

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company for Administration of the)
Significantly Excessive Earnings Test for) Case No. 17-1230-EL-UNC
2016 Under Section 4928.143(F), Revised)
Code, and Rule 4901:1-35-10, Ohio)
Administrative Code.)

**INITIAL BRIEF
BY
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I. INTRODUCTION

As part of the 2008 energy law, the General Assembly protected consumers by limiting a utility's earnings under electric security plans. While utilities may earn excessive profits, they may not earn significantly excessive profits. Under the law a utility must provide a refund to customers when its electric security plan earnings are significantly excessive.¹

Ohio Power Company (“AEP”) had significantly excessive earnings of over \$53 million in 2016.² Under Ohio law (R.C. 4928.143(F)) 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 Settlement³ that does not return a single dollar of the significantly excessive earnings to customers. That is unlawful and unreasonable.

The PUCO should reject the Settlement because it fails the PUCO’s three-part test for evaluating settlements. It was not the product of serious bargaining because the only

¹ R.C. 4928.143(F).

² OCC Ex. 3 (Duann Testimony in Opposition to the Settlement).

³ Joint Ex. 1.

signatory parties are AEP and the PUCO Staff, and they did not resolve any issues at dispute between them. It does not benefit customers or the public interest because it denies AEP's customers the \$53 million refund they deserve. And it violates regulatory principles and practices by causing customers to pay unjust and unreasonable rates.

The PUCO should adopt the Office of the Ohio Consumers' Counsel's ("OCC") recommendation for a \$53 million refund to customers. This is the just and reasonable result for Ohioans.

II. BURDEN OF PROOF AND STANDARD OF REVIEW

The applicant bears the burden of proof in PUCO proceedings.⁴ 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 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 Because this burden of proof is required by law, AEP must satisfy it whether there is a settlement or not.

In PUCO proceedings, a settlement is merely a recommendation that is not legally binding on the PUCO,⁷ 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

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.").

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).

⁶ R.C. 4928.143(F).

⁷ *Duff v. PUCO*, 56 Ohio St.2d 367 (1978); *see also* Ohio Adm. Code 4901-1-30(E).

consideration, but must determine what is just and reasonable from the evidence presented at the hearing.”⁸

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

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.

III. 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 But

⁸ *Duff*, 56 Ohio St.2d 367.

⁹ *See Consumers’ Counsel v. PUCO*, 64 Ohio St.3d 123, 126 (1992).

¹⁰ R.C. 4928.143(B)(2)(h).

the law is also designed to protect consumers by limiting the amount of profit that the utility can charge them under its ESP.¹¹

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 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 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

AEP had significantly excessive earnings of more than \$53 million in 2016.¹⁵ The law requires AEP to return that amount to customers.

IV. RECOMMENDATIONS

A. The PUCO should reject the proposed Settlement because it is not the product of serious bargaining.

The Settlement is not the product of serious bargaining because no bargaining occurred in this case. Black's Law Dictionary defines a "settlement" as "an agreement ending a dispute or lawsuit."¹⁶ It likewise defines a "stipulation" as a "voluntary agreement between opposing parties concerning some relevant point; [especially] an

¹¹ OCC Ex. 3, Attachment DJD-1 at 5 ("As envisioned by the Ohio General Assembly, the annual SEET review provides an important and essential safeguard to protect Ohio's electricity customers from unwarranted charges.").

¹² 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").

¹³ *Id. See also In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690 ¶1.

¹⁴ R.C. 4928.143(F).

¹⁵ OCC Ex. 3 at 9.

¹⁶ Black's Law Dictionary 1404-1405 (8th Ed. 2007).

agreement relating to a proceeding, made by attorneys representing adverse parties to a proceeding.”¹⁷

Under each of these definitions, the key point is that for a settlement or stipulation to exist, there must be a dispute between the parties to the settlement. When parties that are wholly aligned agree on something, they don’t “settle” anything when they simply acknowledge their alignment. Consider a class action lawsuit where multiple plaintiffs are suing a defendant and seeking \$100 million in damages. Surely, the judge overseeing the case would give no weight to a proposed settlement signed by only the plaintiffs stating: “the signatory parties agree that defendant owes the plaintiffs \$100 million.”

Yet that is what is happening here. The PUCO Staff and AEP have never been adverse parties in this case. Before their proposed Settlement, AEP filed the direct testimony of William Allen. Mr. Allen concluded that AEP owed no refund to customers.¹⁸ Before the proposed Settlement, the PUCO Staff filed the direct testimony of Joseph Buckley. Like Mr. Allen, Mr. Buckley also concluded that AEP owed no refund to customers.¹⁹ The Settlement merely restates the parties’ concurring positions.

The Settlement does not even purport to resolve the one issue that the PUCO Staff and AEP disagree on. In pre-Settlement testimony, AEP witness Allen calculated a 2016 SEET ROE threshold of 17.69%, while PUCO Staff witness Buckley calculated a 2016 SEET ROE threshold of 16.08%.²⁰ But the proposed Settlement does not adopt either of these calculations.²¹ In fact, the Settlement does not adopt *any* 2016 SEET ROE

¹⁷ Black’s Law Dictionary 1455 (8th Ed. 2007).

¹⁸ AEP Ex. 4 at 7 (Allen Direct).

¹⁹ Staff Ex. 1 at 2 (Buckley Direct).

²⁰ Joint Ex. 1 at 4-5.

²¹ *Id.*

threshold. Because the signatory parties do not agree on the 2016 SEET ROE threshold, there is no settlement of that issue. The proposed Settlement is just a summary of the previously-filed testimony of AEP and the PUCO Staff.

The PUCO Staff and AEP did not seriously bargain for anything. This is evident from the face of the Settlement, which does nothing more than acknowledge that the PUCO Staff and AEP have never been adverse parties in this case.

B. The PUCO should reject the proposed Settlement because it harms consumers and the public interest by allowing AEP to keep \$53 million in significantly excessive earnings.

If properly applied in this case, the significantly excessive earnings test requires AEP to provide a \$53 million refund to customers. The Settlement, however, proposes 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.

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.²² Therefore, the signatory parties' conclusion that AEP's 2016 earnings were not significantly excessive is wrong.

²² OCC Ex. 3 at 5-6, 9-10; OCC Ex. 3, Att. DJD-1 at 9-10, 12-13.

1. In violation of R.C. 4928.143(F), the signatory parties did not compare AEP's earnings to those of companies that face comparable business and financial risk when applying the SEET.

One step in the SEET is identifying a group of “publicly traded companies, including utilities, that face comparable business and financial risk” to AEP.²³ The earnings of this group are then compiled and an adder is applied to establish a SEET threshold, which is the level of earnings above which anything earned by AEP is considered significantly excessive.²⁴ AEP used a group of 28 companies, but four of those companies (FirstEnergy Corp., Entergy Corp., AES Corp., and NRG Energy) were undergoing significant restructurings in 2016.²⁵ AEP was not similarly restructuring in 2016, so those companies are not comparable.²⁶ By including the four companies, AEP’s analysis resulted in an unreasonably high return on common equity standard deviation (4.27%), which inflated AEP’s subsequent calculation of the SEET threshold to an unreasonable 17.69%.²⁷

The PUCO Staff initially used the same group of 28 companies and found that the average return on common equity was 5.71%.²⁸ But the PUCO Staff also found that the standard deviation was an unreasonable 20.73%.²⁹ Using this unwarranted methodology,

²³ R.C. 4928.143(F).

²⁴ *Id.*

²⁵ OCC Ex. 3 at 19-20; OCC Ex. 3, Att. DJD-1 at 16 (“These four companies are FirstEnergy Corp., Entergy Corp., AES Corp., and NRG Energy. In 2016, they all posted either unusually large accounting losses or significant decreases or increases in shareholders’ equity due to restructurings.”).

²⁶ *Id.*

²⁷ *Id.* at 17.

²⁸ Staff Ex. 1 at JBP-1.

²⁹ *Id.*

the PUCO Staff arrived at a SEET threshold of 39.70%, which is absurd on its face.³⁰ Indeed, the PUCO has previously found that a SEET threshold of 22.51% was “unrealistic and indefensible.”³¹

PUCO Staff witness Buckley then removed three of the four restructuring companies from his analysis,³² though only “very reluctantly.”³³ Mr. Buckley’s updated analysis remained unlawful, however, because by keeping Entergy in the analysis, he included a company that did not face comparable business and financial risk to AEP in 2016.³⁴

To properly apply the law, the PUCO must adopt OCC witness Duann’s group of comparable companies.³⁵ Dr. Duann started with the same list of 28 companies as the signatory parties, but then properly removed all four of the companies that were undergoing significant restructurings in 2016.³⁶ As a result of their restructuring activities, these four companies did not have comparable business and financial risk to AEP and thus cannot be included in the SEET under R.C. 4928.143(F).³⁷

2. AEP understated its 2016 earnings to avoid providing a refund to customers, and the Settlement unreasonably adopts two AEP adjustments without modification.

In order to avoid a finding of "significantly excessive earnings" for 2016, AEP made two unreasonable adjustments to decrease its 2016 earnings. AEP’s first

³⁰ Staff Ex. 1 at JBP-1.

³¹ *See In re Application of Columbus S. Power Co. & Ohio Power Co. for Administration of the Significantly Excessive Earnings Test*, Case No. 10-1261-EL-UNC, Opinion & Order (Jan. 11, 2011)

³² Staff Ex. 1 at JBP-1A.

³³ Tr. at 83:16-23 (Buckley Cross).

³⁴ OCC Ex. 3 at 19-20.

³⁵ OCC Ex. 3 at 19-20; OCC Ex. 3, Att. DJD-1 at 16.

³⁶ *Id.*

³⁷ *Id.*

unreasonable adjustment attempts to shift certain 2016 earnings out of 2016 and back to 2014. In 2014, AEP recorded an accounting provision (a liability) because it expected to issue a refund to customers for having significantly excessive earnings that year.³⁸ In 2016 (the time period at issue in this case), AEP reversed this bookkeeping which resulted in \$21.4 million in earnings—\$13.8 million after taxes—for AEP in 2016.³⁹ AEP, however, excluded this amount from its 2016 earnings, reasoning that these earnings are actually attributable to 2014.

The problem with this adjustment, as OCC witness Duann points out, is that these earnings were not counted for purposes of AEP's 2014 SEET.⁴⁰ AEP's reversal of the 2014 SEET refund provision was made in 2016, and the effect of increasing the per-book earnings as a result of the reversal cannot now be recorded and reported in AEP's 2014 financial statements.⁴¹ In other words, if the PUCO adopts AEP's adjustment, these earnings will never have been included in any significantly excessive earnings review for AEP. The PUCO should reject this proposed adjustment to lower AEP's reported SEET earnings for 2016.

AEP's second unreasonable adjustment removes earnings of \$14.7 million that AEP charged consumers for Phase in Recovery Rider ("PIRR") equity carrying charges during the period of July 2016 through December 2016.⁴²

There is no dispute that AEP actually earned this amount in 2016. OCC witness Duann testified that these previously uncollected incremental PIRR equity carrying

³⁸ AEP Ex. 3 (Ross Direct) at 10.

³⁹ *Id.*

⁴⁰ OCC Ex. 3 at 15; OCC Ex. Att. DJD-1 at 9.

⁴¹ OCC Ex. 3 at 15.

⁴² AEP Ex. 3 at 11 (Ross Direct).

charges were collected in 2016 and have never previously been recorded by AEP.⁴³ And AEP witness Allen claims that these amounts “should have been earned in years 2012 through 2015” but were in fact booked in 2016.⁴⁴

As with AEP’s first adjustment, if the PUCO were to adopt this adjustment, these PIRR carrying charges would *never* be included in any significantly excessive earnings review for AEP.

Nothing in the law allows a utility to shield earnings from SEET review by shifting them from the period under review to a prior period that has already been resolved. The PUCO should reject AEP’s unlawful adjustments and should instead adopt OCC witness Duann’s analysis, which accounts for AEP’s entire earnings under the electric security plan, consistent with the law and establishes refunds to customers based on those overearnings.

Under Dr. Duann’s analysis, AEP’s 2016 SEET earnings result in a return on common equity of 16.23%.⁴⁵ The PUCO should adopt this as AEP’s return on common equity for this case. It should conclude that AEP owes a \$53 million refund to customers.

3. The Settlement delayed resolution of this case and in the process harmed customers and the public interest.

The signatory parties submitted the testimony of a single witness (William Allen) in support of the Settlement.⁴⁶ Mr. Allen testified that the Settlement satisfies the second part of the PUCO’s three-part test. The entirety of his testimony on the second part is one

⁴³ OCC Ex. 3 at 16; Att. DJD-1 at 10.

⁴⁴ AEP Ex. 5 at 6 (Allen Supplemental); See also AEP Ex. 3 at 11.

⁴⁵ OCC Ex. 3, Att. DJD-1 at 11.

⁴⁶ AEP Ex. 5.

sentence. The only purported benefit to customers or the public interest, according to Mr. Allen, is that the Settlement resolved this case “in a timely manner.”⁴⁷

AEP did not, and cannot, demonstrate that the proposed Settlement actually resolved this case any more timely than if there were no Settlement. To the contrary, the proposed Settlement extended the time to resolve this case. Parties filed testimony and were set to go to hearing on February 6, 2018.⁴⁸ That hearing was delayed by two months for the Settlement, which did not resolve any of the issues at dispute in this case (because, as discussed above, the Settlement is between only AEP and the PUCO Staff, and they never had a dispute in the first place). If expediency is the sole benefit to consumers from the proposed Settlement, then consumers would have been better off without it. This alleged benefit to the public of resolving this case in a timely manner is nonexistent, and no other benefit to consumers or the public interest is identified in the record. Because the proposed Settlement harms consumers and fails the second part of the PUCO’s three-part test for determining the reasonableness of a stipulation, it should be rejected.

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

Ohio law requires utilities to charge just and reasonable rates.⁴⁹ The proposed Settlement would allow AEP to overcharge consumers and keep its significantly excessive earnings for the year 2016. 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. AEP had the option to offer market-based rates or an ESP subject to the SEET, and chose to be subject

⁴⁷ AEP Ex. 5 at 4 (Allen Supplemental).

⁴⁸ See AE Entry (Dec. 7, 2017) at ¶5.

⁴⁹ R.C. 4905.22.

to the SEET. 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.”⁵⁰ 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.

Further, 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.⁵¹ The proposed Settlement violates each of these state policies. The proposed Settlement would allow AEP to sidestep refunding its customers \$53,119,070, which is the amount that AEP overcharged them. This is not providing reasonably priced retail electric service, protecting at-risk populations, or facilitating the state’s effectiveness in the global economy.

The PUCO’s three-part test for determining the reasonableness of a proposed stipulation requires the PUCO to determine if the proposed Settlement violates Ohio law and important regulatory principles. State law and important regulatory principles both require AEP to carry the burden of proof and demonstrate that it did not have significantly excessive earnings. This burden of proof should also include a demonstration that AEP’s calculations and methodologies comply with generally accepted accounting principles. Yet AEP makes numerous adjustments to its 2016

⁵⁰ *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690 at ¶30.

⁵¹ See R.C. 4928.02(A), (L), and (N).

earnings without any explanation or demonstration that such adjustments generally comply with the basic principles of accounting.

The PUCO should reject AEP's proposed \$13.8 million and \$14.7 million adjustments to its 2016 earnings. These unsupported adjustments are a thinly-veiled attempt by AEP to shift its 2016 earnings to prior years (that can no longer be reviewed for SEET purposes) to avoid refunding customers the amount that AEP overcharged them.

D. AEP's proposal to keep \$31.2 million in significantly excessive earnings because they relate to energy efficiency programs is unlawful.

AEP proposes that if the PUCO determines that a refund is warranted in this case, AEP should retain \$31.2 million in profit that it earned from its energy efficiency and peak demand reduction programs.⁵² AEP's request for excluding such a large amount resulting from its significantly excessive earnings in 2016 is unlawful, unreasonable, does not benefit customers or the public interest, and should be rejected.

AEP's energy efficiency rider is part of its previously-approved ESP, and AEP charged customers for the program costs through a rider approved in AEP's ESP.⁵³ R.C. 4928.143(F) requires the PUCO to compare AEP's 2016 earnings to those of comparable companies. There is no exception for earnings related to energy efficiency programs. The PUCO must follow the law. Earnings from energy efficiency programs are earnings. They cannot be excluded from the SEET.⁵⁴

⁵² AEP Ex. 4 at 6.

⁵³ See *In re Application of Ohio Power Co. for Authority to Establish a Standard Service Offer*, Case No. 13-2385-EL-SSO, Opinion & Order at 68 (Feb. 25, 2015).

⁵⁴ See *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690 at ¶40.

V. CONCLUSION

AEP bears the statutory burden of proving that its 2016 earnings were not significantly in excess of those earned by comparable companies. 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 2016 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.

The PUCO should reject the Settlement and instead order AEP to refund \$53,119,070 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 1st day of May 2018.

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