

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Determination of the	)	
Existence of Significantly Excessive	)	Case No. 20-1034-EL-UNC
Earnings for 2019 Under the Electric	)	
Security Plan of Ohio Edison Company,	)	
The Cleveland Electric Illuminating	)	
Company, and The Toledo Edison	)	
Company.	)	

In the Matter of the Determination of the	)	
Existence of Significantly Excessive	)	
Earnings for 2018 Under the Electric	)	
Security Plan of Ohio Edison Company,	)	Case No. 19-1338-EL-UNC
The Cleveland Electric Illuminating	)	
Company, and The Toledo Edison	)	
Company.	)	

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**INTERLOCUTORY APPEAL,  
REQUEST FOR CERTIFICATION TO THE COMMISSION,  
AND  
APPLICATION FOR REVIEW  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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OCC submits this *interlocutory appeal*<sup>1</sup> to the PUCO Commissioners on their Attorney Examiner's Entry of July 29, 2020. That Entry sets a case timeline that fails to await an upcoming ruling by the Ohio Supreme Court that binds the PUCO.<sup>2</sup> The Court's ruling is due on OCC's appeal about whether the PUCO's approach to calculating FirstEnergy's profits (by not counting FirstEnergy's so-called distribution modernization

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<sup>1</sup> Ohio Adm. Code 4901-1-15.

<sup>2</sup> *In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2017 Under the Electric Security Plans of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Supreme Court Case No. 2019-961 ("2017 SEET Case").

rider as profit) is unlawful under the 2008 energy law. The PUCO's consideration of FirstEnergy's profits for 2018 and 2019, without awaiting the Court's ruling, may advantage FirstEnergy and disadvantage consumers by making FirstEnergy's profits appear lower than they are. For purposes here, such an undercounting of FirstEnergy's profits could deny consumers bill credits regarding the true and lawful level of its significantly excessive profits.

This issue is Act II regarding the distribution modernization rider. It follows Act I with the Court's original ruling that the PUCO's authorization of the charge was itself unlawful.<sup>3</sup> After that earlier overturning of the PUCO's decision, FirstEnergy's two million consumers lost \$442 million in denied refunds because the PUCO rejected the joint motion by OCC and the Ohio Manufacturers' Association to make the charge subject to refund during the appeal.<sup>4</sup> FirstEnergy's consumers should not be at risk for losing money a second time regarding the distribution modernization rider after a Court reversal, this time being the potential for the Supreme Court to reverse the PUCO's handling of the FirstEnergy profits issue.

Upon review, the PUCO should reverse its Attorney Examiner's Entry and hold these cases in abeyance until after the Ohio Supreme Court renders its decision on whether the PUCO is unlawfully undercounting FirstEnergy's profits. Doing so will serve the interest of justice for customers and administrative efficiency in the cases.

OCC's Interlocutory Appeal of the July 29 Entry should be certified to the PUCO for review, under Ohio Adm. Code 4901-1-15(B). The Entry presents new or novel

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<sup>3</sup> *In re Application of Ohio Edison Company*, 157 Ohio St.3d 73, 2019- Ohio-2401.

<sup>4</sup> *In the Matter of the Application of First Energy*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (October 12, 2016) at para. 209.

questions of law. And an immediate determination is needed to prevent the likelihood of undue prejudice or expense to OCC and other parties.

The reasons for granting this interlocutory appeal are more fully stated in the following memorandum in support.

Respectfully submitted,

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*/s/ William J. Michael*

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

In this case, the PUCO will review FirstEnergy's 2018 and 2019 profits to determine if profits charged to consumers under FirstEnergy's electric security plan were too high ("significantly excessive") and should be credited to customers. For consumers, a key to these bill credits is whether all provisions of the utility's electric security plan, including revenues from FirstEnergy's unlawful distribution modernization charge, are counted in the calculation of profits, as the law requires.

The question of an accurate and lawful calculation of FirstEnergy's profits cannot necessarily be answered for consumers under the Attorney Examiner's case timeline, as issued by Entry (on July 29, 2020).<sup>5</sup> The Entry set a hearing for October 29, 2020, with

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<sup>5</sup> Entry at para. 8; The Entry also consolidated the 2018 and 2019 profits reviews. The Entry is attached hereto.

direct testimony due to be filed by October 15, 2020. But the Entry's timeline may precede the anticipated ruling from the Ohio Supreme Court on a consumer protection issue that will be direct precedent for the current cases.<sup>6</sup>

In calculating the 2017 profits of FirstEnergy, the PUCO did not count FirstEnergy's distribution modernization charge revenues. The PUCO considered that counting the distribution modernization revenues in profits would have created an unnecessary risk to FirstEnergy.<sup>7</sup> The PUCO's decision potentially deprived Ohio Edison consumers of a bill credit that might otherwise have been required from the 2017 profits review.<sup>8</sup>

As stated, OCC appealed the PUCO's decision to the Supreme Court -- just as OCC and others had earlier appealed (successfully) the PUCO's initial decision allowing the distribution modernization rider to be charged to consumers.<sup>9</sup> In the pending appeal, OCC argued that the PUCO's failure to count the distribution modernization charges in FirstEnergy profits was unreasonable and unlawful and resulted in an artificially and unlawfully low calculation of profits that shielded FirstEnergy from owing bill credits to consumers.<sup>10</sup> The appeal has been fully briefed, and oral argument occurred on May 12, 2020. Accordingly, a decision from the Court that will be binding on the PUCO is forthcoming. The PUCO should reverse the Attorney Examiner's Entry and timeline, so as to await the Supreme Court's ruling.

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<sup>6</sup> 2017 SEET Case.

<sup>7</sup> See Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (October 12, 2016) at para. 209.

<sup>8</sup> Case No. 18-0857- EL-UNC, Opinion and Order (March 20, 2019).

<sup>9</sup> *In re Application of Ohio Edison Co.*, 157 Ohio St. 3d 73, 2019-Ohio-2401.

<sup>10</sup> 2017 SEET Case, OCC's Merit Brief.

## **II. STANDARD OF REVIEW**

The PUCO will review an Attorney Examiner's ruling if the Attorney Examiner (or other authorized PUCO personnel) certifies the appeal.<sup>11</sup> The standard applicable to certifying an appeal is that "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question."<sup>12</sup> Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.<sup>13</sup>

## **III. REQUEST FOR CERTIFICATION**

### **A. The Entry represents a new or novel question of law or policy.**

In this case, the PUCO will be reviewing FirstEnergy's 2018 and 2019 profits from its electric security plan. A question is whether profits from the unlawful distribution modernization rider should be included in that review. The answer will be provided by the Ohio Supreme Court in its decision in the 2017 SEET Case.<sup>14</sup> Thus, the PUCO is presented here with the new and novel question of law and policy regarding whether it should proceed with hearing cases when a material issue is pending before the Court for a likely resolution in the near future.

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<sup>11</sup> Ohio Adm. Code 4901-1-15(B).

<sup>12</sup> *Id.*

<sup>13</sup> Ohio Adm. Code 4901-1-15(E).

<sup>14</sup> The PUCO is bound by the Court's decisions. *See, e.g., In the Matter of the Application of Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2379, Entry (January 11, 2012) at 3.

**B. An immediate determination is needed to prevent undue prejudice.**

This Appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice<sup>15</sup> to OCC, other parties, and residential customers. The undue prejudice will result from pushing parties to litigate this case without the benefit of the Court’s ruling in the 2017 SEET Case.

There can be no certainty about when the decision will be announced. But if the Court decides that distribution modernization revenues must be included in the significantly excessive profits review, that ruling will be binding on the PUCO and will materially impact this case – including, potentially, refunds to consumers. FirstEnergy charged consumers approximately \$134.7 million for the distribution modernization charge in 2018, and approximately \$65.2 million in 2019. So including or excluding distribution modernization profits here could mean the difference between consumers getting a credit for significantly excessive profits or FirstEnergy keeping them, contrary to law.

Further, OCC (and all parties) should have adequate time to analyze the decision, consider its applicability to this case, and prepare a case consistent with whatever the Court rules. The ruling will affect parties’ testimony, cross-examination, and briefing. Further, the Court’s decision will no doubt guide parties’ discovery in the case. Law and rule provide for parties to have adequate discovery in advance of opportunities to advocate to the PUCO. R.C. 4903.082 states that “[a]ll parties and intervenors shall be

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<sup>15</sup> Ohio Adm. Code 4901-1-15(B).

granted ample rights of discovery.” Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules.<sup>16</sup>

Likewise, OCC (and all parties) should not be faced with the prospect of litigating this case without the benefit of the Court’s binding decision in the 2017 SEET Case and then relitigating this case (and filing additional briefing on the decision’s impact on this case) *after* a decision by the Court. That would result in wasted resources and administrative *inefficiency*.<sup>17</sup>

This Appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice to OCC and residential customers.

#### **IV. APPLICATION FOR REVIEW**

In many ways electric security plans have heavily favored electric utilities, to the detriment of consumers. One of the few consumer protections (albeit minimal) for consumers is an after-the-fact limit on how much profit electric utilities can charge to consumers. If the profits from the electric security plan are “significantly excessive,” then under the law they must be returned to consumers.

But even that minimal consumer protection was rendered ineffective by the PUCO when it unlawfully excluded certain revenues (the unlawful distribution modernization revenues) from the calculation of FirstEnergy’s 2017 profits review. The PUCO’s exclusion of the distribution modernization charge revenues (that FirstEnergy actually did collect), for purposes of calculating profits, resulted in an artificially and unlawfully low profits determination that shielded FirstEnergy from owing potential bill

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<sup>16</sup> See Ohio Adm. Code 4901-1-16 et seq.

<sup>17</sup> See Entry at para. 8 (noting the benefit of administrative efficiency and consolidating the 2018 and 2019 FirstEnergy SEET cases).



credits to consumers The Court is set to rule whether the PUCO could lawfully exclude such revenues when counting FirstEnergy's profits, under R.C. 4928.143(F). That ruling will be binding on the PUCO, setting precedent on the issue.

Until it does, these consolidated cases should be held in abeyance, with no procedural schedule set. As described above, OCC and consumers would be prejudiced if they are forced to go forward to litigate these two cases, without the Court's ruling. No party would be prejudiced if the case were held in abeyance. Under the July 29 Entry, the two cases for reviewing FirstEnergy's 2018 and 2019 profits were consolidated. The 2018 profits review case has been pending for over a year.<sup>18</sup> No prejudice will result in waiting a while longer until clarity on a material issue in this case will be provided by the Court in its 2017 SEET Case decision

Further, the Attorney Examiner cited to "administrative efficiency" as justification for consolidating the cases.<sup>19</sup> Administrative efficiency will certainly be enhanced by holding this case in abeyance. Parties will not have to litigate without the benefit of the clarity on a material issue in this case that will be provided by the Court in its 2017 SEET Case decision. They will not be faced with the prospect of litigating the case twice – before and after the decision – or multiple rounds of briefing.<sup>20</sup> And the PUCO will not be faced with the prospect of hearing the case twice – before and after the decision – or multiple rounds of briefing.<sup>21</sup>

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<sup>18</sup> See Case No. 19-1338-EL-UNC, Application (July 15, 2019).

<sup>19</sup> Entry at para. 8.

<sup>20</sup> This occurred in DP&L's recent electric security plan case, where parties filed briefs after the hearing to address the impact of the Court's decision on the Unlawful Charge on DP&L's electric security plan. See Case No. 16-395-EL-SSO.

<sup>21</sup> See *id.*

The PUCO should modify the Entry. This case should be held in abeyance, with no procedural schedule set, until after the Court's decision in the 2017 SEET Case.

## V. CONCLUSION

This OCC appeal to PUCO Commissioners could be part of yet providing FirstEnergy's consumers some opportunity for justice where consumers have seen relatively little of it, regarding the so-called distribution modernization rider. That's the distribution modernization charge that the PUCO did not require FirstEnergy to spend a penny on distribution modernization and where consumers were denied nearly a half-billion dollars in refunds despite the Supreme Court declaring it unlawful.

OCC's interlocutory appeal of the July 29 Entry meets the standard for granting interlocutory appeals. OCC's appeal should be certified to the PUCO and the PUCO should modify the procedural schedule as OCC recommends.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Interlocutory Appeal, Request for Certification to the Commission, and Application for Review by the Office of the Ohio Consumers' Counsel was provided electronically to the persons listed below this 3<sup>rd</sup> day of August 2020.

/s/ William J. Michael  
William J. Michael  
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE DETERMINATION  
OF THE EXISTENCE OF SIGNIFICANTLY  
EXCESSIVE EARNINGS FOR 2018 UNDER  
THE ELECTRIC SECURITY PLANS OF OHIO  
EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY,  
AND THE TOLEDO EDISON COMPANY.

CASE NO. 19-1338-EL-UNC

IN THE MATTER OF THE DETERMINATION  
OF THE EXISTENCE OF SIGNIFICANTLY  
EXCESSIVE EARNINGS FOR 2019 UNDER  
THE ELECTRIC SECURITY PLANS OF OHIO  
EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY,  
AND THE TOLEDO EDISON COMPANY.

CASE NO. 20-1034-EL-UNC

### ENTRY

Entered in the Journal on July 29, 2020

{¶ 1} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) are electric distribution utilities, as defined by 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.

{¶ 2} Pursuant to the directives of R.C. 4928.143(F), the Commission is required to evaluate the earnings of each electric utility's approved electric security plan to determine whether the plan or offer produces significantly excessive earnings for the electric utility.

{¶ 3} On July 15, 2019, FirstEnergy filed an application in Case No. 19-1338-EL-UNC for the administration of the significantly excessive earnings test, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2018.

{¶ 4} On May 15, 2020, FirstEnergy filed an application in Case No. 20-1034-EL-UNC for the administration of the significantly excessive earnings test, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2019.

{¶ 5} The Ohio Energy Group (OEG) moved to intervene in both above-captioned proceedings. In support of the motions, OEG states that it has a real and substantial interest in the proceedings because it represents the interests of large industrial customers that purchase electric distribution services from FirstEnergy. OEG further asserts that the Commission's disposition of these proceedings may impair or impede OEG's ability to protect said interest, and that intervention would not unduly delay the proceedings nor unjustly prejudice any existing party. No memoranda contra OEG's motions to intervene were filed.

{¶ 6} The Ohio Consumers' Counsel (OCC) also moved to intervene in both proceedings. OCC asserts that it is the state agency that represents Ohio's residential utility consumers and that it seeks intervention to protect the interests of FirstEnergy's residential utility customers. OCC adds that it satisfies the intervention standard in R.C. 4903.221 because the interest of Ohio's residential customers may be "adversely affected" by these cases. OCC avers that its role as a residential utility consumer advocate complies with the standards set forth in Ohio Adm.Code 4901-1-11(A)(2), which require that a party must have a real and substantial interest in a proceeding to intervene. Further, OCC asserts that the Supreme Court of Ohio has confirmed OCC's right to intervene. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940. No memoranda contra OCC's motions to intervene were filed.

{¶ 7} Upon review, the attorney examiner finds that OEG and OCC have satisfied the intervention requirements set forth in R.C. 4903.221 and Ohio Adm.Code 4901-1-11. Accordingly, the Commission finds that motions to intervene filed by OCC and OEG are reasonable and should be granted.

{¶ 8} Further, the attorney examiner finds that these matters should be consolidated for administrative efficiency and set for hearing. Accordingly, these matters should be set for hearing on October 29, 2020, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio 43215-3793. Additional

motions to intervene should be filed no later than September 29, 2020. Direct testimony should be pre-filed by October 15, 2020.

{¶ 9} It is, therefore,

{¶ 10} ORDERED, That the motions to intervene filed by OEG and OCC in Case Nos. 19-1338-EL-UNC and 20-1034-EL-UNC be granted. It is, further,

{¶ 11} ORDERED, That parties and interested persons adhere to the procedural schedule set forth in Paragraph 8. It is, further,

{¶ 12} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Megan J. Addison

By: Megan J. Addison  
Attorney Examiner

JRJ/kck

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**in**

**Case No(s). 19-1338-EL-UNC, 20-1034-EL-UNC**

Summary: Attorney Examiner Entry granting the motions to intervene filed by OEG and OCC; setting procedural schedule as follows: additional motions to intervene should be filed no later than 9.29.20; direct testimony should be pre-filed by 10.15.20. electronically filed by Kelli C King on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio



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**in**

**Case No(s). 19-1338-EL-UNC, 20-1034-EL-UNC**

Summary: Request Interlocutory Appeal, Request for Certification to the Commission and Application for Review by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.