**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| **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 Excessive Earnings Test Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code.** | **Case No. 18-857-EL-UNC** |

# REPLY BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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## I. INTRODUCTION

In its zeal to contrive a refund, the Office of Ohio Consumers' Counsel ("OCC") builds a record of smoke and mirrors from poorly reasoned arguments. OCC's recommendation is founded on empty rhetoric and declaring "facts" that simply are not so. In OCC's Initial Brief, it is clear that its arguments are based on incorrect and flawed premises. The Commission should reject OCC's efforts to thwart Commission jurisprudence, and approve the Stipulation and Recommendation concluding that no significantly excessive earnings occurred for Applicants Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("Toledo Edison") (collectively, "Companies").

## II. ARGUMENT

### A. OCC's Definition of *Serious Bargaining* is Seriously Flawed.

OCC opines that the first prong of the Commission's long-standing criteria for considering settlements was not met because the Stipulation was not the product of serious bargaining. OCC's arguments are factually incorrect, lack legal support, and are contrary to past practice.

OCC first claims that because the signatory parties herein have reached the same dispositive conclusion, they are "wholly aligned" and cannot be considered adverse for bargaining and compromise purposes.[1] However, the facts contradict OCC's argument. Even OCC recognizes that the PUCO Staff and Ohio Edison disagreed on issues such as the appropriate 2017 SEET threshold. Therefore, they were adverse. Notwithstanding

[1] Initial Brief by the Office of the Ohio Consumers' Counsel, January 8, 2019, p. 5.

their disagreement, the Companies and Staff were able to reach consensus on the overall outcome.[2]

In addition, OCC does not provide any applicable legal authority to support its position that serious bargaining did not take place. OCC cites no statute, rule or case supporting its argument that parties must be in dispute and must resolve everything. It simply references *Black's Law Dictionary* definitions which are both off the mark and unpersuasive, without any connection to a legal standard.

Further, the circumstances surrounding the instant Stipulation and Recommendation are not materially different than those of a Stipulation OCC did not oppose in a prior SEET case. In an almost identical Stipulation under nearly identical circumstances, OCC raised no arguments that serious bargaining had not taken place. In that case, in which the independent analyses of the witnesses led each party to conclude that significantly excessive earnings did not occur despite recommending different SEET thresholds, OCC formally stated for the record that it did not oppose the Stipulation.[3] The Commission approved and adopted that Stipulation and Recommendation.[4]

For all of these reasons, OCC cannot credibly argue that the Stipulation and Recommendation was not the product of serious bargaining, and the Stipulation and Recommendation should be approved.

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[2] To the extent OCC claims the Stipulation failed to resolve the Signatory Parties' differing SEET thresholds, OCC is simply wrong—the Companies, Staff, and OEG *did* resolve the issue of differing SEET thresholds through the Stipulation, by implicitly agreeing that determining an exact SEET threshold was unnecessary to conclude that significantly excessive earnings did not occur.

[3] *In the Matter of the Determination of Significantly Excessive Earnings for 2013 Under the Electric Security Plans of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 14-0828-EL-UNC, Hearing Transcript, August 15, 2014, p. 13 (OCC counsel in response to Attorney Examiner Chiles: "Yes, at this time OCC does want to indicate that we neither support nor oppose the stipulation that has been marked as Joint Exhibit 1.")

[4] *Id*. September 25, 2014.

### B. OCC's Second and Third Prong Arguments are Nothing More Than A Collateral Attack on a Prior Commission Order.

The evidence in this case is clear that when Rider DMR revenues are properly excluded pursuant to the Commission's ESP IV decision, then no refund is implicated. OCC's arguments that the Stipulation does not benefit customers and violates important regulatory policy (second and third prongs, respectively) lack any analytical basis. Rather, OCC's arguments are predicated exclusively on ignoring the Commission's prior decision in ESP IV to exclude Rider DMR revenues from the Companies' SEET analysis.

OCC's own evidence confirms that Ohio Edison's properly adjusted earned ROE falls below even Dr. Duann's SEET threshold, as well as below the independently determined Safe Harbor thresholds presented by all of the expert witnesses. Specifically, the comparable group mean ROEs presented by witnesses Savage, Buckley, and Duann are 12.3%, 9.89%, and 10.41%, respectively. The corresponding Safe Harbor thresholds are 14.3%, 11.89% and 12.41%, respectively. Since each of the Companies' earnings were less than all of these Safe Harbor outcomes, the conclusion is inescapable: none of the Companies experienced significantly excessive earnings in 2017. OCC witness Dr. Duann's own statistics-based analysis would not implicate a refund *even if* Rider DMR revenues were included. However, Dr. Duann simply rejected it altogether.[5] There is no reasonable basis for Dr. Duann's failure to consider all relevant data. Notably, the two other expert witnesses with SEET analyses used reasoned adjustments to their results instead of just ignoring them.

[5] Dr. Duann gave zero weight to his own statistics-based analysis outcome instead of including it as a data point; thus, he relied solely on his arbitrary "adder" to develop his recommended SEET threshold.

To include Rider DMR revenues in SEET, OCC must ignore the Commission's ESP IV decision. OCC attempts to circumvent the Commission's ESP IV decision, by claiming its recommended refund would not cause specific Rider DMR revenues to be refunded to customers. This argument, however, ignores the fact that money is fungible. A SEET refund because of Rider DMR revenues is no different than a refund of Rider DMR revenues. Since Ohio Edison's non-Rider DMR 2017 earned return was below the Safe Harbor threshold (even OCC's), OCC's recommended refund is solely due to the inclusion of Rider DMR revenues. As the Staff's Initial Brief correctly explains, OCC's recommended refund thwarts the Commission's intent when it approved Rider DMR.[6]

OCC argues that Rider DMR should be included in SEET because the Companies filed an ESP, knowing ESPs are subject to SEET. Thus, OCC incorrectly asserts that "the Supreme Court of Ohio has noted, Ohio Edison 'not only had notice of R.C. 4928.143(F), but chose to be subject to it. . . .Presumably, the potential reward outweighed the risk.'" As an initial matter, this argument mischaracterizes a case that involved Columbus Southern Company, not Ohio Edison. Further, the statement refers to a constitutional challenge on lack of notice grounds—something which has not been argued by Ohio Edison in this case. Putting aside the fact that Rider DMR was proposed by PUCO Staff, not the Companies, OCC's position categorically denies the existence of SEET exclusions. A more accurate argument would be that it is OCC who had notice that the SEET allows exclusions, one of which the Commission identified in ESP IV for Rider DMR, but OCC chose to ignore it. OCC's recommendation is thus an argument against the authority, not the Stipulation and Recommendation, and must be rejected.

[6] Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, January 8, 2019, p.2 ("Using the SEET mechanism to take back some of these carefully worked out revenues would simply undo the necessary work accomplished in the ESP case itself.")

## III. CONCLUSION

The evidentiary record in this case proves that each of the Companies' earned ROEs fall below the Commission's Safe Harbor for 2017 operations. The Commission should reject OCC's arguments that contradict the Commission's Order in the ESP IV case establishing future SEET treatment of revenues, approve the Stipulation and Recommendation, and find that the Companies did not experience significantly excessive earnings in 2017.

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing Initial Post-Hearing Brief was served via electronic mail upon the following parties of record, this 18th day of January, 2019.

*/s/ Robert M. Endris*
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Summary: Reply Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company
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