

**BEFORE
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)	Case No. 19-1338-EL-UNC
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 2019 Under the Electric Security Plans of)	Case No. 20-1034-EL-UNC
Ohio Edison Company, The Cleveland Electric)	
Illuminating Company, and the Toledo Edison)	
Company.)	

In the Matter of the Quadrennial Review)	
Required by R.C. 4928.143(E) for the Electric)	
Security Plans of Ohio Edison Company, The)	Case No. 20-1476-EL-UNC
Cleveland Electric Illuminating Company, and)	
The Toledo Edison Company.)	

**MOTION TO MODIFY PROCEDURAL SCHEDULE
AND
REQUEST FOR EXPEDITED RULING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves the Public Utilities Commission of Ohio ("PUCO") for an entry suspending the procedural schedule in these cases until the Supreme Court of Ohio rules in its pending case involving FirstEnergy's 2017 significantly excessive earnings test ("SEET").¹ In the alternative, OCC moves the PUCO for an entry modifying the procedural schedule in these cases as follows:

- a) FirstEnergy testimony due November 2, 2020

¹ *In re Determination of the Existence of Significantly Excessive Earnings for 2017 under the Elec. Security Plans of the Ohio Edison Co., The Cleveland Elec. Illuminating Co., & The Toledo Edison Co.*, Supreme Court No. 2019-0961 ("2017 SEET Appeal").

- b) Initial comments due January 8, 2021
- c) Reply comments due January 29
- d) FirstEnergy supplemental testimony due February 22, 2021
- e) Intervenor testimony due April 5, 2021
- f) Evidentiary hearing commences on or after May 11, 2021
- g) Shorten discovery response time to seven calendar days.

As explained in the attached memorandum in support, good cause exists to suspend the procedural schedule pending resolution of the 2017 SEET Case. In the alternative, good cause and due process warrant modifying the existing procedural schedule, consistent with OCC's proposal. The PUCO has authority to grant these requests under Ohio Adm. Code 4901-1-13(A) (continuance of public hearings and extension of time to file papers for good cause shown), Ohio Adm. Code 4901-1-19(A) (PUCO may shorten the 20-day response time for interrogatories), Ohio Adm. Code 4901-1-20(C) (PUCO may shorten the 20-day response time for requests for production), Ohio Adm. Code 4901-1-22(B) (PUCO may shorten the 20-day response time for requests for admission), and Ohio Adm. Code 4901-1-38(B) (PUCO may waive any rule requirement for good cause shown). Further, no party would be prejudiced by OCC's proposed suspension or modification of the procedural schedule.

OCC also requests an expedited ruling under Ohio Adm. Code 4901-1-12(C) so that the PUCO can rule on this motion before the upcoming deadlines under the current procedural schedule.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Christopher Healey

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MEMORANDUM IN SUPPORT

There should not be a rush to judgment in these cases, especially considering the risk of that to consumer interests. The 2018 SEET Case (Case No. 19-1338-EL-UNC) and 2019 SEET Case (Case No. 20-1034-EL-UNC) should wait until the Supreme Court of Ohio resolves the 2017 SEET Appeal. Likewise, there is nothing particularly urgent about the Quadrennial Review Case (Case No. 20-1476-EL-UNC), and it should be given careful consideration based on a full and complete record. The PUCO should suspend the procedural schedule in these cases until the Supreme Court rules on the 2017 SEET Appeal. In the alternative, the PUCO should modify the procedural schedule to allow more time for parties to reasonably prepare and present their positions in these cases.

I. ARGUMENT

A. **The 2017 SEET Appeal will set binding precedent regarding the 2018 SEET Case and 2019 SEET Cases, so it makes no sense to proceed with those cases before the Supreme Court of Ohio rules in the 2017 SEET Appeal.**

A critical issue in 2018 and 2019 SEET Cases is whether revenues from FirstEnergy's distribution modernization rider ("DMR"), declared unlawful by the Ohio Supreme Court, should be included in determining whether FirstEnergy had "significantly excessive earnings" under R.C. 4928.143(F). That issue (which OCC has appealed to the Supreme Court) is critical because the PUCO's current exclusion of those revenues from FirstEnergy's profits could allow FirstEnergy to avoid making consumer refunds of significantly excessive profits. Those revenues are approximately \$135 million in 2018 and \$65 million in 2019.

As stated, this very issue—whether DMR revenues must be included in the SEET analysis—is pending a ruling by the Supreme Court of Ohio.² That case has been fully briefed for nearly a year, and the Court heard oral argument more than five months ago in May 2020.³ If the Court rules in favor of OCC, then FirstEnergy's DMR revenues must be included in the SEET analysis, thus making it substantially more likely that customers should receive a refund. If the Court rules in favor of FirstEnergy and the PUCO, then the DMR revenues will be excluded from the SEET analysis as the PUCO has ordered.

Under the current procedural schedule, the 2018 and 2019 SEET Cases are required to proceed with testimony filed in November 2020 and a hearing at the beginning of January 2021, even if the Court does not rule on the 2017 SEET Appeal before then. This could lead to an inefficient use of PUCO and party resources.

² See 2017 SEET Appeal.

³ See <https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2019/0961> (briefs completed December 23, 2019, oral argument held May 12, 2020).

For example, suppose the PUCO rules in the 2018 and 2019 SEET Cases that the DMR revenues should be excluded from the SEET analysis (as it did in FirstEnergy's 2017 SEET case, which is now being appealed). That ruling could result in customers not getting a refund, or it could reduce any refund that they might be entitled to. Suppose further that after the PUCO makes such a ruling in the 2018 and 2019 SEET Cases, the Court rules in favor of OCC in the 2017 SEET Appeal. In that scenario, the PUCO would have to redo the 2018 and 2019 SEET Cases to be consistent with the 2017 SEET Appeal ruling, which would be binding precedent. At a minimum, this would require further administrative process or even further appeals.

Moreover, the PUCO could be enabling even more harm to consumers. That could be harm that is additional to the nearly half billion dollars that consumers paid to FirstEnergy for the DMR that the PUCO approved (and the Court declared unlawful) without the PUCO making the charge subject to refund.⁴

All of this can be avoided if the PUCO simply waits for guidance from the Supreme Court in the 2017 SEET Appeal. Although there is no way to know precisely when the Court will rule, history suggests that it will be soon. In recent appeals of PUCO orders, the Court has ruled on average about 150 days after oral argument is held.⁵ It has been just over 160 days since oral argument was held in the 2017 SEET Appeal. In all likelihood, the PUCO will not need to wait long before that case is resolved. All parties and the PUCO—and consumers—could benefit from knowing how that case is resolved before preparing testimony and resolving the 2018 and 2019 SEET Cases.

⁴ See Case No. 14-1297-EL-SSO, Finding & Order (Dec. 21, 2016) (denying a request by OCC and the Ohio Manufacturers' Association Energy Group to make the DMR subject to refund).

⁵ See Supreme Court Case No. 2019-1058 (107 days from oral argument to ruling), Case No. 2018-1396 (92 days from oral argument to ruling), Case No. 2018-0379 (237 days from oral argument to ruling), Case No. 2017-1444 (161 days from oral argument to ruling), Case No. 2017-0749 (154 days from oral argument to ruling).

B. In the alternative, the PUCO should modify the procedural schedule to allow parties a meaningful opportunity to prepare their cases and present evidence.

The current procedural schedule requires FirstEnergy to file its testimony on November 2 and intervenors to file their testimony on November 16.⁶ This schedule, with just 14 days between FirstEnergy’s and intervenors’ testimony, is unfair and unreasonable, especially as it pertains to the Quadrennial Review Case.

In the Quadrennial Review Case, the PUCO must address whether FirstEnergy’s current electric security plan (“ESP”) (i) continues to be more favorable in the aggregate than a market rate offer and (ii) is substantially likely to result in significantly excessive earnings for FirstEnergy.⁷ FirstEnergy bears the burden of proof in this case.⁸

To date, FirstEnergy has not filed anything in support of meeting its burden of proof in the Quadrennial Review Case—no application, no testimony. Parties expect that FirstEnergy will take the view that its ESP continues to be more favorable in the aggregate than a market rate offer and that it is not substantially likely to result in significantly excessive earnings. But unless and until FirstEnergy files testimony, parties are left guessing as to the basis on which FirstEnergy will attempt to support these claims to meet its burden of proof.

And although the case has been pending for several weeks, attempts to determine FirstEnergy’s position through discovery have been fruitless. *In response to discovery from OCC, FirstEnergy simply cited the attorney client privilege based on the fact that its testimony*

⁶ Entry ¶ 7 (Sept. 4, 2020).

⁷ R.C. 4928.143(E).

⁸ See *In re Application of the Ottoville Mut. Tel. Co.*, Case No. 73-356-T, 1973 Ohio PUC LEXIS 3, at *4 (Nov. 13, 1973) (“the applicant must shoulder the burden of proof in every application proceeding before the Commission”); *In re Filing by [FirstEnergy] of a Grid Modernization Bus. Plan*, Case No. 16-481-EL-UNC, Opinion & Order ¶ 106 (July 17, 2019) (“utilities continue to bear the burden of proof for any application submitted for [the PUCO’s] consideration”); R.C. 4928.143(E) (“The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility.”).

*has not yet been filed.*⁹ Thus, intervenors cannot begin to meaningfully analyze the issues in this case or to prepare their own testimony until *after* FirstEnergy files its testimony.

The current procedural schedule makes that virtually impossible. FirstEnergy's testimony is due November 2. Intervenor testimony is due just 14 days later on November 16. Intervenors would be expected to review FirstEnergy's testimony, analyze any and all issues raised in that testimony, and then draft and file their own testimony, all in just two weeks. And of course, intervenors would have no opportunity at all for discovery because the PUCO's rules allow a party 20 days to respond to discovery requests. Any discovery requests regarding FirstEnergy's testimony would not be responded to until after intervenor testimony is due.

Rather than the compressed schedule that is currently in place, the PUCO should follow a process much more akin to the one followed in Dayton Power and Light's quadrennial review case (Case No. 20-680-EL-UNC). In DP&L's case, the utility filed an application and supporting testimony. Parties were then allowed three months to file initial comments, followed by reply comments.¹⁰ The cutoff for written discovery was set five months after the utility's application and testimony.¹¹ Following these comments, the utility was allowed to file supplemental testimony six months after its initial testimony, with intervenor testimony due two weeks after that.¹² The hearing was then scheduled for eight months after the utility's initial application and testimony.¹³

Such a process would be fair to parties and would serve the PUCO's interest in a full record for decision-making. Thus, OCC respectfully requests that the PUCO modify the

⁹ FirstEnergy's responses to OCC's discovery requests are attached to this motion.

¹⁰ Case No. 20-680-EL-UNC, Entry ¶ 8 (Apr. 23, 2020).

¹¹ *Id.*

¹² Case No. 20-680-EL-UNC, Entry ¶ 12 (Sept. 3, 2020).

¹³ *Id.*

procedural schedule in FirstEnergy's Quadrennial Review Case to allow for due process, as follows:

- a) FirstEnergy testimony due November 2, 2020
- b) Initial comments due January 8, 2021
- c) Reply comments due January 29
- d) FirstEnergy supplemental testimony due February 22, 2021
- e) Intervenor testimony due April 5, 2021
- f) Evidentiary hearing commences on or after May 11, 2021
- g) Shorten discovery response time to seven calendar days.¹⁴

This proposal would allow all parties an opportunity to review and assess FirstEnergy's case, issue and receive responses to discovery, file comments and reply comments, and then proceed to a hearing six months after FirstEnergy's initial filing. And it would allow for consumer protection, something sorely lacking in the history of FirstEnergy's distribution modernization subsidy charge.

Further, no party would be prejudiced by this proposed schedule. Intervenors would benefit from it by having an opportunity to make their case. And it has no impact on FirstEnergy. FirstEnergy's current ESP will continue while this case is pending, which is the result that FirstEnergy is undoubtedly seeking in this case anyway.

Thus, good cause exists for the PUCO to grant this motion under Ohio Adm. Code 4901-1-13(A) (extension of time to file papers for good cause shown), Ohio Adm. Code 4901-1-19(A) (PUCO may shorten the 20-day response time for interrogatories), Ohio Adm. Code 4901-1-

¹⁴ See *In re Commission's Investigation into SFE Energy Ohio, Inc. & Statewise Energy Ohio, LLC*, Case No. 20-1216-GE-COI, Entry (Sept. 28, 2020) (shortening discovery turnaround to seven days); *In re Application of the East Ohio Gas Co.*, Case No. 19-468-GA-ALT, Entry (May 27, 2020) (same); *In re Review of Duke Energy Ohio, Inc.'s Distribution Capital Investment Rider*, Case No. 18-1036-EL-RDR, Entry (June 20, 2019) (same).

20(C) (PUCO may shorten the 20-day response time for requests for production), Ohio Adm. Code 4901-1-22(B) (PUCO may shorten the 20-day response time for requests for admission), and Ohio Adm. Code 4901-1-38(B) (PUCO may waive any rule requirement for good cause shown).

C. The PUCO should issue an expedited ruling on this motion.

OCC requests that the PUCO grant this motion on an expedited basis under Ohio Adm. Code 4901-1-12(C). FirstEnergy's testimony is due in less than two weeks. If this motion is not granted on an expedited basis, intervenors will then have to scramble to prepare testimony in the 14 day period between the filing of FirstEnergy's testimony and the deadline for intervenor testimony. OCC cannot confirm that no party objects to expedited treatment. OCC contacted FirstEnergy to inquire if it would agree to OCC's proposed seven calendar day turnaround, and FirstEnergy did not respond.

II. CONCLUSION

The PUCO should allow parties an opportunity for due process and consumers to have protection by granting this motion. The current abbreviated procedural schedule is unfair and prejudicial to OCC and other intervenors—and unfair to consumers who pay the bills for the charges at issue. The PUCO should grant OCC's motion.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Christopher Healey

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served via electronic transmission upon the parties this 20th day of October 2020.

/s/ Christopher Healey

Christopher Healey
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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Case No. 20-1476-EL-UNC

In the Matter of the Quadrennial Review Required by R.C. 4928.143(E)
for the Electric Security Plans of Ohio Edison Company, The Cleveland Electric
Illuminating Company, and The Toledo Edison Company.

RESPONSES TO REQUEST

**OCC Set 1-
INT-001** Pursuant to OAC 4901-1-16(C), please identify each expert witness that FirstEnergy expects to testify at any hearing regarding the Quadrennial Review.

Response Objection. This request is premature and seeks information that may be privileged and/or attorney work product. Subject to and without waiving the foregoing objections, the Companies will produce non-privileged, responsive information as it becomes available.

Case No. 20-1476-EL-UNC

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RESPONSES TO REQUEST

**OCC Set 1-
INT-002** For each expert witness identified in your responses to INT-01-001, please state the
subject matter on which the expert is expected to testify.

Response Objection. This request is premature and seeks information that may be privileged and/or
attorney work product. Subject to and without waiving the foregoing objections, the
Companies will produce non-privileged, responsive information as it becomes available.

Case No. 20-1476-EL-UNC

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RESPONSES TO REQUEST

OCC Set 1- INT-003	Does FirstEnergy's current electric security plan, including its existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continue to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code? If yes, provide all bases for FirstEnergy's belief that this is so.
Response	Objection. This request seeks legal conclusions, is premature, and seeks information that may be privileged and/or attorney work product. Further, the request for "all bases" is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Companies will produce non-privileged, responsive information as it becomes available.

Case No. 20-1476-EL-UNC

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RESPONSES TO REQUEST

**OCC Set 1-
INT-004**

Is FirstEnergy's current electric security plan substantially likely to provide FirstEnergy with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate? If yes, provide all bases for FirstEnergy's belief that this is so.

Response

Objection. This request seeks legal conclusions, is premature, and seeks information that may be privileged and/or attorney work product. Further, the request for "all bases" is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Companies will produce non-privileged, responsive information as it becomes available.

Case No. 20-1476-EL-UNC

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for the Electric Security Plans of Ohio Edison Company, The Cleveland Electric
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REQUEST FOR PRODUCTION

OCC Set 1- RPD-001	Please provide a copy of all formal and informal requests (e.g., interrogatories, requests for production of documents, data requests) made to the Companies by the Commission, the PUCO Staff and/or the PUCO's Attorneys General in this proceeding and the Companies' response to those requests.
Response	The Companies have previously produced all documents responsive to this request, in Case Nos. 19-1338-EL-UNC and 20-1034-EL-UNC.

Case No. 20-1476-EL-UNC

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for the Electric Security Plans of Ohio Edison Company, The Cleveland Electric
Illuminating Company, and The Toledo Edison Company.

REQUEST FOR PRODUCTION

**OCC Set 1-
RPD-002** Please provide a copy of all formal and informal requests (e.g., interrogatories, requests for production of documents, data requests) made to the Companies by any other party in this proceeding and the Companies' responses to those requests.

Response The Companies have previously produced all documents responsive to this request, in Case Nos. 19-1338-EL-UNC and 20-1034-EL-UNC.

Case No. 20-1476-EL-UNC

In the Matter of the Quadrennial Review Required by R.C. 4928.143(E)
for the Electric Security Plans of Ohio Edison Company, The Cleveland Electric
Illuminating Company, and The Toledo Edison Company.

REQUEST FOR PRODUCTION

**OCC Set 1-
RPD-003** Please provide a copy of all written communications between the Companies and the PUCO Staff regarding the Quadrennial Review. This would include, but not be limited to, communications that occurred before the docket was opened on September 4, 2020.

Response Objection. This request is vague and ambiguous as to the phrase “regarding,” and seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, the Companies have no documents responsive to this request.

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In the Matter of the Quadrennial Review Required by R.C. 4928.143(E)
for the Electric Security Plans of Ohio Edison Company, The Cleveland Electric
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REQUEST FOR PRODUCTION

**OCC Set 1-
RPD-004**

Provide any documents that FirstEnergy has created to assess, evaluate, or otherwise determine whether its current electric security plan, including its existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.

Response

Objection. This request is premature and seeks information that may be privileged and/or attorney work product, and is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Companies will produce non-privileged, responsive information as it becomes available.

Case No. 20-1476-EL-UNC

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REQUEST FOR PRODUCTION

**OCC Set 1-
RPD-005**

Provide any documents that FirstEnergy has created to assess, evaluate, or otherwise determine whether its current electric security plan is substantially likely to provide FirstEnergy with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate.

Response

Objection. This request is premature and seeks information that may be privileged and/or attorney work product, and is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Companies will produce non-privileged, responsive information as it becomes available.

Case No. 20-1476-EL-UNC

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REQUEST FOR PRODUCTION

**OCC Set 1-
RPD-006** Provide any documents that you relied upon or that otherwise support your response to
OCC INT-01-003.

Response See the Companies' response to OCC INT-01-003.

Case No. 20-1476-EL-UNC

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for the Electric Security Plans of Ohio Edison Company, The Cleveland Electric
Illuminating Company, and The Toledo Edison Company.

REQUEST FOR PRODUCTION

**OCC Set 1-
RPD-007** Provide any documents that you relied upon or that otherwise support your response to
OCC INT-01-004.

Response See the Companies' response to OCC INT-01-004.

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Case No(s). 19-1338-EL-UNC, 20-1034-EL-UNC, 20-1476-EL-UNC

Summary: Motion Motion to Modify Procedural Schedule and Request for Expedited Ruling by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.