**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Ohio Power Company for Administration of the Significantly Excessive Earnings Test for 2016 Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code. | ) ) ) ) ) ) | Case No. 17-1230-EL-UNC |

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# REPLY POST-HEARING BRIEF OF OHIO POWER COMPANY IN SUPPORT OF THE STIPULATION AND RECOMMENDATION

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## INTRODUCTION

In its Initial Post-Hearing Brief ("Initial Brief"), Ohio Power Company ("AEP Ohio" or the "Company") demonstrated that the Stipulation and Recommendation ("Stipulation") that it and Commission Staff filed in this case on February 13, 2018 satisfies the three-part test that the Public Utilities Commission of Ohio ("Commission") applies to contested settlements. Accordingly, as AEP Ohio has demonstrated, the Commission should approve the Stipulation and find that the Company's 2016 earned return on equity (ROE) does not constitute significantly excessive earnings under the statutory significantly excessive earnings test (SEET) set forth in R.C. 4928.143(F).

The Office of the Ohio Consumers' Counsel ("OCC") opposes the Stipulation because the settlement does not result in a refund to AEP Ohio customers. Each of OCC's arguments in opposition to the Stipulation is predicated on OCC's fundamentally flawed position that a SEET stipulation must include a refund to customers to pass the three-part settlement test. OCC's position is without merit. Although OCC directly participated in settlement negotiations and has advanced no evidence supporting its claim that bargaining did not occur, OCC nonetheless advances the hollow claim that the Stipulation was not the product of serious bargaining. OCC's arguments on that issue are unavailing and both the Commission and the Supreme Court of Ohio have repeatedly rejected them. Moreover, contrary to OCC's arguments, the Stipulation, as a package, clearly benefits customers and the public interest. That the Stipulation does not provide for a refund, and necessitated a short extension of the procedural schedule to reach, do not render the Stipulation harmful to customers or the public. Nor does the manner in which the Signatory Parties applied the statutory SEET. Finally, it is clear from the record that the Stipulation does not violate any important regulatory principles or practices because the Company's 2016 SEET

ROE and SEET thresholds included in the Stipulation were consistent with the approaches and results that the Commission has accepted and endorsed in previous SEET cases.

Accordingly, the Stipulation easily passes the settlement test, despite OCC's meritless arguments otherwise. The Commission should follow the well-established three-part test for consideration of contested settlements and approve the Stipulation without modification.

## ARGUMENT

### I. The Stipulation satisfies the three-part test for evaluation of contested settlements.

As AEP Ohio demonstrated in its Initial Brief, the Stipulation satisfies the Commission's three-part test for evaluating contested settlements. (AEP Ohio Br. at 4-19.) OCC's challenges to each prong of the settlement test are without merit, as discussed below.

#### A. The Stipulation is the product of serious bargaining among capable, knowledgeable parties.

AEP Ohio has demonstrated that the Stipulation satisfies the first prong of the settlement test. (AEP Ohio Br. at 4-6.) Staff concurs. (Staff Br. at 7.) OCC does not dispute that the parties to this case are capable and knowledgeable. OCC, however, asserts that the Stipulation in this case was not the product of serious bargaining. (OCC Br. at 4-6.) In support of this assertion concerning the concept of "bargaining," OCC inexplicably consults the Black's Law Dictionary definitions of "settlement" and "stipulation" – completely different concepts than bargaining. From this starting point, OCC concludes that Staff and AEP Ohio could not form a valid settlement because they never had a "dispute" regarding SEET. (*Id.* at 5.) OCC's argument should be rejected as misguided and illogical – and because it conflicts with Commission and Supreme Court precedent.

As a threshold matter, OCC's definitional argument is inapt. The terms "settlement" and "stipulation" are nouns that describe an agreement, whereas "bargaining" is a verb that describes

action leading up to an agreement. OCC's discussion of the definitions of "settlement" and "stipulation" is not informative as to whether "bargaining" occurred. The document that AEP Ohio and Staff filed in this docket on February 13, 2018 (Joint Exhibit 1) is a Stipulation and Recommendation, the primary purpose of which is to recommend to the Commission a resolution of the main issue presented in this case: whether AEP Ohio's 2016 earned ROE constitutes significantly excessive earnings under R.C. 4928.143(F). As OCC acknowledges, AEP Ohio and Staff do not agree on all facts and issues in this case – but they do agree as to the dispositive question that the Company's 2016 earnings were not significantly excessive. In any case, OCC's definitional argument fails to address the question of whether serious bargaining occurred here.

The only definition of "serious bargaining" in the record in this case came from AEP Ohio witness Allen, who testified that it is present where parties "bargained in a meaningful way where there was intent to come to a resolution that the parties were willing to stand behind." (Tr. at 43.) Regardless, no part of the approved three-part test requires parties to have litigation positions that differ to a specific degree or extent. Indeed, the Ohio Supreme Court has recognized that the "serious bargaining prong" looks to the bargaining process and the settlement discussions and negotiations conducted, not the result of that process. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 86.

OCC's analogy likening the Stipulation in this case to class action plaintiffs signing a statement that recites their litigation position is fundamentally flawed. (*See* OCC Br. at 5.) The Stipulation here involves multiple parties, both the Company and the Staff. Staff's view represents the objective and independent regulatory view that is significantly different from the Company's perspective. And despite OCC's position (as reflected through witness Duann, OCC

Ex. 5 at 9) that the only meaningful outcome here involves a customer refund, this administrative proceeding is not like a civil class action lawsuit that is only successful if a financial judgment is assessed. This proceeding involves application of an annual regulatory test that results in a binary conclusion. The fact that both Staff and the Company have reached the same "no" answer to the dispositive question does not take away from the fact that the result was reached by two different entities with different interests. OCC's class action example is irrelevant and bears no relation to the facts and circumstances in this case.

OCC also complains that the settlement does not resolve "the one issue that the PUCO Staff and AEP Ohio disagree on" – referring to the SEET ROE threshold for 2016. (*Id.* at 5.) The Stipulation did not need to resolve that issue because both Staff's and the Company's SEET ROE thresholds were well above AEP Ohio's 2016 SEET earnings. As Mr. Allen explained:

> What the Company agreed as part of the stipulation was that under either of the two approaches adopted by Staff or the Company, that there were no significantly excessive earnings. We didn't have to go down the path of identifying differences in the calculations because both of them resulted in the same result.

(Tr. at 54.) In other words, the Commission could adopt either the Staff's or the Company's record-based ROE thresholds and still reach the same ultimate conclusion as recommended in the Stipulation: there were no significantly excessive earnings in 2016. The only recommended ROE threshold that is flawed and would be inappropriate to adopt is Dr. Duann's, as demonstrated by AEP Ohio on brief.

Notwithstanding that OCC views the Stipulation as meaningless and irrelevant, the agreement meets the three-part test and addresses the key issue presented for decision in this case. As the Supreme Court has observed, "[t]he issues resolved in the stipulation may not be significant to [Appellant], but they were important issues to the parties that signed the stipulation. The fact that the stipulation did not resolve all of [Appellant's] opposition arguments

does not mean that the commission's approval of the stipulation was unlawful." *In re Application to Modify, in Accordance with R.C. 4929.08, the Exemption Granted to E. Ohio Gas Co.*, 2015-Ohio-3627, 144 Ohio St. 3d 265, 42 N.E.3d 707, ¶ 32. Similarly, the Commission has adopted Stipulations supported by Staff and the Company in prior SEET cases. (*See* Case No. 14-875-EL-UNC, December 3, 2014 Opinion and Order; Case No. 13-2251-EL-UNC, May 28, 2014 Opinion and Order.) Indeed, OCC's whole position here – that a SEET settlement is not worthy unless OCC supports settlement – ignores that Commission precedent in recent SEET cases.

Finally, OCC's argument under prong one conspicuously avoids referencing the negotiations that it was involved with and only refers to negotiations between AEP Ohio and Staff – and the relative lack of conflict between the two parties' litigation positions. AEP Ohio's Initial Brief already addressed the shortcomings in OCC's claim at hearing that OCC's involvement in telephonic negotiations prior to the February 2018 Stipulation were not real negotiations because there was not a settlement meeting around a table with the parties being physically present. (*See* AEP Ohio Br. at 4-6.) There could be at least two reasons why OCC did not directly raise that issue in its initial brief. The first is that it plans to raise it on reply for the first time (which is unfair sandbagging). But the second may be that it discovered that its theory has already been rejected by the Commission and the Supreme Court. In a recent decision, the Supreme Court held in this regard: "[Appellant] registers a general objection to the [negotiation] process employed, specifically the absence of a conventional meeting, with all the parties assembled around a physical table. [Appellant] identifies no legal support for the suggestion that 'serious bargaining' can occur only in such a setting." *In re Application of Ohio*

*Edison Co*., 2016-Ohio-3021, 146 Ohio St. 3d 222, 54 N.E.3d 1218, ¶ 46. In any case, to the extent OCC raises this argument on reply, it is without merit.

In sum, the record supports a finding that the Stipulation satisfies prong one because it was the product of serious bargaining among capable, knowledgeable parties.

**B. The Stipulation as a package benefits ratepayers and the public interest.**

AEP Ohio demonstrated that the Stipulation satisfies the second prong of the settlement test and, as a package, benefits ratepayers and the public interest in several respects. (AEP Ohio Br. at 6-10.) Specifically, the Company explained that the Stipulation resolves this case in a timely manner, which supports administrative efficiency, and in a manner consistent with past Commission cases. (*Id.* at 6-7.) The Stipulation's incorporation of the presentation of all of the Company's and Staff's testimony to promote a full evidentiary record also serves the public interest and benefits customers by helping the Commission verify that all aspects of the SEET were administered in a robust and transparent manner. (*Id.* at 7-9.) Moreover, as the Company pointed out, Staff's support of the Stipulation also confirms that the Stipulation's proposed resolution of this case benefits ratepayers and the public interest, as Staff is an unbiased, independent expert and is charged with protecting the interests of the public and customers. (*Id.* at 9.) Staff agrees that the second prong is satisfied. (Staff Br. at 7.) Further, for each of the following reasons, the Stipulation, as a package, benefits ratepayers and the public interest.

**1. The Commission should reject OCC's flawed and unreasonable position that a SEET stipulation does not benefit customers or the public interest unless it provides for a refund.**

As AEP Ohio predicted (*see id.* at 6-7), OCC continues to advance the flawed position that customers do not benefit from a stipulation unless the stipulation proposes a refund to customers. (OCC Br. at 6.) As the Company explained in its Initial Brief, imposing a refund is not required to advance the public interest in a SEET case. (AEP Ohio Br. at 6-7.) Indeed, such

a requirement would undermine the very purpose of the statutory test, which looks at *whether* a company had significantly excessive earnings that then trigger a refund obligation. The SEET is a statutory consumer protection mechanism, and the Commission's administration of the SEET necessarily advances the public interest – without regard to the outcome of the test results in a given year. Performing the statutory test to confirm the absence of significantly excessive earnings, by itself, is enough to promote the public interest. Applying OCC's approach, by contrast, would presuppose that an EDU had significantly excessive earnings regardless of the outcome of the statutory test and deter settlement where the statutory test demonstrates that significantly excessive earnings did not occur. Such a result would not benefit customers or the public interest.

**2. The short procedural delay that all parties jointly requested in order to continue settlement negotiations did not harm customers or the public interest.**

OCC's contention that the Stipulation "delayed resolution of this case and in the process harmed customers and the public interest" fares no better than its first argument. (OCC Br. at 10-11.) As an initial matter, it is important to note that OCC *joined* the Joint Motion to Suspend Procedural Schedule that was filed on January 26, 2018. In that motion, all parties – including OCC – requested a suspension of the then-existing procedural schedule "[i]n order to facilitate continued settlement discussions and explore whether a partial or complete settlement [could] be reached." Mem. Supp. Jt. Mot. to Suspend Proc. Sched. at 1 (Jan. 26. 2018). That OCC is unhappy with the substantive outcome of those discussions, which resulted in the Stipulation being filed just over two weeks after the motion was filed, does not mean that the short delay *to which OCC expressly agreed* harmed customers or the public interest in any way. And, that the procedural schedule ultimately was extended an additional two months at all parties' request does not, in any way, render the resolution of the case "untimely".

Moreover, contrary to OCC's mischaracterization of AEP Ohio's testimony, expediency is not "the sole benefit to consumers from the proposed Settlement." (*See* OCC Br. at 11.) As set forth above, in AEP Ohio's Initial Brief, and as Mr. Allen testified at hearing, the timely resolution of this case and shortened adjudicatory hearing that resulted from the Stipulation are among many benefits to consumers and the public interest. (*See, e.g.,* AEP Ohio Br. at 6-10; Tr. at 57-58 (Mr. Allen testifying that the effect of the Stipulation in limiting the number of parties contesting issues at hearing promotes to administrative efficiency).)

**3. The manner in which the Signatory Parties applied the SEET did not harm customers or the public interest.**

OCC also contends that the Stipulation harms customers and the public interest because the Signatory Parties did not apply the SEET in the same manner as OCC witness Dr. Duann, specifically asserting that the Signatory Parties did not correctly calculate the Company's 2016 SEET earnings or utilize the correct comparable group. (OCC Br. at 7-10.) AEP Ohio fully addressed each of these arguments in its Initial Brief, which it incorporates here. (*See* AEP Ohio Br. at 10-15 (discussing the calculation of the Company's 2016 SEET earnings); *id.* at 16-19 (discussing the selection of the comparable group and resulting SEET threshold).) OCC's brief adds nothing new that the Company has not already discussed in its Initial Brief.

With regard to the Company's 2016 SEET earnings, however, it is necessary to note that neither of the adjustments that OCC opposes has the effect of improperly shifting earnings or shielding them from SEET review, as OCC contends. (OCC Br. at 9-10.) As the Company explained in its Initial Brief, the earnings attributable to the 2014 SEET provision were included in the Company's calculation of 2014 SEET earnings, which OCC conceded in that case (and which case was included for resolution in the Global Settlement that OCC joined). (AEP Ohio Br. at 12-14.) The PIRR equity carrying charge earnings related to years 2012 through 2015

(and would have been collected in those years but for the Commission's rate of return decision that was the subject of the appeal); thus it was appropriate to reverse the income for 2016 SEET purposes. (*Id.* at 15.) And, it is unrefuted that those earnings, attributable to 2012-2015, would not have triggered significantly excessive earnings in those years. (*Id.*) Dr. Duann's SEET earnings analysis is flawed for these reasons and those set forth in the Company's Initial Brief, and the Commission should disregard it.

With regard to the comparable group for purposes of calculating the SEET threshold ROE, it is also necessary to note that, in addition to the other flaws AEP Ohio described in its Initial Brief (*see* AEP Ohio Br. at 17-19), OCC witness Duann's removal of Entergy from the comparable group lacks any principled basis. OCC's *ipse dixit* assertion that Entergy "did not face comparable business and financial risk" because it was allegedly undergoing restructuring in 2016 is insufficient to refute the Signatory Parties' agreement that Entergy properly was included in the comparable group. Indeed, as the Company explained in its Initial Brief, Entergy was properly included in the comparable group AEP Ohio witness Allen utilized because Mr. Allen adjusted the earnings of all companies in the SPDR Select Sector Fund - Utility to remove the effects of impairments that were booked in 2016. (*Id.* at 17; AEP Ohio Ex. 4 at 5.) Mr. Buckley testified that Entergy should not be removed from the comparable group because its earning and return on equity did not make it an outlier. (AEP Ohio Br. at 18; Tr. at 84.)

Beyond a conclusory assertion that Entergy was engaged in restructuring activities in 2016, OCC witness Duann's testimony is devoid of any explanation justifying Entergy's exclusion from the group. Moreover, Dr. Duann made it clear at hearing that his approach to the comparable group is much less principled than OCC would like for it to seem, testifying that he would exclude any company that lost money in a given SEET year from the comparable group

on that basis alone. (Tr. at 132.) That approach is unreasonable, ignores that comparable utilities can have negative earnings, as Dr. Duann conceded at hearing, *id.* at 131, and ignores that the statute requires a comparison of companies that face comparable risk, not merely a comparison of companies that have comparable earnings. Thus, the Commission should also disregard Dr. Duann's flawed SEET threshold analysis.

In sum, as set forth above and in the Company's and Staff's Initial Briefs, the Stipulation, as a package, benefits ratepayers and the public interest.

### C. The Stipulation does not violate any important regulatory principles or practices.

AEP Ohio also demonstrated that the Stipulation satisfies the third prong of the settlement test and does not violate any important regulatory principles or practices. (AEP Ohio Br. at 10-19.) Specifically, the Company explained that the third prong is satisfied because AEP Ohio's 2016 SEET ROE and the SEET thresholds included in the Stipulation were calculated consistent with the manner accepted by the Commission in the Company's previous SEET cases. (*Id.*) Staff agrees. (Staff Br. at 7.) As Staff explained, "[f]ar from violating regulatory policy[,] the [S]tipulation furthers it by recommending the correct legal result to the only issue in the case." (*Id.*)

OCC claims that the Stipulation violates R.C. 4905.22, which requires utilities to charge just and reasonable rates, because OCC contends the Stipulation allows AEP Ohio to keep significantly excessive earnings for the year 2016. (OCC Br. at 11.) OCC also claims that the Stipulation violates various state policies set forth in R.C. 4928.02. (*Id.* at 12.) Dr. Duann explained at hearing that state policy opinions are based solely on the view that AEP Ohio had significantly excessive earnings in 2016 that should be returned to customers. (Tr. at 114.) As set forth above and in the Company's and Staff's Initial Briefs, however, AEP Ohio did not have

significantly excessive earnings in 2016. (AEP Ohio Br. at 17; Staff Br. at 6, 8; Jt. Ex. 1 at 5.) Thus, the Stipulation does not violate 4905.22 or any of the policy considerations that OCC cites from R.C. 4928.02.

OCC further contends, without support or citation to record evidence, that AEP Ohio's burden of proof should "include a demonstration that AEP[ Ohio]'s calculations and methodologies comply with generally accepted accounting principles [(GAAP)]" and that AEP Ohio failed to explain how its adjustments to 2016 earnings comply with those principles. (OCC Br. at 12-13.) As Company witness Ross explained, however, AEP Ohio began its calculation of 2016 SEET earnings with the Company's per books earnings (which comply with GAAP), consistent with prior SEET reviews. (AEP Ohio Ex. 3 at 3.) It then made adjustments to per books earnings to exclude "non-recurring, special, and extraordinary items." (*Id.* at 3-12; *see also* AEP Ohio Br. at 11 (quoting the Commission's June 30, 2010 Finding and Order in Case No. 09-786-EL-UNC, at 18, directing EDUs to exclude such items from the SEET calculation).) In any event, the Commission has repeatedly recognized that it is not bound by GAAP with regard to utility accounting treatment, and it did so again as recently as last month. *See, e.g.* Case No. 18-47-AU-COI, Second Entry on Rehearing at ¶ 16 (Apr. 25, 2018). As AEP Ohio has demonstrated, its calculation of 2016 SEET earnings was reasonable, appropriate, and consistent with Commission precedent. (*See* AEP Ohio Br. at 10-15.)

Finally in this regard, OCC throws in that the Company's proposal to keep $31.2 million in shared savings associated with energy efficiency and demand response is unlawful. (OCC Br. at 13.) As Mr. Allen explained at hearing, this argument was presented in his direct testimony and was not part of the Stipulation. (Tr. at 70-71.) And the argument was merely presented as an alternative to the Company's primary position that no significantly excessive earnings exist

for 2016. (AEP Ohio Ex. 4 at 6.) In that limited context, the point has validity and is certainly not unlawful. It is merely to say that shared savings that were specifically provided for as part of an approved EE/PDR portfolio plan should not be recaptured through a SEET case. Stated differently, such earnings should be adjusted out of earnings if there is otherwise a determination that significantly excessive earnings exist. The Commission has considerable discretion, pursuant to the SEET guidelines, to approve appropriate adjustment to earnings for purposes of administering the SEET. In any case, the issue need not be reached in this case if the Commission adopts the Stipulation – and it should.

In sum, as set forth above and in the Company's and Staff's Initial Briefs, the Stipulation does not violate any important regulatory principles or practices.

## CONCLUSION

For the foregoing reasons and those contained in the Company's Initial Brief, the Commission should adopt the Stipulation without modification.

Respectfully submitted,

*/s/ Steven T. Nourse*

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## CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record and attorney examiners this 22nd day of May, 2018, via electronic transmission.

*/s/ Steven T. Nourse*
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Summary: Reply - Reply Post-Hearing Brief of Ohio Power Company in Support of the Stipulation and Recommendation electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company