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 2016 Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code.	)))))	Case No. 17-1230-EL-UNC

INITIAL POST-HEARING BRIEF OF OHIO POWER COMPANY IN SUPPORT OF THE STIPULATION AND RECOMMENDATION

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TABLE OF CONTENTS

INTRODUCTION 1

STANDARD OF REVIEW 3

ARGUMENT 4

I. The Stipulation satisfies the three-part test for evaluation of contested settlements. 4

A. The Stipulation is the product of serious bargaining among capable, knowledgeable parties. 4

B. The Stipulation as a package benefits ratepayers and the public interest. 6

C. The Stipulation does not violate any important regulatory principles or practices. 10

1. The Stipulations recommendation that AEP Ohio's 2016 adjusted SEET ROE was 14.97% does not violate any important regulatory principle or practice. 10

a. AEP Ohio's exclusion of income related to the June 2016 reversal of its 2014 SEET provision (Adjustment 2) is proper for SEET purposes. 12

b. AEP Ohio's exclusion of income related to its adjustments to book earnings for PIRR equity carrying charges (Adjustment 3) is proper for SEET purposes. 15

2. The Stipulation SEET threshold range does not violate any important regulatory principle or practice. 16

CONCLUSION 19

CERTIFICATE OF SERVICE

INTRODUCTION

This case concerns the Public Utilities Commission of Ohio's ("Commission") review of Ohio Power Company's ("AEP Ohio" or the "Company") earnings for the year 2016 pursuant to the statutory significantly excessive earnings test (SEET) set forth in R.C. 4928.143(F). AEP Ohio and Commission Staff agree that the Company's 2016 earned return on equity (ROE) does not constitute significantly excessive earnings under the SEET and filed a Stipulation and Recommendation ("Stipulation") to that effect on February 13, 2018. The Office of the Ohio Consumers' Counsel ("OCC") opposes the Stipulation because the settlement agreeing no refund is appropriate does not result in a refund to AEP Ohio customers.

The three-part test that the Commission applies when considering a contested settlement is well-established. Yet, OCC persistently attempts to modify the test and skew test results against adoption of settlements, which OCC typically opposes. This case is no different. OCC claims that the Stipulation does not satisfy prong one of the test – even though OCC does not dispute that settlement negotiations occurred among all three capable, knowledgeable parties leading up to the Stipulation – because it disagrees with the terms of the Stipulation. The undisputed evidence shows that prong one is met.

Regarding the test's second prong, OCC witness Dr. Duann erroneously maintains that there is only a customer benefit if this case results in a refund or a refund equivalent. But performing the statutory test and confirming the absence of significantly excessive earnings, by itself, is enough to promote the public interest. Staff's support of the Stipulation also confirms that the Stipulation's proposed resolution advances the public interest, as Staff looks out for the public interest and that of all customers. As detailed below, the Stipulation incorporated the presentation of the entirety of Company/Staff testimony in order to promote a full evidentiary

record and a more robust set of information and evidence to facilitate the Commission's decision. This approach serves the public interest and benefits customers by helping the Commission verify that all aspects of the SEET have been administered in a robust and transparent manner. The Stipulation's proposed resolution of the 2016 SEET benefits customers and the public interest by facilitating resolution of this case in a timely and efficient manner.

Finally, the Stipulation satisfies the test's third prong and does not violate any important regulatory principle or practice. It is clear that the Stipulation satisfies the third prong because the 2016 SEET ROE and SEET thresholds included in the Stipulation were consistent with the approaches and results that the Commission has accepted and endorsed in previous SEET cases. OCC's positions regarding the Company's adjustments to determine the 2016 SEET ROE are unreasonable and, if followed, would impair the benefit of the Global Settlement that the Company, OCC, and numerous other stakeholders signed, and which the Commission approved. Such an outcome would create a strong disincentive for the Company to settle issues remanded from the Supreme Court of Ohio. OCC witness Duann's approach to the SEET threshold is results-oriented and does not comport with R.C. 4928.143(F). None of OCC's arguments refutes that the Stipulation does not violate any important regulatory principle or practice. The Commission should follow the well-established three-part test for consideration of contested settlements and approve the Stipulation without modification.

STANDARD OF REVIEW

Rule 4901-1-30 of the Ohio Administrative Code authorizes parties to Commission proceedings to enter into stipulations. Although stipulations are not binding on the Commission, their terms are accorded substantial weight. *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992) ("*Consumers' Counsel*"), citing *City of Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). That is especially true where, as here, the stipulation is supported or unopposed by the majority of parties in a proceeding. *See In re Application of Columbus S. Power Co.*, Case No. 09-1089-EL-POR, Opinion and Order at 20 (May 13, 2010) ("*In re Columbus S. Power Co.*"). Although the Commission may place substantial weight on the terms of a stipulation, it must determine from the evidence what is just and reasonable. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, 950 N.E.2d 164, ¶ 19.

In evaluating a contested settlement, the Commission applies a well-established three-part test:

(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?

In re Columbus S. Power Co. at 21 (citing numerous cases in support of this standard). The Ohio Supreme Court has repeatedly approved this three-part test. *See, e.g.*, *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. Applying the three-prong test, the Commission should approve and adopt the Stipulation filed in this case.

ARGUMENT

I. The Stipulation satisfies the three-part test for evaluation of contested settlements.

A. The Stipulation is the product of serious bargaining among capable, knowledgeable parties.

The first prong of the three-part tests asks whether a settlement is "a product of serious bargaining among capable, knowledgeable parties." *In re Columbus S. Power Co*. at 21. The Stipulation here meets this standard. OCC's testimony to the contrary is unavailing, and the Commission should find that prong one is satisfied.

AEP Ohio witness Allen testified that the Stipulation is the product of serious bargaining among capable and knowledgeable parties. AEP Ohio Ex. 5 at 4. Mr. Allen testified that the three parties to the case – the Company, Staff and OCC – discussed and considered various options for resolving the issue presented. *Id*. As a result of the discussions, Staff and the Company entered into the Stipulation. *Id*. Mr. Allen also confirmed that all parties regularly and actively participate in Commission proceedings and are capable, knowledgeable parties. *Id*. Thus, Mr. Allen concluded that the first prong is met.

OCC witness Dr. Duann claims that the first prong is not satisfied – but his position is based on a misguided portrayal of what the first prong requires. The basis of Dr. Duann's conclusion that the first prong is not satisfied, as reflected in his pre-filed testimony, is that the "interests of the residential customers, who will be directly affected by this proposed settlement, are not addressed or represented at all in the proposed Settlement." OCC Ex. 5 at 7-8. Dr. Duann's pre-filed testimony goes on to clarify that two aspects of the Stipulation that support his conclusion are the SEET threshold (which he believes is too high) and the adjusted SEET earnings (which he believes are too low). *Id.* at 8. According to Dr. Duann, "[t]hese two examples demonstrate that the proposed Settlement does not give consideration to the interests of

AEP's customers, and it does not represent a reasonable compromise of the competing positions among the parties." *Id*. In other words, Dr. Duann's assertion that prong one is not met is based entirely on the substantive results reached in the Stipulation (at least as he perceives them).

OCC's argument misses the mark and completely fails to address prong one's requirements. The first prong does not judge the merits of a stipulation's substantive terms. Although the second and third prongs do incorporate a review of the merits of a stipulation, the first prong reviews the settlement process and confirms the regulatory experience of the signatory parties. So while AEP Ohio will separately demonstrate in the discussion of prong two that Dr. Duann is wrong in claiming that the Stipulation does not reflect customer interests, the merits of the substantive results reached in the Stipulation are not the focus of the first prong discussion. And if Dr. Duann were correct (that a settlement that aligns with the litigation position of certain parties "does not represent a compromise of competing positions among the parties," *see* OCC Ex. 5 at 8), the result would support the perverse and illogical conclusion that parties could never enter into a settlement that reflects their litigation positions. Ironically, Dr. Duann criticizes Mr. Allen's testimony as being "just a rehash of the previously-filed testimony," OCC Ex. 5 at 10, when Dr. Duann's Stipulation testimony plainly reiterates OCC's original litigation position and fully incorporates Dr. Duann's original testimony into his testimony addressing the Stipulation (attaching the direct testimony in full). In any case, AEP Ohio and Staff satisfied the three-part test that controls, and there is no component of the test that requires a compromise of competing positions that differs from each party's litigation position.

More relevant to prong one, even Dr. Duann readily admitted during cross examination that settlement discussions occurred between the three parties – including OCC. Tr. at 93-94. This confirms Mr. Allen's testimony (discussed above) that the three parties to the case

negotiated various options for resolving the issue presented. Given the straightforward issues presented in this case, the nature and extent of settlement negotiations was appropriate and reasonable here. Given the binary and quantitative question in this case (*i.e.*, whether the Company's 2016 earnings are significantly excessive), there was no need to compromise on the outcome-determinative question or provide some level of refund as advocated by OCC. In sum, the undisputed evidence of record shows that the Stipulation was the product of serious bargaining among capable, knowledgeable parties as required by the first prong of the settlement test.

B. The Stipulation as a package benefits ratepayers and the public interest.

As AEP Ohio witness Allen testified, the Stipulation satisfies the three-part test's second prong and benefits customers and the public interest by resolving this case in a timely manner, which supports administrative efficiency, and in a manner consistent with past Commission cases. AEP Ohio Ex. 5 at 4. OCC witness Duann disagrees with these points and offers the view that the second prong is only served if the Stipulation includes either a SEET refund or an alternative benefit to customers "that counterbalances and compensates customers" in a way that is equivalent to such a refund. OCC Ex. 5 at 9. Contrary to OCC witness Duann's view, imposing a refund obligation on the EDU is not required to advance the public interest in a SEET case. Dr. Duann's position is like saying the outcome of a base rate case is not just and reasonable if it results in a rate increase. Applied in the present context, such a requirement would undermine the very purpose of the statutory test that is being applied in this case and create a situation where an EDU that did not have significantly excessive earnings would be unable to settle a SEET proceeding without paying a refund that it did not owe. Such a result would plainly be unjust and would deter stipulations. In reality, all that is required under the second prong of the settlement test is a just and reasonable result that serves the public interest.

Because the SEET is a statutory consumer protection mechanism adopted by the General Assembly, the Commission's administration of the SEET necessarily advances the public interest – without regard to the outcome of the test results in a given year. Performing the statutory test to confirm the absence of significantly excessive earnings, by itself, is enough to promote the public interest.

Moreover, the Stipulation incorporated presentation of the entirety of Company/Staff testimony in order to promote a full evidentiary record and a more robust set of information and evidence to facilitate the Commission's decision. Paragraph IV.A of the Stipulation, the first recommendation made by the Signatory Parties, is that the testimony of Staff and Company witnesses be sponsored and admitted as evidence (subject to cross examination). *See* Jt. Ex. 1 at 4. And the Company's full set of witnesses appeared at the hearing and sponsored and defended their testimony in full, such that the Attorney Examiner duly admitted all of the pre-filed testimony in the evidentiary record. This approach serves the public interest and benefits customers by helping the Commission verify that all aspects of the SEET were administered in a robust and transparent manner.

AEP Ohio witness Moore addressed the factors of "other considerations" set forth in the SEET guidelines. *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, Finding and Order (June 30 2010) at 29. Ms. Moore's testimony demonstrates how AEP Ohio is advancing Ohio energy policy, consistent with R.C. 4928.02, by pursuing development of 900 MW of renewable energy projects, deploying gridSMART Phase 2 investments throughout its service territory, conveying significant benefits on its customers through energy efficiency and related programs, making significant capital investments in its

service territory, and making material tax, economic development and philanthropic contributions to the State of Ohio. AEP Ohio Ex. 2 at 4-8 and Ex. AEM-1. AEP Ohio witness Moore also showed how the Company is exposed to generation risk, regulatory risk, and weather and economic risks. *Id.*

AEP Ohio witness Ross testified in support of the Company's 2016 book earnings and explained each of the three adjustments the Company made for SEET purposes. AEP Ohio Ex. 3 at 3-12. First, the Company removed the $17.9 million net-of-tax loss related to the Global Settlement, which increased SEET earnings for 2016; OCC does not contest this adjustment. Second, the Company removed $13.8 million of net-of-tax income to reverse a 2014 earnings provision relating to the 2014 SEET case, triggered by a 2016 decision by the Supreme Court of Ohio. Third, the Company removed $14.7 million of net-of-tax income for incremental Phase-In Recovery Rider equity carrying charges recorded from July 2016 through December 2016 relating years prior to 2016 and collected during 2016 after the Commission issued a remand order in compliance with a separate Supreme Court reversal. The latter two adjustments that OCC challenges will be further discussed below in response to OCC's argument that the adjustments violate an important regulatory policy or principle. *See* Section C.1, *infra*.

And AEP Ohio witness Allen sponsored and defended his original direct testimony, in addition to sponsoring his supplemental testimony in support of the Stipulation. Mr. Allen's Direct Testimony presented the comparable risk group of publicly traded companies. AEP Ohio Ex. 4 at 4-5 and Ex. WAA-1. Mr. Allen also supplemented the "other factors" set forth in AEP Ohio witness Moore's testimony (summarized above) regarding shared savings incentive retained by the Company in accordance with the approved EE/PDR portfolio plan; this point

remains pertinent only if the Commission were otherwise considering a finding of significantly excessive earnings for 2016. *Id*. at 6.

The Company's robust evidentiary presentation in support of the Stipulation and the finding of no significantly excessive earnings for 2016 promotes the public interest and benefits the Company's customers. Staff's support of the Stipulation also confirms that the Stipulation's proposed resolution advances the public interest, since Staff looks out for the public interest and that of all customers. Staff is an unbiased, independent expert and performs the SEET for all of the EDUs. Obviously, the Commission relies on its Staff for such matters, and it is significant and noteworthy that Staff is a Signatory Party to the Stipulation. In his testimony, Staff witness Buckley supports a finding of no significantly excessive earnings for 2016. Staff Ex. 1 at 2.

As Mr. Allen testified, the Stipulation proposal achieves a result consistent with past SEET decisions. The Company and Staff demonstrate compliance with the SEET guidelines and prior adjudicated SEET decisions. This is shown below in response to OCC's claim that the Stipulation violates important regulatory principles or practices by endorsing SEET earnings that are too low (in OCC's opinion) and a SEET threshold that is too high (in OCC's opinion). *See* Section C, *infra*.

Moreover, AEP Ohio witness Allen testified that the Stipulation's proposed resolution of the 2016 SEET benefits customers and the public interest by facilitating resolution of this case in a timely and efficient manner – even though OCC opposes the Stipulation. AEP Ohio Ex. 5 at 4. If no settlement had been reached between Staff and the Company and the issues were fully litigated, there would have been additional data requests issued by Staff; additional testimony filed, additional cross examination conducted, and additional briefing by Staff on each area of disagreement. But due to the Stipulation and the common conclusion of that the Company did

not have significantly excessive earnings in 2016, Staff and the Company did not need to litigate those issues in a full-blown adversarial manner. This clearly promotes administrative efficiency. OCC's view that administrative efficiency is only served if OCC joins a settlement is untenable and has no basis in Commission precedent.

In sum, the Stipulation as a package benefits ratepayers and the public interest.

C. The Stipulation does not violate any important regulatory principles or practices.

The Stipulation also satisfies the third prong of the settlement test. As AEP Ohio witness Allen testified, the third prong is satisfied because AEP Ohio's 2016 SEET ROE and the SEET thresholds included in the Stipulation were calculated consistent with the manner accepted by the Commission in the Company's previous SEET cases. *Id.* at 5. OCC's challenges to the SEET ROE and threshold are flawed in several respects, do not refute that prong three has been satisfied, and should be disregarded.

1. The Stipulation's recommendation that AEP Ohio's 2016 adjusted SEET ROE was 14.97% does not violate any important regulatory principle or practice.

The Signatory Parties have agreed that AEP Ohio's 2016 adjusted SEET ROE was 14.97%. Jt. Ex. 1 at 4 (§IV.B); AEP Ohio Ex. 3 at 12 and Ex. THR-1; Staff Ex. 1 at 3. AEP Ohio witness Ross described the steps that the Company took to arrive at the 2016 SEET ROE. AEP Ohio Ex. 3 at 4-12. The first step of that analysis was to remove the $58.3 million estimated pre-tax 2016 SEET provision for refund, which was the result of including that amount in the Company's 2016 per-books earnings. *Id.* at 4; Tr. at 96. This adjustment is consistent with the approached that AEP Ohio used in its 2014 SEET filing. AEP Ohio Ex. 3 at 4-5. OCC supports this adjustment. Tr. at 95-96.

In Case No. 09-786-EL-UNC, the Commission directed that, "for the SEET calculation, [an EDU's] earned return will equal the electric utility's profits after deduction of all expenses, * * *and excluding any non-recurring, special, and extraordinary items. *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, Finding and Order at 18 (June 30, 2010). Consistent with that directive, Mr. Ross made three additional adjustments to exclude the following non-recurring, special, and extraordinary items that were recorded on AEP Ohio's books in 2016 from the Company's 2016 SEET ROE:

Adjustment 1: Exclusion of the $17.9 million net-of-tax loss related to the December 2016 impacts of the Joint Stipulation and Recommendation filed in Case No. 09-872-EL-FAC, *et al.*, on December 21, 2016 ("Global Settlement"). AEP Ohio Ex. 3 at 5-10.

Adjustment 2: Exclusion of $13.8 million of net-of-tax income related to the June 2016 reversal of AEP Ohio's 2014 SEET provision. *Id.* at 5, 10.

Adjustment 3: Exclusion of $14.7 million of net-of-tax income for incremental Phase-In Recovery Rider (PIRR) equity carrying charges recorded from July through December 2016 that related to years prior to 2016. *Id.* at 6, 11-12.

Each of the above adjustments was reasonable and proper for SEET purposes. Staff witness Buckley affirmed that the Company's 2017 SEET ROE calculation is "in conformity with the SEET calculation provisions contained in Ohio Power Company's electric security plan and an accurate representation of Ohio Power Company's 2016 earnings." Staff Ex. 1 at 3. AEP Ohio witness Allen further explained that the methodology employed to determine the SEET ROE "is based on the approach established by the guidance presented in Case No. 09-786-EL-UNC and subsequent Commission orders." AEP Ohio Ex. 5 at 3.

OCC agrees that Adjustment 1 was appropriate. Tr. at 95; OCC Ex. 3 at Att. DJD-1, p. 8. OCC witness Duann's criticisms of Adjustments 2 and 3 are without merit and are inconsistent

with the Global Settlement to which OCC agreed. Notably, although OCC witness Duann vaguely opines that the Stipulation fails to satisfy the third prong of the settlement test, *see* OCC Ex. 3 at 10-12, he specifically agreed at the evidentiary hearing that he is <u>not</u> testifying that either Adjustment 2 or Adjustment 3 violates any important regulatory principle or practice. Tr. at 115-116. And neither adjustment does. Both adjustments qualify as exclusions from SEET earnings because they are "non-recurring, special and extraordinary items" as defined in the Commission's June 301, 2010 Finding and Order in Case No. 09-786-EL-UNC, as set forth below. AEP Ohio Ex. 5 at 6-7.

a. AEP Ohio's exclusion of income related to the June 2016 reversal of its 2014 SEET provision (Adjustment 2) is proper for SEET purposes.

AEP Ohio properly excluded the June 2016 reversal of its 2014 SEET provision from 2016 SEET earnings. Company witness Ross explained that AEP Ohio recorded the 2014 SEET provision for refund in 2014, as a result of the Commission's order in AEP Ohio's *ESP II* case,[1] which set the Company's SEET ROE threshold at 12% for the term of ESP II. AEP Ohio Ex. 3 at 10. AEP Ohio appealed the 12% SEET threshold to the Supreme Court of Ohio, which reversed and remanded the issue on April 21, 2016. *Id.*; *In re. Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, ¶ 66. Based on the Ohio Supreme Court's decision, AEP Ohio management concluded that a 2014 SEET refund was no longer probable, and AEP Ohio reversed the 2014 SEET provision in June 2016. AEP Ohio Ex. 3 at 10.

The reversal of the 2014 SEET provision had the effect of counting the 2014 SEET provision in AEP Ohio's 2016 per-books earnings. Tr. at 28. That reversal, however, related to income earned in 2014 that was not representative of 2016 SEET earnings. *Id.* at 27-28. Thus,

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[1] Case No. 11-346-EL-SSO, *et al*.

as Mr. Ross explained, the reversal should be excluded from 2016 SEET earnings. Moreover, and consistent with the Company's SEET ROE calculation in this case, AEP Ohio removed the 2014 SEET provision in its 2014 SEET analysis in Case No. 15-1022-EL-UNC, which had the result of including that amount in the Company's 2014 SEET earnings. AEP Ohio Ex. 5 at 5; Tr. at 97 (OCC witness Duann agreeing that AEP Ohio removed the 2014 SEET provision in order to determine 2014 SEET earnings). It would be inappropriate to include the 2014 SEET provision earnings in both the Company's 2014 SEET earnings and again in 2016 SEET earnings. As Mr. Allen aptly explained: "The same dollars cannot be included in SEET earnings in two years." AEP Ohio Ex. 5 at 5; *see also* AEP Ohio Ex. 3 at 10.[2]

Despite having filed testimony in the 2014 SEET case and conceding that AEP Ohio removed the 2014 SEET provision when calculating its 2014 SEET earnings, *see* Tr. at 96-97, OCC witness Duann advances an opportunistic and intellectually flawed argument that there supposedly "is no factual basis" that the 2014 SEET provision was counted in 2014 SEET earnings because the Commission did not make a specific determination regarding the amount of AEP Ohio's 2014 SEET earnings. OCC Ex. 3 at Att. DJD-1, p. 13-15. Dr. Duann's argument conveniently disregards that the Commission did not make a specific determination regarding the amount of AEP Ohio's 2014 SEET earnings only because the 2014 SEET Case was among the numerous cases resolved through the Global Settlement, to which OCC was a signatory party. Thus, in addition to being factually erroneous, Dr. Duann's argument contradicts the Global Settlement, and OCC should be estopped from advancing it.

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[2] OCC witness Duann stubbornly refused at hearing to concede that the same income should not be counted in two different years' SEET ROE calculations. Tr. at 94-95.

As noted above, OCC was a supporting Signatory Party to the Global Settlement and filed testimony specifically in support of that settlement. *See* Case No. 10-2929-EL-UNC, *et al.*, Order on Global Settlement Stipulation at 4-5 (Feb. 23, 2017) ("Global Settlement Order"). The Signatory Parties to the Global Settlement – including OCC – expressly agreed that the Global Settlement resolved both the Supreme Court's reversal of the 12% SEET threshold in the *ESP II* Case and the 2014 SEET Case. *Id.* at 27. They further agreed that $20.3 million would be returned to customers in order to resolve the Company's 2014 SEET Case. *Id.* at 28. Although Dr. Duann may not consider refund provisions in the Global Settlement to be a benefit to customers,[3] it is plain from the record here and the Commission's Global Settlement Order that OCC was aware in 2014 that AEP Ohio (and OCC) included the 2014 SEET provision income in calculating 2014 SEET earnings, and that OCC agreed to settle its other challenges related to the 2014 SEET Case and the 12% SEET threshold from the *ESP II* Case in exchange for significant financial and other benefits to residential customers. Having received the benefits of that settlement, OCC cannot now argue that amounts that it previously conceded were counted in 2014 SEET earnings that were a subject of the settlement should instead be counted again in 2016 SEET earnings. *Accord Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, 880 N.E.2d 892, ¶ 7.

Because the Company's 2014 SEET provision related to 2014 earnings – not 2016 earnings – and the Company already counted the 2014 SEET provision in 2014 SEET earnings, the Company properly excluded the per-books income associated with its reversal of the 2014 SEET provision from 2016 SEET earnings.

[3] Dr. Duann testified that he does not consider the $100 million FAC refund included in the Global Settlement to be a benefit to customers. Tr. at 122.

b. AEP Ohio's exclusion of income related to its adjustments to book earnings for PIRR equity carrying charges (Adjustment 3) is proper for SEET purposes.

AEP Ohio also properly excluded net-of-tax income for incremental PIRR equity carrying charges recorded from July through December 2016 that related to years 2012 through 2015. As AEP Ohio witness Ross explained, the Company began collecting the incremental carrying charges in July 2016 after the Ohio Supreme Court ruled in favor of the Company's appeal for reinstatement of a weighted-average cost of capital rate of return on the PIRR. *See* Ohio Supreme Court Case No. 2012-2008; AEP Ohio Ex. 3 at 11. OCC witness Duann opposes this adjustment to SEET earnings and incorrectly asserts that the adjustment improperly shifts 2016 SEET earnings to prior SEET years. OCC Ex. 5 at Att. DJD-1, p. 11. That position is flawed, as Mr. Ross and AEP Ohio witness Allen explained. AEP Ohio Ex. 3 at 11; AEP Ohio Ex. 5 at 6. Because the incremental PIRR equity carrying charge income related to years 2012 through 2015 (and would have been collected in those years but for the Commission's rate of return decision that was the subject of the appeal), it was appropriate to reverse the income for 2016 SEET purposes. *Id.* And Mr. Ross demonstrated that the additional earnings attributable to 201-2015 would not have triggered significantly excessive earnings. AEP Ohio Ex. 3 at 11-12 and Ex. THR-2.

OCC's position is also flawed because it would render an EDU's successful appeal of a Commission decision meaningless. If an EDU is required to count amounts that should have been earned in prior periods, but for an incorrect Commission decision, as earnings for SEET purposes, in the year in which those amounts are eventually booked (years later and after a successful appeal), then the remedy afforded by the Court would effectively be nullified after the fact. The Commission should not adopt such an unjust approach.

2. The Stipulation SEET threshold range does not violate any important regulatory principle or practice.

With regard to the SEET threshold that the Commission should apply in this case, the Signatory parties have made the following recommendations:

- AEP Ohio witness Allen's testimony supports a finding that the comparable risk group's mean earned ROE is 10.69%. Under the established method for calculating a SEET threshold, an adder is calculated based on 1.64 standard deviations. In this case that adder would be 7.00% resulting in a SEET threshold of 17.69% using the Company's calculation.
- Staff witness Buckley's testimony supports a finding that the comparable risk group's mean earned ROE is 8.67%. Using an adder calculated based on 1.64 standard deviations, Staff calculated a SEET threshold of 16.08%.
- The analysis in AEP Ohio's and Staff's testimony is consistent with the methodology used by the Commission in prior AEP Ohio SEET cases and supports a conclusion that AEP Ohio's 2016 earned ROE does not constitute significantly excessive earnings under Section 4928.143(F) of the Revised Code.
- Accordingly, the Signatory Parties agree that AEP Ohio's 2016 earned ROE does not constitute significantly excessive earnings under Section 4928.143(F) of the Revised Code.

Jt. Ex. 1 at 4-5; AEP Ohio Ex. 5 at 2.

The Signatory Parties' recommendations are consistent with the methodology the Commission has approved and used in numerous prior SEET cases. AEP Ohio Ex. 5 at 3; *see also, e.g. In the Matter of the Application of Columbus Southern Power Company and Ohio Power 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. 11-4571-EL-UNC, *et al*., Opinion and Order at 25-27 (Oct. 23, 2013) ("2010 SEET Case"). As set forth below, the Stipulation SEET threshold range does not violate any important regulatory principle or practice.

Both AEP Ohio witness Allen and Staff witness Buckley began with the SPDR Select Sector Fund - Utility (XLU) for the comparable group. AEP Ohio Ex. 4 at 4-5; Staff Ex. 1 at 4.

The Commission has previously approved the use of the XLU as a group of comparable companies by which to establish the SEET threshold range. *See, e.g.,* 2010 SEET Case at 24. As Staff witness Buckley explained, the use of the XLU as the comparable group is appropriate because XLU is the most widely traded utility electronically traded fund, and its components are selected by an independent third party that is not involved in this case. Staff Ex. 1 at 5. Moreover, using the XLU "fosters the use of a simple and transparent process that produces consistent, reasonable results." *Id.* Consistent with the Commission's order in the 2010 SEET Case and later consistent precedent, Mr. Allen and Mr. Buckley also each applied an adder to the baseline mean earned ROE using 1.64 standard deviations. AEP Ohio Ex. 4 at 5; Staff Ex. 1 at 5; *see also* 2010 SEET Case at 27.

The threshold that Mr. Allen and Mr. Buckley calculated differ by 1.61%, as a result of differences in the manner in which they calculated the earnings of the companies in the comparable risk group. Specifically, Mr. Allen adjusted the earnings of all of the companies in the XLU to remove the effects of impairments that were booked in 2016, *see* AEP Ohio Ex. 4 at 5, while Mr. Buckley removed three companies whose ROE deviated from the average ROE of the XLU group in excess of 400 percent. *See* Staff Ex. 1 at 4. The Signatory Parties agree that under either approach, however, AEP Ohio did not have significantly excessive earnings in 2016. Tr. at 50; AEP Ohio Ex. 5 at 3.

The SEET threshold range agreed upon in the Stipulation is consistent with SEET thresholds established in prior cases. *See, e.g.,* 2010 SEET Case at 27-28 (establishing a 17.56% SEET threshold); Tr. at 129-131 (Dr. Duann agreeing that Staff also proposed a 16.08% SEET threshold in FirstEnergy's 2016 SEET case. OCC did not intervene or oppose the Staff SEET threshold proposed, in that case). That the Stipulation presents a range rather than a single

number for the SEET threshold is also consistent with past precedent and previous SEET stipulations. *See, e.g.,* Case No. 13-2251-EL-UNC, Opinion and Order at 6 (May 28, 2014); Case No. 14-875-EL-UNC, Opinion and Order at 5 (Dec. 3, 2014). Thus, that aspect of the Stipulation, too, does not violate any important regulatory principle or practice.

OCC has not offered testimony in this proceeding that the SEET threshold range set forth in the Stipulation fails the third prong of the settlement test. Rather, OCC witness Duann argues that the SEET ROE threshold range is unreasonable (in OCC's view) inasmuch as it, coupled with the 2016 SEET ROE contained in the Stipulation, does not result in a refund or bill credit to customers. OCC Ex. 5 at 11. Contrary to Dr. Duann's position, however, a stipulation in a SEET case does not fail prong three of the test on that basis. There is no important regulatory principle or practice that requires every SEET proceeding to result in a customer refund, and in fact, such an absurd result would itself be contrary to the purpose of the statutory test.

OCC witness Duann's approach in calculating his proposed SEET threshold of 14.59% is inappropriately results-orients and flawed. Dr. Duann did not do any unique analysis to create his SEET threshold. Rather, he essentially applied each of AEP Ohio's and Staff's methodologies, but selectively excluded from the comparable group four companies that had negative 2016 earnings – including Entergy, which Staff witness Buckley included in the comparable group. Mr. Buckley testified that Entergy should not be removed from the comparable group because it's earning and return on equity did not make it an outlier. Tr. at 84. As he explained, "[s]ome companies lose money, some companies don't." *Id.* at 84-85. Dr. Duann also conceded that comparable utilities sometimes have negative earnings. *Id*. at 131. Nonetheless, he testified that he would exclude a company that lost money in a given SEET year from the comparable group solely on that basis. *Id.* at 132. Dr. Duann's approach is

unreasonable. The statute requires consideration of the Company's earnings relative to publicly traded companies that "face comparable business and financial risk," R.C. 4928.143(F), not only to the subset of those companies whose earnings happened to be positive in a given year. In any event, Dr. Duann's results-oriented approach does not refute that the Stipulation satisfies the third settlement prong, and the Commission should disregard it.

In sum, the Stipulation does not violate any important regulatory principle or practice.

CONCLUSION

For the foregoing reasons, the Commission should adopt the Stipulation without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record and attorney examiners this 1st day of May, 2018, via electronic transmission.

/s/ Steven T. Nourse
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