

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION**

**NASHVILLE, TENNESSEE**

**May 20, 2020**

**IN RE:**

**CHATTANOOGA GAS COMPANY COMPLIANCE  
FILING AND REPORT**

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**DOCKET NO.  
18-00035**

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**FINAL ORDER**

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This matter came before Chair Robin L. Morrison, Vice Chair Kenneth C. Hill, and Commissioner John Hie of the Tennessee Public Utility Commission (“Commission” or “TPUC”) during the regularly scheduled Commission Conference held on March 9, 2020, to determine the remaining issues stemming from the implementation and impact of the 2017 Tax Cuts and Jobs Act, Pub. L. No. 115-97 (“2017 Tax Act” or “TCJA”) with respect to Chattanooga Gas Company (“CGC” “Company”). The Company and the Consumer Advocate Unit in the Financial Division of the Tennessee Attorney General’s Office (“Consumer Advocate”) were the parties in this matter.

In summary, the Hearing Panel determined that Deferred Income Tax Expense Savings (“tax savings”) is \$843,810 and the Deferred Amortization of Excess Accumulated Deferred Income Tax (“Deferred Amortization EDIT”) is \$1,000,900. The aggregate amount of these regulatory liabilities is \$1,844,710. The regulatory liability of \$1,844,710 shall be amortized over a three-year period and incorporated into the Annual Rate Mechanism of Chattanooga Gas Company’s annual filings with an unamortized balance reflected as a reduction in rate base.

## BACKGROUND

On January 1, 2018, the 2017 Tax Act became effective which significantly impacted the earnings of investor-owned utilities. The 2017 Tax Act reduced the corporate federal income tax rate from 35% to 21%. On February 6, 2018 in Docket No. 18-00001, the Commission issued its *Order Opening an Investigation and Requiring Deferred Accounting Treatment* (hereafter “2018 Tax Reform Order”). Therein, the Commission ordered Atmos Energy Corporation (“Atmos Energy”), Kingsport Power Company d/b/a AEP Appalachian Power (“Kingsport Power”), Piedmont Natural Gas Company (“Piedmont Natural Gas”), Tennessee American Water Company (“Tennessee American Water”), and CGC to immediately apply deferred accounting treatment with respect to the impact of the lowered federal corporate income tax rate and, no later than March 31, 2018, provide the Commission with the amounts deferred and a proposal to reduce rates or otherwise make adjustments to account for the tax benefits resulting from the 2017 Tax Act.<sup>1</sup> The *2018 Tax Reform Order* directed Staff to assist the remaining water, wastewater, and natural gas utilities under the Commission’s jurisdiction in the calculating the tax impacts on their earnings resulting from the 2017 Tax Act and report the results to the Commission.

In this docket, the Company reported it had tracked and accumulated the revenue impact of the TCJA in a deferred account.<sup>2</sup> Exhibits were provided reflecting the accumulated amounts for January and February 2018 and the impact of the reduction in the tax rate for the twelve months ending January 31, 2018. Because the twelve-month average provided by the Company

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<sup>1</sup> See *In re: Tennessee Public Utility Commission Investigation of Impacts of Federal Tax Reform on Public Utility Revenue Requirements*, Docket No. 18-00001, *Order Opening Investigation and Requiring Deferred Accounting Treatment* (February 6, 2018) (hereinafter *2018 Tax Reform Order*).

<sup>2</sup> *Chattanooga Gas Company’s Compliance Filing and Report*, p. 1, (March 29, 2018).

indicated that CGC was under-earning, the Company recommended no further action was immediately necessary. CGC proposed to retain any TCJA savings to offset earning below its authorized return. Further, as CGC had a rate case in Docket No. 18-00017 pending before the Commission, which reflected the new lower tax rate going forward, the Company asserted any further investigation regarding the impact of the TCJA should be handled in the rate case docket.<sup>3</sup>

The Consumer Advocate sought intervention in the docket, which was granted on April 24, 2018.<sup>4</sup> On May 14, 2018, a contested case proceeding was convened by the Hearing Panel.<sup>5</sup> During this time, the rate case in Docket No. 18-00017 progressed forward.

#### **RELEVANT PROCEDURAL HISTORY OF RATE CASE DOCKET NO. 18-00017**

The Company filed its rate case on February 15, 2018 in Docket No. 18-00017. In its *Petition*, the Company made no claim that it had a right to retain any 2017 Tax Act related savings, nor did not provide calculations of any amount it may have sought to retain. Neither did the Company seek to consolidate the rate case with the present docket, Docket No. 18-00035. The Consumer Advocate, rather than the Company, first raised the TJCA related tax savings issue during the Company's 2018 rate case several months after the *Petition* had been filed. On July 3, 2018, the Consumer Advocate filed its direct testimony in the 2018 rate case, including the Pre-Filed Direct Testimony of Mr. David Dittimore.

Mr. Dittimore's Pre-Filed Testimony in the 2018 rate case covered a forecast of the attrition period of CGC's O&M expenses and addressed a host of other regulatory accounting issues, including the tax savings related from the TJCA. Mr. Dittimore referenced the Company's *Compliance Filing and Report* filed in Docket No. 18-00017, and contended that

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<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Order Granting Petition to Intervene filed by the Consumer Advocate* (June 11, 2018).

<sup>5</sup> *Order Convening a Contested Case Proceeding and Appointing a Hearing Officer* (May 18, 2018).

CGC should not be allowed to retain the tax savings for the period between January 1, 2018 and the date that the new rates ordered in the rate case became effective.<sup>6</sup> The Consumer Advocate computed an estimate of the tax savings through September 2018, stating that the estimate would change if rates resulting from the rate case were implemented on a later date.<sup>7</sup> The Consumer Advocate also asserted CGC may have already begun to amortize its excess ADIT balance, an alleged action by the Company that went beyond the *2018 Tax Reform Order* in Docket No. 18-00001 to the detriment of the interests of the customers.<sup>8</sup>

In rebuttal testimony filed on August 3, 2018, CGC conceded that the *2018 Tax Reform Order* did not expressly authorize a public utility to retain any tax savings in the event that a public utility was under-earning.<sup>9</sup> Nevertheless, Mr. Gary A. Tucker, on behalf the Company, asserted that the “Company has deferred the savings and has proposed to retain those savings until new rates are established as presented in the Company’s current rate case filing.”<sup>10</sup> The Company, however, did not provide an estimate or a known and measurable amount of the income tax expense savings it sought to retain in the rate case docket.

The rate case was decided by the Commission on October 15, 2018, with rates becoming effective thereafter on November 1st. The Commission briefly addressed the Accumulated Deferred Income Tax and Regulatory Liability for Excess Deferrals in the rate case. On page 55 of the *Amended Order* issued in Docket No. 18-00017 on January 15, 2019, the voting panel adopted an EDIT regulatory liability of \$22,177,646 for the attrition year and adopted the Company’s amortization periods for both protected and unprotected EDIT. Additionally, beyond

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<sup>6</sup> *In re: Petition of Chattanooga Gas Company for Approval of an Adjustment in Rates and Tariffs; the Termination of the AUA Mechanism and Related Tariff Changes and Revenue Deficiency Recovery; and an Annual Rate Review Mechanism*, (herein after “2018 Rate Case”), Docket No. 18-00017, David Dittmore, Pre-Filed Direct Testimony, pp. 27-28 (July 3, 2018).

<sup>7</sup> *Id.* at 29. The rates set in Docket No. 18-00017 were not effective until November 1, 2018.

<sup>8</sup> *Id.* at 23, 27.

<sup>9</sup> 2018 Rate Case, Gary Tucker, Pre-Filed Rebuttal Testimony, pp. 39-40 (August 3, 2018).

<sup>10</sup> *Id.*

that needed to set rates in the rate case, CGC was ordered to accrue in a regulatory liability account the Deferred Amortization EDIT for the period January 2018 to the effective date of new rates, which was November 1, 2018. The disposition of this unique regulatory liability would be determined in the present docket.<sup>11</sup> As noted by the Company and the Consumer Advocate in the present docket, the *Amended Order* in the rate case did not expressly address the calculation or disposition of the regulatory liability for the tax savings in the rate case; rather, this issue remained within the scope of the present docket, Docket No. 18-00035.

#### **STATUS CONFERENCE OF MARCH 27, 2019**

Upon the conclusion of rate case Docket No. 18-00017, the present docket moved forward. In an email dated March 12, 2019, the Consumer Advocate submitted two outstanding issues to be addressed in this docket: first, the treatment of Deferred Amortization EDIT as set forth in the Commission's *Amended Order* in Docket No. 18-00017 (on page 55) and second, the appropriate disposition of the Tax Savings accrued during the period January 1, 2018 through the date the new CGC rate became effective.<sup>12</sup> CGC disagreed that the second issue should be included as an issue for consideration. CGC asserted that the issue regarding savings had already been determined in its recent rate case.<sup>13</sup> The Hearing Officer convened a Status Conference on March 27, 2019 to discuss the issues to be included in the docket.

During the Status Conference, the Consumer Advocate reiterated the issues it thought should be included in the docket. The Consumer Advocate contended that the Commission never said that deferred amounts should remain with the Company. Rather, the Consumer Advocate asserted that deferred tax dollars should flow back to ratepayers and that the tax dockets were set up to address these types of issues. CGC asserted that all issues had been

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<sup>11</sup> 2018 Rate Case, *Amended Order*, p. 55 (January 15, 2019).

<sup>12</sup> *Order Establishing Issues for Consideration*, p. 2, (June 27, 2019).

<sup>13</sup> *Id.*

litigated, and if the Commission had intended to send more than one issue to the tax docket it would have done so specifically. CGC maintained that the issue of TCJA tax savings had already been considered and decided in the rate case. CGC asserted that the Commission made the determination in the rate case that the TCJA related tax savings was in the rate base and the amount was zero.<sup>14</sup>

During the Status Conference, the parties presented their positions verbally, and did not file any motions or supporting documentation in the record. The parties disagreed as to whether the second issue regarding the disposition of tax savings should be included as an issue in this docket. CGC maintained that a determination had already been made on the issue of the disposition of tax savings in CGC's rate case, decided by the Commission on October 15, 2018 in Docket No. 18-00017. In her order, the Hearing Officer rejected the Company's position:

The Hearing Officer finds that one of the objectives of this docket and similar dockets for the other larger utilities, commonly referred to as "tax dockets," is to determine the disposition of the tax savings by the utilities to the ratepayers. In its *Order Opening an Investigation and Requiring Deferred Accounting Treatment* issued in Docket No. 18-00001, the Commission states that CGC and certain other larger public utilities shall "provide to the Commission no later than March 31, 2018, the amounts deferred and a proposal to reduce rates or otherwise make adjustments to account of the tax benefits resulting from the 2017 Tax Cuts and Jobs Act, Pub. L. No. 115-97 ("2017 Tax Act")." Because of this mandate by the Commission, the current docket was opened with the filing of the *Chattanooga Gas Company Compliance Filing and Report* on March 29, 2019. Therefore, the Hearing Officer concludes that it is appropriate for the disposition of the tax savings to be considered in the current docket. Of course, CGC may argue before the Commission that its tax savings was already calculated and included in its recent rate case. The Commission is in the best position to determine whether it has previously ruled on the issue of the disposition of the tax savings.<sup>15</sup>

Thereafter, pursuant to the procedural schedule established by the Hearing Officer, the parties filed pre-filed testimony concerning both issues.

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<sup>14</sup> *Id.* at 3-4.

<sup>15</sup> *Id.*

## DIRECT TESTIMONY OF CHATTANOOGA GAS

In Pre-Filed Direct Testimony on behalf of CGC, Mr. Gary A. Tucker, addressed the amortized amounts of EDIT for the January to October 2018 time period and, due to reduction in the corporate tax rate, the potential tax savings in rates for the same period.<sup>16</sup> Mr. Tucker claimed that the Company provided testimony addressing all aspects of the 2017 Tax Act in its 2018 rate case, including the proposal that the Company retain the tax savings accumulated between January 1, 2018 and the effective date of its new base rates.<sup>17</sup> Mr. Tucker submitted that, going forward, rates reflect the benefits of the 2017 Tax Act, including the new 21% federal tax rate and amortization of excess accumulated deferred income taxes.<sup>18</sup>

Mr. Tucker conceded that not all impacts of the 2017 Tax Act were resolved in the rate case, but reiterated the Company's position that only one issue was remanded back to this docket for resolution: the disposition of the Deferred Amortization EDIT for the January to October 2018 period.<sup>19</sup> His opinion relied upon the written order in the Company's rate case in Docket No. 18-00017, specifically page 55 of the *Amended Order*, where it specifically states that the disposition of the EDIT regulatory liability will be determined in this present docket, Docket No. 18-00035. As the *Amended Order* did not specify that the tax saving issue was also referred to Docket No. 18-00035, Mr. Tucker reasoned that the matter should not be an issue in this docket. To support his belief that the tax savings issue was resolved in the rate case, Mr. Tucker points to various schedules contained in the rate case *Amended Order* showing that both the Regulatory Liability Deferred Tax Savings amount in Rate Base and 2018 Tax Savings Amortization is

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<sup>16</sup> Gary A. Tucker, Pre-Filed Direct Testimony, pp. 2-3 (September 13, 2019).

<sup>17</sup> Commission approved new rates became effective on November 1, 2018.

<sup>18</sup> *Id.* at 4-5.

<sup>19</sup> *Id.* at 5-7.

“zero”; whereas, the excess tax deferrals were decided in the amount \$22,177,646.<sup>20</sup> In summary, Mr. Tucker concluded the zero balances in the schedules, in combination with the express referral of the Deferred Amortization EDIT issue back to this docket indicate the issue of the savings resulting from the reduction in the federal income tax rate was considered in the 2018 rate case and determined by the Commission and decided to be zero.<sup>21</sup>

Referencing Exhibit GT-1, and assuming the tax savings is addressed by the Commission in this docket, Mr. Tucker calculated the total deferred tax savings regulatory liability balance of \$1,633,314.<sup>22</sup> The portion of this amount related to the reduction in the federal tax rate was \$582,309. Mr. Tucker calculated these amounts using the current period preliminary earnings before taxes and multiplying by the change in the composite statutory income tax rate (13.09%); i.e., the difference between the composite statutory income tax rate of 39.23% (based on a 35% federal tax rate) and the new composite statutory income tax rate of 26.14% (based on a 21% federal tax rate). The result was grossed for taxes to arrive at the revenue adjustment.

The current period was used by the Company because it recognizes the earnings received from January to October 2018, rather than assuming that earnings are recognized equally over a twelve-month period. In addition, the calculation recognizes the tax savings generated from the current taxable income that resulted from the reduced federal income tax rate, rather than the taxable income at the time of CGC’s last rate case in 2010. Using 2010 data produces a mismatch of earnings that would overstate the actual income tax savings realized by the Company.<sup>23</sup> While the CGC did not believe the tax savings should be an issue in this docket, the

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<sup>20</sup> *Id.* at 6-7.

<sup>21</sup> *Id.* at 6-7.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.* at 9.



Company submitted that \$582,309 was the correct amount if the Commission considered the matter the present docket.<sup>24</sup>

According to the Company, the portion related to the EDIT amortization deferral is \$1,051,005.<sup>25</sup> In 2018, CGC amortized \$931,605 of protected and unprotected EDIT. To arrive at the amount amortized prior to the new rates in the rate case, CGC prorated for the January to October 2018 timeframe to arrive at an EDIT amortization of \$776,337, which was grossed-up for taxes and recorded as a reduction to revenues with an equal offset to the tax savings regulatory liability account. This amount reflects the Company's finalized 2017 tax return and utility plant activity for 2018, but does not align with the amount approved in the Company's rate case docket, as the protected portion was subject to change pending finalization of the 2017 tax return.<sup>26</sup>

CGC has calculated a total deferred tax savings regulatory liability balance of \$1,633,314 made up of \$582,309 regulatory liability balance due to reduction in the federal income tax rate and \$1,051,005 EDIT tax savings.<sup>27</sup> Addressing the disposition of the Total Tax Savings – Regulatory Liability Balance of \$1,633,314, the Company proposed to recognize and retain the entire deferred tax savings within the Company. An adjustment would be required to the current period rate of return calculation in order to remove any impacts that result from the retained tax savings.

The Company notes its recent rate case filing was delayed by approximately two months primarily due to the 2017 Tax Act.<sup>28</sup> As part of the basis or rationale for retaining the tax savings, the Company relies on its financial results in 2018 in which it did not realize its

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<sup>24</sup> *Id.* at 8-10.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 13.

<sup>28</sup> *Id.* at 12.

authorized rate of return (“ROR”). According to the Company, CGC earned a ROR of 5.54% for 2018, compared to the authorized rate of 7.12% in the rate case, representing a revenue deficiency of \$2.9 million.<sup>29</sup> Mr. Tucker states that even with the recognition of the deferred tax savings, the Company would not earn its authorized ROR. The new ROR calculation produces a ROR of 6.42%, still below the authorized return of 7.12%, which represents a revenue deficiency of \$1.3 million.<sup>30</sup>

In conclusion, Mr. Tucker claims that the Company’s proposal to retain the total deferred tax savings is in the public interest and appropriate in that it is the Commission’s function to provide utilities the opportunity to earn a fair and reasonable return.<sup>31</sup> The Company notes that the rate case addressed the ability of the Company to earn a fair return going forward. In this docket, the CGC requests the Commission to partially offset its revenue deficiency from January to October of 2018.<sup>32</sup> Further, CGC asserts that retaining the aforementioned tax savings still leaves it earning more than 100 basis points below its authorized ROR, which in itself is a serious concern.<sup>33</sup>

#### **DIRECT TESTIMONY OF THE CONSUMER ADVOCATE**

On behalf of the Consumer Advocate, Mr. David Dittemore made a series of recommendations and findings. First, Mr. Dittemore recommended the Commission should require deferred tax savings accruing during the January to October 2018 period to be amortized as a credit (on a gross of tax basis) and should further require the Deferred Amortization EDIT to be amortized as a credit to expense (on a gross of tax basis) for the benefit of CGC customers

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<sup>29</sup> *Id.* at GT-2.

<sup>30</sup> *Id.* at 13; GT-2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 13.

through the annual ARM mechanism.<sup>34</sup> The Consumer Advocate submitted the Company's proposal to retain the tax savings for the period of January to October 2018 should be rejected.

Second, Mr. Dittemore recommended the tax savings deferral should be calculated based on CGC's last rate case as of January 16, 2018, consistent with Commission's *2018 Tax Reform Order* of February 6, 2018 in Docket No. 18-00001. Mr. Dittemore found the Company's calculation of the Deferred Amortization EDIT for 2018 to be reasonable, notwithstanding CGC's position that it should retain those benefits accruing for the period of January to October 2018.<sup>35</sup> Finally, he contended that the total 2017 Tax Act-related savings accruing from January to October 2018 of \$1,894,815 should be amortized over a three-year period and incorporated in the Company's ARM as a reduction to rate base.<sup>36</sup>

In addition, Mr. Dittemore clarified that the amortization expense should be recorded as a credit to Account 407 Amortization Expense.<sup>37</sup> Credits should flow back to customers via the annual ARM adjustments. The termination date for the calculation of tax savings and Deferred Amortization EDIT should be October 2018 to coincide with the Company's new base rates effective November 1, 2018.<sup>38</sup>

With respect to the calculation of the tax savings, the Consumer Advocate disagreed with the Company's calculations. The Consumer Advocate's calculation is based on an income tax calculation from the Company's last base rate case in Docket No. 09-00183, which is consistent with the Commission's instruction in its *2018 Tax Reform Order* in Docket No. 18-00001, which

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<sup>34</sup> David N. Dittemore, Pre-Filed Direct Testimony, p. 2 (November 27, 2019).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2-3.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.*

initiated the tax investigation. CGC's calculation is based on the January to October 2018 time period.<sup>39</sup>

With respect to the Deferred Amortization EDIT balances proposed by the Company, the Consumer Advocate was in agreement. The balances were revised downward by the Company due to true-up of the actual 2017 tax return and removal of pension and OPEB related timing differences from the unprotected EADIT balance consistent with the treatment of these items in the rate case docket. Mr. Dittmore testified that he reviewed the Company's calculation of the deferred amount for January to October 2018 and found it to be reasonable.<sup>40</sup>

Further, Mr. Dittmore testified that he had several concerns with the Company's positions.<sup>41</sup> First, Mr. Dittmore disagreed with the Company's argument that the omission of a value in the 2018 rate case revenue requirement schedules represented the Commission's approval of the Company's request to retain Income Tax Expense savings in the rate case. Mr. Dittmore contended the Commission's silence on the issue does not create a reasonable inference that a determination was made based on a line item in a schedule. Conversely, if in fact the Commission declined to address tax savings in the rate case proceeding, it would have been incorrect to assign any value to that line item.<sup>42</sup>

Furthermore, Mr. Dittmore disagrees with the Company's total deferred tax savings regulatory liability of \$1,633,314. The Consumer Advocate's calculation is \$1,894,815, the difference being the period upon which tax expense savings were determined. Mr. Dittmore

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<sup>39</sup> *Id.* at 3-4.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* at 6-7.

<sup>42</sup> *Id.* at 6.

again points out that he calculated his amount consistent with the Commission's directive in Docket No. 18-00001; whereas, the Company calculated based on 2018 actual results.<sup>43</sup>

The Consumer Advocate disagrees with the Company's position that under-earning in 2018 should allow the Company to retain the income tax savings. Whether the Company was under-earning in 2018 is irrelevant as to the treatment of the Tax Savings and Deferred Amortization EDIT. Relying on the basic tenants of the Filed-Rate Doctrine, the Consumer Advocate asserts that there is a prohibition against retroactive ratemaking to make up any under-collection of costs.<sup>44</sup> Mr. Dittmore states, hypothetically, if the situation were reversed and the Company was over-earning in a given year and had no annual ARM review, rates could only be changed prospectively upon the issuance of a Commission order.<sup>45</sup>

Finally, Mr. Dittmore notes that the Commission's *2018 Tax Reform Order* in Docket No. 18-00001 created a regulatory liability in the deferral of tax savings; a liability the Company is seeking to offset with a "regulatory asset" composed solely of earnings below its authorized return.<sup>46</sup>

#### **REBUTTAL TESTIMONY OF CHATTANOOGA GAS COMPANY**

In Pre-Filed Rebuttal Testimony, Mr. Tucker updated and revised his previous exhibits and reiterated his assertion that the Commission's 2018 rate case *Amended Order* referred *only* the Deferred Amortization EDIT issue to this docket. Mr. Tucker maintained his belief that if the Commission had not decided the 2018 tax savings to be zero as reflected in the final schedules at pages 40, 41, 93, and 100 of the Commission's *Amended Order*, then the

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 7-8.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Id.*

Commission would have specifically sent that issue for consideration in this docket as well.<sup>47</sup> His conclusion, therefore, is that this issue was considered and decided by the Commission in the rate case docket and no further action is required or appropriate in this docket.<sup>48</sup>

With respect to the Consumer Advocate's calculations, Mr. Tucker acknowledged the Commission's approach to calculating income tax expense savings based on earnings approved in the Company's previous rate case in Docket No. 09-00183. Mr. Tucker asserted that while this may be the best approach for utilities that have recently had a rate case or have little or no change in net rate base or overall cost of service since the last rate case, this is not the best approach for CGC.<sup>49</sup>

Since the Company's last rate case was decided in 2010, there have been substantial increases in capital investments between 2011 and 2018 as well as other increases in revenues and expenses over this time period. According to the Company, using the last rate case decided in 2010 as a basis for the calculation results in a mismatch in earnings and overstates the actual income tax savings realized by CGC. Mr. Tucker submits the Commission never intended for the calculation of the income tax savings reserve to be in excess of the benefit recognized as a result of the 2017 Tax Act. The Company maintained it would support the same position should the reverse, i.e. actual earnings for January to October 2018, produce a higher income tax savings deferral.<sup>50</sup>

While disagreeing with the Commission's directive as it relates to CGC specifically, Mr. Tucker agreed that the Consumer Advocate's calculation of TCJA tax savings is reasonable and that it follows the directive of the Commission in its *2018 Tax Reform Order* in Docket No. 18-

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<sup>47</sup> Gary A. Tucker, Pre-Filed Rebuttal Testimony, p. 3 (January 10, 2020).

<sup>48</sup> *Id.* at 2-3.

<sup>49</sup> *Id.* at 3-4.

<sup>50</sup> *Id.* at 3-5.

00001. Nevertheless, Mr. Tucker disagrees with the manner in which the Consumer Advocate calculated the savings, asserting that it does not recognize that earnings are not realized equally over a twelve-month period. While the Consumer Advocate's method of multiplying the annualized income tax savings by 10/12 (or approx. 83.3%) is reasonable, Mr. Tucker states the most accurate method would be to multiply the annualized tax savings by the 2018 margin allocation factor of 78.8%. This method would produce a total income savings reserve of \$798,000, as compared to the Consumer Advocate's result of \$844,000.<sup>51</sup>

Finally, Mr. Tucker disagrees with the proposition that whether CGC is under-earning is not a relevant consideration in determining the disposition of the tax savings and Deferred Amortization EDIT. The Company contends that focusing on just one aspect of a utility's earnings would lead to non-compensatory rates and unfair results. Mr. Tucker quotes from page 3 of the Commission's *2018 Tax Reform Order* in Docket No. 18-00001 that "review and action is necessary in order to investigate to prevent utilities from receiving windfall profits."

Mr. Tucker submits that "windfall profits" can be determined only by analyzing the utility's total earnings and rate of return both before and after the tax benefit and then deciding whether the utility was earning above its authorized rate of return.<sup>52</sup> The Company claims it was earning well below its authorized return. Mr. Tucker asserts that a refund to customers should not be ordered based on one revenue source being greater than the amount calculated when setting rates. The Company reiterates that the passage of the 2017 Tax Act delayed the filing of CGC's general rate and thereby rate relief by approximately two months. CGC states that it is not asserting that there should be retroactive rates to remedy this delay, but provides this

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<sup>51</sup> *Id.* at 5-6.

<sup>52</sup> *Id.* at 6-7.

information to the Commission as a factor in its decision as to whether the Company experienced windfall profits through revenues collected based on its approved, filed rates.<sup>53</sup>

Finally., Mr. Tucker disagrees with the Consumer Advocate's assertion that the Company's request to retain the deferred tax savings violates the Filed-Rate Doctrine. He defines the Filed-Rate Doctrine as, "filed and approved rates are presumed reasonable until they are proven to not be reasonable, which is a function of the utility's overall rate of return, with any rate changes made prospectively."<sup>54</sup> The Company asserts the Consumer Advocate is looking at the tax rate change in complete isolation of all other factors and because the tax rate declined, so should the customer rates for the period, regardless of the utility's overall earnings situation.<sup>55</sup>

## THE HEARING

The hearing in this matter was noticed by the Commission on February 7, 2020 and held on February 18, 2020, before the assigned voting panel during the regularly scheduled Commission Conference. The appearances made on behalf of the parties were as follows:

Chattanooga Gas Company – **J.W. Luna, Esq.**, Butler Snow LLP, 150 3<sup>rd</sup> Avenue South, Suite 1600, TN 37201; **Floyd R. Self, Esq.**, Berger Singerman, LLP, 313 North Monroe Street, Suite 301, Tallahassee, Florida 32301

The Consumer Advocate Unit – **Daniel Whitaker, III., Esq.**, Office of the Tennessee Attorney General and Reporter, Post Office Box 20207, Nashville, Tennessee, 37219

During the hearing, Mr. Gary Tucker presented testimony on behalf of the Company. Mr. David Dittmore provided testimony on behalf of the Consumer Advocate. Opportunities for the public to comment were presented, but no member of the public sought recognition to comment.

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.* at 7-9.



## FINDINGS AND CONCLUSIONS

The Company has made several arguments in an effort to show that it should be permitted to retain the tax savings and the Deferred Amortization EDIT related to the 2017 Tax Act and the Commission's *2018 Tax Reform Order*. Among them was a conclusion that the tax savings had already been resolved in the Company's favor in the 2018 rate case docket. As a matter of procedure before the Commission, this argument cannot stand. As noted in the Hearing Officer's *Order Establishing Issues for Consideration*, a separate docket was established for each of the large utilities in recognition of the practical complexities of resolving the consequences of the implementation of 2017 Tax Act. There is no order, or any other indication in the rate case docket, that the *2018 Tax Reform Order* in Docket No. 18-00001 was or has been superseded. There was no motion made by any party, nor order issued, to consolidate this docket with the 2018 rate case docket.<sup>56</sup> While the parties provided their respective positions in the rate case, there is no reasonable indication in the record that the Commission moved issues from this docket to the rate case for resolution. It is the Commission's prerogative to manage its resources and the orderly adjudication of the issues and dockets that come before it.

The rate case did resolve lowering the federal tax rate going forward as naturally a new revenue requirement established for setting rates must recognize the current tax rate, which is now the new lower 21% tax rate. However, as a practical matter, there was no final calculation in the record of the rate case for the TCJA related tax savings at the time the rate case was decided on October 15, 2019. The calculated tax savings from January 1 until October 31, 2018, could not be known until after new rates went into effect on November 1, 2018. The Consumer

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<sup>56</sup> See an example of the Commission consolidating issues from different dockets into one proceeding: *In re: Petition of Chattanooga Gas Company for a General Rate Increase, Implementation of the ENERGYsmart Conservation Programs, and Implementation of Revenue Decoupling Mechanism*, Docket No. 09-00183, *Order Moving Outstanding Issues into New Docket and Administratively Closing the Docket* (January 5, 2018).

Advocate offered an estimate during the 2018 rate case for a period ending in September 2018. The Company itself never offered a calculation of the tax savings during the 2018 rate case. Put simply, there was not enough evidence in the record in the 2018 rate case to accurately calculate the tax savings at the time the rates were set.

Indeed, the Company did not present its calculation of the income tax savings for the deferral period (January 2018 through October 2018) until Mr. Tucker filed his direct testimony in this docket on September 13, 2019 - nearly a year *after* the Commission's deliberations resolving the CGC rate case in October 2018.<sup>57</sup> Although the Consumer Advocate submitted an estimated deferred tax savings amount in the 2018 rate case, it did not submit its final calculation of savings until November 27, 2019.<sup>58</sup>

Further, the Company's reliance on the *Amended Order* in the rate case to assert the matter at hand was already determined and authorized the Company to retain the tax savings is misplaced. The schedules and data tables provided by the Commission in its 2018 rate case *Amended Order* represent the proverbial tip of the rate-making iceberg. Thousands of calculations go into the underlying data points in the illustrative rate-making schedules. The schedules themselves in isolation contain no explanation or rationale justifying any particular policy, methodology, or calculation over another. The inclusion of a zero, or a dash, is a default symbol used when there is no numerical value to insert or include in a category. No party can point to any text within the *Amended Order* that would provide any rationale for the Commission to single out the Company for special treatment and allow it to retain tax savings that no other large public utility has been authorized to retain. The proposition that the Commission would authorize the Company to retain such tax savings and memorialize doing so solely in a dash or

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<sup>57</sup> Gary A. Tucker, Pre-Filed Direct Testimony, pp. 8-10, (September 13, 2019).

<sup>58</sup> David N. Dittmore, Pre-Filed Direct Testimony, Ex. DND-2 (Nov. 27, 2019).

zero in a chart is tenuous at best.<sup>59</sup>

The Company's reliance on the Commission's explicit remand of the Deferred Amortization EDIT issue from the rate case to this docket and, specifically, a lack of a corresponding remand of the tax savings is without merit. As previously discussed, the issue of the amount of the tax savings was never procedurally before the Commission in the 2018 rate case; as such there was no reason to "remand" the tax savings issue to the present docket. The explicit remand of the issue Deferred Amortization EDIT is due in part to the fact that the Consumer Advocate asserted that the Company may have gone beyond the Commission's directives in Docket No. 18-00001 and begun amortizing to the detriment of customers. While the original allegation seemingly fell to the wayside as the parties built the record, the explicit remand of the issue served to place the parties on notice that this unique or a similar issue would fall within the scope of the present docket.

The assertion that retaining the tax savings is justified in that the Company's reports it did not earn its authorized return in 2018 is unpersuasive. The Commission strives to set rates that are based on known and measureable adjustments for the future, not necessarily the past. Absent extraordinary circumstances or defined regulatory mechanisms, public service commissions do not reach into the past, provide offsets for past financial performance, or otherwise set rates retroactively. This principle applies both ways: for utilities and for utility customers. Indeed, the Company would agree that there is no basis to reach back into the years since the CGC's 2009 rate case and refund to Tennessee customers any earnings that were realized which exceeded the Company's authorized return. Neither the Company's 2018

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<sup>59</sup> Providing additional schedules and data tables with orders is for illustrative and transparency purposes intended for the convenience of the parties and the public. The Commission will have to reconsider this practice if parties intend to single out and frame a data point in a schedule as a policy changing precedent to the exclusion of a docket's record and the Commission's orders.

financial results nor the 2018 rate increase, are appropriate considerations to justify the Company to retain tax savings.

Moreover, an assertion that retention of the tax savings and Deferred Amortization EDIT is justified because the Company's 2018 reported financial results show no evidence of "windfall profits" is unpersuasive. The Company asserts there is a simple test for whether a utility is collecting "windfall profits" – that is, whether a utility reports it is earning above and beyond its authorized return. The Commission has applied no such test to any of the major public utilities in Tennessee. Federal income tax expense, an expense that is built into the rates of large public utilities, represents a significant cost that is funded and absorbed by customers. As a matter of public policy, this Commission, as well as many public utility regulators across the country, has recognized that the lower federal income tax expense rate necessitates a corresponding lower level of federal income tax that is incorporated into the rates.<sup>60</sup> To allow a public entity to collect and retain a significant sum for a tax obligation that does not, or no longer, exists would constitute a windfall in and of itself. For this reason, regulators of public utilities have consistently singled out the issue and passed on any deferred savings to customers, and reduced rates.

With respect to the differences in the amount of the tax savings, both the Consumer Advocate and the Company use the same methodology, but diverge at the starting point for the calculation. The Consumer Advocate's approach of utilizing the taxable income approved in the Company's 2009 rate case is reasonable and complies with the *2018 Tax Reform Order* in Docket No. 18-00001. The same directive has been applied to the largest utilities in Tennessee, including Piedmont Natural Gas Company and Tennessee-American Water Company, which had rate cases in 2011 and 2012, respectively. Rates are set using a snapshot in time with

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<sup>60</sup> *2018 Tax Reform Order*, pp. 2-3, fn. 2 (February 6, 2018).

adjustments made for the future, and include discretionary and reasonable judgments, which have been delegated to the Commission by the General Assembly. In contrast, the time periods between rate cases are not marked by regulatory scrutiny over those business, spending, and management decisions that could impact income tax expense significantly. Thus, the requirement that the tax savings calculation be derived or commenced from the Company's last base rate case is not a line or policy drawn arbitrarily, but rather the only reasonable starting point for purposes of regulatory certainty.

Based on the administrative record in this case and the Commission's orders issued in Docket Nos. 18-00001 and 18-00017, the Hearing Panel unanimously found that the issues of the disposition of the Deferred Income Tax Expense Savings for the period of January 2018 through October 2018, and Deferred Amortization of Excess Accumulated Deferred Income Tax for the period of January 2018 through October 2018, were not determined or decided in Docket No. 18-00017 and should be decided in this case.

The Hearing Panel further found that the amount of the Deferred Income Tax Expense Savings is \$843,810, and the amount of the Deferred Amortization of Excess Accumulated Deferred Income Tax is \$1,000,900. The aggregate amount of these regulatory liabilities is \$1,844,710, which shall be amortized over a three-year period and incorporated in the Company's annual ARM filings with the unamortized balance reflected as a reduction to Rate Base.

**IT IS THEREFORE ORDERED THAT:**

1. The request of Chattanooga Gas Company to retain the tax savings deferred for the period January 1, 2018 through November 1, 2018 is denied.
2. The Deferred Income Tax Expense Savings is \$843,810 and the Deferred

Amortization of Excess Accumulated Deferred Income Tax is \$1,000,900. The aggregate amount of these regulatory liabilities is \$1,844,710.

3. The regulatory liability of \$1,844,710 shall be amortized over a three-year period and incorporated into the Annual Rate Mechanism of Chattanooga Gas Company's annual filings with an unamortized balance reflected as a reduction in rate base.
4. Any party aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within fifteen (15) days from the date of this Order.
5. Any party aggrieved by the Commission's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

**Chair Robin L. Morrison, Vice Chair Kenneth C. Hill, and Commissioner John Hie concur.**

**ATTEST:**



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**Earl R. Taylor, Executive Director**