BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison 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. 18-857-EL-UNC**

INITIAL POST-HEARING BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

Electric utilities in Ohio that serve customers through an Electric Security Plan ("ESP") are required by statute to annually submit an application to determine whether "significantly excessive earnings" occurred in the prior calendar year. Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("Illuminating Company", or "CEI"), and The Toledo Edison Company ("Toledo Edison"), (collectively "Companies"), filed an Application along with testimony and exhibits demonstrating that significantly excessive earnings did not occur for any of the Companies in calendar year 2017. Intervenors Ohio Energy Group ("OEG") and the Staff of the Public Utilities Commission of Ohio ("Commission") along with the Companies jointly submitted a Stipulation and Recommendation ("Stipulation") agreeing that significantly excessive earnings did not occur, and resolving all issues among them.[1]

The Office of the Ohio Consumers' Counsel ("OCC"), on the other hand, argued that the Companies should not follow the Commission's prior Order to exclude certain revenues from the significantly excessive earnings test ("SEET"),[2] and instead concluded that significantly excessive earnings did occur for Ohio Edison only. OCC is the sole party opposing the Stipulation, which opposition is based entirely on its contention that the Commission should disallow the exclusion of Rider DMR revenues from the Companies' SEET review.

For the reasons set forth below, the Commission should approve the Stipulation and issue an Order that significantly excessive earnings did not occur for the Companies in 2017.

[1] Stipulation and Recommendation, October 26, 2018.
[2] Fifth Entry on Rehearing, Case No. 14-1297-EL-CSS, p.98, October 12, 2016. See also Eighth Entry on Rehearing, Case No. 14-1297-EL-SSO, p. 35, August 16, 2017.

II. FACTUAL BACKGROUND

On May 15, 2018, the Companies timely filed their Application in this proceeding, along with testimony and exhibits demonstrating that significantly excessive earnings did not occur in 2017. The testimony also included all of the information as required by statute, Ohio Rev. Code 4928.143(F), and by the Commission. On September 6, 2018, the presiding Attorney Examiner issued an Entry ("Entry") setting the deadline for motions to intervene by October 15, 2018, filing of testimony by parties by October 16, 2018, and scheduling an evidentiary hearing for October 30, 2018.[3]

Company witness Jason S. Petrik, Assistant Controller for the Companies, testified that the 2017 earned returns on equity, appropriately adjusted for SEET purposes, were: 11.8% for Ohio Edison; 4.0% for CEI; and 6.4% for Toledo Edison.[4] Mr. Petrik described the adjustments to the Companies' book net income and common equity balances.[5] Based upon the comparable group analysis performed by Company witness Joanne Savage described below, Mr. Petrik concluded that none of the Companies had earned returns on equity in excess of the "safe harbor" of 14.3%, and therefore, significantly excessive earnings did not occur for any of the Companies in 2017.[6]

Company witness Joanne M. Savage, Manager, Revenue Requirements, performed an analysis of the return on equity ("ROE") earned by the comparable group of publicly traded companies during 2017 and also calculated the safe harbor threshold. The methodology used by Ms. Savage is consistent with the methodology previously

[3] Entry, Case No. 18-857-EL-UNC, September 6, 2018..
[4] Company Exhibit 2, Testimony of Jason S. Petrik ("Petrik") p. 9.
[5] Petrik, pp. 6-8.
[6] Petrik, p. 9.

conducted by PUCO Staff and accepted as valid by the Commission in other SEET proceedings. Ms. Savage calculated returns on equity earned in 2017 by the companies comprising the Standard and Poor's index made up of electric utilities or their holding companies ("XLU"), considered by her as sufficiently comparable to the Companies in terms of business and financial risk.[7] Ms. Savage testified that the weighted average return on equity ("ROE"), after removing two companies with anomalous results, was 12.3%.[8] Ms. Savage then applied a standard deviation multiplier to determine the level of ROE above which earnings should be considered significantly excessive, i.e., the "SEET threshold," of 19.2%.[9] Ms. Savage testified that other methods of analysis may be appropriate; however, there was no need to conduct such further analysis because the Companies' 2017 SEET ROEs fell under the Commission's "safe harbor."[10]

On October 16, 2018, Staff witness Joseph P. Buckley filed testimony accepting the Companies' SEET-adjusted 2017 earned returns on equity and presenting his own analysis of the comparable group ROEs.[11] Mr. Buckley testified that Staff reviewed the Companies' calculations of earned ROEs, and found them to be in conformity with the SEET provisions of the Companies' approved electric security plan ("ESP"), and that the results "are an accurate representation of [the Companies'] 2017 earnings."[12] Mr. Buckley presented the results of his comparable group ROE analysis determining an average ROE of 9.89%.[13] Following the same standard deviation multiplier method

[7] Company Exhibit 3, Testimony of Joanne M. Savage ("Savage"), p. 4. Specifically, Ms. Savage noted that this was the same group used by Staff in other SEET proceedings.
[8] Savage, p. 5.
[9] *Id*.
[10] Savage, p. 6.
[11] Staff Exhibit 1, Prefiled Testimony of Joseph P. Buckley ("Buckley"), p. 3-4. Mr. Buckley used the same initial XLU group, but excluded different companies than Ms. Savage.
[12] Buckley, p. 3.
[13] Buckley, p. 4.

employed by Company witness Savage, Mr. Buckley testified that his SEET threshold determination is 17.22%.[14]

During the course of this proceeding, several parties moved to intervene, namely, OCC, OEG, and Industrial Energy Users – Ohio ("IEU").[15] On October 16, 2018, OCC witness Daniel J. Duann, Ph.D., filed testimony regarding the SEET results presented by Ohio Edison, but made no statements regarding CEI or Toledo Edison. Dr. Duann objected to the exclusion of revenues collected through Ohio Edison's Distribution Modernization Rider ("Rider DMR"),[16] re-calculated Ohio Edison's 2017 average common equity used to determine Ohio Edison's ROE,[17] and presented his own comparable group ROE analysis and recommended SEET threshold.[18] Dr. Duann recommended a comparable group average ROE of 10.41%.[19] Dr. Duann's statistics-based SEET threshold was 24.10%;[20] however, Dr. Duann rejected the standard deviation multiplier in favor of an arbitrary "adder" of 450 basis points to conclude a SEET threshold of 14.91%.[21]

On October 26, 2018, the Companies filed a Stipulation and Recommendation with OEG, Staff, and the Companies ("Signatory Parties") agreeing that significantly excessive earnings did not occur and resolving all issues among the Signatory Parties.[22] The Companies also filed the Supplemental Testimony of Joanne M. Savage in support of

[14] *Id*.
[15] Neither OEG nor IEU filed testimony in this proceeding.
[16] OCC Exhibit 1, Direct Testimony of Daniel J. Duann, PhD. ("Duann") p. 4, 10, 29.
[17] Duann, p. 8,.
[18] Duann, p. 25-28.
[19] Duann, p. 25. Dr. Duann used the same initial comparable group as Ms. Savage and Mr. Buckley, but excluded the results from different companies than those excluded by them.
[20] Duann, Attachment DJD-6.
[21] Duann, p. 28.
[22] Staff Exhibit 2, Stipulation and Recommendation, October 26, 2018.

the Stipulation.[23] Ms. Savage testified that the Stipulation is supported by adequate data and information; represents a just and reasonable resolution of issues in this proceeding; violates no regulatory principle or precedent; and is the product of serious bargaining among knowledgeable and capable Signatory Parties in a cooperative process and undertaken by the Signatory Parties representing a wide range of interests to resolve the aforementioned issues.[24] The Stipulation indicated that it remained open for other parties to join until an Order is issued in this proceeding.[25]

On October 29, 2018, OCC moved to modify the procedural schedule to allow time to file testimony on the Stipulation and requested an expedited ruling.[26] OCC indicated that all parties had been contacted, and all agreed to an expedited ruling on the proposed schedule for testimony in support of the Stipulation to be filed on or before November 9, 2018, testimony in opposition to the Stipulation to be filed on or before November 16, 2018, and an evidentiary hearing to be held on November 29, 2018. OCC's motion was granted by Attorney Examiner's Entry dated October 31, 2018, and all motions to intervene also were granted therein.

On November 16, 2018, OCC filed the testimony of Dr. Duann in opposition to the Stipulation.[27] Dr. Duann reiterated the positions taken in his earlier testimony,[28] and further opined that the Stipulation did not represent serious bargaining among the parties, did not benefit customers or the public interest, and violated important regulatory

[23] Supplemental Testimony of Joanne M. Savage, October 26, 2018. ("Savage Supplemental").
[24] Savage Supplemental, p. 4-5
[25] Stipulation, p. 4
[26] Motion to Modify Procedural Schedule and Request for Expedited Treatment, October 29, 2018.
[27] OCC Exhibit 2, Testimony of Daniel J. Duann, Ph.D. for Consumer Protection from the Stipulation, November 16, 2018 ("Duann Supplemental").
[28] Dr. Duann's earlier testimony was attached to his Supplemental Testimony.

principles.[29] Dr. Duann stated that the first time he had seen the Stipulation was when it was filed and, therefore, the interests of residential consumers were not represented.[30]

On November 29, 2018, an evidentiary hearing was held at which all parties stipulated the admission of testimony and exhibits.

III. LAW AND ARGUMENT

The statute providing for ESPs established an annual test to determine whether significantly excessive earnings resulted from an approved plan.[31] In order to implement this statute, the Commission initiated an investigation that provided guidance on the manner in which SEET should be performed ("SEET Investigation").[32] Among other issues, the Commission expressly held that SEET treatment for specific items can be pre-determined within a utility's ESP proceeding.[33] Notably, OCC did not appeal this decision.

The SEET Investigation also discussed methods for determining the threshold above which earnings could be considered "significantly" excessive. The Commission found that "statistical analysis can be one of many useful tools" for establishing the SEET threshold.[34] Importantly, the Commission recognized a "safe harbor" of 200 basis points above the mean of the comparable group, below which an electric utility will be found

[29] Duann Supplemental, p. 2.
[30] Duann Supplemental, p. 5.
[31] 4928.143(F), Ohio Rev. Code, in pertinent part: "With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate."
[32] *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC.
[33] *Id*., Entry on Rehearing, August 25, 2010, at p.7, (regarding Duke Energy's recent ESP stipulation: "Where SEET related issues are sufficiently addressed in the stipulation, the stipulation will guide the Commission in its excessive earnings determination.")
[34] *Id*., Finding and Order, June 30, 2010, at p.29.

not to have significantly excessive earnings ("Safe Harbor").[35] All three witnesses in this proceeding presented the results of a comparable group mean and a statistical analysis threshold.[36]

A. The Companies' SEET ROEs were less than the "Safe Harbor" threshold.

As noted above, Company Witness Petrik testified that the 2017 earned ROEs for Ohio Edison, The Illuminating Company, and Toledo Edison were 11.8%; 4.0%, and 6.4%, respectively. While OCC Witness Duann purports to "correct" Mr. Petrik's computation of average common equity, he inexplicably uses all thirteen monthly balances from Mr. Petrik's schedule detailing the SEET common equity adjustments instead of using the same method he used for calculating Ohio Edison's "per book" average common equity, namely, adding the December 31, 2016 balance to the December 31, 2017 balance and dividing the sum by two.[37] If Dr. Duann had been consistent using the "typical" method, he would have discovered that this is, in fact, exactly how Mr. Petrik calculated the SEET-adjusted average common equity.[38] Thus, there simply was no mathematical error in Mr. Petrik's derivation of an 11.8% ROE for Ohio Edison, and Dr. Duann's correction and conclusions based thereon should be rejected.

The comparable group mean ROEs presented by witnesses Savage, Buckley, and Duann are 12.3%, 9.89%, and 10.41%, respectively. Applying the Commission's Safe Harbor methodology of adding 200 basis points to each witness' comparable group mean

[35] Id.
[36] See, Savage Testimony, Schedule JMS-1; Buckley Testimony, Staff Exhibit 1; Duann Testimony, Attachment DJD-6.
[37] Duann Testimony, p. 6, fn 10 ("The average common equity is typically calculated as the average of the 2016 year-end common equity and the 2017 year-end common equity.")
[38] (December 31, 2016 + December 31, 2017) / 2 = ($1,109,136,880 + $1,036,267,583) / 2 = $1,072,702,232.

ROE yields corresponding Safe Harbor thresholds of 14.3%, 11.89% and 12.41%, respectively. Since each of the Companies' earnings were less than all of these Safe Harbor thresholds, the conclusion is inescapable: none of the Companies experienced significantly excessive earnings in 2017.

B. The Stipulation Satisfies the "Three-Prong Test" and Should Be Approved.

Rule 4901-1-30, Ohio Administrative Code ("O.A.C.") provides that any two or more parties to a proceeding may enter into a written stipulation covering the issues presented in such a proceeding. The Commission utilizes the following criteria to consider Stipulations: 1) Is the settlement a product of serious bargaining among capable, knowledgeable parties? 2) Does the settlement, as a package, benefit ratepayers and the public interest? and 3) Does the settlement package violate any important regulatory principle or practice? The Supreme Court of Ohio endorses the Commission's use of these criteria to resolve its cases.[39]

Company witness Savage testified that the three prongs were met, while OCC witness Duann argues that *none* of the three prongs were met. For example, Dr. Duann complains that the bargaining wasn't serious because he didn't see the stipulation until it was docketed.[40] However, the timing of Dr. Duann's receipt of the Stipulation says nothing about whether it was previously offered to and rejected by OCC's counsel. Noticeably absent from Dr. Duann's testimony is any assertion that an OCC request to negotiate was rebuffed, nor even that any effort at all to negotiate was made by OCC. Further, by its very terms the Stipulation remains open and thus available to OCC to

[39] *Office of Consumers' Counsel v. Public Utilities Com.*, 64 Ohio St. 3d 123, 126.
[40] Duann Supplemental, p.5.

continue to negotiate and join the Stipulation. Dr. Duann suggests that *serious bargaining* requires entreating OCC to settle, even when OCC itself makes no effort and even when its testimonial position is based solely on ignoring the Commission's prior Order.[46]

As for Dr. Duann's assertions that the second and third prongs were not met, his arguments again rely solely upon ignoring the Commission's prior decision to exclude Rider DMR revenues as approved in the Companies' last ESP case.[41] The Commission expressly explained its reasoning in that case, yet Dr. Duann fails to acknowledge those reasons and in a collateral attack declares that he does "not see a valid reason not to consider this Rider DMR revenue of $58.5 million as part of Ohio Edison's 2017 net income for purposes of reviewing the profits of the Utility."[42] The Companies submit that complying with a direct Commission Order is a valid reason.

The entirety of Dr. Duann's contention that ratepayers are entitled to a refund—and that the Stipulation's failure to provide one is harmful to ratepayers and against regulatory principle or practice—is predicated on including Rider DMR revenues in Ohio Edison's 2017 SEET net income. This issue has already been extensively litigated and decided by the Commission in a lengthy proceeding involving more than 50 parties, dozens of witnesses, almost 60 days of hearings, and volumes of record evidence.[43] As such, OCC is left with nothing but the results of its own analysis demonstrating that none

[41] Duann Testimony, p. 10, ("I am aware that the PUCO, in approving the current ESP, did allow Ohio Edison to exclude Rider DMR revenues from earnings for SEET purposes.")
[42] Duann Testimony, p. 10.
[43] In sharp contrast to the instant proceeding having just 3 intervenors, 3 witnesses, and a brief hearing in which all parties—including OCC—agreed to waive cross examination.

of the Companies had earned ROEs in excess of the Safe Harbor threshold, and therefore, that significantly excessive earnings did not occur for any of the Companies.[44]

IV. CONCLUSION

All three ROE witnesses presented evidence that each of the Companies' earned ROEs meet the Commission's Safe Harbor presumption that significantly excessive earnings did not occur in 2017. The Commission should reject OCC's arguments regarding Ohio Edison's revenues that flatly contradict the Commission's Order in the ESP IV case establishing future SEET treatment of revenues, and should approve the Stipulation and Recommendation and find that the Companies did not experience significantly excessive earnings in 2017.

Respectfully submitted,

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[44] Specifically, 11.8% < 12.41%.

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Initial Post-Hearing Brief was served via electronic mail upon the following parties of record, this 8th day of January, 2019.

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Summary: Brief Initial Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Mr Robert M Endris on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company