

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

IN THE MATTER OF THE DETERMINATION
OF THE EXISTENCE OF SIGNIFICANTLY
EXCESSIVE EARNINGS FOR 2018 UNDER
THE ELECTRIC SECURITY PLANS OF OHIO
EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY.

CASE NO. 19-1338-EL-UNC

IN THE MATTER OF THE DETERMINATION
OF THE EXISTENCE OF SIGNIFICANTLY
EXCESSIVE EARNINGS FOR 2019 UNDER
THE ELECTRIC SECURITY PLANS OF OHIO
EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY.

CASE NO. 20-1034-EL-UNC

IN THE MATTER OF THE QUADRENNIAL
REVIEW REQUIRED BY R.C. 4928.143(E)
FOR THE ELECTRIC SECURITY PLANS OF
OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON
COMPANY.

CASE NO. 20-1476-EL-UNC

ENTRY

Entered in the Journal on February 26, 2021

{¶ 1} Ohio Edison Company (OE), The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) are electric distribution utilities (EDUs) as defined by R.C. 4928.01(A)(6), and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 2} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer (MRO), in accordance with R.C. 4928.142, or an electric security plan (ESP), in accordance with 4928.143.

{¶ 3} Pursuant to the directives of R.C. 4928.143(F), the Commission is required to evaluate annually the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility. Moreover, R.C. 4928.143(E) requires that, if a Commission-approved ESP has a term that exceeds three years from the effective date of the plan, the Commission must test the plan in the fourth year (the quadrennial review) to determine whether the ESP, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under R.C. 4928.142, i.e., under an MRO. The Commission must also determine the prospective effect of the ESP to determine if that effect is substantially likely to provide the EDU with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with adjustments for capital structure as may be appropriate.

{¶ 4} On May 15, 2018, FirstEnergy filed an application in Case No. 18-857-EL-UNC for the administration of the significantly excessive earnings test (SEET), as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2017.

{¶ 5} In Case No. 18-857-EL-UNC, a stipulation and recommendation (Stipulation) between FirstEnergy, Ohio Energy Group (OEG), and Staff was filed on October 26, 2018. On March 20, 2019, the Commission issued its Opinion and Order in this matter, adopting the Stipulation, as modified, regarding FirstEnergy's 2017 SEET. In the Opinion and Order,

the Commission found that it was appropriate to exclude the revenues from the distribution modernization rider (Rider DMR) from the 2017 SEET, consistent with the Commission's orders in FirstEnergy's latest ESP. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (ESP IV), Fifth Entry on Rehearing (Oct. 12, 2016) at ¶212, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶81. OCC appealed the Commission's decision, asserting that the Commission unreasonably and, under R.C. 4928.143(F), unlawfully failed to consider the Rider DMR revenues under OE's ESP, which caused ESP profits to be understated.

{¶ 6} On July 15, 2019, FirstEnergy filed an application in Case No. 19-1338-EL-UNC for the administration of the SEET, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2018.

{¶ 7} On May 15, 2020, FirstEnergy filed an application in Case No. 20-1034-EL-UNC for the administration of the SEET, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2019.

{¶ 8} Subsequently, the Commission opened Case No. 20-1476-EL-UNC in order to conduct the quadrennial review for FirstEnergy required by R.C. 4928.143(E). By Entry issued on September 4, 2020, the attorney examiner consolidated that case with Case Nos. 19-1338-EL-UNC and 20-1034-EL-UNC for administrative efficiency, established a procedural schedule, and set the matters for hearing. On October 29, 2020, the attorney examiner established a new procedural schedule and set the consolidated cases for hearing no earlier than May 3, 2021.

{¶ 9} On December 1, 2020, the Supreme Court of Ohio issued its decision in OCC's appeal of Case No. 18-857-EL-UNC, remanding with instructions to conduct a new SEET proceeding and include the Rider DMR revenue in the analysis. Specifically, the Court held that the Rider DMR revenue must be included in the annual SEET review pursuant to R.C. 4928.143(F). *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under Elec. Sec. Plan of Ohio Edison Co.*, Slip Opinion No. 2020-Ohio-5450 at ¶¶ 14-21. In order to

address the remand of Case No. 18-857-EL-UNC, the attorney examiner consolidated all of the above-captioned cases on January 12, 2021.

{¶ 10} On October 5, 2020, OCC filed a motion to compel discovery in Case No. 20-1034-EL-UNC. In the motion to compel, OCC seeks discovery of information used by FirstEnergy witnesses to calculate the SEET for 2019 “separately and individually” for each of the Companies. OCC avers that the information is relevant and reasonably calculated to lead to the discovery of admissible evidence. OCC notes that the information sought would serve two purposes. First, OCC claims that the information is necessary to determine if an individual utility had significantly excessive earnings in 2019 because, prior to October 17, 2019, the SEET was calculated on an individual basis. Second, OCC avers that the information sought is necessary to confirm that the combined SEET information is accurate.

{¶ 11} The Companies filed a memorandum contra the motion to compel on October 13, 2020. The Companies argue that OCC’s discovery requests are not relevant and are not reasonably calculated to lead to the discovery of admissible evidence. The Companies rely upon R.C. 4928.143(F) which mandates that the 2019 SEET be conducted using the total return on equity of the combined Companies and that the 2019 SEET be conducted at the end of the annual period which ended on December 31, 2019.

{¶ 12} The attorney examiner finds that the motion to compel should be granted. Discovery may be had of any matter, not privileged, which is relevant to the subject matter of these proceedings. Ohio Adm.Code 4901-1-16. In Case No. 20-1034-EL-UNC, the Companies have submitted information for the 2019 SEET, which is consolidated from information derived from each utility. It is plainly relevant to these proceedings that the consolidated SEET information be accurate, and OCC has the right to discover the underlying individual utility information in order to replicate that Companies’ calculation and confirm that the consolidated information is accurate. The Companies are directed to submit the information sought by the motion to compel within seven days of the issuance of this Entry.

{¶ 13} On February 4, 2021, OCC filed a motion of an indefinite continuance of the procedural schedule and evidentiary hearing. OCC contends that Senate Bill 10, currently pending before the General Assembly, would amend R.C. 4928.143(F), which governs the calculation of the SEET. Thus, OCC reasons that good cause exists to continue this case indefinitely, pending the General Assembly's consideration of Senate Bill 10.

{¶ 14} The Companies filed a memorandum contra the motion for an indefinite continuance on February 16, 2021. In the memorandum contra, the Companies do not object to the continuance but recommend that all discovery be stayed, including pending requests. The Companies reason that, if good cause exists for an indefinite postponement of the testimony deadlines and the hearing, good cause also exists to stay discovery, including all outstanding requests, for the duration of the continuance.

{¶ 15} On February 23, 2021, OCC filed its reply. OCC states that it does not oppose continuing additional discovery, but OCC argues that discovery currently pending should be answered, particularly the discovery which is the subject of the October 5, 2020 motion to compel.

{¶ 16} The attorney examiner finds that the motion for an indefinite continuance should be denied. A request for an indefinite continuance based upon a future change in law is an extraordinary request. The attorney examiner notes that the procedural schedule in these cases has been extended twice already and that, currently, no date for hearing has been established. Entry (Sep. 4, 2020) at ¶ 7; Entry (Oct. 29, 2020) at ¶ 17. Moreover, the attorney examiner is not persuaded that an indefinite continuance of the entire procedural schedule, including discovery and the filing of testimony, is necessary or appropriate under these circumstances. Parties should continue to diligently prepare for hearing, and if there is a change in law prior to the hearing, the parties will be provided with an opportunity to conduct additional discovery, if necessary, and to file supplemental testimony. An indefinite continuance of the entire procedural schedule, on the other hand, may result in an undue delay of the hearing of this case, as once a hearing date was established, the parties

would unavoidably require additional time to prepare for hearing, in the event there is no change in law.

{¶ 17} Nonetheless, the attorney examiner finds that, in light of the ruling on the motion to compel, the procedural schedule should be modified. Accordingly, the date for intervenor testimony should be extended to April 5, 2021, and the deadline for the service of discovery, except for notices of deposition, should be extended to April 19, 2021. After the deadline for the service of discovery, a prehearing conference will be scheduled, by subsequent entry, to discuss mutually agreeable hearing dates.

{¶ 18} Given the current COVID-19 health emergency, this hearing may be held remotely. The attorney examiners will provide additional information to the parties at a prehearing conference to be scheduled by subsequent entry.

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That OCC's motion to compel be granted. It is, further,

{¶ 21} ORDERED, That OCC's motion for an indefinite continuance be denied. It is, further,

{¶ 22} ORDERED, That the procedural schedule be modified as set forth in Paragraph 17. It is, further,

{¶ 23} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Gregory A. Price

By: Gregory A. Price
Attorney Examiner

MJA/hac

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Case No(s). 18-0857-EL-UNC, 19-1338-EL-UNC, 20-1034-EL-UNC, 20-1476-EL-UNC

Summary: Attorney Examiner Entry ordering that OCC's motion to compel be granted; ordering that OCC's motion for an indefinite continuance be denied; and, ordering that the procedural schedule be modified as set forth in Paragraph 17 electronically filed by Heather A Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio