

**IN THE SUPREME COURT  
OF OHIO**

In the Matter of the Determination of the : Case No. 19-961  
Existence of Significantly Excessive :  
Earnings for 2017 Under the Electric : On Appeal from the Public  
Security Plan of Ohio Edison Company, : Utilities Commission of Ohio,  
The Cleveland Electric Illuminating : Case No. 18-857-EL-UNC  
Company, and The Toledo Edison :  
Company. :

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**BRIEF OF APPELLEE SUBMITTED ON BEHALF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**INTRODUCTION**

When the Public Utilities Commission of Ohio (Commission) implements a statute, it must implement all of it. That is what happened in the case below. When considering whether Ohio Edison Company, Cleveland Electric Illuminating Company and Toledo Edison Company (FE) experienced earnings significantly in excess of companies with comparable risk, the Commission took into consideration FE’s capital structure and capital requirements as the statute requires. The evidence showed that FE did not experience significantly excessive earnings within the meaning of R.C. 4928.143(F)<sup>1</sup>, Appellant’s App. at 000039. The Commission so found. Having done its assignment properly, the Commission’s order should be affirmed.

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<sup>1</sup> References to Supplement to Merit Brief of Appellant are denoted “Appellant’s Supp. at \_\_\_”; references to the Appendix of Appellant’s Merit Brief are denoted “Appellant’s App. at \_\_\_”; references to the Appendix attached to Appellee Public Utilities Commission of Ohio Merit Brief are denoted “App. at \_\_\_”; references to Appellee Public Utilities Commission of Ohio Supplement are denoted “Supp. at \_\_\_”.

## STATEMENT OF THE FACTS AND THE CASE

On May 15, 2018 FE filed an application for the administration of the Significantly Excessive Earnings (SEET) test pursuant to R.C. 4928.143(F). Testimony supporting a finding of no significantly excessive earnings was filed by two FE witnesses and one PUCO Staff witness. Appellant filed the testimony of one witness supporting a finding of significantly excessive earnings.

A stipulation between FE, the PUCO Staff and the Ohio Energy Group recommending a finding of no significantly excessive earnings was filed in the case on October 26, 2018. Hearing was held on the stipulation on November 29, 2018 and initial and reply briefs were submitted by the parties.

On March 30, 2019 the Commission issued an opinion and order adopting the stipulation and finding that FE has no significantly excessive earnings. Appellant submitted an application for rehearing on April 19, 2019 which was denied by order on May 15, 2019. Appellant filed a notice of appeal on July 15, 2019 and this case ensued.

### **Proposition of Law No. I:**

**The Public Utilities Commission may make adjustments to capital structure and give consideration to the capital requirements of future committed investments in this state. R.C. 4928.143(F).**

The Commission has implemented the significantly excessive earnings test statute, R.C. 4928.143(F), *all of it*. The statute provides, in relevant part:

With regard to the provisions that are included in an electric security plan under this section, the 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. Consideration also shall be given to the capital requirements of future committed investments in this state. ...*

R.C. 4928.143(F)(emphasis added). This is exactly what the Commission was doing in the order below, creating an adjustment for improving the company's capital structure appropriately to support the large commitments needed for grid modernization.

From the very beginning the purpose of the DMR<sup>2</sup> was perfectly clear. It began as a proposal of the Commission Staff and the Commission described it as:

Staff contends that Rider DMR would provide FirstEnergy Corp., through the Companies, with funds to assure continued access to credit on reasonable terms in order to allow the borrowing of adequate capital to support its grid modernization initiatives.

*In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, PUCO Case No. 14-1297-EL-SSO (SSO Case) (Fifth Entry on Rehearing) (Oct. 12,*

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<sup>2</sup> The DMR no longer exists. It was terminated in compliance with this Court's order. *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, PUCO Case No. 14-1297-EL-SSO (SSO Case) (Finding and Order) (Sept. 26, 2019).*

2016) at 51, App. at 8. Quite specifically, the Staff's concept in proposing the DMR mechanism was to adjust the companies' working capital, to improve it so as to allow future investment in infrastructure. This was to be achieved by:

recovery of \$131 million annually through Rider DMR, for a period of three years, in order to improve FirstEnergy's credit position, as determined by its Cash Flow from Operations per-Working Capital (CFO) to debt ratio.

*Ibid.* The goal from the beginning has been:

As a final point. Staff indicates that Rider DMR will enable the Companies to access capital markets on more favorable borrowing terms, thus, ensuring that they have sufficient resources to dedicate toward reliability through their grid modernization initiative.

*Ibid* at 60. Thus, the intent was to change the capital structure sufficiently to allow yet more change to the capital structure (through added borrowing) to allow commitments to improve the distribution grid to be fulfilled. These commitments are not hypothetical. The companies are currently<sup>3</sup> committed to spending up to \$516 million during the first phase of their grid modernization plan. *In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan*, PUCO case number 16-481-EL-UNC (Opinion and Order) (July 17, 2019), App. at 200.

The situation is exactly as the Commission anticipated when the DMR was established. The Companies have a significant need for capital to be able to implement a

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<sup>3</sup> Although the Commission's approval of a grid modernization plan occurred in 2019, the Companies' request was filed February 29, 2016.



very extensive grid modernization project. They need a solid capital structure to do this. They did not have one. The DMR was intended to improve the capital position of the Companies. To include the DMR revenues in the SEET calculation would create the possibility of a return of some portion of those revenues. This outflow of cash would weaken the capital structure of the Companies when the goal of the Commission was to enhance that structure. That is why the Commission recognized upfront that this adjustment was necessary to the SEET test and so ordered in the establishment of the DMR mechanism. That reasoning still holds today and the Commission recognized that in the order now before the Court. *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 Ohio Edison Company* PUCO Case Number 18-857-EL-UNC (Opinion and Order) (Mar. 20, 2019) at 9, Appellants App. at 000008.

Although this Court has determined that the DMR mechanism the Commission approved was not appropriate under R.C. 4928.143(B)(2) (App. at 1), the goal sought to be achieved by that mechanism certainly is under Chapter 4928. The Commission is charged to ensure reliable service. R.C. 4928.02(A), App. at 1. This is one of the primary goals of grid modernization. Likewise, the modernization will enable competitive suppliers to operate more efficiently, bringing the new options offered by a competitive market as required by R.C. 4928.02(B), App. at 1. The Commission is specifically required to support smart grid programs and advanced metering infrastructure, exactly the commitments the Commission was trying to provide the financial means to achieve. R.C.

4928.02(D), App. at 1. Thus, it is quite clear that the General Assembly wants the kind of grid modernization that the Commission tried to provide the financial means to support.

Including the DMR revenues in earnings for purposes of the SEET analysis would undercut the General Assembly's goals. Every dollar taken from the Companies reduces their capital position. This is exactly the wrong thing to do at this point. The Companies need a stronger capital position not a weaker one. Nothing is free. To achieve the General Assembly's goals requires money. Borrowing those funds requires a strong balance sheet. How strong is a matter for the Commission's expertise. The Commission has been in the business of monitoring and influencing utility capital structure for over a century. This is a matter on which this Court should defer to the Commission. The Court has consistently refused to substitute its judgment for that of the Commission on evidentiary matters. See, e.g., *Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006). Deference should be shown to Board determinations where, as here, the Commission applies its specialized expertise and discretion. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262 (2001); *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000).

The statute itself provides the Commission with discretion. It provides that, in performing the SEET analysis, the Commission may make "...such adjustments for capital structure as may be appropriate." R.C. 4928.143(F). Removing the DMR from the SEET test is an appropriate adjustment, in the Commission's view, for capital structure as it facilitates the implementation of the grid modernization that the General Assembly has directed.

The SEET test is meant to determine if the electric security plan has given the utility in some sense too much money. In the Commission's view in this case the utilities have earned just enough money to advance the grid modernization initiatives. There is nothing excessive here.

Having determined what this case is about, it is necessary to discuss what it is not about. It is not about the legality of the DMR. The DMR has already been rejected by this Court. *In re Application of Ohio Edison Slip Opinion 2019-Ohio-2401*. This case is also not about returning DMR payments to customers. That has also been considered and rejected by this Court. *Ibid*. This case is not a second bite at the apple. Rather this case is simply about earnings and capital structure, not about the source of the earnings.

## **CONCLUSION**

In sum, in administering the SEET test, the Commission is charged to make capital adjustments that are, in its view, appropriate. It did so here to advance important legislative goals as it is charged to do. It found that the Companies did not receive significantly excessive earnings in 2017. The Commission did its job in this case and its decision should be affirmed.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief delivered to the following parties via e-mail this 8th day of November, 2019.

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