**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 2018 Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code. | )))))) | Case No. 19-1098-EL-UNC |

**INITIAL BRIEF**

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**INITIAL BRIEF**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# INTRODUCTION

As part of the 2008 energy law, the Ohio General Assembly protected consumers by limiting a utility's earnings under electric security plans. Utilities may earn excessive profits but not significantly excessive profits. If a utility is found to have earned significantly excessive profits, it must return them to customers (refund).[[1]](#footnote-2)

Ohio Power Company (“AEP”) had significantly excessive earnings of $5.7 million in 2018.[[2]](#footnote-3) Under Ohio law, AEP should return that money to customers. But in this case, AEP and the Staff of the Public Utilities Commission of Ohio (the “PUCO Staff”) signed a Settlement[[3]](#footnote-4) that does not return a single dollar of the significantly excessive earnings to customers. This is unlawful and unreasonable.

The PUCO should reject the Settlement because it fails the PUCO’s three-part test for evaluating settlements. It does not benefit customers or the public interest. And it violates regulatory principles and practices by causing customers to pay unjust and unreasonable rates.

The PUCO should therefore adopt the Office of the Ohio Consumers’ Counsel’s (“OCC”) recommendation for a $5.7 million refund to customers. This is the just and reasonable result for Ohioans.

# BURDEN OF PROOF AND STANDARD OF REVIEW

The applicant bears the burden of proof in PUCO proceedings.[[4]](#footnote-5) When there is a stipulation, the signatory parties "bear the burden to support the stipulation" and must "demonstrate that the stipulation is reasonable and satisfies the Commission's three-part test."[[5]](#footnote-6) And in cases involving the significantly excessive earnings test “[t]he burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility.”[[6]](#footnote-7) Because this burden of proof is required by law, AEP must satisfy it regardless as to whether there is a settlement or not.

A settlement is merely a recommendation that is not legally binding on the PUCO,[[7]](#footnote-8) and the PUCO has the discretion to give each settlement the weight that the PUCO believes it deserves. The PUCO “may take the stipulation into consideration but must determine what is just and reasonable from the evidence presented at the hearing.”[[8]](#footnote-9)

In evaluating settlements, the ultimate issue for the PUCO’s consideration is whether the agreement is “reasonable and should be adopted.” In answering this question, the PUCO has adopted the following three-part test:[[9]](#footnote-10)

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit customers and the public interest?
3. Does the settlement violate any important regulatory principles or practice?

As OCC demonstrates, the proposed Settlement in this case does not meet this standard.

# OVERVIEW OF THE SIGNIFICANTLY EXCESSIVE EARNINGS TEST

The 2008 energy law (S.B. 221), codified in part in R.C. 4928.143, allows electric distribution utilities in Ohio to charge customers under an electric security plan, or ESP. These ESPs have proven very profitable for Ohio’s electric utilities, in large part because they allow the utilities to engage in previously-prohibited, single-issue ratemaking.[[10]](#footnote-11) But the law is also designed to protect consumers by limiting the amount of profit that the utility can charge them under its ESP.[[11]](#footnote-12)

R.C. 4928.143(F) requires the PUCO to compare a utility’s earnings under an ESP (measured by return on common equity) to the earnings of comparable companies during the same period.[[12]](#footnote-13) If the utility’s earnings are “significantly in excess” of those comparable companies’ earnings, then the utility must refund the excess amounts to consumers.[[13]](#footnote-14) If the PUCO orders such a refund, the utility then has the option to terminate its ESP and immediately file a Market Rate Offer.[[14]](#footnote-15)

AEP had significantly excessive earnings of more than $5.7 million in 2018.[[15]](#footnote-16) The law requires AEP to return that amount to customers.

# RECOMMENDATIONS

## The PUCO should reject the proposed Settlement because it harms consumers and is not in the public interest because it allows AEP to keep $5.7 million in significantly excessive earnings.

If properly applied in this case, the significantly excessive earnings test requires AEP to provide a $5.7 million refund to customers. The Settlement, however, contains no refund to customers. Customers do not benefit from a settlement that allows AEP to charge its customers for significantly excessive earnings and then shift those earnings to a previous review period to avoid a refund.

OCC Expert Witness Dr. Duann reviewed the proposed Settlement and determined that AEP would be found to have no significantly excessive earnings in 2018 from the approved Electric Security Plan if it were approved.[[16]](#footnote-17) And if the proposed Settlement is adopted, AEP would not be required to refund any of its 2018 significantly excessive earnings. While AEP will get to keep these earnings, AEP’s customers will be unjustly and unreasonably deprived of the refund they are entitled to under Ohio’s Significantly Excessive Earnings Test (“SEET”) statute and PUCO precedent.[[17]](#footnote-18) As a result, AEP’s customers will pay substantially more than the just and reasonable rates for receiving monopoly electric distribution services from Ohio Power.[[18]](#footnote-19) The PUCO should not approve this Settlement that harms consumers and is not in the public interest.

The PUCO Staff provided no reasonable basis for its conclusion that AEP’s 2018 earnings are not significantly excessive. The PUCO Staff did not calculate or determine AEP’s SEET earnings at all. And, it took no position[[19]](#footnote-20) regarding AEP’s calculations of its 2018 earnings.[[20]](#footnote-21) The PUCO Staff neither agreed with nor supported the SEET earnings threshold of 16.49% proposed by AEP.[[21]](#footnote-22) Instead, PUCO Staff proposed its own SEET threshold of 15.73%.[[22]](#footnote-23) But according to OCC Witness Duann, the methodology used by the PUCO Staff and the resulting earnings threshold itself are flawed and unreasonable.[[23]](#footnote-24) And the method used by the PUCO Staff in deriving the earnings threshold is comparable to that used by Ohio Power.

Dr. Duann reviewed the methodology used by the PUCO Staff and found its proposed 15.73% earnings threshold is based on an average 2018 ROE of 7.61% and an adder of 8.12%.[[24]](#footnote-25) The 8.12% adder is in turn calculated from a multiplier of 1.64 and a standard deviation of 4.95%.[[25]](#footnote-26) Dr. Duann determined that the earnings threshold of 15.73% proposed by the PUCO Staff is clearly unreasonable and should be rejected.[[26]](#footnote-27) This is because the proposed adder of 8.12% alone is larger than the proposed average ROE of 7.61%.[[27]](#footnote-28) In other words, the PUCO Staff’s proposed earnings threshold would require AEP’s earned ROE to be twice as high (more specifically 106.7% higher) as the average ROE in order to be considered significantly excessive.[[28]](#footnote-29) This is an unreasonable interpretation of “significantly excessive” based on common sense and a reasonable reading of Ohio law.

As Dr. Duann explained in his testimony, AEP earned approximately $327 million in 2018, and had a return on equity (“ROE”) of 14.19%, based on a proper reading of Ohio’s SEET statues and sound regulatory principles.[[29]](#footnote-30) Based on this 2018 profit level of 14.19% and a reasonable SEET ROE threshold of 14% proposed by OCC, AEP should refund its customers $5,718,971 for its significantly excessive earnings in 2018.[[30]](#footnote-31) AEP’s own calculation of $295,269,000 in 2018 earnings and a ROE of 12.81% for SEET purpose is flawed and unreasonable and should not be adopted by the PUCO to determine if AEP had significantly excessive earnings in 2018.[[31]](#footnote-32)

There are several reasons the PUCO should rejects this proposed Settlement. First, the proposed Settlement unreasonably requires AEP’s customers to forego the approximately $5.7 million SEET refund that they should receive.[[32]](#footnote-33) Second, the proposed Settlement disregards the customer protection included in the ESP statute related to SEET, and thus will harm AEP’s customers.[[33]](#footnote-34) Third, the proposed Settlement is not a reasonable compromise of competing positions.[[34]](#footnote-35) Finally, the PUCO’s approval of the proposed Settlement will serve no public interest.[[35]](#footnote-36)

Rather than adopt the Settlement’s proposal to allow the utility to keep significantly excessive earnings, the PUCO should adopt OCC witness Duann’s proper application of the significantly excessive earnings test, which results in overearnings being returned to customers. Dr. Duann explained that the signatory parties misapplied the significantly excessive earnings test.[[36]](#footnote-37) Therefore, the signatory parties’ conclusion that AEP’s 2018 earnings were not significantly excessive is wrong and the Settlement should be rejected.

## The PUCO should reject the proposed Settlement because it violates Ohio law and important regulatory principles and practices.

### The Proposed Settlement would allow AEP to overcharge consumers and keep its significantly excessive earnings for 2018 in violation of Ohio law and important regulatory principles.

Ohio law requires utilities to charge just and reasonable rates.[[37]](#footnote-38) But the proposed Settlement would allow AEP to overcharge consumers and keep its significantly excessive earnings for 2018. The General Assembly adopted the SEET as a necessary check to ensure that, for the benefit of customers, Ohio’s electric utilities do not earn significantly excessive profits through their electric security plan.[[38]](#footnote-39) AEP had the option to offer market-based rates or an ESP subject to the SEET and chose the later, subjecting itself to the profits test under Ohio law. As the Supreme Court of Ohio has noted, AEP “not only had notice of R.C. 4928.143(F), but chose to be subject to it. . . . Presumably, the potential reward outweighed the risk.”[[39]](#footnote-40) Indeed, to AEP the rewards of the ESP were great, because AEP’s earnings significantly exceeded those of other companies facing comparable business and financial risk.

Customers will be paying substantially more (approximately $5.7 million) than the just and reasonable rates for monopoly electric distribution service if the proposed Settlement is adopted.[[40]](#footnote-41) The proposed Settlement, if adopted, would violate the fundamental regulatory principle that the rates and terms of service for Ohioans be just and reasonable.[[41]](#footnote-42)

### AEP’s assertion that the adjustment to earnings related to the Phase-In Recovery Rider (“PIRR”) is similarly applicable to the earning adjustment related to the Retail Stability Rider (“RSR”) should be rejected because it is contrary to the Ohio SEET statutes, it violates important regulatory principles and practices.

Dr. Duann concluded that the proposed Settlement, if approved by the PUCO, would unreasonably exclude approximately $27,564,000 in earnings collected through the 2018 Retail Stability Rider (“RSR”) from the earnings review in any year (past and future).[[42]](#footnote-43) This is contrary to the Ohio SEET statute, which requires that *all* earning from an electric security plan be counted in the SEET review.[[43]](#footnote-44) As envisioned by the Ohio General Assembly, the annual SEET review provides an essential safeguard to protect Ohio’s electric customers from unreasonable rates of an ESP.[[44]](#footnote-45) But pulling out a subset of electric security plan earnings and treating those as immune from the profits review is contrary to the statute and PUCO precedent.[[45]](#footnote-46)

The proposed Settlement also unreasonably treats the approximately $4,290,000 prior year SEET refund as an expense in 2018 for SEET purposes.[[46]](#footnote-47) This proposed treatment by AEP violates the PUCO rules regarding the treatment of one-time events for SEET purposes and contradicts AEP’s own position regarding SEET refund in the past.

The PUCO should reject AEP’s proposed $27,564,000 and $4,290,000 adjustments to its 2018 earnings.[[47]](#footnote-48) These unsupported adjustments are a thinly-veiled attempt by AEP to shift its 2018 earnings to prior years (that can no longer be reviewed for SEET purposes) to avoid refunding customers the amount that AEP overcharged them. The PUCO should not permit this.

AEP has not demonstrated in this proceeding that the RSR-related earnings should be treated similarly to the earnings related to the PIRR.[[48]](#footnote-49) AEP instead demonstrated that there is *no* PUCO precedent to “relocate” the RSR earnings booked and collected in 2018 to prior years for SEET purposes as proposed by AEP.[[49]](#footnote-50) And AEP has admitted that, in Case No. 17-1230-EL-UNC, the PUCO’s decision was related only to the earnings collected through the PIRR.[[50]](#footnote-51) Adjustment to earnings collected through RSR was not an issue in that case. The PIRR and RSR have been two different and distinct provisions of the approved electric security plan for AEP. Additionally, it should be noted that the Supreme Court of Ohio’s decision that reinstated the weighted average cost of capital (“WACC”) on the fuel costs deferral balance has nothing to do with the SEET proceeding or the reallocation of PIRR earnings from current year to prior years.[[51]](#footnote-52)

AEP’s argument that its proposed adjustment to the RSR earnings is in line with exclusions to the SEET calculation as non-recurring, special, or extraordinary items determined by the PUCO in Case No. 09-786-EL-UNC is puzzling.[[52]](#footnote-53)  As Dr. Duann explained, RSR is a provision in an ESP approved by the PUCO and any earnings (or losses) associated with RSR should be part of the earnings subject to the SEET.[[53]](#footnote-54) Any decision by the Supreme Court of Ohio does not change that. The decision by the Supreme Court of Ohio related to RSR does not make the RSR a non-recurring, special, or extraordinary item. Additionally, the Supreme Court of Ohio’s remand regarding the determination of energy credit would only affect the amount of RSR to be collected and had nothing to do with the SEET proceeding or the reallocation of RSR earnings from current year to prior years.[[54]](#footnote-55)

AEP does not allocate its earnings when preparing its financial statements in 2018 or any other years. As discussed in Dr. Duann’s testimony, this reallocation of RSR earnings from 2018 to prior years is essentially hiding the $27,564,000 RSR earnings from SEET review in any year.[[55]](#footnote-56) The PUCO may not permit this proposed treatment because it is contrary to the Ohio SEET statutes, which require all earnings from a utility’s electric security plan to be included for SEET purposes.[[56]](#footnote-57) AEP’s request for excluding such a large amount resulting from its significantly excessive earnings in 2018 is unlawful, unreasonable, does not benefit customers or the public interest, and should be rejected.

### The PUCO should reject the proposed Settlement because it violates important regulatory principles outlined in Ohio’s policy regarding electric service.

R.C. 4928.02 identifies the policies of the state of Ohio regarding electric services. It is the policy of the state of Ohio to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service; to protect at-risk populations; and to facilitate the state’s effectiveness in the global economy.[[57]](#footnote-58) The proposed Settlement violates each of these state policies. The proposed Settlement would allow AEP to sidestep refunding its customers approximately $5.7 million, which is the significantly excessive earnings AEP charged customers through the ESP rates. This is not providing reasonably priced retail electric service, protecting at-risk populations, or facilitating the state’s effectiveness in the global economy.[[58]](#footnote-59) The PUCO should reject the Settlement to protect consumers.

# CONCLUSION

AEP bears the statutory burden of proving that its 2018 earnings were not significantly excessive. AEP did not meet that burden in this case. Instead, AEP and the PUCO Staff signed a settlement that (i) fails to adopt any SEET threshold; (ii) relies on AEP’s analysis of its 2018 earnings, which includes two unlawful adjustments designed to avoid PUCO review of AEP’s earnings; and (iii) provides literally nothing to consumers for funding AEP’s significantly excessive earnings. For all the reasons discussed above, the Settlement in this case, fails to meet the PUCO’s standard for evaluating stipulations because it harms customers and is not in the public interest, and it violates important regulatory principles and practices.

The PUCO should reject the Settlement and instead order AEP to refund $5,718,971 to customers.

 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Initial Brief was served on the persons stated below via electronic service, this 4th day of December 2019.

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The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. R.C. 4928.143(F). [↑](#footnote-ref-2)
2. Duann Supp. Testimony at 2 (November 5, 2019). [↑](#footnote-ref-3)
3. Stipulation and Recommendation (October 1, 2019) (“Settlement”). [↑](#footnote-ref-4)
4. *In re Application of the Ottoville Mut. Tel. Co.*, Case No. 73-356-Y, 1973 Ohio PUC LEXIS 3, at \*4 ("the applicant must shoulder the burden of proof in every application proceeding before the Commission"); *In re Application of the Ohio Bell Tel. Co.*, No. 84-1435-TP-AIR, 1985 Ohio PUC LEXIS 7, at \*79 (Dec. 10, 1985) ("The applicant has the burden of establishing the reasonableness of its proposals."). [↑](#footnote-ref-5)
5. *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agmt. for Inclusion in the Power Purchase Agmt. Rider*, No. 14-1693-EL-SSO, Opinion & Order at 18 (Mar. 31, 2016). [↑](#footnote-ref-6)
6. R.C. 4928.143(F). [↑](#footnote-ref-7)
7. *Duff v. PUCO,* 56 Ohio St.2d 367 (1978); *see also* Ohio Adm. Code 4901-1-30(E). [↑](#footnote-ref-8)
8. *Duff*, 56 Ohio St.2d 367. [↑](#footnote-ref-9)
9. *See* *Consumers’ Counsel v. PUCO*, 64 Ohio St.3d 123, 126 (1992). [↑](#footnote-ref-10)
10. R.C. 4928.143(B)(2)(h). [↑](#footnote-ref-11)
11. R.C. 4928.143(F) (the PUCO must determine if “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”). [↑](#footnote-ref-12)
12. *Id.* [↑](#footnote-ref-13)
13. *Id.* *See also In re Application of Columbus S. Power Co*., 134 Ohio St.3d 392, 2012-Ohio-5690 ¶1. [↑](#footnote-ref-14)
14. R.C. 4928.143(F). [↑](#footnote-ref-15)
15. Duann Supp. Testimony at 5. [↑](#footnote-ref-16)
16. *Id.* at 4. [↑](#footnote-ref-17)
17. *Id.* [↑](#footnote-ref-18)
18. *Id.* [↑](#footnote-ref-19)
19. *See Ohio 2018 SEET Application*, Direct Testimony of Joseph P. Buckley at 3 (September 3, 2019). [↑](#footnote-ref-20)
20. Duann Supp. Testimony at 8. [↑](#footnote-ref-21)
21. *Id.*  [↑](#footnote-ref-22)
22. *See* *Ohio 2018 SEET Application*, Direct Testimony of Buckley at 4. [↑](#footnote-ref-23)
23. Duann Supp. Testimony at 9. [↑](#footnote-ref-24)
24. *Id.* [↑](#footnote-ref-25)
25. *See* Direct Testimony of Buckley, Attachment 1. [↑](#footnote-ref-26)
26. Duann Supp. Testimony at 9. [↑](#footnote-ref-27)
27. *Id.* [↑](#footnote-ref-28)
28. *Id.* [↑](#footnote-ref-29)
29. *Id.* at 4-5. [↑](#footnote-ref-30)
30. *Id.* [↑](#footnote-ref-31)
31. *Id.* at 5. [↑](#footnote-ref-32)
32. *Id.* [↑](#footnote-ref-33)
33. *Id.* [↑](#footnote-ref-34)
34. *Id.* [↑](#footnote-ref-35)
35. *Id.* [↑](#footnote-ref-36)
36. *Id.* at 3-5. [↑](#footnote-ref-37)
37. R.C. 4905.22. [↑](#footnote-ref-38)
38. R.C. 4928.143(F). [↑](#footnote-ref-39)
39. *In re Application of Columbus S. Power Co*., 134 Ohio St.3d 392, 2012-Ohio-5690 at ¶30. [↑](#footnote-ref-40)
40. Duann Supp. Testimony at 6. [↑](#footnote-ref-41)
41. *Id.* [↑](#footnote-ref-42)
42. *Id.* at 6-7. [↑](#footnote-ref-43)
43. *See* Ohio Revised Code 4928.143(F). [↑](#footnote-ref-44)
44. Duann Supp. Testimony at 7. [↑](#footnote-ref-45)
45. R.C. 4928.143(F); *In re Columbus S. Power Co.*, 134 Ohio St.3d 392 (2012). [↑](#footnote-ref-46)
46. Duann Supp. Testimony at 7. [↑](#footnote-ref-47)
47. *Id.* [↑](#footnote-ref-48)
48. *Id.* at 11-13. [↑](#footnote-ref-49)
49. *Id.* [↑](#footnote-ref-50)
50. *See* Direct Testimony of Moore at 7-8. [↑](#footnote-ref-51)
51. *See* *In re Application of Ohio Power C*o., 144 Ohio St.3d 1, 2015-Ohio-2056. [↑](#footnote-ref-52)
52. *See* Direct Testimony of Moore at 7. [↑](#footnote-ref-53)
53. See Duann Supp. Testimony at 12. [↑](#footnote-ref-54)
54. *See In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio-1607. [↑](#footnote-ref-55)
55. *See* Duann Direct Testimony at 9-10. [↑](#footnote-ref-56)
56. *Id.* [↑](#footnote-ref-57)
57. *See* R.C. 4928.02(A), (L), and (N). [↑](#footnote-ref-58)
58. *See id.*  [↑](#footnote-ref-59)