BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2017 for Florida Division of Chesapeake Utilities Corporation ______________________________________/	DOCKET NO. 20180054-GU FILED: December 28, 2018

CITIZEN'S POST-HEARING BRIEF

The Citizens of the State of Florida, through the Office of Public Counsel ("OPC" or "Citizens"), pursuant to the Order Establishing Procedure in this docket, Order PSC-2018-0216-PCO-GU issued April 25, 2018, Order PSC-2018-0277-PCO-GU issued May 31, 2018, and Order PSC-2018-0412-PCO-GU issued August 20, 2018, submit this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

Florida Division of Chesapeake Utilities Corporation d/b/a Central Florida Gas ("CFG" or "Company"), in its May 31, 2018 petition, seeks a determination by the Florida Public Service Commission ("Commission or "PSC") related to the tax benefits arising from the Tax Cuts and Jobs Act of 2017 ("TCJA"). The Company wants to keep the annual base rate income tax savings of $954,499 and the net gross-up tax benefit arising from the excess accumulated deferred income taxes which is approximately $250,042 annually, instead of refunding this money to its customers. (TR 209-10, 300). This represents money that belongs to CFG's customers (both residential and commercial) and it should be returned to the customers who previously paid according to the higher income tax rate. Accordingly, the Commission should reject this proposal as being unjust, unfair and unreasonable, and should apply the annual base rate TCJA savings and the net annual amortization of the Protected and Unprotected EADIT (not associated with the acquisition adjustment) for the benefit of customers as a base rate reduction. (TR 291-293, 300)

The Company indicates the impact of the TCJA on the Company's Gas Reliability Infrastructure Program ("GRIP") results (i) in a 2018 tax savings of $324,362 and (ii) in an annual tax savings, for the period 2019 and beyond, of approximately $358,889. (TR 294-295) CFG proposes to flow back the 2018 tax savings to its customers by incorporating it as an over-recovery in its 2019 GRIP projection. (TR 294-295) Additionally, CFG indicates it will apply the new 21 percent federal income tax rate into its 2019 GRIP surcharge projections and future projections, which will reduce the annual GRIP revenue amount by the annual tax savings of approximately $358,889. OPC agrees with the Company's proposals to flow back the GRIP-related TCJA savings directly to its customers in this manner. (TR 295)

CFG's revised filing on August 27, 2018, contained a reclassification of excess ADIT related to cost-of-removal from protected to unprotected. (TR 296) OPC does not disagree with this reclassification; however, due to the uncertainty in this area and the fact that different utilities have taken different positions as to the classification of unprotected excess ADIT, OPC suggests it may be appropriate for CFG to seek a private letter ruling ("PLR") from the Internal Revenue Service ("IRS") regarding its classification of the excess ADIT relating to cost of removal/negative net salvage as "unprotected". (TR 296-298) 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 CFG and its affiliates from having to incur costs to obtain their own specific PLR. (TR 296-298)

Since all other issues are subject to stipulations, this brief will address only issues 4B, 5B, 18, 19, 20 and 23.

ISSUES AND POSITIONS

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

OPC: The Company 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 the Company does not have the information to compute the ARAM.

ARGUMENT:

CFG Witness Cassel identified three impacts of the TCJA that the Company's proposal addressed: (1) the in the federal tax rate change from 35% to 21%; (2) the Unprotected Deferred Tax Liability and Tax Asset; and (3) the Protected Deferred Tax Liability. (TR 138) Witness Cassel testified that as a result of the TCJA, CFG 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% in taxes. (TR 139) The benefit in the Protected Deferred Tax is recorded on CFG's balance sheet as a grossed-up (for tax purposes) Deferred Regulatory Tax liability. (TR 139)

As OPC Witness Smith testified, these accumulated deferred income taxes (ADIT) 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 286) Witness Smith explained that one primary source of ADIT results from claiming accelerated tax deductions. He further explained 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 286) He noted that these types of method/life differences are subject to normalization requirements under Sections 167 and 168 of the Internal Revenue Code. (TR 286) 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 286)

Further, Witness Smith explained that 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 rate (FIT) of 35% under which the ADIT was originally accumulated and the new FIT rate of 21% under the TCJA. (TR 286-287) In other words, the utility’s ADIT must be revaluated at the new FIT (as if it had always been applicable), and the amounts that have been accumulated using the FIT rates that are higher than the current 21% flat rate will represent “excess” ADIT. (TR 287) As stated above, the protected EADIT is subject to normalization and the Average Rate Assumption Method (ARAM). (TR 289) As of its August 27, 2018 filing, the Company had an estimated regulatory liability for the Protected EADIT of $9,537,104. (TR 287) CFG proposed that $9,609,491 should be amortized using the IRS prescribed methodology for a flow back period of 26 years at approximately $369,596 per year. (TR 291, HE 2)

Witness Cassel testified that CFG wants to keep the annual amortization of the protected EADIT of $369,596 less the annual amortization of the Unprotected EADIT asset for a net benefit of $250,042, instead of returning it to CFG’s customers. (TR 140, 291) These EADIT amounts represent money CFG’s ratepayers have already paid to the Company. Notwithstanding, Witness Cassel argued that retention of these EADIT amounts 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 140) Yet, under cross-examination, Witness Cassel affirmed that the TCJA does not contain any language, express or otherwise, that suggests an intended goal of the act was to allow a utility to keep the tax savings so as to continue making capital investments while potentially delaying the need for a rate proceeding. (TR 212)

In contrast to the Company's proposal to keep the customer's tax savings associated with the protected EADIT, OPC recommends that these tax savings be flowed back to CFG's customers. Witness Smith testified that the net annual amortization of the protected deferred tax liability and unprotected deferred tax asset that is not related to the acquisition adjustment, should be applied for the benefit of the customers as a rate reduction. (TR 300) To do otherwise would be unjust, unfair and unreasonable to CFG's customers.

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

OPC: The Company should not be allowed to retain the benefit of the unprotected excess ADIT. The Unprotected excess ADIT net asset of $1,195,541 should be amortized over 10 years at $119,554 per year.

ARGUMENT:

As stated in Issue 4B, OPC Witness Smith explained that the "excess" ADIT (EADIT) is the portion of the ADIT balances that are "excess" based on recalculating the difference between the old FIT of 35% under which the ADIT was originally accumulated and the new FIT rate of 21% under the TCJA. (TR 286-287) He testified the "unprotected" property and non-property related EADIT is not subject to normalization requirements, and the amortization or application is up to the discretion of the Commission. (TR 229) Witness Smith stated the unprotected ADIT will be revaluated at the lower 21% tax rate, creating balances of excess unprotected ADIT that can be flowed back to customers over amortization periods to be determined by the Commission (e.g., such as for the recovery of regulatory assets). (TR 288)

CFG Witness Cassel testified the Unprotected Deferred Tax Asset has an estimated balance of $1,195,541. (TR 139) Witness Cassel further testified that the Company requests this unprotected EADIT to be amortized over 10 years at $119,554 per year. He suggested this annual amortization detriment should be netted against the annual Protected benefit and the net amount be retained by the Company, instead of returning it to CFG's customers. (TR 139) Yet, the Florida Supreme Court stated in Reedy Creek Co. v. Fla. Public Serv. Comm., 418 So. 2d. 249, 254(Fla. 1982), "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 292-294, HE 18)[1]

Witness Smith agreed the Protected EADIT liability amortization of $369,596 net of the $119,554 per year Unprotected EADIT net asset amortization produces an estimate net benefit amount of $250,042. (TR 292-293) He also testified that this net benefit amount of $250,042 should be returned to customers via a base rate reduction which is consistent with the Court's decision in the Reedy Creek case and the Commission's recent decisions to return tax savings to utility customers when it approved settlements with other electric and gas utilities regarding the TCJA. (TR 293)

ISSUE 18: Should CFG be allowed to retain any of the tax benefit associated with the tax rate change implemented by the TCJA and if so, how much?

OPC: No, CFG should not be allowed to retain any of the tax benefit associated with the tax rate change implemented by the TCJA.

ARGUMENT:

For the reasons articulated above, CFG should not be allowed to retain the customer's tax benefits. Again, as stated by 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 294, HE 18) Contrary to Witness Cassel's assertion that the earnings position of the utility was determinative in the Reedy Creek case, the Florida Supreme Court recognized that the utility would receive a "windfall" if these customer

[1] 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).

paid tax savings are not returned to customers. (TR 167, 294) Separate from its consideration of earnings posture or an expansion factor, the Reedy Creek commentary couples the usage of the 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 the recent cases before this Commission that addressed the tax saving, other electric and gas utilities agreed to refund the monies to their customers or apply the savings in a manner to directly benefit those customers (e.g., pay for storm damages in lieu of utilizing storm surcharges). (TR 317-318) Witness Smith testified that he did not recall the exact earnings of those utilities, although he believed they were all earning positive returns. (TR 320) Similarly, CFG is earning "positive" returns; to wit, Witness Cassel testified CFG is earning within its range without the customer's tax savings being retained. (TR 138) Moreover, Witness Cassel could not show where CFG provided any evidence or any calculations in the hearing to demonstrate where the Company's earnings would be if the tax savings were to be retained (TR 210), although he did contend that keeping the tax saving would not put CFG in an over-earnings position. (TR 143) Rightfully so, Witness Cassel did acknowledge that EADITs are monies the Company's customers had already paid to CFG. (TR 210) And the Court in Reedy Creek noted that it is common practice for utilities to pass through to their customers as an expense the payment of the utilities' income taxes. (HE 18) Further, Witness Cassel 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 212)

In contrast to the Company's proposal to retain the customer's tax savings, the tax savings should be flowed back to customers. Witness Smith testified the regulatory liability for the base rate TCJA savings should be applied for the benefit of customers as a permanent base rate reduction. (TR 300) To allow the Company to keep the tax savings would be unjust, unfair and unreasonable.

ISSUE 19: Should CFG be allowed to retain the total net benefit associated with the Protected Deferred Tax Liability and the Unprotected Deferred Tax Asset, and should CFG be allowed to amortize the Protected Deferred Tax Liability over 26 years and the Unprotected Deferred Tax Asset over 10 years?

OPC: No, CFG should not be allowed to retain the total net benefit associated with the Protected Deferred Tax Liability and the Unprotected Deferred Tax Asset. Yes, CFG should be allowed to amortize the Protected Deferred Tax Liability over 26 years and the Unprotected Deferred Tax Asset over 10 years.

ARGUMENT:

As stated above in Issues 4B and 5B, OPC Witness Smith testified the net gross-up tax benefit of $250,042 arising from the EADIT amortization should be returned to CFG's customers via a base rate reduction. (292-293) Witness Cassel testified the protect EADIT will be amortized using the IRS's prescribed methodology and is estimated to flow back over 26 years at approximately $369,596 per year. (TR 140) As of its August 27, 2018 filing, CFG estimated its regulatory liability for the Protected EADIT to be $9,537,104. (TR 287) OPC Witness Smith agreed with the Company's proposal that $9,609,491 should be amortized using the Average Rate Assumption Method (ARAM) or the IRS prescribed methodology that complies with IRS normalization requirements, if the Company does not have information to compute the ARAM, and flowed back over 26 years at approximately $369,596 per year. (TR 291-292, HE 2)

CFG Witness Cassel also testified the Unprotected Deferred Tax Asset has an estimated balance of $1,195,541, and that this amount should be amortized over 10 years at $119,554 per year. (TR 139) Witness Smith did not object to these amounts and amortization periods for the protected and unprotected EADITs, as revised by the Company in its August 27, 2018, testimony, subject to correction by December 22, 2018 and later true-up. (TR 291-292)

ISSUE 20: Should the tax benefit arising from the TCJA rate reduction, excluding the 2018 GRIP savings, be retained by CFG?

OPC: No, the tax benefits arising from the TCJA rate reduction should not be retained by CFG.

ARGUMENT:

For the reasons articulated in the Issues above, the 2018 base rate income tax savings arising from the TCJA rate reduction should not be retained by CFG. Contrary to Witness Cassel's assertion that the earnings position of the utility was determinative in the Reedy Creek case, the Florida Supreme Court recognized the utility would receive a "windfall" if the customer paid tax savings are not returned to customers. (TR 167, 294) Other electric and gas utilities have already agreed to refund the tax savings to their customers or apply the savings in a manner to directly benefit those customers (e.g., pay for storm damages in lieu of utilizing storm surcharges). (TR 317-318)

Since these tax benefits exist because of monies the customers have already paid to CFG (TR 210), the Company should return these tax savings to its customers. Additionally, except for cost-of-capital components that would have to be replaced because of the lower deferred taxes, these funds (i.e. taxes) are basically revenue-neutral for the Company. (TR 212) Moreover, CFG has not demonstrated why the tax savings should be retained, despite there being multiple reasons to return this money to the customers. CFG will be earning a "positive" return for the foreseeable future, as demonstrated by Witness Cassel's testimony that CFG is earning within its range without the tax savings being retained. (TR 138). In addition, under cross-examination, Mr. Cassel could not point to where any evidence or calculations provided by CFG in this docket to show demonstrate what the Company's projected earnings would be if these tax savings were retained by CFG (TR 210), even though he contended that keeping the tax savings would not put CFG in an over-earnings position. (TR 143) In contrast to the Company's proposal to keep the customers' money, the tax savings be flowed back to CFG's customers. (TR 300) Consistent with the Court in Reedy Creek and this Commission's recent decisions to return tax savings to utility customers when it approved settlements with other electric and gas utilities regarding the TCJA, the 2018 base rate tax savings should be applied for the benefit of CFG's customers as a base rate reduction. (TR 138, 300, 318-319) The bottom line is the tax savings represent money that was previously paid by CFG's customers, it belongs to those customers, and it should be returned to them.

ISSUE 23: Should this docket be closed?

OPC: No.

Respectfully submitted,

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CERTIFICATE OF SERVICE
20180054-GU

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

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