

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA
THE MOTION TO COMPEL OF THE OFFICE OF THE OHIO CONSUMERS’
COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”) Motion to Compel should be denied, as OCC seeks to compel individual data from Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”) to purportedly conduct the 2019 significantly excessive earnings test (“SEET”) review of the Companies. Individual data for the Companies, however, is not relevant or necessary to conduct the 2019 SEET review. Instead, R.C. 4928.143(F), as amended by House Bill 166 and effective October 17, 2019, mandates that the Commission conduct the SEET review for an annual period—*after* that annual period has ended—utilizing the total return on equity (“ROE”) of the combined Companies.

OCC’s discovery requests are premised on its unsupported logic that because the current version of R.C. 4928.143 did not become effective until October 17, 2019, the 2019 SEET review must be comprised of two different periods for the 2019 SEET. Not only is OCC’s position incorrect, it is also unworkable. R.C. 4928.143 requires the Commission to compare the Companies’ earnings to the earnings of a comparable group during the same annual period, so it

is entirely unclear how OCC's request for individual data of the Companies could be utilized in this 2019 SEET proceeding. OCC appears to suggest it is appropriate to conduct an analysis of individual company results for part of the year, which would require OCC to develop earnings and returns on equity for a comparable group of companies for only January through October, and separately for November through December. This analysis would have no meaning and would be in direct conflict with the underlying statute. Thus, the individual company information sought simply has no relevance to this proceeding. Further, because the information required to properly conduct the 2019 SEET review of the combined Companies has already been provided in the Companies' May 15, 2020 filing, OCC's requests for individual data of the three Companies is not relevant. OCC's Motion to Compel should be denied.

II. ARGUMENT

Ohio law is clear that a movant seeking to compel discovery must establish that the information sought through discovery is relevant to, and within the scope of, a proceeding.¹ Where the movant fails to establish the relevance of the information, a motion to compel is properly denied.² OCC's discovery requests seeking individual data for the three Companies is not relevant to this 2019 SEET proceeding, and therefore OCC's Motion to Compel must be denied.

¹ Ohio Adm. Code 4901-1-23(C).

² See, e.g., *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates*, Case No. 93-432-TP-ALT, Entry (Mar. 24, 1994) (denying motion to compel where the movant "failed to establish the relevance of the information which it is seeking to discover"); see also *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Entry (Nov. 26, 1991) (denying motion to compel because discovery sought was irrelevant and concerns raised were better suited to be addressed in a different proceeding).

A. R.C. 4928.143(F) governs the 2019 SEET proceeding.

The 2019 SEET proceeding is governed by R.C. 4928.143(F), which requires the Commission to conduct the SEET review for an annual period, *after* that annual period has ended:

[T]he commission shall consider, **following the end of each annual period of the plan**, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned **during the same period** by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate.³

Importantly, this statute was amended by House Bill 166, effective October 17, 2019, providing the following instruction to the Commission when conducting SEET reviews moving forward: “In making its determination of significantly excessive earnings under this division, the commission shall, for affiliated Ohio electric distribution utilities that operate under a joint electric security plan, **use the total of the utilities’ earned return on common equity.**”⁴ In other words, for SEET reviews conducted after October 17, 2019, R.C. 4928.143(F) requires the Commission to conduct the SEET review for an annual period—after that annual period has ended—and must use the total ROE of the affiliated Ohio EDUs for the plan year at issue.

Here, because the Companies are affiliated Ohio EDUs and the Commission is conducting this SEET review for the 2019 plan year—after the annual period ended on December 31, 2019—the only relevant data for this SEET review is the total ROE for the combined Companies for the 2019 plan year. Because this information is included in the filing made by the Companies on May 15, 2020, which reflects year-end financials for the combined Companies,⁵ OCC’s discovery

³ R.C. 4928.143(F) (emphasis added).

⁴ R.C. 4928.143(F) (emphasis added).

⁵ See the Companies’ Application, filed May 15, 2020.

requests seeking separate and individual data for the three Companies for 2019 is simply not relevant to this 2019 SEET proceeding.

B. OCC’s discovery requests are not relevant and are not reasonably calculated to lead to the discovery of admissible evidence.

Despite this clear statutory mandate requiring that the 2019 SEET review be conducted using the total ROE of the combined Companies, OCC seeks SEET data on the three Companies “separately and individually in order to conduct the 2019 SEET review.”⁶ OCC incorrectly claims that this information is “directly related” to the Companies’ application filing because the consolidated earnings provision was not effective until October 2019, and therefore “FirstEnergy was required to calculate individual earnings on its three EDUs prior to October 17, 2019.”⁷ This, however, is not the law.

Under R.C. 4928.143(F), the Commission conducts its review following the end of each annual period—meaning no earlier than 2020 in this case—and it must use the Companies’ combined ROE as reflected in 2019 year-end financials prepared in early 2020. Notably, the law does not make a differentiation between months in an annual period as OCC seems to claim. It plainly states that the SEET review must be conducted “*after* the end of each annual period.”⁸ It is simply not permissible under the statute to split the test into two periods: ten months (January through October) reviewed individually and two months (November and December) reviewed combined as OCC requests. The only period that matters is the *annual* period which, for the 2019 SEET review, ended on December 31, 2019.

⁶ OCC Motion to Compel, Exhibit A, p. 3.

⁷ OCC Mem. in Supp. at p. 7.

⁸ R.C. 4928.143(F) (emphasis added).

Additionally, OCC's claim that it "requested individual EDU data in order to more fully evaluate FirstEnergy's application and to prepare for this proceeding" also fails.⁹ It is inconceivable that any individual information for the three Companies would be required to evaluate the Companies' application and prepare for this proceeding, since the SEET requires the Commission to compare the Companies' earnings to the earnings of a comparable group "during the same period" as the annual period of the plan.¹⁰ OCC appears to suggest it is appropriate to conduct an analysis of individual company results for part of the year, which would require OCC to develop earnings for a comparable group of companies for only January through October, and separately for November through December. Not only would such an analysis have no useful purpose, it would also contradict the statute. Thus, the individual information sought has no relevance to this proceeding. OCC claims it wants to use the requested individual data to "conduct the 2019 SEET review", but the data already provided for the combined Companies enables OCC to do so.¹¹ Thus, because OCC's requests for the three Companies' data separately and individually is wholly unnecessary to conduct the 2019 SEET review, OCC's Motion to Compel such information must be denied.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission deny OCC's Motion to Compel. The discovery requests for which OCC seeks to compel responses are

⁹ OCC Mem. in Supp. at p. 9.

¹⁰ R.C. 4928.143(F). *See, generally, In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, PUCO Case No. 09-786-EL-UNC, Finding and Order, p. 18 (June 30, 2010) ("The average book equity used to calculate the SEET will be the book equity for the 12-month period.")

¹¹ OCC Motion, Ex. A, p. 3.

not relevant to this proceeding and are not reasonably calculated to lead to the discovery of admissible evidence.

Respectfully submitted,

/s/ James F. Lang

Brian J. Knipe (0090299)
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
(330) 384-5795
bknipe@firstenergycorp.com

James F. Lang (0059668)
Kari D. Hehmeyer (0096284)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
khehmeyer@calfee.com

*Attorneys for Ohio Edison Company, The
Cleveland Electric Illuminating Company,
and The Toledo Edison Company*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 13th day of October, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ James F. Lang

One of the Attorneys for Ohio Edison
Company, The Cleveland Electric
Illuminating Company, and The Toledo
Edison Company

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Summary: Memorandum Contra Motion to Compel of OCC electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company