

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of Tariff) Case No. 18-1831-GA-ATA
Amendments.)

**REPLY BRIEF
BY
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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

I. INTRODUCTION

The PUCO should order Duke Energy Ohio to promptly reduce its charges to natural gas consumers, to reflect that the federal corporate income tax that is part of Duke's current rates has been reduced by the Tax Cut and Jobs Act of 2017 ("federal tax cuts"). In this way, Ohio utility consumers should share in the benefit of the federal tax cut and utilities should not reap a financial windfall at consumer expense. Early this year, Duke's electricity consumers already received a reduction in their utility charges for the lower federal tax rate.

Specifically, 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 were set using the higher 35% federal income tax rate.

Natural gas consumers deserve to benefit as soon as possible from the reduction in Duke's federal income taxes. They will if the PUCO adopts the recommendations of the Office of the Ohio Consumers' Counsel ("OCC") and PUCO Staff. It should do so.

OCC Recommends that the PUCO order Duke to pass the full tax savings resulting from the federal tax cuts to consumers via “Rider Gas TCJA” Or “Rider GTCJA” (“tax savings rider”). Also, Duke’s balance sheet, as of December 31, 2017, should be used as the basis for calculating the balances for both “Normalized” and “Non-Normalized” excess deferred income tax. These recommendations are the most simple, straight-forward, and transparent way of passing on to consumers the benefit of the federal tax cuts.

II. RECOMMENDATIONS

A. **To benefit consumers, Duke should pass back savings from the federal tax cuts through the tax savings rider.**

In its Application and Brief, Duke asserts that it should be permitted to pass back savings from the federal tax cuts through a reduction in base rates. This differs from the PUCO Staff and OCC’s recommendation to pass the reduction through the tax savings rider.¹

Duke specifies three reasons for this assertion.² First, Duke claims that it would be “accurate and consistent” with the PUCO’s actions in other federal tax cuts cases.³ Second, Duke claims that this is the most obvious and straightforward solution, so that the federal income tax rate reduction going forward will apply in the exact same manner to each customer.⁴ Finally, Duke claims that incorporating the federal tax cuts rate

¹ Duke Initial Brief at 4.

² *Id.* at 4-11.

³ *Id.* at 4.

⁴ *Id.*

reduction into the tax savings rider would impose an unnecessary burden on Duke, which PUCO Staff and OCC supposedly failed to consider.⁵

Duke's claims are wrong. The PUCO should reject Duke's claims and order it to pass the federal tax savings back through the tax savings rider for the reasons described by PUCO Staff and OCC, as discussed below.

1. Duke's proposed base rate adjustment is inconsistent with the PUCO's decisions in other federal tax cuts cases.

Duke claims that it would be "accurate and consistent" with the PUCO's decisions in other federal tax cuts cases to pass the federal tax savings back through a reduction in base rates.⁶ But Duke is incorrect. In fact, the opposite is true. As the PUCO Staff stated in its Brief, the federal tax savings have been returned to customers through a tax savings rider in most cases, as is recommended by PUCO Staff and OCC in this case.⁷ Further, this is a single-issue case (federal taxes), and as OCC stated in its Initial Brief, "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."⁸ Therefore, and as OCC observed in its Initial Brief, passing back all federal tax savings through the tax savings rider is consistent with PUCO practices, while Duke's proposal to pass the savings through a base-rate adjustment is not.⁹

⁵ *Id.* at 10.

⁶ *Id.* at 4.

⁷ PUCO Initial Brief at 6.

⁸ OCC Initial Brief at 5; Hearing Transcript at 54.

⁹ OCC Initial Brief at 6.

2. To protect consumers, the PUCO should follow its own precedent and pass back to consumers the federal tax cuts in the most transparent way possible.

Duke is also seemingly concerned about and resistant to passing the tax savings back in the most transparent way possible, as OCC and PUCO have advocated.¹⁰ Duke argues that requiring transparency is inconsistent with PUCO practice and that the PUCO has previously accepted federal tax savings that did not provide customers a “discreet line item” on their bill to reflect the tax savings.¹¹

But as OCC advocated in its Initial Brief, consumers deserve to benefit from the tax savings as soon as possible, and in the most transparent way possible.¹² Both OCC and the PUCO Staff have argued that providing the single-issue federal tax savings as a direct credit to consumers, 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 federal tax cuts.¹³ And although Duke tries to point to cases where the PUCO has accepted federal tax savings in base rates, instead of a bill line item, Duke mischaracterizes those cases.¹⁴

In the Dayton Power and Light and Vectren cases cited by Duke, the federal tax savings were being addressed in a *base-rate case*, which is not a single-issue ratemaking case like this one.¹⁵ In the Columbia case,¹⁶ although not a base-rate case, there were

¹⁰ Duke Initial Brief at 7-10.

¹¹ *Id.* at 5.

¹² OCC Initial Brief at 4.

¹³ OCC Initial Brief at 4; Hearing Transcript at 53-54, 61-65.

¹⁴ Duke Initial Brief at 8.

¹⁵ OCC Initial Brief at 5-6; Hearing Transcript at 54, 64-65.

¹⁶ Case No. 17-2202-GA-ALT.

several rate changes that were occurring, which Duke acknowledged.¹⁷ Not one of the cases relied on by Duke involved *single-issue* ratemaking.¹⁸ This is a critical distinction, because the PUCO has never approved a *single-issue* change in base-rates outside of a base-rate case.¹⁹ It is well settled that the PUCO should follow its precedent except where the need to depart from the precedent is clear and the prior decision was in error.²⁰

As OCC Witness Adkins testified, “The Commission typically changes base rates through a base rate proceeding and single issues such as this, this is a single issue, then that’s consistent, Commission typically does that through riders evidenced by the proliferation of riders across all utilities.”²¹ Therefore, while it is completely proper to pass a credit through base-rates in a base-rate case, it is not proper (nor possible because there is no mechanism to do so) to amend base rates for a single-issue, outside of a base-rate case. The PUCO should follow its precedent involving single-issue ratemaking and require Duke to pass the federal tax savings back through the tax savings rider, as OCC advocated in its Initial Brief.²²

Finally, Duke is concerned that accepting OCC and PUCO Staff’s recommendation for the tax savings to be returned through the tax savings rider will

¹⁷ Duke Initial Brief at 8; Hearing Transcript at 24 (Q. Did you read the Stipulation in the Columbia case, Mr. Wathen? A: I did, yeah. Q. And you are aware that the Stipulation addresses matters beyond just tax issues, correct? A. I am aware of that).

¹⁸ Case No. 18-1007-EL-UNC (while this case did not require a line item on the bill, the tax savings were rolled into the distribution infrastructure rider, thus it was not “single-issue” ratemaking); Case No. 18-1185-EL-UNC (while this case did not require a line item on the bill, the tax savings were rolled into rider DCI, thus it was not “single-issue” ratemaking; Case No. 18-1604-EL-UNC (while this case did not require a line item on the bill, the tax savings were rolled into rider DCR, thus it was not “single-issue” ratemaking).

¹⁹ Hearing Transcript at 54.

²⁰ *Cleveland Electric Ill. Co. v. PUCO*, 42 Ohio St.2d 403 (1975).

²¹ Hearing Transcript at 54.

²² OCC Initial Brief at 5-6.

necessitate the creation of two riders, would impose “an unnecessary burden on Duke, which PUCO Staff and the OCC failed to consider,”²³ and will “place additional administrative and financial burden on the Company by requiring significant changes to its billing system ...it would be impossible or the Company to include this base rate reduction in its proposed Rider GTCJA.”²⁴ Neither OCC nor the PUCO Staff share Duke’s concern.²⁵

As both OCC and the PUCO Staff stated in their Initial Briefs, Duke will be creating a new rider, the tax savings rider, no matter what.²⁶ Duke already has *at least* 14 riders in its gas tariffs that are collected from consumers either through direct charges or volumetrically.²⁷ Thus, as PUCO Staff illustrated, Duke must be *very* familiar with performing the calculations (and implementing the associated billing system changes) that call for volumetric and per customer charges, and returning the tax savings through the tax savings rider is no different.²⁸

Duke tries to discredit OCC Witness Adkins and PUCO Staff Witness Borer for lacking IT experience, or personal knowledge of Duke’s billing system. But by Duke’s own admission, it has at least ten or 11 gas riders and 19 electric riders.²⁹ Clearly, Duke has substantial experience with, and expertise in, billing system changes given that it has

²³ Duke Initial Brief at 10.

²⁴ PUCO Initial Brief at 4-5; Wathen Direct Test. at 19, Duke Ex. 2.

²⁵ OCC Initial Brief at 5; PUCO Initial Brief at 4-5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ PUCO Initial Brief at 4-5.

²⁹ Hearing Transcript at 17-18.

approximately 30 riders.³⁰ It does not require an IT degree or experience with billing systems to reach this conclusion. Paraphrasing Julius Caesar, experience is the best teacher.

B. 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.

Duke wants to return excess deferred income taxes to consumers based on the balance as of the date certain in its last base-rate case (from 2012, which is about 12-years old).³¹ Duke argues that this is the most logical and reasonable approach. It dismisses OCC and PUCO Staff's recommendation to use Duke's excess deferred income tax balance on December 31, 2017.³² Duke asserts that using the date certain from the last base-rate case will ensure that customers receive precisely what they are owed, while at the same time admitting it is not possible to calculate the precise amounts at this time.³³ Duke also claims that using the date of the last base-rate case to determine the balance of the excess deferred income tax will prevent Duke from being required to refund amounts associated with costs that may yet be disallowed.³⁴ Finally, Duke argues that including excess deferred income taxes based on the balance as of the date certain in Duke's last base-rate case would be most consistent with the PUCO's approach to similarly situated utilities.³⁵ Duke's arguments are misleading and wrong.

³⁰ 10 or 11 gas plus 19 electric = 29-30.

³¹ Duke Initial Brief at 11.

³² *Id.*

³³ *Id.* at 11-13.

³⁴ *Id.* at 16.

³⁵ Duke Initial Brief at 18.

OCC and PUCO Staff agree that using the excess deferred income tax balances recorded on Duke's balance sheet as of December 31, 2017 ensures that 100% of the excess deferred income tax balances will be refunded to consumers.³⁶ As OCC explained in its Initial Brief, the PUCO has ordered all utilities to return *all* tax savings to consumers, not just some.³⁷ What Duke proposes (using the excess deferred income tax balance as of Duke's last base rate case) will result in an interest-free loan from the federal government³⁸ and the refund of *less* than *all* tax savings.³⁹ This is wrong, violates the PUCO's order, and is plainly unfair to consumers.

Duke argues that “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.”⁴⁰ Thus, according to Duke, “[u]ntil 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.”⁴¹

But as OCC explained in its Initial Brief, Duke has conveniently ignored 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, 2018.⁴² Duke's approach of

³⁶ PUCO Initial Brief at 6.

³⁷ OCC Initial Brief at 7.

³⁸ PUCO Initial Brief at 7.

³⁹ *Id.*

⁴⁰ Duke Initial Brief at 14.

⁴¹ *Id.*

⁴² *Id.*

using a lower, date certain amount of deferred taxes would ignore the tax benefits Duke received since the last date certain, allowing Duke to keep and not return those tax savings to customers. The PUCO Staff explained in its Brief that customers have funded Duke's investments, so it is proper to recommend that the customers receive, over the life of the investments, the same tax benefits of accelerated depreciation as recognized by Duke.⁴³ If Duke uses the date certain deferred income tax balance as the basis for refunding money to customers, then Duke will keep permanent tax savings that will never be received by customers. To prevent this, the excess deferred income tax balance should be the one on December 31, 2017.³¹

Duke also argues that using the balance of excess deferred income taxes as of its last base rate case would be most consistent with the PUCO's approach to similarly situated utilities.⁴⁴ Contrary to its argument that there is "no one-size-fits-all" solution to passing back the tax savings, Duke incredibly argues that it should be treated similarly to the way Columbia was in Case No. 17-2202-GA-ALT.⁴⁵ Duke reasons that it is similarly situated to Columbia, which was permitted to use the date certain of its last base rate case to pass back the tax savings. Duke is thereby requesting a one-size-fits-all solution for what it considers "similarly situated" utilities.⁴⁶ Duke cannot have it both ways.

As OCC explained in its Initial Brief, the approach used in Columbia was the result of a settlement agreement, based on the facts and circumstances of that case alone. And the settlement was evaluated as a package, rather than by the individual terms

⁴³ PUCO Initial Brief at 8.

⁴⁴ Duke Initial Brief at 18.

⁴⁵ *Id.*

⁴⁶ Duke Initial Brief at 19.

contained in it. Additionally, settlements are not precedent in other cases. The PUCO Staff agrees.

PUCO Staff explained in its Initial Brief that the Columbia case was not solely a tax case; it involved many other parties and issues; and the settlement in the case specifically provided that it should not be cited a precedent in any future proceeding.⁴⁷ Further, the PUCO has accepted, and sometimes utilities (*including Duke*) have themselves recommended, using December 31, 2017 as the excess deferred income tax balance date in their applications.⁴⁸ While Duke has argued that it should be treated the same as other similarly situated utilities, here Duke is asking for the opposite. It is asserting that it is “special” and should be treated differently from all other similarly situated utilities. To protect consumers, the PUCO should reject Duke’s contradictory request.

To safeguard that consumers receive *all* savings from the reduction in federal taxes, it is much more logical and transparent that the balance for determining the excess deferred income taxes should be the latest balance immediately before the law became effective.⁴⁹ By using the latest available balance, customers get the full benefit for the federal tax cuts. Therefore, the PUCO should adopt OCC’s and PUCO Staff’s recommendations that the excess deferred income taxes balance at December 31, 2017 is

⁴⁷ PUCO Initial Brief at 8.

⁴⁸ *Id.*

⁴⁹ *Id.*

the proper balance to use to determine the total excess deferred income taxes that should be passed back to customers.⁵⁰

III. CONCLUSION

Duke should return the federal tax savings reduction as a credit to customers through the tax savings rider rather than as a reduction in base rates. Using the tax savings rider is a more transparent way of returning to consumers the benefits of the federal tax cuts. And to fairly capture the excess deferred income tax savings associated with the federal tax cuts, the excess deferred income tax that will be credited to customers should be based on Duke's excess deferred income tax balance of December 31, 2017. 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 their recommendations.

⁵⁰ Duke throws in an argument that the Stub Period deferral should be used to offset other costs. See Duke's Initial Brief at 21-22. But it acknowledges that OCC's and PUCO's Staff's position – that *all* savings should be passed back to consumers through the tax savings rider – is “reasonable and consistent” with Duke's initial proposal. See *id.* For the reasons stated herein, and admitted to by Duke, Duke's proposal of an “offset” should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief was served on the persons stated below via electronic service, this 25th day of September 2019.

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