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IN THE SUPREME COURT OF OHIO

FILE

In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2017 Under the Electric Security Plans of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)))))))	Case No. 19- 0961 On Appeal from the Public Utilities Commission of Ohio Case No. 18-0857-EL-UNC

NOTICE OF APPEAL
BY
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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel ("OCC" or "Appellant"),[1] gives notice to this Court and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal of PUCO Orders that allowed Ohio Edison Company ("Ohio Edison" or "FirstEnergy") to unlawfully exclude $ 58.5 million of Distribution Modernization Rider charges from the calculation of Ohio Edison's profits. Excluding these revenues understated (on paper) Ohio Edison's profits and thus reduced any refunds that Ohio Edison should make to consumers under the law. The legislature's profits test exists to protect consumers from paying too much profit to electric utilities like FirstEnergy; however, the PUCO's version of the profits test unlawfully protects the utility (FirstEnergy) from refunding profit to consumers. The PUCO's approach improperly denied 925,000 consumers the protection of R.C.4928.143(F) and Supreme Court of Ohio precedent, *In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690. The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on March 20, 2019 (Attachment A), and the PUCO's Entry on Rehearing of May 15, 2019 (Attachment B).[2]

The revenues that the PUCO allowed Ohio Edison to exclude from the calculation of Ohio Edison's profits are from the so-called Distribution Modernization Rider charge, as part of FirstEnergy's electric security plan. It should be noted, that on June 19, 2019, this Court issued a decision in *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-2401, which held that FirstEnergy's Distribution Modernization Rider charge is unreasonable and unlawful. Additionally, the Court deferred ruling on OCC's claim that the PUCO erred by its decision to

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[1] In accordance with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02.

[2] Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

exclude Distribution Modernization Rider revenues from the FirstEnergy utilities' annual profit review. The Court declined to address the issue noting that there would be an annual profit review where OCC could raise this issue.[3] And the Court correctly noted that the law (R.C. 4928.143(F)) expressly provides for customer refunds if the utility's electric security plan resulted in significantly excessive earnings. *Id.* at ¶34.

The review of Ohio Edison's annual profits for 2017 has been completed. Appellant is the statutory representative, as established under R.C. Chapter 4911, of Ohio Edison's 925,000 residential customers. OCC was a party of record in the case being appealed. OCC filed a timely application for rehearing of the PUCO's March 20, 2019 Opinion and Order (Attachment C). On May 15, 2019, the PUCO issued its Entry on Rehearing denying OCC's application for rehearing. This was the PUCO's final order issued in the case. The issues OCC raises on the PUCO's rulings are now ripe for review by this Court.

As OCC alleged in its application for rehearing (at p. 2), the PUCO's Orders are unlawful and unreasonable in the following respect:

> The PUCO unreasonably and unlawfully excluded Ohio Edison's Distribution Modernization Rider revenues collected from customers in the utility's annual profit calculation required under the electric security plan. The PUCO's action understated Ohio Edison's profits and denied customers potential refunds of profits under Ohio law and Supreme Court of Ohio precedent, (R.C. 4928.143(F); *In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690 at ¶¶1-6).

The Court should reverse and vacate the Orders under this appeal. The Court should instruct the PUCO to perform the 2017 review of Ohio Edison's profits by including the $ 58.5 million of Distribution Modernization Rider revenues collected from customers.

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[3] *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-2401, ¶¶ 33-34.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal was served on the persons stated below via electric transmission this 15th day of July 2019.

/s/ William J. Michael
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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

/s/ William J. Michael
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IN THE SUPREME COURT OF OHIO

In the Matter of the Determination of the	)	
Existence of Significantly Excessive	)	Case No. 19- 0961
Earnings for 2017 Under the Electric	)	
Security Plans of Ohio Edison Company,	)	On Appeal from the Public Utilities
The Cleveland Electric Illuminating	)	Commission of Ohio
Company, and The Toledo Edison	)	
Company.	)	Case No. 18-0857-EL-UNC

ATTACHMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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 PLAN OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY.

CASE NO. 18-857-EL-UNC

OPINION AND ORDER

Entered in the Journal on March 20, 2019

I. SUMMARY

{¶ 1} The Commission finds that the stipulation between the Companies and Staff regarding the significantly excessive earnings test for the annual period ending December 31, 2017, meets the criteria used by the Commission to evaluate stipulations, is reasonable, as modified, and should be adopted.

II. PROCEDURAL HISTORY

{¶ 2} Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are electric distribution utilities, as defined in R.C. 4928.01(A)(6), and public utilities, as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} Pursuant to R.C. 4928.141, electric utilities are required to provide consumers with a standard service offer, consisting of either a market-rate offer or an electric security plan (ESP). Further, R.C. 4928.143(F) requires the Commission to evaluate the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility. The Commission issued a Finding and Order in *In re Significantly Excessive Earnings Test,* Case No. 09-786-EL-UNC (*SEET Test Case*), Finding and Order (June 30, 2010), which established the policy and significantly excessive earnings test (SEET) filing directives for the electric utilities.

{¶ 4} On May 15, 2018, the Companies filed an application for the administration of the SEET, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2017. The Companies also filed the supporting testimony of Jason S. Petrik and Joanne M. Savage as attachments to its application.

{¶ 5} On October 16, 2018, Staff filed the testimony of Joseph P. Buckley and the Ohio Consumers' Counsel (OCC) filed the testimony of Daniel J. Duann, Ph.D.

{¶ 6} A stipulation and recommendation (Stipulation) between FirstEnergy, Ohio Energy Group (OEG), and Staff was filed on October 26, 2018, in addition to supplemental testimony submitted by FirstEnergy witness Savage.

{¶ 7} OCC filed supplemental testimony of Dr. Duann in response to the Stipulation on November 16, 2018.

{¶ 8} Motions to intervene were filed by OCC, OEG, and Industrial Energy Users-Ohio on June 29, 2018, June 5, 2018, and October 5, 2018, respectively. The attorney examiner granted the motions to intervene by Entry issued October 31, 2018, as well as scheduled a hearing for November 29, 2018.

{¶ 9} At the November 29, 2018 hearing, the Stipulation was introduced and admitted into the record (Jt. Ex. 1). The attorney examiner also admitted into the record the testimony of OCC witness Duann (OCC Ex. 1; OCC Ex. 2), Staff witness Buckley (Staff Ex. 1), and FirstEnergy witnesses Savage (Co. Ex. 3; Co. Ex. 4) and Petrik (Co. Ex. 2).

{¶ 10} At the conclusion of the hearing, the parties agreed that initial and reply briefs would be submitted by January 8, 2019, and January 18, 2019, respectively. Briefs were timely filed by Staff, OCC, and the Companies on those prescribed days.

III. Discussion

A. *Summary of Application*

{¶ 11} In the application, the Companies explain that in *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.,* Case No. 12-1230-EL-SSO (*ESP III*), Opinion and Order (July 18, 2012), the Commission approved an ESP for the Companies effective June 1, 2014 through May 31, 2016. Additionally, the Companies affirm that in *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.,* Case No. 14-1297-EL-SSO (*ESP IV*), Opinion and Order (Mar. 31, 2016), the Commission approved an ESP for the Companies effective June 1, 2016 through May 31, 2024. The Companies note that R.C. 4928.143(F) requires the Commission to annually determine whether an electric distribution utility has earned significantly excessive earnings under its ESP. In the application, the Companies request that the Commission find that significantly excessive earnings did not result for the Companies under their ESPs with respect to the annual period ending December 31, 2017. (Co. Ex. 1 at 1-3.)

{¶ 12} The application and supporting testimony explain that, for purposes of determining significantly excessive earnings, net income and common equity were adjusted as contemplated by the stipulations in *ESP III* and *ESP IV* (Co. Ex. 2 at 5). Under the terms of the stipulation, adjustments should be made to net income and common equity in order to exclude the impact of any reduction in equity from any write-off of goodwill, of deferred carrying charges, and of any liability or write-off of regulatory assets due to the implementation of the Companies' ESPs. The application notes that no adjustments were made for the write-off of goodwill or the write-off of regulatory assets; however, adjustments were made for other special, extraordinary, and nonrecurring items as the Companies had done previously. (Co. Ex. 2 at 6-7.) After making these adjustments, the application indicates that the Companies' 2017 adjusted net income for SEET purposes was \$126,320,235 for OE, \$58,142,960 for CEI, and \$34,110,490 for TE. The average common equity with adjustments for 2017 was \$1,072,702,323 for OE, \$1,436,357,709 for CEI, and

$529,304,805 for TE. The resulting return on equity for 2017 was 11.8 percent for OE, 4.0 percent for CEI, and 6.4 percent for TE. (Co. Ex. 2 at 8-9.)

{¶ 13} The Companies further state that their 2017 returns on equity for SEET purposes are below the "safe harbor" threshold of 200 basis points above the mean of the comparable risk group recognized by the Commission in the *SEET Test Case*, or 14.3 percent (Co. Ex. 2 at 12). Finally, the Companies state that, because their earnings are not significantly excessive, they do not need to submit revenue information from their prior rate plans (Co. Ex. 2 at 12-13).

B. *Summary of Stipulation*

{¶ 14} As noted above, the Stipulation signed by FirstEnergy and Staff was filed on October 26, 2018. The Stipulation was intended by the signatory parties to resolve all outstanding issues in this proceeding (Jt. Ex. 1 at 1). The Stipulation states that the earned returns on equity for the Companies for 2017, as adjusted by specific items contemplated in *ESP IV*, was 11.8 percent for OE, 4.0 percent for CEI, and 6.4 percent for TE. On that basis, the signatory parties recommend the Commission determine that significantly excessive earnings did not occur with respect to the Company's ESPs in 2017. (Jt. Ex. 1 at 2.)

C. *Applicable Law*

{¶ 15} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *See Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

{¶ 16} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re W. Res. Tel. Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re The Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(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?

{¶ 17} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *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 v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). Additionally, the Court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. *Consumers' Counsel* at 126.

D. *Arguments of Parties*

{¶ 18} In support of the Stipulation, Staff notes that the Commission has previously determined that Rider DMR revenues should not be used for purposes of calculating significantly excessive earnings. *ESP IV*, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶77-80. Moreover, Staff contends that if the Commission were to follow its reasoning in *ESP IV* and conclude that these revenues should not be included in the Commission's determination as to the level of earnings, all parties would then agree that no significantly excessive earnings exist (OCC Ex. 2 at 10). Specifically, Staff contends that the Commission adopted several reasons to exclude Rider DMR revenues from the SEET, the first and foremost being that including these revenues in the test would run in direct contradiction to the main purpose of Rider DMR, which was to enable the Companies to improve the group credit rating and create a financial environment conducive to allowing grid modernization investment. Furthermore, Staff asserts that the plain language of R.C. 4928.143(B)(2)(h), namely that the Commission is authorized to adopt measures under this statute "...notwithstanding any provision of Title XLIX of the Revised Code to the contrary...", cannot be limited by R.C. 4928.143(F), as such an interpretation would run against the expressed intent of the General Assembly. Finally, Staff contends other arguments adopted by the Commission in *ESP IV* would further bolster the decision to refrain from including Rider DMR revenues as earnings for purposes of the 2017 SEET. See *ESP IV*, Eighth Entry on Rehearing, (Aug. 16, 2017) at ¶78.

{¶ 19} OCC strongly objects to the exclusion of the Rider DMR revenues and raises many of the arguments it proffered during the *ESP IV* proceeding, while emphasizing that these profits should be included in earnings as a matter of fairness and reasonableness for consumers (OCC Ex. 2 at 7). See *ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶181-82, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶¶77-80. Notably, OCC contends that if these revenues are excluded, then OE's SEET-adjusted net income would be unreasonably and artificially reduced from approximately $184.8 million to $126.3 million, resulting in a 2017 ROE reduction from 17.39 percent to 11.80 percent (OCC Ex. 1 at 10).

{¶ 20} Upon determining that the Rider DMR revenues should not be included for purposes of the SEET, Staff calculated the ROE of comparable risk companies, using a select group from the SPDR Select Sector Fund-Utility (XLU) (Staff Ex. 1 at 3-4).[1] Using the

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1 Staff notes that several XLU companies had earnings that injected too much volatility into the resulting average; therefore, Staff made the calculated decision to remove certain companies demonstrating very large and irregular performance. Staff concludes that, although they hesitantly removed several

modified XLU group, Staff calculated a resulting average ROE of 8.73 percent, concluding that any returns above this level are in excess of the average return on annuity (Staff Ex. 1 at 3). Staff then utilized the method adopted by the Commission in previous cases to render an ROE of 9.89 percent and an earnings threshold of 17.22 percent.[2] See *In re the Application of Columbus S. Power Co.*, Case No. 11-4571-EL-UNC; *In re Ohio Power Co.*, Case No. 11-4572-EL-UNC. As a final matter, the Companies and Staff assert that the Stipulation in this case satisfies the Commission's adopted three-prong test (Co. Ex. 4 at 4-5).

{¶ 21} However, OCC avers that the three-prong test has not been met in this case. OCC initially argues that the Stipulation fails the first prong, as no serious bargaining could have occurred because Staff and the Companies were never adverse parties to this case and the purported Stipulation does not even resolve the 2017 SEET threshold, the only issue upon which Staff and the Companies disagree, without which OCC avers there is no basis to decide if OE's SEET-adjusted ROE was significantly excessive or not (OCC Ex. 2 at 6-7, 9; Co. Ex. 2 at 4-6; Staff Ex. 1 at 2; Joint Ex. 1). Moreover, OCC witness Duann testified that he first learned of the Stipulation when it was filed and made publicly available in the case docket (OCC Ex. 1 at 5). As such, OCC avers that the Stipulation is nothing more than a summary of the previously-filed testimony of these two parties and should not be considered the product of serious bargaining (OCC Ex. 1 at 3-4). Contrarily, Staff and the Companies assert that, even if they agreed with OCC's incorrect interpretation as to what is required by the first prong, it would be met as the Companies and Staff disagreed about the correct methodology to use when administering the SEET or the 2017 SEET threshold, even though the signatory parties conclude that all approaches resulted in the same conclusion.

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companies in the XLU from the comparable group of companies to calculate the ROE and earnings threshold, that action did not change their ultimate conclusion in this case but did provide a more reliable value for purposes of the SEET.

2 Using all companies contained in the XLU, Staff first calculated an earnings threshold of 30.28 percent, which again, in its opinion, resulted in a higher than acceptable standard deviation, necessitating the modification to the comparable group (Staff Ex. 1 at 4-5).

The Companies add that OCC fails to provide any applicable legal authority to support its position that serious bargaining did not occur.

{¶ 22} As to the second prong, OCC contends the proposed settlement harms consumers by allowing OE to withhold significantly excessive profits of more than $42 million collected in 2017, rather than requiring the company to return that amount to customers, consistent with Ohio law. OCC encourages the Commission to adopt OCC witness Duann's results of the SEET, which he claims is a more appropriate application of the SEET than that utilized by Staff (OCC Ex. 1 at 30). Further, as indicated in Dr. Duann's testimony, OCC claims that there is no commensurate benefit to compensate consumers for the $42 million refund to which they are entitled, noting that FirstEnergy witness Savage only referenced that the proposed settlement would benefit customers and the public interest by contributing to a "timely and reasonable resolution to this case" (OCC Ex. 2 at 6). However, as OCC alleges, the Stipulation will have no impact on the timeliness and efficiency of the resolution of this case; rather, OCC contends that the Stipulation, if adopted, will likely discourage participation and negotiation by all parties with diverse interests in resolving difficult issues in future cases (OCC Ex. 2 at 7).

{¶ 23} In response, FirstEnergy argues that complying with the Commission's orders in *ESP IV* is a valid reason for excluding the Rider DMR revenues from the 2017 SEET calculation. See *ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶212, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶81. In fact, if the Commission agreed with OCC's analysis and ultimate conclusion that a $42 million refund should be provided to OE's customers, the Companies and Staff contend that the Commission would be jeopardizing the entire purpose of Rider DMR, a purpose that was emphasized by the Commission when it approved the rider.

{¶ 24} Finally, OCC contends that the Stipulation fails to satisfy the third-prong of the Commission's test for evaluating stipulations, noting that the proposed settlement would result in unjust and unreasonable rates and violate state policy (OCC Ex. 2 at 7-8). In support of its argument, OCC maintains that the entire point of the SEET was to ensure that utilities were prevented from collecting significantly excessive earnings from their customers and OE chose to subject itself to the SEET when it elected to offer an ESP, pursuant to R.C. 4928.143(F). *In re Application of Columbus S. Power Co.,* 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276.

{¶ 25} Staff quickly notes that the Commission recognized that Rider DMR would support the state policies set forth in R.C. 4928.02 when it found that Rider DMR would provide the necessary "jumpstart" to allow the Companies to improve their credit rating and ultimately position them to make significant enhancements toward grid modernization in their service territories.

IV. CONCLUSION

{¶ 26} As an initial matter, at significant issue in this proceeding is whether it was appropriate for the Companies and Staff to exclude Rider DMR revenues from earnings for purposes of the 2017 SEET in their respective analyses. In *ESP IV*, we determined that Rider DMR revenues would be excluded from SEET calculations for the approved initial three-year period of the rider; however, we did note that we would consider whether to exclude Rider DMR revenues from SEET when we rule upon any possible extension of Rider DMR. *ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶212, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶81. Staff conducted their statutorily required review of the earnings level of the Companies in 2017, in conjunction with the Commission's prior instructions as to the Rider DMR revenues application to the SEET, and determined that the Companies did not have any significantly excessive earnings for that period (Staff Ex. 1 at 3-5). Staff excluded those revenues because the Commission had directed their exclusion. This issue has been thoroughly considered by the Commission in *ESP IV* and OCC has failed to demonstrate any new rationale for including these revenues in the 2017 SEET. OCC is welcome to request intervention and raise its concerns regarding the inclusion of Rider DMR revenues for purposes of the SEET in FirstEnergy's recent application requesting a two-year extension of

Rider DMR. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 19-361-EL-RDR, Application (Feb. 1, 2019).

{¶ 27} Before conducting the three-prong test, we will first address OCC's arguments pertaining to the conflicting analyses presented. We would note that there does not appear to be any dispute that TE and CEI did not experience any significantly excessive earnings, based on the independent calculations submitted on the record, as well as the Stipulation (Joint Ex. 1 at 2; OCC Ex. 1 at 4-5; Co. Ex. 2 at 3; Staff Ex. 1 at 3). OCC only raises the possibility of significantly excessive earnings for OE in 2017 (OCC Ex. 1 at 3-4, 11). As we find the determination that TE and CEI did not experience any significantly excessive earnings for 2017, a conclusion presented by all interested parties to this proceeding, to be reasonable, we will limit the following discussion to the persuasiveness and ultimate disposition of the analyses presented as to whether OE similarly did not experience significantly excessive earnings.

{¶ 28} Relying on the Commission's prior decisions regarding Rider DMR, we find that a majority of Dr. Duann's analysis is rendered fundamentally flawed, particularly his proposed 17.39 percent SEET-adjusted 2017 ROE for OE, as he indicates that he included Rider DMR revenues in his calculation (OCC Ex. 1 at 4-5, 11-14). The Commission determined previously that Rider DMR revenues, at least for the first three-year period, would be excluded from earnings for purposes of the SEET. As Dr. Duann's analysis goes directly against prior Commission orders on this matter, we cannot rely on his suggested SEET-adjusted ROE for OE. We do, however, agree that the Companies made a calculation error, which was later included in the Stipulation, and OE's average common equity should be $1,033,641,759, given the three adjustments proposed by OE, resulting in a corrected 2017 SEET ROE for OE as 12.22 percent (OCC Ex. 1 at 8-9; Co. Ex. 2, Att. JSP-3). Accordingly, the Stipulation should be amended to reflect the revised 12.22 percent ROE. As discussed below, we do not believe this slight modification changes the outcome of this proceeding or the signatory parties' determination that significantly excessive earnings did not occur.

{¶ 29} Staff witness Buckley's testimony provided significant detail in the method utilized by Staff to determine the ROE threshold of 17.22 percent, ultimately concluding that the Companies did not experience significantly excessive earnings in 2017 (Staff Ex. 1 at 3-5). The Companies also provided detail in their initial calculations for the ROE threshold of 19.20 percent, while acknowledging that the methodology used by Staff was an appropriate alternative (Co. Ex. 2 at 4-6, Att. JMS-1). We find both methodologies to be appropriate, in addition to the safe harbor provision set forth in the *SEET Test Case*, even though the Stipulation does not directly address the issue of the ROE threshold.

{¶ 30} As noted above, the corrected 2017 SEET ROE for OE was 12.22 percent. While OCC argues that the Companies' 19.20 percent ROE threshold is excessive, Dr. Duann does acknowledge that significantly excessive earnings only occur when the utility's earnings are above the established ROE threshold, necessitating a refund to customers (OCC EX. 1 at 17, 25). We would note that even if we were to adopt Dr. Duann's alternatively proposed 14.91 percent threshold,[3] OE's revised ROE of 12.22 percent would not exceed it, which provides further support for the conclusion that OE did not experience any significantly excessive earnings in 2017 (OCC Ex. 1 at 29-30). In summary, OCC, Staff, and the Companies each supplied a suggested ROE threshold, and the properly calculated 2017 SEET ROE for OE of 12.22 percent fell well below all of those recommended thresholds.

{¶ 31} Turning now to our review of the Stipulation, FirstEnergy witness Joanne Savage provided testimony regarding the Stipulation and the application of the Commission's three-prong test. She testified that the Stipulation is a product of serious bargaining among knowledgeable and capable parties (Co. Ex. 4 at 4). We find the arguments of OCC lack merit. We recognize that the inclusion of Rider DMR revenues in earnings for SEET purposes has not been disputed between Staff and the Companies because the Commission already addressed and decided that issue on multiple occasions,

3 Furthermore, it does appear that Dr. Duann attributed zero weight to his own statistics-based analysis outcome, and instead, relied solely on his suggested adder of 450 basis points to develop his recommended SEET threshold (OCC Ex. 1 at 27-28, Att. DJD-6).

as discussed above. Moreover, given that both parties decided to adhere to those Commission directives, it is not unreasonable that they arrived at similar conclusions after conducting their own initial independent analyses. Furthermore, OCC provides no case precedent supporting its position that the Companies and Staff should be prohibited from entering into a stipulation in this, or any, proceeding, or should be limited as to what a potential stipulation may include, simply because OCC considers them to be "non-adversarial" parties. Accordingly, we find that the first prong of the test is met. However, we will note that, while no one party's inclusion in settlement discussions automatically satisfies the first prong of the test, we expect OCC to have the opportunity to participate in settlement negotiations for all SEET cases.

{¶ 32} With regard to the second criterion, Ms. Savage explained that the Stipulation benefits the public interest by avoiding needless litigation (Co. Ex. 4 at 4). The Commission agrees, noting that such a benefit has long been acknowledged and valued in prior SEET proceedings, and consequently finds that the Stipulation also satisfies the second prong of the test. See, e.g., *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 10-1265-EL-UNC, Opinion and Order (Nov. 22, 2010); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 11-4553-EL-UNC, Opinion and Order (Jan. 18, 2012); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 12-1544-EL-UNC, Opinion and Order (Feb. 13, 2013); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 13-1147-EL-UNC, Opinion and Order (Oct. 16, 2013); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-993-EL-UNC, Opinion and Order (Mar. 8, 2018).

{¶ 33} Finally, Ms. Savage testified that the Stipulation does not violate any important regulatory policy or principle (Co. Ex. 4 at 5). The Commission finds that there is no evidence that the Stipulation violates any important regulatory principle or practice, and, therefore, the Stipulation meets the third criterion. Accordingly, the Commission finds that the Stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

{¶ 34} Finally, we strongly disagree that the approval of this Stipulation will, in any way, discourage parties from engaging in settlement negotiations in future proceedings before the Commission, as alleged by OCC witness Duann (OCC Ex. 2 at 7). Moreover, every stipulation filed before us is subjected to, and must satisfy, the three-prong test, which obviously includes the evaluation of contradictory evidence submitted by opposing parties. If interested parties would like to make bold assertions as to the Commission's interpretation or use of the three-prong test that would dictate otherwise, they should cite to precedent supporting those assertions.

V. Findings of Fact and Conclusions of Law

{¶ 35} The Companies are public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.

{¶ 36} R.C. 4928.143(F) requires the Commission to evaluate the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility.

{¶ 37} On May 15, 2018, the Companies filed an application for the administration of the SEET, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10.

{¶ 38} The evidentiary hearing was held in this matter on November 29, 2018. At the hearing, the Stipulation was submitted and admitted into the record. OCC opposed certain portions of the Stipulation.

{¶ 39} The Stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted, as modified by this Opinion and Order.

VI. Order

{¶ 40} It is, therefore,

{¶ 41} ORDERED, That the Stipulation filed in this proceeding, as modified herein, be approved and adopted. It is, further,

{¶ 42} ORDERED, That the Companies take all necessary steps to carry out the terms of the Stipulation, as modified, and this Opinion and Order. It is, further,

{¶ 43} ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

{¶ 44} ORDERED, That a copy of this Opinion and Order be served upon each party of record be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

M. Beth Trombold

M. Beth Trombold, Chair

Thomas W. Johnson

Thomas W. Johnson

Lawrence K. Friedeman

Lawrence K. Friedeman

Daniel R. Conway

Daniel R. Conway

MJA/mef

Entered in the Journal

MAR 2 0 2019

Tanowa M. Troupe

Tanowa M. Troupe
Secretary

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 PLAN OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY.	CASE NO. 18-857-EL-UNC

ENTRY ON REHEARING

Entered in the Journal on May 15, 2019

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Ohio Consumers' Counsel on April 19, 2019.

II. DISCUSSION

{¶ 2} Ohio Edison Company (OE), The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities, as defined in R.C. 4928.01(A)(6), and public utilities, as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} Pursuant to R.C. 4928.141, electric utilities are required to provide consumers with a standard service offer, consisting of either a market-rate offer or an electric security plan (ESP). Further, R.C. 4928.143(F) requires the Commission to evaluate the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility. The Commission issued a Finding and Order in *In re Significantly Excessive Earnings Test,* Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010), which established the policy and significantly excessive earnings test (SEET) filing directives for the electric utilities.

{¶ 4} On May 15, 2018, the Companies filed an application for the administration of the SEET, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10, for 2017. The

Companies also filed the supporting testimony of Jason S. Petrik and Joanne M. Savage as attachments to its application.

{¶ 5} On October 16, 2018, Staff filed the testimony of Joseph P. Buckley and the Ohio Consumers' Counsel (OCC) filed the testimony of Daniel J. Duann, Ph.D.

{¶ 6} A stipulation and recommendation (Stipulation) between FirstEnergy, Ohio Energy Group (OEG), and Staff was filed on October 26, 2018, in addition to supplemental testimony submitted by FirstEnergy's witness Savage.

{¶ 7} OCC filed supplemental testimony of Dr. Duann in response to the Stipulation on November 16, 2018.

{¶ 8} Motions to intervene were filed by OCC, OEG, and Industrial Energy Users-Ohio on June 29, 2018, June 5, 2018, and October 5, 2018, respectively. The attorney examiner granted the motions to intervene by Entry issued October 31, 2018, as well as scheduled a hearing for November 29, 2018.

{¶ 9} At the November 29, 2018 hearing, the Stipulation was introduced and admitted into the record.

{¶ 10} On March 20, 2019, the Commission issued its Opinion and Order in this matter, adopting the Stipulation, as modified, regarding FirstEnergy's 2017 SEET. In the Opinion and Order, the Commission found that it was appropriate to exclude the revenues from the distribution modernization rider (Rider DMR) from the 2017 SEET, consistent with the Commission's orders in FirstEnergy's latest ESP. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (*ESP IV*), Fifth Entry on Rehearing (Oct. 12, 2016) at ¶212, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶81.

{¶ 11} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 12} On April 19, 2019, OCC filed an application for rehearing of the Commission's March 20, 2019 Opinion and Order, asserting that the Commission unreasonably and, under R.C. 4928.143(F), unlawfully failed to consider the Rider DMR revenues under OE's ESP, which caused ESP profits to be understated and denied customers over $42 million in refunds of significantly excess earnings. OCC strongly objects to the exclusion of the Rider DMR revenues and raises many of the same arguments made in its comments and the *ESP IV* proceeding, while emphasizing that these profits should be included in earnings as a matter of fairness and reasonableness for consumers (OCC Ex. 2 at 7). See *ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶181-82, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶¶77-80. Notably, OCC contends that if these revenues are excluded, then the Commission would effectively be segregating out a significant portion of OE's ESP, Rider DMR revenues, and treating them differently from all other revenues created under the ESP, in violation of R.C. 4928.143(F). Accordingly, OCC requests that the Commission grant rehearing and reverse its ruling in order to comply with Ohio law.

{¶ 13} On April 29, 2019, FirstEnergy filed a memorandum contra OCC's application for rehearing, requesting that the Commission affirm its decision to exclude Rider DMR revenues from the SEET. The Companies argue that OCC's arguments were raised, and thoroughly addressed, in *ESP IV* and this proceeding. Opinion and Order at 9; *ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at 85-86, 98, Eighth Entry on Rehearing (Aug. 16, 2017) at 35. As OCC has raised no new arguments for the Commission's consideration, FirstEnergy requests that the Commission deny OCC's application for rehearing.

{¶ 14} This issue was thoroughly addressed in the Opinion and Order, as well as the *ESP IV* proceeding. Opinion and Order at ¶26. In *ESP IV*, we determined that Rider DMR revenues would be excluded from SEET calculations for the approved initial three-year period of the rider. *ESP IV*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶212, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶81. OCC has again failed to demonstrate any new rationale for including these revenues in the 2017 SEET. We again stress that concerns regarding the inclusion of Rider DMR revenues for purposes of the SEET beyond the initial three-year period would be more appropriately raised in response to FirstEnergy's application requesting a two-year extension of Rider DMR. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 19-361-EL-RDR, Application (Feb. 1, 2019). As such, we find OCC's application for rehearing should be denied.

III. ORDER

{¶ 15} It is, therefore,

{¶ 16} ORDERED, That OCC's application for rehearing be denied. It is, further,

{¶ 17} ORDERED, That a copy of this Entry on Rehearing be served upon each party of record be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

MJA/mef

Entered in the Journal

MAY 1 5 2019

Tanowa M. Troupe
Secretary

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, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)	Case No. 18-0857-EL-UNC

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

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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<u>/s/ William J. Michael</u>
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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, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)	Case No. 18-0857-EL-UNC

MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING

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."[1] 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.[2] Yet, here the revenues in question are derived directly from the ESP. They are an "adjustment" under the ESP that contributes

[1] *In re: Columbus S. Power Co.*, 134 Ohio St. 3d 392, para. 40 (2012).
[2] *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
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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
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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.