

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of)	Case No. 2011-751
Columbus Southern Power Company and)	
Ohio Power Company for Administration)	On Appeal from the Public Utilities
of the Significantly Excessive Earnings)	Commission of Ohio,
Test under Section 4928.143(F), Revised)	Case No.10-1261-EL-UNC
Code, and Rule 4901:1-35-10, Ohio)	
Administrative Code.		

**BRIEF OF
 AMICUS CURIAE
 OHIO PARTNERS FOR AFFORDABLE ENERGY
 IN SUPPORT OF APPELLANTS
 OHIO ENERGY GROUP AND INDUSTRIAL ENERGY USERS-OHIO
 AND INTERVENING APPELLANT OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Colleen L. Mooney
 (Reg. No. 0015668)
 Counsel of Record
 Ohio Partners for Affordable Energy
 231 West Lima Street
 Findlay, Ohio 45839-1793
 Telephone: (419) 425-8860
 Facsimile: (419) 425-8862
cmooney2@columbus.rr.com

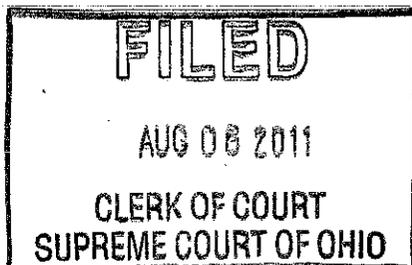
COUNSEL FOR AMICUS CURIAE,
 OHIO PARTNERS FOR
 AFFORDABLE ENERGY

Michael DeWine
 (Reg. No. 0009181)
 Attorney General of Ohio

William L. Wright
 (Reg. No. 0018010)
 Section Chief, Public Utilities Section
 Thomas W. McNamee
 (Reg. No. 0017352)
 Assistant Attorney General

Public Utilities Commission Of Ohio
 180 East Broad Street, 6th Floor
 Columbus, Ohio 43215-3793
 Telephone: (614-466-4397)
 Facsimile: (614) 644-8767
William.wright@puc.state.oh.us
Thomas.mcnamee@puc.state.oh.us

COUNSEL FOR APPELLEE, PUBLIC
 UTILITIES COMMISSION OF OHIO



David F. Boehm, Esq.
(Reg. No. 0021881)
Michael L. Kurtz, Esq.
(Reg. No. 0033350)
Counsel of Record
Boehm, Kurtz & Lowry
36 E. Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Telephone: (513) 421-2255
Facsimile: (513) 421-2255
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

COUNSEL FOR APPELLANT,
OHIO ENERGY GROUP

Samuel C. Randazzo
(Reg. No. 0016386)
(Counsel of Record)
Frank P. Darr
(Reg. No. 0025469)
Joseph E. Olikier
(Reg. No. 0086088)
McNees Wallace & Nurick LLC
21 East State Street, 18th Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Facsimile: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

COUNSEL FOR APPELLANT,
INDUSTRIAL ENERGY USERS-OHIO

Steven T. Nourse
(Reg. No. 0046705)
Counsel of Record
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com

Kathleen M. Trafford
(Reg. No. 0021753)
Daniel R. Conway
(Reg. No. 0023058)
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-1915
Facsimile: (614) 227-1000
ktrfford@porterwright.com
dconway@porterwright.com

COUNSEL FOR CROSS-APPELLANT,
COLUMBUS SOUTHERN POWER
COMPANY

Janine L. Migden-Ostrander
(Reg. No. 0002310)
Ohio Consumers' Counsel
Maureen R. Grady, Counsel of Record
(Reg. No. 0020847)
Melissa R. Yost
(Reg. No.0070914)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 - Telephone
(614) 466-9475 - Facsimile
grady@occ.state.oh.us
yost@occ.state.oh.us

COUNSEL FOR INTERVENING APPELLANT,
OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

Ohio Partners for Affordable Energy (“OPAE”) is a non-profit Ohio corporation with a stated purpose of advocating for affordable energy policies for low- and moderate-income Ohioans. OPAE’s membership includes non-profit organizations, which are customers of Columbus Southern Power Company (“CSP”). OPAE members advocate on behalf of CSP’s low- and moderate-income customers. OPAE members manage bill payment assistance programs to ensure customer access to electric service from CSP. OPAE members also provide weatherization and energy efficiency services to those same customers.

OPAE respectfully submits this amicus curiae brief to the Court in support of the Appellants, Ohio Energy Group (“OEG”) and Industrial Energy Users-Ohio (“IEU-O”), and the Intervening Appellant the Office of the Ohio Consumers’ Counsel (“OCC”). The Appellants seek to reverse the orders of the Public Utilities Commission of Ohio (“PUCO”) dated January 11, 2011 and March 9, 2011 in PUCO Case No. 10-1261-EL-UNC, *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*. The PUCO’s orders denied CSP’s customers part of their statutorily-mandated refund for the significantly excessive earnings of CSP in 2009 under CSP’s PUCO-approved electric security plan (“ESP”).

OPAE was an intervening party and an active participant in PUCO Case No. 10-1261-EL-UNC. OCC, the intervening appellant, along with OEG, filed

testimony on CSP's application for administration of the significantly excessive earnings test ("SEET"). OPAE participated in the evidentiary hearing and filed a post-hearing brief and a reply brief. OPAE also filed an Application for Rehearing addressing the PUCO's error in unlawfully excluding CSP's profits from off-system sales from the SEET analysis. This error is the basis of OEG's notice of appeal filed May 5, 2011.

II. STATEMENT OF FACTS

The significantly excessive earnings test ("SEET") was established by Amended Substitute Senate Bill ("SB") 221, which was signed into law on May 1, 2008. Revised Code ("R.C.") §4928.143(F) directs the PUCO to evaluate the earnings of each electric utility under its approved electric security plan ("ESP") at the end of each plan year to determine whether the earned return on common equity of the utility was significantly in excess of the returns on common equity earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the utility. If the PUCO finds significantly excessive earnings, it shall require the utility to return to consumers the amount of the excess by prospective adjustments. R.C. §4928.143(F).

~~Shortly after the enactment of SB 221, the PUCO initiated an investigation~~ to provide guidance on the application of the SEET. In its Finding and Order of June 30, 2010 and Entry on Rehearing of August 25, 2010 in Case No. 09-786-

EL-UNC, *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*, the PUCO addressed the treatment of off-system sales in the SEET. CSP advocated for exclusion of the earnings from off-system sales from the SEET calculation, while customer groups and other utilities argued that earnings from off-system sales should be included in the SEET analysis. In response, the PUCO stated that it was not deciding in its investigation case the SEET treatment of off-system sales and would address the treatment of off-system sales in the individual SEET proceedings of the individual utilities on a case-by-case basis. *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*, Case No. 09-786-EL-UNC, Entry on Rehearing, August 25, 2010 at 13.

The Commission's failure to require inclusion of off-system sales revenues in the SEET analysis had disastrous consequences for the SEET analysis. The whole point of the SEET is to compare the earnings of the utility to a comparable group of companies, including utilities. Off-system sales are an inherent part of the earnings of utilities. Making selective adjustments from earnings, such as the exclusion of off-system sales, skews the comparison. When a similar adjustment is not applied to companies in the comparable group, CSP is effectively permitted to understate its earnings.

In 2009, CSP's earnings from off-system sales were \$32,977,000, which was 12.1% of CSP's total earnings. When these earnings were excluded from

the SEET analysis, only 87.9% of CSP's earnings were being compared to 100% of the earnings of the comparable group of companies. The exclusion of off-system sales earnings from CSP's SEET analysis clearly biased CSP's earnings downward in comparison to the earnings of the group of comparable companies used to determine the SEET earnings threshold. The PUCO's exclusion of off-system sales biased the SEET analysis by making CSP's earnings look 12.1% lower than they actually were when compared to the comparable group.

Having made this biased decision to exclude off-system sales from the SEET analysis, the PUCO immediately found itself in trouble. At the hearing, the PUCO's staff had noted that while CSP had excluded its margins from off-system sales from the numerator of its SEET calculation, CSP had not also excluded the common stock equity in the denominator to account for that part of the equity that financed the generation plant which enabled the off-systems sales in the first place. Staff Ex. 1 at 18-22 (Direct Testimony of Richard Cahaan). When the PUCO made the adjustment to remove off-system sales margins from the numerator, the PUCO also needed to remove the equity used to make off-system sales from the denominator in accordance with the PUCO Staff's methodology. The PUCO's calculation increased CSP's return on equity to 19.73% instead of the 18.31% improperly calculated by CSP.

However, the PUCO's adjustment did not remove all expenses associated ~~with the off-system sales, so the calculation of the return on equity was still~~ biased in favor of CSP. The Staff improperly scaled down its adjustment to the denominator, limiting its adjustment to only the generation-related components of

equity capitalization. The Staff, for example, made no adjustment for transmission investment associated with making off-system sales. Thus there was still a mismatch because off-system sales margins were totally removed from the numerator, but only partially removed from the denominator. No correct quantification was made by any witness.

Without a record to exclude off-system sales properly, the PUCO had two alternatives to perform a proper SEET analysis. One alternative was to include off-system sales in the SEET analysis so that all the earnings of CSP would be properly compared to all of the earnings of the companies in the comparable group. The PUCO rejected this alternative. On rehearing while the PUCO admitted that its adjustment to exclude off-system sales was not properly made, the PUCO still refused to include off-system sales in its SEET calculation. In the second alternative, the PUCO could have required CSP to provide the proper analysis. The PUCO rejected this as well. The PUCO stated that "it is always our intent to correctly calculate any adjustment" but "in this instance we used the best information available in the record." Entry on Rehearing at 8. In other words, the PUCO admitted that it did not have a record to exclude off-system sales properly but would exclude them anyway. The PUCO allowed the lack of a record to advantage CSP, but the lack of a record actually meant that CSP had failed to meet its burden of proof. The PUCO unlawfully failed to hold CSP to its ~~statutory burden to come forward with evidence showing no significantly~~ excessive earnings measured by the SEET. R.C. §4928.143(F).

III. ARGUMENT

Proposition of Law

The PUCO acted unreasonably and unlawfully in violation of R.C. Section 4928.143(F) when it excluded off-system sales profits from the Significantly Excessive Earnings Test analysis, creating a biased comparison between Columbus Southern Power Company and publicly traded companies that face comparable business and financial risk and thereby failing to make the refund to customers required by R.C. Section 4928.143(F).

R.C. §4928.143(F) requires that the earned return on common equity of the electric utility be compared with the return on common equity that was earned during the same period by comparable publicly traded companies, including utilities. The PUCO failed to conduct a lawful analysis of comparable companies as required under R.C. §4928.143(F) when it excluded off-system sales from the SEET analysis.

The PUCO should not have excluded off-system sales from the SEET analysis. Off-system sales revenues are an inherent component of a utility's earnings, just as the costs of the assets and expenses incurred to provide the capacity and energy for the off-system sales are an inherent component of earnings. In 2009, CSP's after-tax earnings from off-system sales were \$32.977 million, or 12.1% of CSP's total earnings. Excluding these earnings from the SEET analysis meant that the PUCO compared only 87.9% of CSP's earnings to 100% of the earnings of the comparable group of companies. Joint Intervenors' Ex. 2 at 21-23 (Direct Testimony of Lane Kollen). Making selective adjustments from earnings, such as the exclusion of off-system sales, was not done for the companies in the comparable group. The whole point of the SEET is to compare

the earnings of the utility to a comparable group of companies. Excluding CSP's off-system sales biased CSP's earnings downward in comparison to the group of comparable companies used to determine the SEET earnings threshold.

The PUCO's comparison of only 87.9% of CSP's earnings with 100% of the earnings of the companies in the comparable group resulted in a biased comparison that did not comply with the statute. The PUCO's biased comparison violated R.C. §4928.143(F) and rendered the PUCO's SEET analysis meaningless and asymmetrical. The PUCO's ruling also meant that customers would not receive the full refund that they were due under R.C. §4928.143(F). Customers would have received an additional \$22 million over and above the \$42 million refund ordered by the PUCO if off-system sales had been included.

The PUCO's exclusion of the revenues from off-system sales tipped the SEET analysis in favor of CSP by making CSP's earnings look less than they actually were in comparison to the comparable group. The exclusion of off-system sales revenues reduced CSP's return on equity from 20.84% to 18.31%. Opinion and Order at 27. The PUCO excluded off-system sales from CSP's SEET calculation simply because the inclusion of off-system sales revenues gave CSP a return on equity of 20.84%, while the exclusion reduced it to 18.31%. Opinion and Order at 30. In short, the PUCO was looking for ways to reduce CSP's earnings in the SEET analysis and thus reduce the refund to customers.

In excluding off-system sales, however, the PUCO determined that it was necessary to exclude from the SEET calculation the portion of generation that

supported the off-system sales. While CSP argued for the exclusion of its revenues from off-system sales, CSP did not properly exclude the costs associated with its off-system sales from its SEET calculation. The inclusion of the fixed costs to make off-system sales reduced CSP's earnings in CSP's SEET analysis. CSP reduced its earnings for depreciation expense on all generating and transmission assets owned by CSP that were used to make off-system sales. Similarly, CSP reduced its earnings because CSP issued debt and common equity to finance the cost of CSP's generation and transmission plant that were used to make off-system sales. In short, CSP provided the PUCO with an inconsistent calculation for the exclusion of its off-system sales.

When the PUCO determined that it would exclude off-system sales from the SEET calculation, the PUCO attempted to recalculate the CSP's SEET calculation to exclude the portion of generation that supports off-system sales. This recalculation increased CSP's return on equity from 18.31% in CSP's analysis to 19.73%. Opinion and Order at 30. The PUCO's threshold return on equity for excessive earnings was 17.6%, i.e., the PUCO found earnings above 17.6% to be excessive. This threshold was based on 100% of the earnings of the comparable group. The return of 19.73% in comparison to the PUCO's SEET threshold of 17.6% (above which threshold, earnings are excessive) resulted in the refund to customers of \$42,683,000. Opinion and Order at 35. ~~The customer parties had originally recommended a refund to customers of~~ approximately \$145,000,000 based on a SEET threshold of 13.58%. Thus, the PUCO's refund of a mere \$42,683,000 was \$100 million less than the refund

originally recommended by the customers. Excluding off-system sales from the SEET calculation reduced the refund by \$22 million.

All of CSP's earnings including off-system sales should have been judged against the earnings of the companies in the comparable group. Should the PUCO's decision to exclude off-system sales be upheld, CSP's customers will be deprived of \$22 million that should lawfully be returned to them. The PUCO should not have allowed CSP to retain such a large portion of the refund that the statute requires be returned to consumers.

The statute directs the PUCO to return to consumers the amount of the significantly excessive earnings. The significantly excessive earnings of CSP under its ESP must be returned to CSP's ratepayers in accordance with Ohio law. It is well established that the PUCO is a creature of statute and has only those powers granted to it by the General Assembly. *Tongren v. Pub. Util. Comm.*, (1999), 85 Ohio St.3d 87; *Columbus Southern Power Co. v. Pub. Util. Comm.*, (1993), 67 Ohio St.3d 535. To follow the law, the PUCO should have ordered a refund based on all of CSP's earnings in 2009, not a mere 87.9% of CSP's earnings. .Because the PUCO failed to follow the law, the Court should reverse the PUCO's unlawful order.

The PUCO also failed to follow the law when it declined to order that CSP meet its burden of proof that its earnings were not excessive because there ~~was inadequate record evidence to permit the PUCO to make the correct~~ calculation. CSP has the burden of proof in the SEET proceeding. CSP proposed the exclusion of off-system sales from its SEET analysis. CSP

excluded its revenues from off-system sales, which reduced its earnings, but included its generation and transmission costs. CSP failed to meet its burden of proving it had no excess earnings when off-system sales were excluded because CSP gave the PUCO an inconsistent analysis. The PUCO then had no basis to exclude off-system sales properly. Because CSP has the burden of proof, the failure of the record to provide for a correct calculation for the exclusion of off-system sales was the sole fault of CSP. The PUCO's order allowed CSP's conscious error to benefit CSP.

By failing to require CSP to meet its burden of proof, the PUCO failed to comply with the statute. The PUCO has only those powers granted to it by the General Assembly. *Tongren v. Pub. Util. Comm.*, (1999), 85 Ohio St.3d 87; *Columbus Southern Power Co. v. Pub. Util. Comm.*, (1993), 67 Ohio St.3d 535. To follow the law, the PUCO should have required that CSP meet its burden of proof. The PUCO's failure to follow the law requires that the Court reverse the PUCO's order.

IV. CONCLUSION

The significantly excessive earnings of CSP under its ESP must be returned to CSP's ratepayers in accordance with Ohio law. To follow the law, the PUCO should have ordered a refund to customers based on a SEET analysis ~~that included all of CSP's earnings in 2009, not a mere 87.9% of CSP's earnings.~~ The PUCO also should have required that CSP meet its burden of proof that it did not have excessive earnings under a proper SEET analysis. The PUCO

unlawfully refused to return to customers the significantly excessive earnings of CSP as the Ohio General Assembly intended. R.C. Section 4928.143(F). It is fundamentally inconsistent with the statute to allow CSP to retain its significantly excessive earnings, rather than to refund the significantly excessive earnings to consumers. Given significantly excessive earnings, the PUCO must comply with the statute and make the proper refund to customers.

Respectfully submitted,

OHIO PARTNERS FOR AFFORDABLE
ENERGY



Colleen L. Mooney

(Reg. No. 0015668)

Ohio Partners for Affordable Energy

231 West Lima Street

Findlay, OH 45839-1793

Telephone: (419) 425-8860

FAX: (419) 425-8862

cmooney2@columbus.rr.com

*Attorney for Amicus Curiae
Ohio Partners for Affordable Energy*

CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief of Amicus Curiae Ohio Partners for Affordable Energy have been served by first class mail, postage prepaid, to the following parties of record, this 8th day of August 2011.


Colleen L. Mooney

SERVICE LIST

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

Samuel C. Randazzo
Frank P. Darr
Joseph E. Olikier
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

Maureen R. Grady
Melissa R. Yost
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
grady@occ.state.oh.us
yost@occ.state.oh.us

William Wright
Thomas McNamee
Public Utilities Commission of Ohio
180 E. Broad St., 6th Fl.
Columbus, OH 43215
William.wright@puc.state.oh.us
Thomas.mcnamee@puc.state.oh.us

Steven T. Nourse
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
stnourse@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
dconway@porterwright.com