BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2017 Under the Electric Security plans of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	: : :	Case No. 18-857-EL-UNC

BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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On behalf of the Staff of
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January 8, 2019

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INTRODUCTION

The purpose of this proceeding is to determine if the FirstEnergy operating companies have experienced significantly excessive earnings within the meaning of R.C. 4928.143(F). The resolution of this question is easily reached. If the Commission follows its decision in *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, case number 14-1297-EL-SSO, Eighth Entry on Rehearing (August 16, 2017) (ESP order), where this Commission determined that DMR revenues should not be used for purposes of calculating significantly excessive earnings, there are no significantly excessive earnings. The Commission should so rule and the case be closed.

ARGUMENT

A. EARNINGS

The first step in determining whether significantly excessive earnings exist is to determine the level of the earnings themselves. While this matter is frequently trivial in most of these proceedings, in this instance it is determinative. In its ESP order, this Commission determined that the revenues derived from the DMR should not be included for purposes of the SEET calculation. When this is done, all parties agree that there are no significantly excessive earnings. OCC Ex. 2 at 10. The Commission should follow its prior decision as its reasoning remains valid.

The Commission adopted several reasons for the exclusion of the DMR revenues. The first, and perhaps most practical is simply that including these revenues in the test work directly at cross-purposes with establishing the DMR itself. In the ESP order the Commission went to great pains to determine the amount of revenue that would be needed across the FirstEnergy companies to improve the group credit rating. It then determined the portion of that amount which should be borne by Ohio ratepayers. Using the SEET mechanism to take back some of these carefully worked out revenues would simply undo the necessary work accomplished in the ESP case itself. The companies would no longer have their calculated, and necessary, revenues and the effect that the Commission intended would not be achieved.

Further, the DMR mechanism was established pursuant to R.C. 4928.143 (B)(2)(h). As this Commission is well aware, that section empowers the Commission to adopt the measures enumerated there "…notwithstanding any provision of Title XLIX of the Revised Code to the contrary…" If the DMR revenues were included in the SEET test it would effectively mean that R.C. 4928.143(B)(2)(h) would be limited by R.C. 4928.143(F) and this is against the expressed intent of the General Assembly. Arguments to the contrary should be rejected.

In addition, the Commission found the other arguments made by FirstEnergy persuasive, specifically:

> (1) Rider DMR charges constitute "extraordinary items"; (2) there are no comparable companies with a rider mechanism such as Rider DMR, thus, making it impossible to create a valid comparison for purposes of the SEET calculation; and (3) the Order provides for SEET exclusions "associated with any additional liability or write-off of regulatory assets due to implementing the Companies' ESP IV."

ESP order at pg. 34. While the first point has been mooted by subsequent changes to GAAP, the other two remain valid and are sufficient to support the continued exclusion of DMR revenues from the SEET calculation.

As the Commission's decision was perfectly clear, the companies calculated their revenues for SEET purposes without the inclusion of the DMR amounts. The Staff recognized this and utilized this base for their further calculations. Staff Ex. 1 at 3.

B. SIGNIFICANTLY EXCESSIVE CHARGES

Having determined the companies' earnings, the Staff proceeded to calculate the ROE of comparable companies. The Staff did this in the usual fashion, that is to say, using the SPDR Select Sector Fund-Utility (XLU)[1]. It totaled the net income of that group and divided by the total common equity of the group resulting in an ROE of 8.73 percent. Staff Ex. 1 at 3. As this is the average return on annuity of the comparable group, returns above this level are in excess of it.

To determine significantly in excess of the average, the Staff first utilized the method adopted by the Commission in previous cases[2], adding the standard deviation of the comparable group to achieve a 95% confidence interval. Staff Ex. 1 at 3. This provides an earnings threshold of 30.28 percent. While this would be a precedentially simple way to determine this case, the companies' ROEs being substantially less than 30.28%, the Staff did not stop here.

The Staff was concerned that several XLU companies had earnings that injected too much volatility into the average. Their earnings were large and negative, making the standard deviation appear high in the Staff's judgment. Eliminating them and recalculating gave an ROE of 9.89 percent and a threshold of 17.22 percent. In Staff's view this is a more reliable value for purposes of the test. Regardless of this, the conclusion is unchanged. The companies did not have significantly excessive earnings.

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1 The XLU was selected to avoid any bias and to provide transparency. Staff Ex. 1 at 4.

2 *In the Matter of the Application of Columbus Southern Power Company for Administration of the Significantly Excessive Earnings Test under Section* 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code; Case No, 11-4571-EL-UNC; *In the Matter of the Application of Ohio Power Company for Administration of the Significantly Excessive Earnings) Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*. Case No. 11-4572-EL-UNC At pg. 27.

The Staff points out that it is very hesitant to remove any of the companies in the XLU from its group. Doing so reduces some of the benefits of utilizing the XLU in the first place. The Staff feels obligated to do so in this one instance because of the rather unique situation presented in this case with very large and apparently aberrant performance by several members of the group. Although this technical adjustment appears necessary to the Staff, it does not alter the ultimate conclusion. There are no significantly excessive earnings.

C. THREE PART TEST

When a stipulation is submitted to the Commission it typically utilizes the three part test in its review. Apply this test to the case at bar reveals that the stipulation easily passes all three prongs.

The stipulation does reflect the result of serious bargaining amongst capable, knowledgeable parties. Certainly there can be no doubt that the Staff and the companies themselves are knowledgeable and capable. There has been as much bargaining as possible given the fact that the Staff and the companies independently reached the same conclusion. To suggest that a compromise of some previously held position is necessary to pass this prong of the test is absurd. An example reveals why. If, hypothetically, in this case the OCC, the Staff and the companies all reached the same conclusion, that there were significantly excessive earnings in some amount and submitted a stipulation to that effect, the Commission would have to reject it. It would fail the test under the

OCC's peculiar reading. Such an outcome is silly. If parties agree, they agree and they should be able to say so as happened in this case.

The second prong of the test is also easily met. The stipulation benefits the public. It reflects the application of the statutory test and assures the public of a correct, legal review of the earnings of the companies.

Finally, far from violating any regulatory policy, the stipulation implements the regulatory policy. It effectuates the policy of this state to avoid significantly excessive earnings.

In sum, when the Commission evaluates the stipulation in this case under the three prong test, it should adopt the same.

CONCLUSION

The companies in this case have not had significantly excessive earnings under the statute. The Commission should so find and close the case.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via electronic mail upon the following Parties of Record, this 8th day of January, 2019.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/8/2019 12:53:13 PM

in

Case No(s). 18-0857-EL-UNC

Summary: Brief Brief submitted on behalf of the staff of the Public Utilities Commission of Ohio. electronically filed by Ms. Yvette L Yip on behalf of PUCO