

**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.	)	

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**POST HEARING REPLY BRIEF  
OF DUKE ENERGY OHIO, INC.**

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**I. INTRODUCTION**

The Staff of the Commission (Staff) and the Ohio Consumers' Counsel (OCC) make two arguments in their initial briefs: (1) the Company must pass back the federal income tax (FIT) rate reduction in Rider GTCJA (and not in base rates) for transparency; and (2) the Company must use the December 31, 2017, date as the basis for "refunding" excess accumulated deferred income taxes (EDITs). Neither Staff nor OCC engages with the specific circumstances of this case (as the Commission has done in other TCJA cases), or reconciles their demands of the Company with basic cost recovery principles and past precedent.

First, they fail to justify applying a uniquely elevated transparency standard to Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) or to establish that a separate exclusively TCJA-dedicated line item on the customer bill is some sort of baseline requirement, demanded of all utilities passing back the FIT rate reduction. They refuse to acknowledge the transparency of a properly filed and approved base rate pass-through, or to confront the reality of the additional burden their preferred rate design would impose on the Company. As far as the Company knows,

no other major gas or electric utility has been required to provide the dedicated separate line item that Staff and OCC are demanding of Duke Energy Ohio. The Company should be permitted to pass back the FIT rate reduction in the most logical and straightforward manner: an adjustment to base rates (which Staff has acknowledged would leave customers with the same amount of money as its recommendation).

Second, neither Staff nor OCC grapple with the primary inequity of the recommendation to use the December 31, 2017, date as the basis for “refunding” excess accumulated deferred income taxes (EDITs), when customers are only paying the Company for costs associated with assets in service as of March 31, 2012, the date certain of the last base rate case. There is no mention in either Staff or OCC’s brief of the costs that the Company bears on assets put in service after March 31, 2012, that the Company will never recover in a future rate case, either due to depreciation or to ultimate disallowances. Given the age of the Company’s last base rate case, the lack of any base rate case on the horizon, the most similar case is the Columbia Gas Case and the Commission should therefore approve a similar solution for Duke Energy Ohio: using the date certain of the last base rate case as the basis for refunding EDITs.

## **II. DISCUSSION**

### **A. Staff And OCC Propound An Elevated Transparency Standard For The Company, Which The Commission Does Not Appear To Have Applied To Any Other Major Utility.**

Staff concedes that “[t]he customers receive the same refund amount whether done through a reduction to base rates or passed through the GTC[J]A rider as a credit,”<sup>1</sup> but nonetheless continues to insist that the FIT rate reduction must be passed back through the rider to be more

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<sup>1</sup> Initial Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, p. 6 (Sept. 11, 2019) (Staff Brief). OCC does not dispute this point.

“transparent and understandable.”<sup>2</sup> Presumably Staff believes that base rates are opaque and incomprehensible to customers—according to Staff, a “specific line item on the customer’s bill” is required to “explain what the credit is.”<sup>3</sup> Staff does not give any additional reason—beyond transparency—for insisting on passing back the FIT rate reduction in this manner.<sup>4</sup>

As the Company explained in its initial brief, its proposal to pass back the FIT rate reduction through base rates will provide customers with transparency. The publicly available revised tariff and attached schedule will explain down to the penny how the TCJA had impacted the customers’ rate.<sup>5</sup> Although the Company had made this same point in its comments,<sup>6</sup> neither OCC nor Staff address it; neither explain why the Commission’s usual standards for transparency must be suddenly elevated for the TCJA FIT rate adjustment.

Additionally, while the transparency rationale would appear to apply equally to all utilities, OCC and Staff seek to apply it selectively. For example, OCC states that “a utility” should not transfer tax savings to customers in a manner that “involve[s] offsetting cost increases from unrelated utility programs.”<sup>7</sup> And Staff extols the virtues of the separate line item.<sup>8</sup> And yet, both attempt to justify permitting numerous utilities to pass back the FIT rate adjustment and other TCJA benefits via base rates or combined riders.<sup>9</sup>

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<sup>2</sup> Staff Brief, p. 4; *see also* Initial Brief For Converting Federal Tax Cuts For Duke Rate Cuts for Ohio Consumers by the Office of the Ohio Consumers’ Counsel, p. 4 (Sept. 11, 2019) (OCC Brief) (making same argument).

<sup>3</sup> Staff Brief, p. 4.

<sup>4</sup> Staff Brief, pp. 4-6; *see also* Hearing Tr., pp. 60-61 (conceding that Staff had no other reason).

<sup>5</sup> *See* Initial Post Hearing Brief of Duke Energy Ohio, Inc., p. 8 & n. 26 (Sept. 11, 2019) (Duke Energy Ohio’s Brief) (citing application materials).

<sup>6</sup> Duke Energy Ohio, Inc.’s Comments on the Staff Review and Recommendation, pp. 7-8 (May 10, 2019) (Duke Energy Ohio’s Comments).

<sup>7</sup> OCC Brief, p. 2.

<sup>8</sup> Staff Brief, p. 4.

<sup>9</sup> *See* Duke Energy Ohio’s Brief, pp. 4-6, 9-10.

Insofar as Staff attempts to rely on prior Commission precedent,<sup>10</sup> it mischaracterizes what occurred in the cases it cites. Staff argues that “in most Commission cases, the FIT [rate reduction] refund goes back to customers through a credit rider,” and cites three cases, including one involving the Company’s electric business.<sup>11</sup> The misleading implication is that the utilities in these cases did what Staff is advocating here: passed back their FIT rate reduction in a dedicated rider that generated a “transparent” separate line item on the customer bill. However, that is not the case. In all three of the cases cited by Staff, the “credit rider” involved passed back the FIT rate reduction in combination with other, completely unrelated, costs, so that the customer would never see on the bill how much the TCJA alone impacted the final balance.<sup>12</sup> Thus, the cases on which Staff relies do not support its position on transparency in this case.

Duke Energy Ohio is aware of no TCJA-related case involving a major gas or electric utility where the entire FIT rate reduction passed back to the customer via an exclusively dedicated separate rider. As the Company explained in its initial brief,<sup>13</sup> the Commission has permitted several utilities to include certain TCJA-related benefits in combined riders where the only line item on the customer’s bill would ultimately reflect only the total amount after the TCJA benefits “offset[]” costs “from unrelated utility programs,” something which OCC deems unacceptable in

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<sup>10</sup> Staff Brief, p. 6.

<sup>11</sup> Id.

<sup>12</sup> See *In the Matter of Ohio Power Company’s Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, Finding and Order, pp. 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 for Approval of a Tariff Change*, Case No. 18-1656-EL-ATA, 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).

<sup>13</sup> Duke Energy Ohio’s Brief, p. 9 (collecting cases).

this case.<sup>14</sup> And several more utilities—those with pending base rate cases—have been permitted to pass back the FIT rate adjustment via base rates.<sup>15</sup>

Regarding the cases in which utilities have been permitted to pass back the FIT rate adjustment in base rates, OCC offers only the circular logic that “base rate case matters” should be resolved in “base rate cases,” while “single issues” should be resolved in “single-issue related cases” without explaining why a reduction to federal tax rates that are normally incorporated in base rates is not a “base rate” matter.<sup>16</sup> And Staff appears to ignore the base rate cases entirely. In all of these cases, utilities successfully and transparently passed back the FIT rate adjustment without any separate line item on the customer’s bill.

Additionally, it should be noted that the argument in favor of transparency is undermined by Staff and OCC’s arguments related to the refunds of EDITs related to the Company’s Rider AMRP and Rider AU. On the one hand, Staff argues that the FIT benefit should be separately identified on customers’ bills so that the benefit of the lower FIT is conspicuous.<sup>17</sup> On the other hand, Staff and OCC both recommend that the refunds of EDITs associated with Riders AMRP and AU be reflected as a reduction in the revenue requirement calculation for those riders,<sup>18</sup> meaning that benefit of the TCJA will be completely non-transparent to customers. It is difficult to reconcile the incongruity of the Staff’s and OCC’s insistence on transparency for one component of the TCJA while simultaneously recommending that another component be effectively hidden from customers in the rates for Riders AMRP and AU.

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<sup>14</sup> See OCC Brief, p. 2.

<sup>15</sup> Duke Energy Ohio’s Brief, pp. 5-6.

<sup>16</sup> OCC Brief, p. 5.

<sup>17</sup> Staff Brief, pp. 4-6.

<sup>18</sup> Review and Recommendations of the Staff of the Public Utilities Commission of Ohio, pp. 2-3 (Apr. 17, 2009) (Review and Recommendations); 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).

Despite effectively conceding a total lack of personal knowledge on the point at hearing,<sup>19</sup> Staff and OCC maintain their conclusory assertions that modifying the GTCJA rider design to include the FIT rate reduction would be a simple matter.<sup>20</sup> The mere fact that the Company has other riders does not justify imposing an unnecessarily burdensome billing arrangement on the Company in this case, especially when that arrangement might also create additional confusion for customers.<sup>21</sup>

**B. Staff And OCC Fail To Reconcile Staff's Recommended Date Of December 31, 2017, With Cost Recovery Principles Or Precedent.**

In its brief, Staff misstates the relationship between current base rates and the EDIT balance as of December 31, 2017. Staff states that “current base rates do not include the EDIT balances,”<sup>22</sup> but Staff is either confused or misspeaking. “[C]urrent base rates” *do not* include EDITs related to deferred income taxes that were generated from March 31, 2012, through December 31, 2017; however, “current base rates” *do* include 100 percent of the value of the EDIT component of the deferred income tax balances included in the March 31, 2012, rate base. Customers’ base rates currently reflect and, until new base rates are established in a base rate case, will continue to reflect the benefit of all deferred income taxes that existed on March 31, 2012. Because the balance of accumulated deferred income taxes are a net offset to rate base, customers have benefitted in the form of a return on the total balance of the deferred income taxes, the pre-tax weighted average cost of capital approved in the last base rate case. Of course, as the Company pointed out in its opening brief, investments made by the Company after March 31, 2012, are *not* reflected in current base rates just as any EDITs associated with deferred income taxes generated after March 31, 2012,

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<sup>19</sup> See Duke Energy Ohio’s Brief, p. 11 (citing Hearing Tr., pp. 41, 43, 58-59, 75-76).

<sup>20</sup> Staff Brief, p. 5; OCC Brief, p. 5.

<sup>21</sup> See Duke Energy Ohio Ex. 2, pp. 19-20 (Testimony of William Don Wathen Jr.).

<sup>22</sup> Staff Brief, p. 7.

are *not* reflected in current base rates. Consequently, customers are not paying for those investments and should not benefit from savings (including reduced income taxes) generated from those investments.

Mr. Borer conceded at the hearing that Staff's recommendation requires "that customers begin to collect refunds of tax balances before they've paid for any costs associated with those investments,"<sup>23</sup> but in briefing, Staff fails to address the consequences of this fact: for assets, other than those being recovered via Riders AMRP and AU, placed in service after the date certain of the last base rate case, the Company has singlehandedly borne the costs associated with paying investors for the use of their money (*e.g.*, a return) and has not been recovering any of the depreciation associated with the assets or for any property taxes on the assets.<sup>24</sup>

By insisting that Duke Energy Ohio provide customers "the same tax benefits" that the Company receives on these underlying investments, Staff and OCC fail to account for this asymmetry in cost-bearing.<sup>25</sup> Following conventional ratemaking principles, it is fair for customers to receive benefits when they have paid for whatever investment or expense generated the benefit. It is not fair for customers to receive benefits without paying for whatever investment or expense generated the expense. As explained by the Company in its initial brief, any tax benefits of accelerated depreciation that accrued to the Company, corresponded to considerable costs that the Company has not been recovering and will not recover even after the next base rate case (when

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<sup>23</sup> Hearing Tr. 83.

<sup>24</sup> Although Duke Energy Ohio is not currently recovering any of these costs, the Commission has permitted the Company to defer property taxes, depreciation, and carrying costs at the long-term debt rate pursuant to R.C. 4929.111. See *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 13-2417-GA-UNC, *et al.*, Finding and Order (Oct. 1. 2014). As of the date of this filing, it is unknown whether the Commission will approve full recovery of these deferrals.

<sup>25</sup> Staff Brief, pp. 7-8; *see also* OCC Brief, p. 7.

these assets will enter the rate base at only a considerably depreciated value, which may even be zero in some cases).<sup>26</sup>

Additionally, the arguments in favor of December 31, 2017, rest on the premise that “customers will fund the investments” eventually.<sup>27</sup> And yet, neither OCC nor Staff even attempt to address the Company’s arguments about deferred costs that the Commission may *never* approve. As the Company explained in its initial brief and comments, its uncertainties over the eventual recovery of currently deferred costs are both concrete and substantial: nearly \$12 million in a single instance.<sup>28</sup> Using the date of the last base rate case would avoid mandating any improper refunds of EDITs associated with investments for which customers never pay.

Staff and OCC fail to convincingly distinguish the Columbia Gas Case.<sup>29</sup> Both attempt to discount it due to the fact that it involved a compromise of multiple issues.<sup>30</sup> But there was no indication in that case that either Staff or the Commission felt conflicted about the TCJA portion of the stipulation or accepted it grudgingly to obtain concessions on other issues. To the contrary, the Commission praised the TCJA resolution as “recogniz[ing] the intent of the TCJA.”<sup>31</sup>

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<sup>26</sup> See Duke Energy Ohio’s Brief, pp. 14-16.

<sup>27</sup> Staff Brief, p. 8.

<sup>28</sup> Duke Energy Ohio’s Brief, pp. 16-18.

<sup>29</sup> *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).

<sup>30</sup> Staff Brief, p. 8; OCC Brief, p. 8.

<sup>31</sup> Columbia Gas Case, Opinion and Order, pp. 27-28 (Nov. 28, 2018).



The cases cited by Staff,<sup>32</sup> are inapposite. In all three cases, the utilities in question voluntarily stipulated to use the December 31, 2017, date; so, the question of whether this approach might be unfair to the utilities was never reached or contested.<sup>33</sup> Insofar as these utilities included the Company's own electric distribution business, the Company made its electric proposal before the Columbia Gas Case offered a clearly superior approach.<sup>34</sup> And, the date certain of the Company's last base rate case was much more recent than here—June 30, 2016,<sup>35</sup> meaning the deferred income tax balances used in the last electric base rate case were not expected to change significantly over the eighteen months from June 30, 2016, to the date the TCJA was enacted. Thus, the Columbia Gas Case (in which the most recent base case occurred much longer ago) remains the most relevant example to this case.

Finally, neither Staff nor OCC respond to the Company's argument that there will be no need to segregate Rider AU and Rider AMRP EDITs if the December 31, 2017, date is used (which it should not be). As explained in the Company's initial brief, the Company only proposed to account separately for such EDITs because it planned to use the date of the last base rate case as the basis for refunding EDITs, which would have excluded EDITs associated with subsequent investments for which customers have been paying through these two riders.<sup>36</sup> If the December 31, 2017, date is used, there will be no need for separate accounting.

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<sup>32</sup> Staff Brief, pp. 8-9 & n.34.

<sup>33</sup> *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, pp. 6-7 (Nov. 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, p. 3 (Oct. 3, 2018); *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, p. 5 (July 25, 2018).

<sup>34</sup> Testimony of William Don Wathen Jr., pp. 12-13.

<sup>35</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et al.*, Opinion and Order, p. 4 (Dec. 19, 2018).

<sup>36</sup> Duke Energy Ohio's Brief, pp. 20-21; *see also* Testimony of William Don Wathen Jr., p. 25.

### 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, for reasons given in the Company's initial brief, 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.

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 25th day of September 2019.

/s/ Larisa M. Vaysman

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**Commission of Ohio Docketing Information System on**

**9/25/2019 4:12:05 PM**

**in**

**Case No(s). 18-1830-GA-UNC, 18-1831-GA-ATA**

Summary: Brief Post Hearing Reply Brief of Duke Energy Ohio, Inc. electronically filed by Mrs. Debbie L Gates on behalf of Duke Energy Ohio Inc. and Vaysman, Larisa and D'Ascenzo, Rocco O. Mr. and Kingery, Jeanne W