FILED 12/28/2018
DOCUMENT NO. 07697-2018
FPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2017 for Florida Public Utilities Company – Indiantown Division.

DOCKET NO. 20180052-GU

FILED: December 28, 2018

CITIZENS' POST-HEARING BRIEF

The Citizens of the State of Florida, through the Office of Public Counsel ("Citizens" or "OPC"), pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2018-0214-PCO-GU issued April 25, 2018, Order PSC-2018-0275-PCO-GU issued May 31, 2018, and Order PSC-2018-0412-PCO-GU issued August 20, 2018, hereby submit this Post-Hearing Brief.

PRELIMINARY STATEMENT

Within this Brief, the Office of Public Counsel will be referred to as "Citizens" or "OPC." OPC will refer to Florida Public Utilities Company – Indiantown Division as "Indiantown." Citations to the hearing transcript will use "TR _"; and hearing exhibits will use "HE _". Each OPC position statement will be set off with asterisks.

STATEMENT OF BASIC POSITION

In its May 31, 2018, petition, Indiantown seeks a determination by the Florida Public Service Commission ("Commission" or "PSC") of the tax benefits arising from the Tax Cuts and Jobs Act of 2017 ("TCJA"). Indiantown wants to keep the net gross-up tax benefit arising from the excess accumulated deferred income taxes which is approximately $7,862 annually. OPC contests Indiantown's proposal to keep the net benefit of the excess accumulated deferred income taxes amortization, as being unjust, unfair and unreasonable, and recommends the estimated net benefit amount of $7,862 be returned to customers via a base rate reduction.

Additionally, Indiantown projects to have a negative net operating income for 2018 and has identified an annual net tax detriment of $54,096, based on its 2018 *pro forma* surveillance report. Because it is not over-earning, Indiantown proposes to recover the full amount of the annual TCJA tax detriment through the Energy Conservation Cost Recovery clause. OPC contends the fact that Indiantown is not over-earning is not a valid justification to allow Indiantown to charge the ratepayers for the 2018 income Base Rate Income Tax Detriment. Indiantown has knowingly been earning below its authorized range since 2013, and has had ample opportunity to file for a base rate increase. Therefore, all of the 2018 base rate income tax savings should be applied for the benefit of customers through a base rate reduction.

Lastly, Indiantown's revised filing on August 27, 2018, contained a reclassification of excess accumulated deferred income taxes related to cost-of-removal from "protected" to "unprotected". OPC does not disagree with this classification; however, due to the uncertainty in this area and the fact that different utilities have taken different positions as to the classification, OPC suggests it may be appropriate for Indiantown to seek a private letter ruling ("PLR") from the Internal Revenue Service ("IRS") regarding its classification of the excess accumulated deferred income taxes relating to cost of removal/negative net salvage as "unprotected." Notwithstanding, because of the cost involved in seeking such a ruling, OPC acknowledges that guidance provided by PLRs to other Florida utilities may be sufficiently clear so as to prevent Indiantown and its Florida utility affiliates from having to incur costs to obtain their own specific PLRs.

Since all other issues are subject to stipulations, this brief will address only issues 4B, 5B, 17, 18, 19, and 21.

ISSUES

ISSUE 4B: **What is the appropriate disposition of the protected excess deferred taxes?**

OPC: *Indiantown should not be allowed to retain the benefit of the protected excess ADIT. The protected excess ADIT should be reversed using an Average Rate Assumption Method ("ARAM") if the utility has the available information to calculate the ARAM, or via another appropriate method that complies with normalization requirements, if Indiantown does not have the information to compute the ARAM.*

ARGUMENT:

To fully address the appropriate disposition of the protected excess deferred taxes, you must analyze the source of the excess deferred taxes. Witness Cassel identified three impacts of the TCJA addressed in Indiantown's proposal: (1) the federal tax rate change from 35% to 21%; (2) the Unprotected Deferred Tax Liability; and (3) the Protected Deferred Tax Liability. (TR 119:3-6). As a result of the TCJA, Indiantown recorded a regulatory liability on its balance sheet for the Protected Deferred Tax at a rate of 35%, which it is now only required to pay at a rate of 21%. (TR 120:20-21). The benefit in the Protected Deferred Tax is recorded on the Company's balance sheet as a grossed-up (for tax purposes) Deferred Regulatory Tax liability of approximately $221,269. (TR 120:22-24; HE 2). The Company proposes that this amount be amortized using the IRS prescribed methodology for a flow back period of 26 years at approximately $8,510 per year. (TR120:22-121:4; HE 2). This tax reduction is the source of the protected excess deferred taxes at issue in this docket. Instead of retaining the proceeds as proposed by Indiantown, these taxes should be returned to the ratepayers as the rightful owners as soon as possible.

As OPC Witness Smith testified, accumulated deferred income taxes (ADIT) result from differences between book and tax accounting and these balances typically build up (or accumulate) over time, *e.g.* as tax deductions exceed corresponding book expense. (TR 247:8-11). One primary source of ADIT results from a utility claiming accelerated tax deductions. Mr. Smith explained that the tax deductions on public utility property typically occur on an accelerated basis (method differences) and over shorter periods of time (life differences) than book depreciation accruals relating to the original cost of the public utility property. (TR 247:11-15). He further noted that these types of method/life differences are subject to normalization requirements under Sections 167 and 168 of the Internal Revenue Code. (TR 247:16-18).

The term "protected" ADIT applies to the portion of the property-related ADIT that is subject to normalization requirements and accelerated tax depreciation (including bonus tax depreciation). (TR 249:11-17). Witness Smith explained the "excess" ADIT (EADIT) is the portion of the ADIT balances that are "excess" based on recalculating the difference between the old federal income tax ("FIT") rate of 35% under which the ADIT was originally accumulated and the new FIT rate of 21% under the TCJA. (TR 247:22-26). In other words, the utility's ADIT must be revalued at the new FIT rate, as if the new FIT rate had always been applicable, and the amounts that have been accumulated using the old FIT rates that were higher than the current 21% FIT rate will represent "excess" ADIT. (TR 247:26-248:2). Again, only the protected EADIT is subject to normalization under the Average Rate Assumption Method ("ARAM"). (TR 249:23-250:2). As of its August 27, 2018, filing, Indiantown had an estimated regulatory liability for the Protected EADIT of $221,269. (TR 248:7-10). The Company proposes that this amount be amortized using the IRS prescribed methodology for a flow back period of 26 years at approximately $8,510 per year. (TR 251:23-252:2; HE 2).

Witness Cassel testified that Indiantown wants to keep the annual amortization of the protected EADIT liability of $8,510, instead of returning it to the Company's customers. (TR 120:8-14; 121:6-, 233; HE 2). The estimated annual amount of protected EADIT liability less the Unprotected EADIT asset produces a net benefit of $7,862. (TR 120:16-121:8; 251:16-252:6; and HE 2). Witness Cassel argued Indiantown's proposal meets the intended goal of the TCJA because it allows the Company to continue making capital investments while potentially delaying the need for a costly rate proceeding. (TR 121:8-11). However, under cross-examination, Witness Cassel admitted the TCJA did not contain any language, express or otherwise, that suggests an intended goal of the Act is to allow a utility to keep the customers' tax savings to make capital investments or delay potential rate proceedings. (TR 184:8-15). He further acknowledged that the Company did not provide any evidence or calculations showing where, in its authorized earnings range, Indiantown would be earning if the Commission were to allow it to keep the tax savings. (TR 182:4-9). [1] Nevertheless, Witness Cassel suggests that Indiantown should be allowed to retain the tax proceeds "to recover costs not currently recovered in base rates such that [Indiantown] may be able to maintain base rates at their current levels longer than would otherwise be possible given [Indiantown's] current earnings posture." (TR 121:24-122:2). In spite of his failure to reference any specific "costs" or changes in circumstances over the prior years, Witness Cassel seems to make a vague threat that Indiantown will file a general rate case if not allowed to retain the tax proceeds. *See id*. Such a veiled threat should not be considered by the Commission.

[1] Since Docket Numbers 20180051, 20180052, 20180053, and 20180054 were consolidated for hearing, the cross-examination at hearing applies to each of these dockets, except where specifically restricted to the unique facts of a particular case.

Witness Smith testified that the 2018 base rate income tax savings should be applied for the benefit of customers through a base rate reduction. (TR 255:16-17). According to the Florida Supreme Court in *Reedy Creek Co. v. Fla. Public Serv. Comm.*, 418 So. 2d. 249, 254 (Fla. 1982), "… a change in a tax law should not [sic] result in a 'windfall' to a utility, but in a refund to the customer who paid the revenue that translated into the tax savings." (TR 25:17-205, HE 18).[2] By definition, the excess tax monies in Indiantown's possession are a windfall.

Witness Cassel attempted to distinguish the *Reedy Creek* case from Indiantown's position by arguing the Reedy Creek utility was in an over-earnings position, and Indiantown is not. (TR 167:1-2). He further alleged that, even if the entire tax benefit was retained by Indiantown, it would not be in an over-earnings posture, and thus, this would not result in a "windfall" to the utility. (TR 167:8-12). However, no evidence or calculation was provided by FPUC to demonstrate what Indiantown's projected earnings would be if the Company kept the customer's tax savings. (TR 182:4-9) Moreover, Witness Cassel's interpretation of *Reedy Creek* mistakenly links the over-earnings posture of the utility in that case with the Court's use of the term "windfall." It is a given that the decision in *Reedy Creek* was driven by the over-earning posture of the utility. However, the foundation of the analysis was based, not on the extent of the utility's earnings, but on the cause of the increase in earnings. In fact, in the decisions underlying the court case in *Reedy Creek*, the Commission increased the amount to be refunded by the utility from the amount of the excess taxes to an amount based on an expansion factor which was based on the over-earning position of the utility. *Reedy Creek*, 418 So. 2d. at 251-2. Separate from its consideration of earnings posture or an expansion factor, the *Reedy Creek* commentary couples the usage of the

[2] The term "windfall" is defined as "an unexpected, unearned, or sudden gain or advantage." *Merriam-Webster* https://www.merriam-webster.com/dictionary/windfall (last visited December 14, 2018).

term “windfall” to the idea that the money resulted from customers overpaying taxes and not from anything the utility did to earn or warrant the money at issue. It truly was a windfall.

In addition, Witness Cassel acknowledged the EADITs are monies that Indiantown’s ratepayers have already paid to the Company because it is common ratemaking practice for utilities to pass through to their customers as an expense the payment of the utility’s income taxes. (TR 182:17-19; 188:14-20). Witness Cassel also affirmed that, except for cost-of-capital components that would have to be replaced because of the lower amount of deferred taxes, these funds (i.e. taxes) are basically revenue-neutral for the utility. (TR 188:21-25).

While Indiantown alludes to the fact that it could avoid a “potential” rate case if it were allowed to keep the tax savings, a close examination of Witness Cassel’s testimony demonstrates no rate case was, or necessarily will be, avoided by FPUC. Indiantown’s earning surveillance reports for 2012-2018 demonstrate the Company has been in an under-earnings posture for several years; thus, it has had the ability to file at any time for a base rate increase, which it unilaterally chose not to do. (HE 19) Further, none of the exhibits attached to Indiantown’s testimony included any pleading or evidence showing a pending rate case or the anticipation of one. (*See generally* HE 2-18).

During cross-examination, Witness Smith was questioned as to the Commission’s consideration of earnings in the 1979 tax act that resulted in the Supreme Court’s decision in *Reedy Creek*. Witness Smith acknowledged that the Commission in those 30 year old tax cases considered the utilities’ earnings in its disposition of tax benefits. (TR 314:10-315:9). However, he testified that, in the current tax cases pending before the Commission implementing the TCJA, other electric and gas utilities have agreed to apply the savings from the TCJA in some manner to reflect a direct benefit to their customers. (TR 317:24-318:6). He further testified that it varied from company to company as to exactly how it was applied, yet each company agreed the tax savings needed to be returned to their customers or applied in manner to benefit their customers. *Id.* Because the funds accruing to EADIT are collected only when there is a presumption, not a simple possibility, that the anticipated taxes will be owed, the excess ADIT resulting from the TCJA should be refunded to the customers as soon as reasonably possible. In other words, the tax benefits resulting from the lowering of the tax rates should be flowed back to the customers who paid the taxes in rates and should not result in a windfall to the utility.

In summary, the TCJA's effect on the ADIT resulted in ratepayers making overpayments to Indiantown. Like any overpayment, the protected excess deferred taxes should be refunded as rapidly as possible under the IRS regulations to ensure only fair, just, and reasonable rates are paid by ratepayers.

ISSUE 5B: What is the appropriate disposition of the unprotected excess deferred taxes?

OPC: *Indiantown should not be allowed to retain the benefit of the unprotected excess ADIT. The unprotected excess ADIT net asset of $6,484 should be amortized over 10 years at $648 per year*

ARGUMENT:

As stated above in Issue 4B, the Unprotected Deferred Tax Liability was identified by Witness Cassel as one of the three impacts of the TCJA. (TR 119:2-6). Witness Smith explained the "excess" ADIT or EADIT is the portion of the ADIT balances that are "excess" based on recalculating the difference between the old FIT rate of 35% under which the ADIT was originally accumulated and the new FIT rate of 21% under the TCJA. (TR 247:21-25). For the reasons articulated in Issue 4B, instead of retaining the proceeds as Indiantown has proposed, these tax savings should be returned to the ratepayers as the rightful owners as soon as allowable under the IRS guidelines. As OPC Witness Smith testified, these ADIT amounts result from differences between book and tax accounting, and represent balances that typically build up (or accumulate) over time, *e.g.* as tax deductions exceed corresponding book expense. (TR 247:8-11).

In this case, FPUC estimated the Unprotected EADIT to be a regulatory asset in the amount of $6,484 and proposed a 10-year amortization for an annual amount of $648. Indiantown wants to retain the estimated annual amount of the Protected EADIT liability less the $648 annual Unprotected EADIT asset amount which produces an estimated net annual liability or benefit amount of $7,862. (TR 120:9-14, 121:6-8, 253: 8-13). Witness Cassel argued that this meets the intended goal of the TCJA by allowing the Company to continue making capital investments while potentially delaying the need for a costly rate proceeding. (TR 121:8-11). However, as iterated in issue 4B, under cross-examination, Witness Cassel affirmed that the TCJA does not contain any language, express or otherwise, suggesting an intended goal of the Act is to allow a utility to keep tax savings in order to continue making capital investments or to avoid potential rate proceedings. (TR 184:8-15) Mr. Cassel further acknowledged FPUC did not provide any evidence or calculations to show where, in its authorized earnings range, Indiantown would be earning if the Commission were to allow it to retain any tax savings. (TR 182:4-9).

Witness Smith testified that, as an alternative to the Company's proposal to retain the full net benefit amount of the EADIT amortization, this amount should be returned to the customers via a base rate reduction. (TR 253:6-13). As articulated in Issue 4B, according to the Florida Supreme Court in *Reedy Creek*, "… a change in a tax law should no [sic] result in a 'windfall' to a utility, but in a refund to the customer who paid the revenue that translated into the tax savings." (TR 255:17-20; HE 18)

The bottom line is that the TCJA's effect on FPUC results in the customers making overpayments to Indiantown to create EADIT. Like any overpayment, the unprotected excess deferred taxes should be refunded as rapidly as possible to avoid intergenerational inequity and to ensure only fair, just, and reasonable rates are paid by Indiantown's ratepayers.

ISSUE 17: **Should Indiantown be allowed to recover any detrimental impact associated with the corporate income tax rate change implemented by the TCJA? If so, what amount, and should Indiantown be allowed to recover such amount through the Energy Conservation Cost Recovery (ECCR) clause?**

OPC: *No, Indiantown should not be allowed to recover any detrimental impact associated with the corporate income tax rate change implemented by the TCJA.*

ARGUMENT:

Combined with Indiantown's request to retain the direct benefits of the TCJA, Indiantown also proposes to charge ratepayers for a tax detriment based on the reduction in value of carried forward losses, which as of 2018 were calculated at $54,096. (TR 119:10-22; 189:7-11; and HE 2). This putative tax detriment is not suffered directly by Indiantown but is suffered, if at all, by Indiantown's parent through its consolidated tax return(s). (TR 213:21-215:5). In fact, on cross examination Witness Cassel fully admitted that the taxes at issue here are already part of current base rates. (TR 189:18-20). The $54,096 upon which the putative tax detriment is based includes the EADIT in dispute in Issues 4B and 5B. (TR 190:7-9).

To demonstrate further the fallacy of Indiantown's proposed treatment of the putative tax detriment, simply invert the effects of the TCJA. If, instead of a detriment to the parent company's consolidated tax return, as purported here, the TCJA affected a benefit only on the parent's consolidated tax return, then Indiantown would not be requesting to include the benefit in its rate base. It would be inappropriate to inure any benefit to Indiantown based on a tax detriment that it does not suffer. Indiantown's position is the proverbial 'heads we win; tails you lose' scenario for the ratepayers. Therefore, Indiantown should not be allowed to recover the tax detriment in Issue

17, through the ECCR or otherwise.

ISSUE 18: **Should Indiantown be allowed to retain and amortize, over 26 years, the total annual benefit associated with the Protected Deferred Tax liabilities?**

OPC: *No, Indiantown should not be allowed to retain any portion of the protected deferred income taxes; however, OPC agrees with the 26 years amortization which is consistent with ARAM.*

ARGUMENT:

As argued above in Issue 4B, Indiantown should not be allowed to retain the annual benefit associated with the Protected Deferred Tax liabilities. However, if the Commission decides to allow Indiantown to retain the protected deferred tax benefit, then that benefit should be amortized over 26 years consistent with ARAM.

ISSUE 19: **Should Indiantown be allowed to retain and amortize, over 10 years, the total annual benefit associated with the Unprotected Deferred Tax liabilities?**

OPC: * No, Indiantown should not be allowed to retain any portion of the unprotected deferred income taxes; however, OPC agrees with the 10 years amortization period.*

ARGUMENT:

As argued above in Issue 5B, Indiantown should not be allowed to retain the annual benefit associated with the Unprotected Deferred Tax liabilities. However, if the Commission decides to allow Indiantown to retain the unprotected deferred tax benefit, then that benefit should be amortized over 10 years.

ISSUE 21: Should this docket be closed?

OPC: *No.*

ARGUMENT:

Once the Commission makes the findings contained herein it will be unnecessary to keep this docket open. However, until that time, the docket should not be closed.

Respectfully submitted,

J. R. Kelly
Public Counsel

/s/Virginia Ponder
Virginia Ponder
Associate Public Counsel

c/o The Florida Legislature
Office of Public Counsel
111 W. Madison Street, Room 812
Tallahassee, FL 32399-1400

Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Citizen's Post-Hearing Brief has been furnished by electronic mail on this 28th day of December, 2018, to the following:

Charles Murphy
Margo Duval
Rachael Dziechciarz
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
cmurphy@psc.state.fl.us
mduval@psc.state.fl.us
RDziechc@psc.state.fl.us

Beth Keating
Gregory M. Munson
Lila A. Jaber
Gunster Law Firm
215 South Monroe Street, Suite 601
Tallahassee FL 32301-1839
bkeating@gunter.com
gmunson@gunster.com
ljaber@gunster.com

Mr. Mike Cassel
Florida Public Utilities Company - Fort
Meade Division
1750 S.W. 14th Street, Suite 200
Fernandina Beach FL 32034
mcassel@fpuc.com

/s/Virginia Ponder
Virginia Ponder
Associate Public Counsel