

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Determination of the)	
Existence of Significantly Excessive)	
Earnings for 2017 Under the Electric)	
Security Plans of Ohio Edison Company,)	Case No. 18-0857-EL-UNC
The Cleveland Electric Illuminating)	
Company, and The Toledo Edison)	
Company.)	

**REPLY BRIEF OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Section 4928.143(F) of Ohio’s 2008 electricity law (S.B. 221) favors utilities and disfavors consumers by allowing Ohio Edison Company to charge their customers “excessive” profits earned through PUCO-approved electric security plans (“ESPs”) so long as Ohio Edison can show that those profits are not “significantly excessive.” In this case, whether Ohio Edison’s profits under its ESP for 2017 are significantly excessive is directly at issue and disputed by OCC. OCC’s evidence not only contradicts Ohio Edison’s and PUCO Staff’s testimony that Ohio Edison’s profits were not significantly excessive, it supports a \$42 million refund to Ohio Edison’s customers.

Ohio Edison and PUCO Staff argue that the PUCO should deny customers a refund and allow Ohio Edison to keep its \$42 million in significantly excessive earned profits simply because Ohio Edison and PUCO Staff *agreed* in their Stipulation and

Recommendations¹ that Ohio Edison satisfied the statutory Significantly Excessive Earnings Test (“SEET”). But ignoring OCC’s evidence and recommendations for a customer refund based on Ohio Edison’s and PUCO Staff’s unilateral attempt to settle this case in Ohio Edison’s favor is unlawful, unreasonable, and contrary to the public interest. In short, the Settlement fails the PUCO’s three-part test it uses to evaluate stipulations, and it should be rejected.

Even if the Settlement satisfied the three-part test (which it does not), it should still be rejected because Ohio Edison fails to satisfy its statutory burden to demonstrate that it did not earn significantly excessive profits in 2017. Ohio Edison’s and PUCO Staff’s conclusion that Ohio Edison had no significantly excessive earnings ignores real cash revenue it received from its customers through its so-called Distribution Modernization Rider (“Rider DMR”). Consequently, customers are deprived of the \$42 million refund to which they are entitled under R.C. 4928.143(F). Finally, the Settlement does not adopt a specific SEET threshold, and without that, the PUCO cannot fulfill its statutory duty to review Ohio Edison’s earnings from its electric security plan.

II. THE PUCO SHOULD PROVIDE CONSUMERS THE PROTECTION THAT EXISTS UNDER THE LAW AND REJECT THE SETTLEMENT BECAUSE OHIO EDISON AND PUCO STAFF FAIL TO DEMONSTRATE THAT IT IS REASONABLE AND BENEFITS CONSUMERS.

The PUCO is not legally required to adopt the Settlement, and it should not do so in this case because Ohio Edison and PUCO Staff do not, and cannot, satisfy *their* burden to show that it is reasonable and meets the three-part test the PUCO applies in evaluating

¹ In its Initial Brief and Reply Brief, OCC refers to Ohio Edison’s and PUCO Staff’s “Stipulation and Recommendation” as “the Settlement” because, as further explained below, the legal effect of adopting this agreement would be to end entirely this proceeding in Ohio Edison’s favor.

such agreements. The three-part test, which has been affirmed by the Ohio Supreme Court, requires that the Settlement must: i.) be a product of serious bargaining among capable and knowledgeable parties; ii.) benefit the customers and the public interest; and iii) not violate any important regulatory principle or practice.² The Settlement fails on each count.

A. The Settlement Was Not a Product of “Serious Bargaining.”

OCC witness Daniel J. Duann, Ph. D, testified that the first he heard of the Settlement was after it was filed and made publicly available on the PUCO’s website.³ Neither Ohio Edison nor PUCO Staff offer any explanation in their Initial Briefs as to why OCC was excluded from any settlement discussions. Instead, Ohio Edison blames OCC itself for not initiating settlement negotiations.⁴ But placing blame on OCC for not coming to the table ignores that Ohio Edison – not OCC – has the burden of demonstrating that it did not earn significantly excessive profits. Further, even if OCC were engaged in the Settlement negotiations (and it was not) there was nothing to negotiate in the first place. The Settlement and the Supporting Supplemental Testimony of Joanne Savage do nothing but rehash Ohio Edison’s and PUCO Staff’s established positions, which OCC opposes.⁵ This alone demonstrates that the Settlement lacked serious bargaining by the parties.

² See *Office of the Consumers’ Counsel v. Pub. Util. Comm’n*, 64 Ohio St. 3d 123, 126.

³ OCC Ex. 1 at 5.

⁴ Ohio Edison Init. Br. at 8.

⁵ OCC Ex. 1 at 3-4.

Unable to support its position that the Settlement is reasonable and benefits customers, PUCO Staff instead muddies the issue by playing a game of semantics with the terms “Settlement” and “Stipulation.”⁶ Although the terms can be used interchangeably in the context of Rule 4901-1-39 of the Ohio Administrative Code (“OAC”),⁷ they have very different meanings under their traditional definitions, and more importantly, very different legal effects. As OCC explained in its Initial Brief, a “Settlement” is an agreement that ends a dispute or a lawsuit.⁸ A “Stipulation,” on the other hand, is typically used to refer to an agreement between parties as to an issue of fact to streamline the issues to be litigated in a case.⁹

The distinction here is important. In this case, Ohio Edison and PUCO Staff agreed in their Settlement for purposes of this proceeding that Ohio Edison’s 2017 return on equity (“ROE”) was 11.8% and agreed that that return does not reflect significantly excessive earnings under its ESP. As a result, the Settlement recommends that the PUCO “issue its Opinion and Order in this proceeding determining that significantly excessive earnings under Revised Code Section 4928.143(F) did not occur with respect to [Ohio Edison’s] ESP in 2017.”¹⁰ Therefore, what Ohio Edison and PUCO Staff want is to unilaterally end this proceeding. While Ohio Edison and PUCO Staff may certainly stipulate not to litigate an issue, their settlement as to Ohio Edison’s ROE cannot lawfully

⁶ PUCO Staff Init. Br. at 5-6.

⁷ Compare OAC 4901-1-30 (which governs “Stipulations”) with *Office of the Consumers’ Counsel v. Pub. Util. Comm’n*, 64 Ohio St. 3d 123, 126 (using the term “Settlement” in the three-part test the PUCO uses to evaluate Stipulations under OAC 4901-1-30).

⁸ OCC Init. Br. at 5, quoting *Black’s Law Dictionary*, 1404-05 (8th Ed. 2007).

⁹ See OAC 4901-1-30(A) (“Any two or more parties may enter into a written or oral stipulation concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding.”).

¹⁰ Settlement at 2.

have the effect of settling (*i.e.* ending) this proceeding in Ohio Edison's favor without the PUCO's consideration of the OCC's evidence contradicting the methodology used to support the Settlement. Permitting Ohio Edison to simply end the proceeding in its favor by memorializing with PUCO Staff their aligned positions would defeat the purpose of Section 4928.143(F) and deny Ohio Edison's customers the protections the statute affords.

Finally, Ohio Edison chose to offer service under an ESP and subject itself to the SEET. It could have chosen to offer service under market-based rates, but it did not.¹¹ Ohio Edison should not now be permitted to unlawfully end run the regulatory protections to customers under Section 4928.143(F) to the detriment of Ohio Edison's customers. Accordingly, the PUCO should reject the Settlement.

B. The Settlement Harms Customers and the Public Interest.

OCC represents nearly 1 million of Ohio Edison's residential customers, who would be denied a \$42 million refund if the PUCO adopts the Settlement. That is a real financial harm.¹² OCC's witness Dr. Duann presented overwhelming evidence supporting a \$42 million customer refund, and notably, Ohio Edison and PUCO Staff do not dispute his calculations underlying that result. Rather, Ohio Edison and PUCO Staff contest Dr. Duann's inclusion of Rider DMR revenues in Ohio Edison's 2017 SEET net income. And whether exclusion of Rider DMR in the SEET results in Ohio Edison being allowed to keep significantly excessive earnings at its customers' expense is not an issue

¹¹ *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690 at ¶30. Utilities "not only had notice of R.C. 4928.143(F), but chose to be subject to it. . . . Presumably, the potential reward outweighed the risk."

¹² See OCC Ex. 2 at 10, and OCC Init. Br. at 11.

that can lawfully be swept under the rug through Ohio Edison's and PUCO Staff's unilateral agreement to dispose of the issue and end the proceeding.

The only support Ohio Edison and PUCO Staff offer for their position that the Settlement benefits customers is the testimony of Joanne Savage that the Settlement would benefit customers by "contribut[ing] to a timely and reasonable resolution to this case."¹³ That contention is disingenuous and should be rejected. To be sure, the Settlement would end this proceeding quickly. But it would also financially harm Ohio Edison's customers in the process, leaving them with no refund of the significantly excessive profits Ohio Edison earned. That is not a reasonable resolution to this case. It would also set a dangerous precedent for future SEET proceedings, effecting a continuous harm on utility customers for years to come.

C. Ohio Edison And PUCO Staff Fail To Show That The Settlement Is Consistent With Ohio Law And Regulatory Principles.

Beyond the bald assertion that the Settlement "implements the regulatory policy,"¹⁴ neither PUCO Staff nor Ohio Edison can offer any legitimate argument as to how the Settlement does not violate established Ohio regulatory law – let alone implement it. To the contrary, rubber-stamping the Settlement and issuing an order that Ohio Edison did not earn significantly excessive profits would effectively gut the protections afforded to customers under Section 4928.143(F). As explained above, Ohio Edison and PUCO Staff could simply end any SEET proceeding through their unilateral agreement despite credible and contradictory evidence demonstrating the existence of

¹³ Ohio Edison Ex. 4 at 5.

¹⁴ PUCO Staff Init. Br. at 6.

significantly excessive earnings. The Settlement can and should be rejected for this reason alone.

But aside from that, Ohio Edison and PUCO Staff do not dispute (nor can they) that Ohio law requires utilities to charge just and reasonable rates.¹⁵ And OCC presented credible evidence that Ohio Edison profited from significantly excessive earnings in 2017. It is unjust and unreasonable to force Ohio Edison's customers to pay rates that result in Ohio Edison collecting from customers (and retaining) \$42 million that leads to significantly excessive earnings. This result is patently unreasonable, and is at direct odds with the General Assembly's intent when it adopted Section 4928.143(F) (*i.e.* that there be a necessary check on utilities' earning under their ESPs). Therefore, the Settlement should be rejected.

III. THE SETTLEMENT SHOULD BE REJECTED BECAUSE SIGNATORY PARTIES FAIL TO DEMONSTRATE THAT OHIO EDISON DID NOT EXPERIENCE SIGNIFICANTLY EXCESSIVE PROFITS.

Even if the Settlement did meet the three-part test (and it does not), Ohio Edison's and PUCO Staff's recommendation should be rejected because Ohio Edison fails to meet its "burden of proof for demonstrating that significantly excessive earnings did not occur."¹⁶ And for the reasons explained above, Ohio Edison must satisfy this standard regardless of any Settlement with PUCO Staff. However, there is significant evidence in this proceeding that Ohio Edison's and PUCO Staff's analyses and conclusion that Ohio Edison did not earn significantly excessive profits is flawed and should be rejected.

¹⁵ R.C. 4905.22.

¹⁶ R.C. 4928.143(F).

As thoroughly explained in OCC's Initial Brief and the testimony of Dr. Duann, the Settlement's recommendation rests on an analysis that excludes Rider DMR from SEET.¹⁷ Because the Rider was approved as part of Ohio Edison's most recent ESP, OCC's evidence demonstrates that it is unreasonable to exclude Rider DMR revenues from the significantly excessive earnings analysis.¹⁸ In 2017, Ohio Edison collected more than \$58 million (net of tax) real cash revenue through Rider DMR, and there is no legitimate reason to exclude it from Ohio Edison's net income for purposes of conducting the SEET analysis.¹⁹ Excluding this revenue unreasonably reduces Ohio Edison's 2017 SEET-adjusted net income from approximately \$184.8 million to \$126.3 million and its 2017 SEET ROE from 17.39% to 11.80%, which in turn results in the elimination of a \$42 million refund to customers.²⁰

Ohio Edison and PUCO Staff argue that including revenue from Rider DMR in SEET is proper because the Rider itself was approved by the PUCO. But that argument is beside the point, because the refund would not affect the amount of revenue Ohio Edison can collect under Rider DMR. Rather, any customer refund from the 2017 SEET review would be from the entire pool of significantly excessive profits earned by Ohio Edison in 2017 under its approved ESP.²¹ In other words, the current SEET review does not review the reasonableness of Rider DMR itself, or any other particular rider for that matter.²²

¹⁷ See OCC Ex. 1 at 7.

¹⁸ OCC Ex. 2 at 9-11.

¹⁹ See *id.* at 10.

²⁰ See *id.*

²¹ See *id.* at 31.

²² See *id.*

The Settlement should also be rejected because it fails to establish the SEET ROE threshold, which is a key issue on which PUCO Staff and Ohio Edison disagree. As explained in OCC's Initial Brief and evidence, the SEET ROE threshold is necessary to determine whether Ohio Edison's SEET-adjusted ROE was significantly excessive.²³

Dr. Duann proposed a SEET ROE threshold of 14.91%.²⁴ This proposed SEET ROE threshold is reasonable and fair to both Ohio Edison and its customers.²⁵ It will allow Ohio Edison to earn a reasonable return on its capital investments and to maintain its ability to obtain funding from the financial markets at reasonable costs, but not a significantly excessive return.²⁶ It is also the basis for calculating the \$42 million refund to be returned to Ohio Edison's customers.²⁷

IV. CONCLUSION

The Settlement is nothing more than an attempt by Ohio Edison and PUCO Staff to bypass the regulatory process required by R.C. Section 4928.143(F). The Settlement also harms Ohio Edison's customers by denying them millions of dollars in refunds and vital protections to which they are entitled under Ohio law. Moreover, Ohio Edison fails to meet its burden under Section 4928.143(F) of proving that it did not earn significantly excessive profits in 2017. For these reasons, and for the reasons set forth in OCC's Initial Brief and testimony, the PUCO should reject the Settlement and order Ohio Edison to refund to customers \$42,064,470.

²³ OCC Ex. 1 at 9.

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief of the Office of the Ohio Consumers' Counsel was served on the persons stated below via electric transmission this 18th day of January 2019.

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