

**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.     )

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**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The ratemaking in Ohio’s 2008 energy law is a failure for millions of consumers whose fate is only made worse with acceptance by the Public Utilities Commission of Ohio (“PUCO”) of such proposals as FirstEnergy’s plan to deny consumers refunds of Ohio Edison’s significantly excessive profits. Under the 2008 law allowing so-called “electric security plans,” utilities were unfortunately allowed to charge consumers for excessive profits. The law merely barred utilities from charging consumers for “significantly” excessive profits. Even that low bar for consumer protection has been difficult to enforce, and this case illustrates the problem.

Contrary to law, the PUCO declined to include \$58.5 million of profits in 2017 that Ohio Edison received through its so-called Distribution Modernization Rider (“DMR”). Ohio Edison’s profits from its electric security plan were understated in the significantly excessive earnings test (“SEET”). As a result, customers will be denied \$42 million in potential refunds. Therefore, the PUCO’s Opinion and Order entered on March 20, 2019 (“Order”) is unreasonable and unlawful under R.C. 4928.143(F).

ASSIGNMENT OF ERROR NO. 1: The PUCO unreasonably and, under R.C. 4928.143(F), unlawfully failed to consider the distribution modernization rider as revenues under Ohio Edison's ESP, which caused ESP profits to be understated and denied customers over \$42 million in refunds of significantly excessive earnings (profits).

The grounds for rehearing are explained in more detail in the attached

Memorandum in Support.

Respectfully submitted,

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Ohio Consumers' Counsel

*/s/ William J. Michael*  
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**MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING**

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**I. INTRODUCTION**

Under Section 4928.143(F) of Ohio’s 2008 electricity law (S.B. 221), Ohio Edison Company can (unfortunately) charge its customers “excessive” profits earned through its PUCO-approved ESPs, but not “significantly excessive” profits. Ohio Edison’s profits under its ESP for 2017 were significantly excessive.

The PUCO’s Order adopts a Settlement between Ohio Edison and PUCO Staff that stipulates that Ohio Edison had no significantly excessive earnings for 2017. The Settlement ignores significant revenue Ohio Edison received through the Distribution Modernization Rider (“DMR”), and consequently deprives Ohio Edison’s customers of the \$42 million refund to which they are entitled under R.C. 4928.143(F).

**II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10, which provides that within 30 days after issuance of a PUCO order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect

to any matters determined in the proceeding.” OCC entered an appearance through its Motion to Intervene in this case, and the PUCO granted OCC’s Motion.

R.C. 4903.10(B) also requires that an application for rehearing be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Further, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.” In considering an application for rehearing, R.C. 4903.10(B) provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating or modifying some portions of the Order is met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing and abrogate or modify the Order consistent with OCC’s Recommendations herein.

### III. RECOMMENDATIONS

**ASSIGNMENT OF ERROR NO. 1: The PUCO unreasonably and, under R.C. 4928.143(F), unlawfully failed to consider the distribution modernization rider as revenues under Ohio Edison’s ESP, which caused ESP profits to be understated and denied customers over \$42 million in refunds of significantly excessive earnings (profits).**

The PUCO should grant rehearing on the Order adopting the Settlement. The PUCO determined that DMR revenues should be excluded from the SEET calculation. That determination was unlawful. Under R.C. 4928.143(F), the PUCO must conduct an annual review of the utility’s total earnings under its ESP. In its annual review, the PUCO is required to consider “if any such adjustments resulted in excessive earnings.” If the PUCO finds that “such adjustments” did result in significantly excessive earnings, compared to similar companies, the utility must return the excess to customers.

The Ohio Supreme Court has construed this particular SEET statute. The Court held that “such adjustments” refers to “the provisions that are included in an ESP” that “resulted in excessive earnings.”<sup>1</sup> In other words, the earnings caused by the plan (adjustments) must be considered as part of the earnings reviewed in the SEET. So excluding DMR revenues from SEET is contrary to R.C. 4928.143.

Additionally, it is notable that in that case, the Court upheld the PUCO decision to exclude from the earnings review “off-system sales.” The basis of that exclusion was that the sales were not derived from the ESP.<sup>2</sup> Yet, here the revenues in question are derived directly from the ESP. They are an “adjustment” under the ESP that contributes

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<sup>1</sup> *In re: Columbus S. Power Co.*, 134 Ohio St. 3d 392, para. 40 (2012).

<sup>2</sup> *Id.*

to the earnings of Ohio Edison. The earnings from Rider DMR must be included in the SEET review under R.C. 4928.143(F).

The SEET test is an important consumer protection. It is meant to safeguard the public so that ESPs are not setting prices that are too high. But here the PUCO's ruling thwarts a complete review of Ohio Edison's earnings under its ESP. It does this by segregating out a significant portion of Ohio Edison's ESP (the DMR) and treating it differently from all other revenues created under Ohio Edison's ESP.

Not only is this unlawful, but it is also unreasonable. The PUCO's ruling could deprive customers of refunds they may be otherwise entitled to under the law. If Ohio Edison has significantly excessive earnings, as a result of including DMR revenues along with all other riders and rates, then Ohio Edison must return those excessive earnings to customers.

Rehearing should be granted. The PUCO should reverse its ruling and comply with the law.

#### **IV. CONCLUSION**

The Order is unlawful and unreasonable because it excludes DMR revenues for 2017 from SEET review in violation of R.C. 4928.143(F). The Order also potentially denies Ohio Edison's customers \$42 million in refunds and vital protections to which they are entitled under Ohio law. For these reasons, the PUCO should grant OCC's Application for Rehearing and modify the Order consistent with OCC's recommendations in this proceeding.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ William J. Michael  
William J. Michael (0070921)  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing by the Office of the Ohio Consumers' Counsel was served on the persons stated below via electric transmission this 19th day of April 2019.

/s/ William J. Michael

William J. Michael

Assistant Consumers' Counsel

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Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.