, by the year 2022, when Mr. Borer assumes the Company will begin recovery on this asset in base rates, the asset will have lost $6.24 million in book value due to depreciation. The Company has no way to recover the $6.24 million in this example, which means customers benefit in the form of lower rates and by avoiding the revenue requirement associated with the return on, income taxes on the return, depreciation, and property tax expense over that ten-year period. Staff's recommendation to credit customers for the tax savings generated by this asset would only be remotely justifiable if the credit was offset against all of the expenses associated with the asset borne by the Company in the meantime.

A simple counter-example, applying Mr. Borer's own assumptions—in-service date of April 1, 2012, and new base rates in 2022—to an asset with a shorter life, exposes the flaw in Mr. Borer's analysis and demonstrates why it is necessary to go back to the last rate case for the EDITs. Consider the same $30 million asset assumed by Mr. Borer, except that this asset has a seven-year book and tax life. Like Mr. Borer's asset, this asset goes into service on April 1, 2012. Assuming this asset is eligible for accelerated tax depreciation, there would be an accumulated deferred income tax as of December 31, 2017, because more of the asset would have been depreciated for tax purposes than for book purposes as of that date. Because of the TCJA, the December 31, 2017, accumulated deferred income tax balance would be reduced by 40 percent with a corresponding credit to an EDIT account.

[55] Testimony of Jonathan J. Borer, Attachment JJB-1 (giving a "Book Depreciation Accrual Rate" of 2.08%).

According to Staff, the Company should refund this amount to customers now, because customers will "ultimately" pay for the underlying asset,[56] but, as this counter-example clearly demonstrates, Staff's thesis is incorrect. In fact, the asset in this example would be fully depreciated <u>before</u> the next rate case in 2022. At the time of the next rate case, there would be no remaining investment to include in rate base; consequently, customers would never pay a penny for the asset that provided service to them for seven years: no return, no income taxes on the return, no depreciation expense, and no property taxes. And yet, Staff's recommendation would still require the Company to "refund" amounts to customers based on tax benefits associated with assets for which the customers never paid any costs. Such a one-sided approach would be patently unfair to the Company. By contrast, the deferred income taxes reflected in the Company's last base rate case are included in the current base rates and are rightly owed back to customers—making March 31, 2012 the appropriate date for calculating the EDIT refunds.

c. <u>Using the date of the last base rate case will prevent the Company from being required to refund amounts associated with costs that may yet be disallowed.</u>

Not only does Staff's proposal require the Company to issue refunds of amounts that were never paid by any customers, but it would require the Company to calculate those refunds under the baseless assumption that the Commission will allow all requested costs. Mr. Borer admitted that Staff recommends "customers begin to collect refunds of tax balances" even though "it is currently unknown how much of those costs will be approved for recovery."[57]

Although Staff and OCC seek to downplay the magnitude and significance of the potential unknown disallowances, the uncertainties inherent in the cost recovery process are real and

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[56] *See* Testimony of Jonathan J. Borer, p.6.
[57] Hearing Tr., p. 83.

potentially impactful. As Duke Energy Ohio discussed in its comments, the Company is currently facing nearly $12 million of recommended disallowances related to its MGP deferrals for the January 1, 2013, to December 31, 2017, period.[58] And there are other deferred income taxes from the December 31, 2017, balance sheet stemming from deferrals whose recovery has not yet been approved.[59] Staff's recommendation not only requires the Company to refund income tax benefits generated by expenses for which customers have not yet paid, but also income tax benefits generated by expenses for which they may <u>never</u> pay. Given the inherent uncertainties in the cost approval process, requiring a refund based on costs that are never recovered would be unjust and confiscatory.

Ironically, Staff takes the exact opposite view in another case where the full amount of a cost is uncertain. In proceedings involving the recovery of costs for remediation and investigation of Duke Energy Ohio's former manufactured gas plants (MGP cases), Staff recommended denying the Company's motion to continue its existing rider to recover costs, even though the Company acknowledged that a true-up would be required eventually. Staff reasoned that "[b]efore the Company is permitted to collect additional funds, the Commission should determine how much is permissible to be collected."[60] In other words, Staff believed it was not appropriate to begin recovery when the total amount of costs to be recovered was uncertain, which directly contradicts Staff's position in this case. Even though the magnitude of unprotected EDITs ultimately owed to customers is uncertain, Staff in this case embraces the uncertainty, recommending that the EDIT

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[58] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case No. 14-0375-GA-RDR, *et al.*, Staff Report, p.7 (Sept. 28, 2018).
[59] Testimony of William Don Wathen Jr., p.11.
[60] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case No. 14-0375-GA-RDR, *et al.*, Staff Report, p.7 (July 12, 2019).

balances begin flowing to customers even though the costs have not "been fully considered and approved for recovery by the Commission."[61]

Mr. Borer suggests that such premature refunds would be harmless because "the Company would be permitted to work with Staff in order to reconcile any disallowances with the associated EDIT that may have already been refunded."[62] But Staff failed to consider that such an approach unfairly places the burden on the Company—at least procedurally if not substantively—to retrieve funds it never should have paid out in the first place. Staff gave no consideration to how its proposed reconciliation process would work, how amounts would be calculated, or how long it might take.[63] Neither Staff's recommendations nor Mr. Borer's testimony offer any justification for preferring a premature payout of inflated refunds (which the Company then has to "work with Staff" to reconcile) over the Company's proposal, which assures that customers will only receive back what they are actually owed.

5. **Including EDITs based on the balance as of the date certain in the Company's last base rate case would be most consistent with the Commission's approach to similarly situated utilities.**

The Commission has declined to impose a one-size-fits-all approach to passing back TCJA benefits. It has permitted utilities to address the impacts of the TCJA via a variety of procedural mechanisms and methods, with approaches differing based on utilities' individual different circumstances. However, utilities in similar circumstances should be treated similarly.

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[61] *Id.*
[62] Testimony of Jonathan J. Borer, p.9.
[63] *See* Hearing Tr. 91-92 (Mr. Borer stating that he is "not familiar with the kind of administrative side of things like that" and that he has no thoughts "in detail on the reconciliation process").

Out of the utilities with Commission-approved TCJA resolutions, Columbia Gas of Ohio, Inc., (Columbia Gas) is the most similarly situated to Duke Energy Ohio. Like the Company, Columbia Gas had not adjusted base rates in the past several years prior to the TCJA. Perceiving correctly that customers' refunds ought to be calculated based on costs paid by customers, Columbia Gas proposed to use the date certain of its last base rate case, December 31, 2007, and the Commission approved the proposal.[64]

Mr. Borer's attempts to dismiss the Columbia Gas Case as merely a grudging "compromise of all the issues involved"[65] ignores the Commission's own statements specifically regarding the TCJA resolution in that case. In cataloguing support for its finding that the stipulation "benefits ratepayers and the public interest," the Commission emphasized the TCJA resolution first and praised it as "recogniz[ing] the intent of the TCJA."[66] Thus, it is clear that the Commission viewed the TCJA portion of the Stipulation positively and as an appropriate approach for utilities in circumstances similar to Columbia Gas.

To the extent that other utilities are taking different approaches to refunding EDITs, their circumstances differ from Columbia Gas' and from the Company's in this case. For example, Duke Energy Ohio's electric distribution business faced very different circumstances when it agreed to use the December 31, 2017, date: (1) the Commission had not yet approved the Columbia Gas approach and (2) the TCJA resolution took place during a pending electric distribution base rate case, in which the Company had already reached a stipulation which included an agreement on the base revenue requirement (including agreement on the magnitude of the deferred taxes

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[64] Columbia Gas Case, Opinion and Order, pp. 20, 28 (Nov. 28, 2018).
[65] Testimony of Jonathan J. Borer, p. 5.
[66] Columbia Gas Case, Opinion and Order, pp. 27-28 (Nov. 28, 2018).

included in base rates as of the date certain).[67] The resolution of the EDIT refunds for Ohio Gas Company, which received approval to forego any refunds for EDITs, was an unusual circumstance where that company voluntary waived the benefit of any growth in rate base from amortizing EDITs.[68]

Having not had a base rate case in some time, Duke Energy Ohio is most similarly situated to Columbia Gas and should similarly receive approval to use the date of its last base rate case.

6. **If the Commission requires the Company to use the December 31, 2017, date, all of the EDIT refunds should flow through the Rider GTCJA.**

Staff recommended that EDITs associated with Rider AMRP and Rider AU be refunded through those riders.[69] But if the Company is required to refund EDITs based on the December 31, 2017, balance sheet, there is no need to segregate the Rider AMRP and Rider AU EDITs from EDITs in base rates. As Mr. Wathen explained, the Company only proposed to segregate these EDITs because it was proposing to use the date certain of the last base rate case as the basis for refunding EDITs, and such segregation would be obsolete under the Commission's recommendation:

> First, the EDITs in "base rates" are the EDITs from the date certain [in] the base rate case. The deferred income taxes as of December 31, 2017, are not necessarily in existing base rates. The reason the Company proposed to segregate the EDITs associated with Riders AMRP and Rider AU is that the current revenue requirement for those riders is based on capital additions made since the date certain in the last rate case. Because the Company proposed to use the deferred income tax balances from the last base rate, it must

[67] *See 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 (Feb. 20, 2019); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, Opinion and Order, p.40 (Dec. 19, 2018).

[68] *In the Matter of the Application of Ohio Gas Company for a Waiver of Orders Related to the Tax Cuts and Jobs Act of 2017*, Case No. 18-1903-GA-WVR, Opinion and Order, p.4 (June 19, 2019).

[69] Review and Recommendations, p.3.

> separately account for the impact of the TCJA on the deferred taxes included in Riders AU and AMRP that include activity that occurred since that time. That is the same approach taken in the Columbia Gas case because it has two similar riders.
>
> On the other hand, there will be no need to complicate the Rider AU and AMRP filings if the Commission accepts Staff's recommendation to use December 31, 2017, deferred income tax balances, because all of the EDITs owed to customers would already be fully accounted for in Rider GTCJA.[70]

Thus, if the Commission adopts Staff's recommendation to use the December 31, 2017, date—which would be erroneous for the many reasons listed above—it should at least reject Staff's recommendation to unnecessarily segregate the EDIT amounts.

**7. Using the Stub Period deferral to offset existing Duke Energy Ohio deferrals would be more efficient than a credit and would improve rate stability for customers.**

Pursuant to Commission direction,[71] the Company has been recording deferrals for the reduced FIT rate since January 1, 2018. Staff recommended that the Company refund that Stub Period deferral, including the carrying costs calculated based on the most recently approved long-term debt rate to be accrued up until the refund begins.[72] While Staff's recommendation is reasonable and consistent with the Company's initial proposal (in which the Company also voluntarily offered to include carrying charges on the Stub Period refund),[73] it is not necessarily the optimal way to proceed under current circumstances. As of August 31, 2019, the balance of the deferral for the Stub Period is approximately $24.5 million. An option that could be utilized

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[70] Testimony of William Don Wathen Jr., p. 25.
[71] *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, pp.1-2 (Oct. 24, 2018) (citing earlier entry).
[72] Review and Recommendations, p.4.
[73] *See* Duke Energy Ohio's Comments, p. 9.

by the Commission would be to use this liability owed to customers to offset existing deferred costs on the Company books that customers owe the Company. This proposal would minimize rate volatility for customers and be more efficient overall.

Refunding the Stub Period Deferral over a twelve-month period will be confusing for customers: significantly lower rates for one year while the refund is flowing through, followed by significantly higher rates after the refund ends at the end of that year. And, potentially even higher rates as the Company begins to recover existing deferred costs (whether via riders or a rate case). Netting the $24.5 million Stub Period deferral against the tens of millions of dollars in deferred costs to be recovered in a future rider or a future rate case will serve to smooth out the rate impacts. Without doing so, it is likely that the refund for the TCJA will begin at a different date than the dates when recoveries of other deferred costs begin; meaning that customers will see multiple rate shocks (up and down) in their bills. When the Stub Period Deferral is fully refunded, followed by an increase in rates to recover deferred costs, customers will experience undesirable and potentially significant swings in their monthly bills, which typically undermines customer satisfaction. Offsetting the Stub Period deferral (or even some or all of the unprotected EDITs) against existing deferred costs would permit the Company to mitigate rate volatility.

In addition to mitigating rate impacts on customers' bills, offsetting refund obligations generated by the TCJA against other deferrals is consistent with the Commission's TCJA precedent. The Commission has permitted at least one utility to net out TCJA benefits in a similar manner. Specifically, the Commission authorized Ohio Power Company to use $48.2 million of non-normalized EDIT resulting from the TCJA as a "one-time offset to [an] amount currently deferred" as an under-recovery on a separate rider.[74] In this case, the Commission effectively permitted the utility to forego refunding a portion of TCJA benefits to customer in exchange for customers experiencing lower rates in the future (than would have been the case if the full TCJA amounts had been refunded). Thus, while Staff's recommendation to refund the Stub Period deferral is reasonable, applying the Stub Period deferral to offset other existing deferrals—with details to be determined in a separate proceeding—would be better than merely "reasonable," it would be optimal.

## III. CONCLUSION

For the reasons above, the Commission should reject Staff's recommendations to require a separate TCJA rider and to use the December 31, 2017, date. Additionally, the Commission should consider excluding the Stub Period deferral from its order in this case, and permit Duke Energy Ohio to make a proposal in a separate proceeding for allocating those amounts to existing deferred costs. In all other regards, Duke Energy Ohio requests that the Commission accept the Company's proposal as modified by Staff's remaining recommendations.

[74] *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, *et al.*, Finding and Order, p.7 (Oct. 3, 2018).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon the following parties via electronic mail, regular mail or hand delivery on this 11th day of September, 2019.

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