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PUBLIC UTILITIES - OHIO

[In re Determination of Existence of Significantly Excessive Earnings for 2017 Under Electric Security Plan of Ohio Edison Company]

Supreme Court of Ohio - December 1, 2020 - N.E.3d - 2020 WL 7033864 - 2020 -Ohio- 5450

Office of Ohio Consumers' Counsel (OCC) sought judicial review of orders of the Public Utilities Commission finding that an electric-distribution utility's earnings for a particular year were not excessive, challenging the Commission's decision to remove the utility's revenue collected under its distribution modernization rider (DMR) from the excessive-earnings test.

The Supreme Court held that:

- Commission violated statute governing electric security plans (ESP) by removing DMR revenue;
- Court lacked jurisdiction over issue of whether Commission violated statute requiring it to file written opinions;
  OCC established harm resulting from Commission's decision; and
- Court had jurisdiction to remand for new excessive-earnings proceeding.

Public Utilities Commission violated the statute governing electric security plans (ESP) by removing an electric-distribution utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's ESP resulted in significantly excessive earnings compared to companies facing comparable risk; the Commission offered no explanation as to how the statute permitted exclusion of the revenue as introducing an unnecessary element of risk that undermined the DMR's purpose of providing credit support, and the DMR was an adjustment under the statute of the sort the Commission was required to include when determining whether an ESP resulted in excessive earnings.

Supreme Court lacked jurisdiction over issue of whether the Public Utilities Commission violated the statute requiring the Commission to file written opinions in all contested cases by failing to explain the statutory and evidentiary bases for excluding an electric-distribution utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, where the Office of Ohio Consumers' Counsel did not allege a violation of the statute in its application for rehearing before the Commission challenging the DMR decision.

Public Utilities Commission's claim that it sought to improve electric-distribution utility's capital structure was not a basis for affirming its decision to remove the utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, where the Commission, in rendering its decision, never said it was making an adjustment for capital structure when it removed DMR revenue, and the utility did not argue that removal of the revenue was justified on such ground.

Need for a valid comparison based on comparable risk was not a basis for affirming the Public Utilities Commission's decision to remove an electric-distribution utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, where the Commission never mentioned the comparable-risk clause in the ESP statute's provision requiring the excessive-earnings test as its reason for excluding the DMR revenue.

Purported status of revenue earned by an electric-distribution utility under its distribution modernization rider (DMR) as an extraordinary item or an additional liability or write-off of a regulatory asset, so as not to be part of the utility's earned return on common equity, was not a basis for affirming the Public Utilities Commission's decision to remove DMR revenue from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, where the Commission did not rely on the utility's argument regarding such a status or make express or implied findings to support it, and the application seeking the Commission's analysis did not mention an exclusion of DMR revenue as an extraordinary item.

Office of Ohio Consumers' Counsel (OCC) established harm resulting from the Public Utilities Commission's decision to remove an electric-distribution utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, as required to seek reversal of an order of the Commission; the OCC was not required to show that ratepayers were entitled to a refund to establish harm, but instead the OCC's harm was that the utility was not required to include its DMR revenue in its earnings for the excessive-earnings test.

Supreme Court had jurisdiction to remand to the Public Utilities Commission for a new proceeding to determine whether an electric-distribution utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, in an appeal brought by Office of Ohio Consumers' Counsel challenging the Commission's decision to exclude the utility's revenue collected under its distribution modernization rider (DMR) from the excessive-earnings test, where the Commission did not decide a return-on-equity threshold for the test, so that it was unclear whether inclusion of the DMR revenue would have resulted in a return-on-equity calculation that exceeded the applicable threshold.

Office of Ohio Consumers' Counsel (OCC) did not waive its challenge to a stipulation approved by the Public Utilities Commission, which recommended that the Commission find that utility's electric security plan (ESP) did not result in significantly excessive earnings compared to companies facing comparable risk; the OCC was not required to argue on appeal that the stipulation did not meet the three criteria necessary for approval of a stipulation, but instead it was enough for the OCC to argue that the Commission's orders were unlawful and unreasonable because it removed the utility's revenue collected under the utility's distribution modernization rider (DMR) in making an excessive-earnings determination, which directly implicated the Commission's approval of the stipulation.