

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) Case No. 10-1265-EL-UNC
Excessive Earnings Test Under Section)
4928.143(F), Revised Code, and Rule)
4901:1-35-10, Ohio Administrative)
Code.)

OPINION AND ORDER

The Commission, having considered the record in this matter and the stipulation and recommendation submitted by the signatory parties, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Calfee, Halter & Griswold, LLP, by Mr. James F. Lang, 1400 KeyBank Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Richard Cordray, Ohio Attorney General, Thomas W. McNamee and Sarah J. Parrot, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility consumers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company.

Boehm, Kurtz & Lowry, by Michael L. Kurtz, Suite 1510, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

David C. Rinebolt and Colleen L. Mooney, 231 West Lima Street, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

OPINION:I. Background

On May 1, 2008, the governor signed into law Amended Substitute Senate Bill No. 221 (SB 221), amending various statutes in Title 49 of the Ohio Revised Code. Among the statutory amendments were changes to Section 4928.14, Revised Code, to establish a standard service offer (SSO). Pursuant to the amended language of Section 4928.14, Revised Code, electric utilities are required to provide consumers with an SSO, consisting of either a market-rate offer (MRO) or an electric security plan (ESP). Pursuant to the directives of Section 4928.143 (F), Revised Code, the Commission is required to evaluate the earnings of each electric utility's approved MRO or ESP to determine whether the plan or offer produces significantly excessive earnings for the electric utility. On June 30, 2010, the Commission issued a finding and order in *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 (09-786), which established policy and significantly excessive earnings test (SEET) filing directives for the electric utilities.

On September 1, 2010, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) filed an application for the administration of the SEET, as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.) (FirstEnergy Ex. 1). The Companies also filed the supporting testimony of Harvey L. Wagner and Michael J. Vilbert (FirstEnergy Exs. 2 and 3, respectively).

By entry issued September 22, 2010, the attorney examiner scheduled this matter for hearing on November 2, 2010. Subsequently, by entry issued on October 7, 2010, the hearing in this matter was rescheduled for November 3, 2010. The October 7, 2010, entry also granted the motions to intervene in this proceeding filed by Ohio Energy Group (OEG), the Ohio Consumers' Counsel (OCC), and the Ohio Partners for Affordable Energy (OPAE). In addition, by that same entry a motion to admit David C. Rinebolt to practice *pro hac vice* in this proceeding was granted. Motions to intervene filed by Citizen Power, Inc. (Citizen Power) and the Industrial Energy Users-Ohio (IEU-Ohio), as well as a motion to admit William M. Ondrey Graber to practice *pro hac vice* in this proceeding, were granted at the hearing held on November 3, 2010.

At the November 3, 2010, hearing, a Stipulation and recommendation (Stipulation) entered into by the Companies, Staff, OP&A, O&G, and Citizen Power was filed in this proceeding (Joint Ex. 1). At the hearing, OCC stated that, although it was not a signatory party to the Stipulation, it did not oppose the Stipulation. I&U-Ohio subsequently filed correspondence indicating that it neither opposes nor supports the stipulation and recommendation.

II. Application and Comments

In the application, the Companies explain that, in *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, et al. (08-935), the Commission approved an electric security plan (ESP) for the Companies. The Companies note that Section 4928.143(F), Revised Code, requires the Commission to annually consider whether an electric distribution utility has earned significantly excessive earnings under its ESP. In the application, the Companies request that the Commission find that significantly excessive earnings did not result for the Companies under their ESP with respect to the annual period ending December 31, 2009. (FirstEnergy Ex. 1 at 1-2.)

The application and supporting testimony explain that, for purposes of the determination of significantly excessive earnings, net income and common equity were adjusted as contemplated by the stipulation in 08-935. Under the terms of that stipulation, adjustments should be made to net income and common equity in order to exclude the impact of the write-off of regulatory assets due to the implementation of the Companies' ESP, the revenues garnered under the Companies' delivery service improvement rider, a reduction in equity from any write-off goodwill, and deferred carrying charges. The application notes that no adjustments were made for the write-off of goodwill, but that, due to the ESP, adjustments were made to exclude approximately \$216 million of regulatory transmission charges and \$10 million of fuel-related regulatory assets. After making these adjustments, the application indicates that the Companies' 2009 earnings were \$79,050,396 for CEI, \$73,053,457 for OE, and \$18,569,765 for TE. The average common equity with adjustments for 2009 was \$1,523,705,651 for CEI, \$1,175,699,059 for OE, and \$484,621,117 for TE. The resulting return on equity for 2009 was 5.2 percent for CEI, 6.2 percent for OE, and 3.8 percent for TE. (FirstEnergy Ex. 2 at 5-8.)

The Companies further state that their 2009 returns on equity for SEET purposes are less than the 10.5 percent return on equity authorized by the

Commission in the Companies' most recent distribution rate case, while additionally pointing out that their returns are also below the "safe harbor" threshold of 200 basis points above the mean of the comparable group recognized by the Commission in 09-786. Finally, the Companies state that, because their earnings are not significantly excessive, they need not submit revenue information from their prior rate plans. (FirstEnergy Ex. 2 at 9-13.)

III. Stipulation

A Stipulation signed by the Companies, Staff, OPAE, OEG, and Citizen Power was submitted on the record, at the hearing held November 3, 2010 (Jt. Ex. 1). The Stipulation was intended by the signatory parties to resolve all outstanding issues in this proceeding. The Stipulation states that the earned returns on equity for the companies for 2009, as adjusted by specific items contemplated by the stipulation in 08-935, were CEI, 5.2 percent, Ohio Edison, 6.2 percent, and Toledo Edison, 3.8 percent. The Stipulation further states that, using the Commission-approved 200 basis point "safe harbor" above the return earned by comparable companies, 2009 returns on equity below the following amounts would not be significantly excessive: CEI, 12.49 percent, Ohio Edison, 11.90 percent, and Toledo Edison, 12.32 percent. On this basis, the stipulating parties recommend that the Commission determine that significantly excessive earnings under Section 4928.143(F), Revised Code, did not occur with respect to each of the Companies' ESPs in 2009. (Jt. Ex. 1 at 2.)

IV. Consideration of the Stipulation

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. See *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 125, citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155. The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, *et al.* (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (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?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559 (citing *Consumers' Counsel, supra*, at 126.) The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. (*Id.*)

Doris McCarter, chief of the Commission's Capital Recovery and Financial Analysis Division, testified that the Stipulation is a product of serious bargaining among capable, knowledgeable parties who have been involved in numerous complex matters before the Commission (Tr. 9-10). Therefore, upon review of the terms of the Stipulation, based on our three-prong standard of review, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is met.

With regard to the second criterion, Ms. McCarter asserts that the Stipulation efficiently resolves the application of the SEET to the Companies' returns on common equity and confirms that none of the Companies had excessive earnings in 2009 (Tr. 10). Further, the Stipulation is in the public interest because it avoids further litigation in this matter. Therefore, upon review of the Stipulation, we find that, as a package, it satisfies the second criterion.

Ms. McCarter also testified that the Stipulation does not violate any important regulatory principle or practice (Tr. 10). The Commission finds that there is no evidence that the Stipulation violates any important regulatory principle or practice and, therefore, the Stipulation meets the third criterion.

Accordingly, we find that the Stipulation entered into by the parties is reasonable and should be adopted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) The Companies are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On September 1, 2010, the Companies filed an application for the administration of the SEET, as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C.
- (3) On October 7, 2010, OCC, OEG and OP&E were granted intervention in this proceeding and David C. Rinebolt was granted admission *pro hac vice*. At the hearing on November 3, 2010, Citizen Power and I&E-Ohio were granted intervention, and William M. Ondrey Graber was granted admission *pro hac vice*.
- (4) On November 3, 2010, the Companies, Staff, OP&E, OEG, and Citizen Power filed a Stipulation that purports to resolve all of the issues in this proceeding.
- (5) The evidentiary hearing was held on November 3, 2010.
- (6) At the hearing, the Stipulation was submitted, intending to resolve all issues in this case. No one opposed the Stipulation and during the hearing OCC represented that, although it was not a signatory party to the Stipulation, it did not oppose the Stipulation. I&E-Ohio subsequently filed correspondence indicating that it neither opposes nor supports the stipulation and recommendation.
- (7) The Stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

ORDER:

It is, therefore,

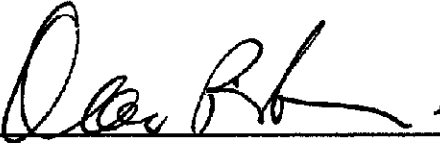
ORDERED, That the Stipulation filed in this proceeding be approved and adopted. It is, further,

ORDERED, That the Companies take all necessary steps to carry out the terms of the Stipulation and this order. It is, further,

ORDERED, That nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



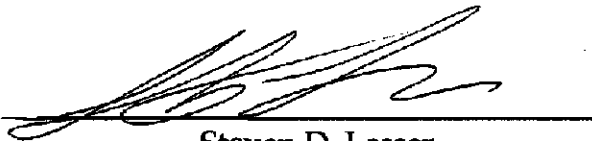
Alan R. Schriber, Chairman



Paul A. Centolella



Valerie A. Lemmie



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Cheryl L. Roberto

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Renee J. Jenkins
Secretary