ORIGINAL

IN THE SUPREME COURT OF OHIO

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	:	Case No. 2011-0751 Appeal from the Public Utilities Commission Of Ohio Case No. 10-1261-EL-UNC

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INTRODUCTION

Under Senate Bill 221, an electric utility is entitled to earn excessive profits under its Electric Security Plan ("ESP"), provided that the ESP does not result in "significantly excessive" profits. Any "significantly excessive" profits resulting from ESP "adjustments" (rate increases) must be returned to customers under R.C. 4928.143(F). Pursuant to that statute, the Public Utilities Commission of Ohio ("PUCO" or "Commission) examined whether Columbus Southern Power Company ("CSP"), had "significantly excessive" profits in 2009. In 2009, the PUCO awarded CSP ESP "adjustments" (rate increases) of $155.9 million which contributed to it being the most profitable of the 142 investor-owned electric utilities in the United States, with an after-tax return on equity of 20.84%.[1] But the PUCO conducted a flawed analysis that deprived customers of $22.24 million that should have been returned to them under R.C. 4928.143(F).

In Merit Briefs, both the PUCO and CSP (collectively, "Appellees") advocate for an interpretation of R.C. 4928.143(F) that is contrary to the plain meaning of the statute. The statute requires that *all* of the earnings of the utility be compared to *all* of the earnings of a comparable group of companies to determine if rate increases approved by the PUCO in a utility's ESP resulted in significantly excessive profits. The PUCO erred in its review of CSP's 2009 earnings when it compared only *part* of CSP's earnings to *all* of the earnings of a comparable group of companies.

Appellees maintain that the significantly excessive earnings test ("SEET") comparison should not consider off-system sales earnings since those sales are regulated by the Federal

[1] Supp. 69 and 136-37 (Customer Parties' Ex. 2, LK-3). A better quality version of Ex. LK-3 is available at R. 10/28/2010, Substitute copy of Mr. Kollen's exhibits LK-2 through LK-6 for easier reading and review.

Energy Regulatory Commission ("FERC"). The argument that federally-regulated items cannot be considered in the calculation of the utility's earnings is contrary to the statute and inconsistent with the manner in which the SEET review was actually conducted. Other federally-regulated items that reduce earnings, including $67,581,274 in interstate transmission expenses and $533,837,229 in costs of off-system purchases,[2] were not excluded from the SEET comparison.[3] Thus, the bright-line distinction between federally-regulated versus non-federally regulated items that Appellees attempt to establish is quickly blurred when the Commission's actual application of the SEET review is considered. This Court should not permit such an asymmetrical application of the statute, that excludes federally-regulated *revenue* (which increase earnings) but includes federally-regulated *expenses* (which decrease earnings).

Appellees also argue that off-system sales earnings were properly excluded from the SEET because off-system sales were not approved in CSP's ESP.[4] But Appellees misinterpret and misapply the language of R.C. 4928.143(F). The statute provides "[w]ith 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***." Contrary to Appellees' arguments, this language only serves to limit the amount of "significantly excessive" earnings that can be refunded to customers. The refund is limited to the amount of ESP adjustments (rate increases) imposed on consumers during the year. The language relied upon by Appellees does not restrict or limit the actual earnings components that must be included in the SEET. The statute requires a review of the utility's total earnings, but its refund exposure is limited to the ESP rate increases which contributed to significantly

[2] R.11/8/2010 Tr. Parts 1 and 2. (Company Ex. 1 (CSP FERC Form 1)) at 321, lines 76 and 112.
[3] PUCO Brief at 14 ("Although a variety of adjustments were suggested by CSP, the Commission was persuaded that only one adjustment was necessary, off system sales***").
[4] PUCO Brief at 14; CSP Brief at 5.

excessive profits. In this way, R.C. 4928.143(F) protects customers from ESP rate increases that, in retrospect, turned out to be unnecessary and which contributed to a utility's "significantly excessive" profits.

The plain language of R.C. 4928.143(F) requires the PUCO to compare *all* of the utility's earnings with *all* of the earnings of a comparable group of companies to determine whether a utility had "significantly excessive" earnings. This Court should reject Appellees' interpretations of R.C. 4928.143(F) and find that the Commission erred by comparing only *part* of CSP's 2009 earnings with *all* of the earnings of a comparable group of companies. Doing so will ensure that the unlawful amount of money paid by CSP's customers is refunded, which is the only way that CSP's customers will receive the full protection provided to them by the General Assembly in R.C. 4928.143(F).

ARGUMENT

A. Appellees' argument that off-system sales earnings were properly excluded for purposes of the SEET because such sales are regulated by the Federal Energy Regulatory Commission is unfounded and inconsistent with the plain language of the statute.

1. Appellees' argument that off-system sales earnings should be excluded for purposes of the SEET because such sales are regulated by the Federal Energy Regulatory Commission is inconsistent with the manner in which the SEET review was actually conducted.

Appellees argue that off-system sales are regulated by the FERC and are therefore properly excluded for purposes of the SEET comparison.[5] In making this argument, Appellees

[5] CSP Brief at 4 ("[t]he exclusion of off-system sales margins from the SEET calculation also is required to maintain the well-established distinction between wholesale sales, which are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission...and retail sales which may be regulated by the States."); PUCO Brief at 16 ("AEP met its burden of proof and showed that [off-system sales] are related to federally regulated transactions and not the ESP and therefore should be excluded."); CSP Brief at 9 ("The Commission was correct in refusing to interpret the SEET as encompassing earnings related to FERC-jurisdictional transactions.").

attempt to establish a jurisdiction-based "bright line" to justify the Commission's asymmetrical comparison of only *part* of CSP's earnings to *all* of the earnings of the comparable group. But that bright line is quickly blurred when the Appellees' argument is compared to how CSP's 2009 SEET review was actually conducted.

As background, a utility's "earnings" (profits) are calculated by determining its total revenues and then subtracting its total expenses for the same time period.[6] A utility's total revenue is comprised of funds that it receives from its normal business activities. Total revenues can stem from multiple sources, for example, revenues from services the utility provides to retail consumers, rent, interest, dividends, or off-system sales.[7] In 2009, CSP had total revenues of approximately $2 billion, of which $155.9 million resulted from ESP rate "adjustments."[8] Likewise, a utility's total expenses stem from multiple sources of costs, for example, the costs of coal, taxes, maintenance, Xerox paper, or off-system power purchases.[9] In 2009, CSP had total expenses of approximately $1.7 billion.[10] CSP's earnings (profits) for 2009 are determined by subtracting CSP's approximately $1.7 billion in total expenses from CSP's approximately $2 billion in total revenues. Thus, CSP had total "earnings" of $271.5 million in 2009.[11]

Appellees' argument that one particular source of revenue, off-system sales, was properly excluded from the earnings considered for purposes of the SEET because off-system sales are federally-regulated ignores the fact that other federally-regulated expenses were not excluded. In conducting the SEET review, the Commission used the information reported on CSP's FERC

[6] R. 11/8/2010 Tr. of Columbus Southern Power Co. hearing held on 10/26/10 at 255, lines 16-24.
[7] See, e.g. R.11/8/2010 Tr. Parts 1 and 2 (Company Ex. 1) at 300.
[8] R.11/8/2010 Tr. Parts 1 and 2 (Company Ex. 1) at 114-117.
[9] See, e.g. R.11/8/2010 Tr. Parts 1 and 2 (Company Ex. 1) at 320-23.
[10] R.11/8/2010 Tr. Parts 1 and 2 (Company Ex. 1) at 114-117.
[11] Appx. 43 (Opinion and Order, Case No. 10-1261-EL-UNC (January 11, 2011)("SEET Order") at 35).

Form 1 for 2009 to calculate CSP's earned return on equity, as required by the PUCO's rules.[12] FERC Form 1 data includes jurisdictional revenues and expenses (regulated by the PUCO) and non-jurisdictional revenues and expenses (not regulated by the PUCO).[13]

Appellees acknowledge that non-jurisdictional items were included in the SEET review.[14] For example, CSP's 2009 expenses, as reported to FERC, included interstate transmission expenses of $67,581,274.[15] Pursuant to the Federal Power Act, FERC regulates electric transmission in interstate commerce.[16] CSP acknowledges this fact in its Merit Brief.[17] But the Commission did not specifically exclude CSP's transmission expenses from the Commission's SEET comparison for CSP's 2009 earnings. Thus, the Commission excluded certain federally-regulated *revenue* from the SEET comparison, but included federally-regulated *expenses*.

Moreover, CSP's 2009 expenses, as reported to FERC, included $533,837,229 in purchased power costs.[18] These costs include wholesale power that CSP purchased off-system to

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[12] Appx. 21 (SEET Order at 13); Appx. 104 (Ohio Adm. Code 4901:1-35-03(C)(10)(a)(i) (requiring the filing of FERC Form 1 information in the annual SEET filings).

[13] See Company Ex. 1 at 114-117 and 320-23.

[14] Appx. 21 (SEET Order at 13) ("Nowhere in Section 4928.143(F), Revised Code, is a comprehensive jurisdictional allocation study required in order to determine an earned ROE appropriate for use in the SEET. Nor do we find that a comprehensive jurisdictional allocation study is the only manner in which to determine an earned ROE for SEET. Rather, we find that it is acceptable to make appropriate adjustments to FERC Form 1 data in order to develop an earned ROE for SEET. In making this determination, we note that, under applicable provisions of Section 4928.01, Revised Code, and under Section 4905.03, Revised Code, an electric utility is not limited to a subset of a firm's activities that may be regulated under an ESP. Additionally, the definition of an electric light company explicitly covers firms engaged in both activities subject to rate regulation by this Commission and activities such as transmission that are, in large part, subject to federal jurisdiction."); R. 11/8/2010 Tr. of Columbus Southern Power Co. hearing held on 10/25/10 at 137, lines 15-19 ("[Mr. Randazzo:] Have you excluded or did you direct Mr. Mitchell to exclude the earnings associated with the transmission business that is subject to FERC's jurisdiction for purposes of this case? [CSP witness Hamrock:] No.")).

[15] R.11/8/2010 Tr. Parts 1 and 2 (Company Ex. 1) at 321, line 112; The Commission also did not exclude $13,478,421 in revenues from CSP's transmission of electricity to others. R.11/8/2010 Tr. Parts 1 and 2 (Company Ex. 1) at 300, line 22.

[16] 16 U.S.C. 824.

[17] CSP Brief at 8; PUCO Brief at 14.

[18] R.11/8/2010 Tr. Parts 1 and 2 (Company Ex. 1) at 321, line 76

resell to CSP's customers.[19] As Appellees have noted, FERC regulates the wholesale power market.[20] Accordingly, under Appellees' argument that FERC-regulated items should be excluded from the SEET comparison, the $533,837,229 in costs for off-system purchases should have been excluded from the expenses used to determine CSP's 2009 earnings. But this was not how the SEET review was conducted. Instead, CSP's revenues from off-system *sales* were specifically excluded from the SEET while CSP's expenses from off-system *purchases* were included in the SEET.

Appellees' argument that off-system sales were properly excluded from the SEET comparison because such sales are federally-regulated is undermined by the fact that other federally-regulated expenses were not excluded. CSP's earnings from off-system sales were the only federally-regulated item that the Commission excluded from consideration for purposes of the 2009 SEET review. By excluding only one federally-regulated item, the earnings from off-system sales, from consideration for purposes of the SEET, the Commission biased the comparison and deprived customers of the refund in the amount required by R.C. 4928.143(F). The Commission's biased SEET comparison is contrary to R.C. 4928.143(F) which, as OEG/OCC have advocated, requires the Commission to compare *all* of the utility's earnings to *all* of the earnings of a comparable group of companies.

2. The inclusion of earnings from off-system sales in the SEET is not contrary to federal law.

Contrary to CSP's assertions,[21] the General Assembly's requirement that the Commission compare *all* of a utility's earnings to *all* of the earnings of companies with comparable risk for

[19] See R.11/8/2010 Tr. Parts 1 and 2 (Company Ex. 1) at 326-27.
[20] CSP Brief at 8.
[21] CSP Brief at 6-9.

purposes of the SEET is not contrary to federal law. OEG/OCC are not advocating that the Commission should have "clawed back" CSP's profits from off-system sales.[22] Rather, OEG/OCC advocate that the Commission should have returned to customers all of CSP's "significantly excessive" profits resulting from unnecessary ESP "adjustments" (rate increases) granted at the *retail* level. This is what R.C. 4928.143(F) requires.

The additional $22.24 million that customers would have received had the Commission conducted the SEET in accordance with Ohio law comes from the unnecessary rate increases the Commission approved at the *retail* level in CSP's ESP under review. R.C. 4928.143(F) limits the amount of "significantly excessive" earnings that must be returned to customers to the amount of money that was collected as a result of "adjustments" (rate increases) approved at the retail level in the ESP. If CSP had no ESP rate increases at the retail level in 2009, then R.C. 4928.143(F) would not require any of CSP's profits to be returned to customers, regardless of how large CSP's profits from off-system sales may have been.

CSP's argument that considering off-system sales earnings for purposes of the SEET violates federal law is based on slightly varying recitations of the established fact that FERC has exclusive jurisdiction over wholesale power transactions. But CSP's preemption arguments are not applicable to the present case. CSP admits that the "typical federal preemption case" involves the filed rate doctrine and a state attempting to prevent recovery of FERC-approved *costs* in retail rates.[23] Advocating that the Commission should consider off-system sales for purposes of the SEET is consistent with the plain language of R.C. 4928.143(F) and is not

[22] CSP Brief at 12 ("[i]t was legally necessary and appropriate for the Commission to exclude earnings from off-system sales, because the record was clear that the inclusion of off-system sales would overstate CSP's return on common equity and result in impermissibly clawing back wholesale earnings for refunds to retail customers").
[23] CSP Brief at 7.

equivalent to advocating that the Commission disallow the recovery of any FERC-approved costs, thereby "trapping" CSP with FERC-approved costs that it cannot recover from retail customers.

In the *Nantahala* and *Mississippi Power* cases cited by CSP, the Supreme Court held that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price...A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."[24] OEG/OCC do not advocate that the PUCO should deem FERC-approved rates to be altered in any way for purposes of the SEET comparison. Rather, FERC-approved wholesale rates should be considered for SEET purposes exactly as approved by and reported to FERC. Accordingly, OEG/OCC's argument is consistent with the findings of the *Nantahala* and *Mississippi Power* cases since considering off-system sales earnings exactly as approved by and reported to FERC does not require state alteration of FERC-approved rates.

The SEET refund does not represent disallowance of FERC-approved costs because the earnings returned to customers result from unnecessarily high *retail* rate increases granted by the PUCO in an ESP. 4928.143(F) protects customers from ESP rate increases that turn out to be unnecessary and which contribute to a utility's "significantly excessive" profits. Thus, the amount of money returned to customers after the Commission finds that a utility had "significantly excessive" earnings merely represents the PUCO's disallowance of unnecessarily high *retail* rates that the PUCO previously approved in an ESP.

[24] *Nantahala Power & Light Co. v. Thornburg*, (1986) 476 US 953, 965-66, 106 S. Ct. 2349, 90 L. Ed. 2d 943; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, (1988) 487 US 354, 373, 108 S. Ct. 2428, 101 L. Ed. 2d 322.

In its Brief, CSP seems to recognize that off-system sales are not the revenues being returned to customers after a SEET review.[25] Presumably anticipating arguments to this effect, CSP now claims more generally that, since there is a distinction between wholesale and retail regulation, "the State may not reach across that line and use wholesale earnings to justify retail refunds. To do so, in effect, penalizes or disadvantages a utility for achieving earnings that were lawfully achieved as a matter of law."[26] But R.C. 4928.143(F) serves to protect customers from unnecessarily high retail rate increases authorized in an ESP, and does not punish a utility for its non-jurisdictional profits. If a utility had no approved "adjustments" (rate increases) in its ESP under review, there could be no SEET refund, regardless of the amount of non-jurisdictional profits. The statute merely serves to remedy unnecessarily high ESP rate increases granted at the retail level. In this case, the $155.9 million ESP rate increase awarded to CSP in 2009[27] turned out to be unnecessary, and the portion of that rate increase which contributed to excess profits must be refunded.

In many of the jurisdictions where American Electric Power, CSP's parent company, operates, except Ohio and Tennessee, off-system sales profits are used to reduce retail rates.[28] If there was a valid federal preemption reason why reflecting off-system earnings in retail ratemaking was illegal, then the state commissions in Virginia, West Virginia, Indiana,

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[25] CSP Brief at 8 ("even if the Commission stops short of actually seizing wholesale earnings and putting them in the pool of earnings to be refunded to customers, it's assertion of jurisdiction over earnings from wholesale sales still is unlawful.").

[26] CSP Brief at 8.

[27] Supp. 36, Company. Ex. 4. Mr. Mitchell quantified the components of the cash rate increases as $20.934 million for the 2001-2008 environmental investments (Supp. 55, Ex. TEM-2), $9.352 million for enhanced vegetation management investments (Supp. 56, Ex. TEM-3), $8.429 million for gridSMART investments (Supp. 57, Ex. TEM-4), $80.209 million for net incremental POLR (Supp. 58, Ex. TEM-5), and a rate increase for fuel adjustment clause expenses of $36.982 million (Supp. 59-60, Ex. TEM-6). CSP Brief at 3.

[28] Supp. At 88, 172-74 (Customer Parties' Ex. 2 at 24 and Ex. LK-6).

Kentucky, Michigan, Texas, Oklahoma, Louisiana and Arkansas would all be in violation of the law. But they are not.

CSP's argument that the Commission's inclusion of off-system sales revenues in the SEET would violate federal law is misplaced, unsubstantiated, and selectively applied. A proper SEET comparison as required by R.C. 4928.143(F) requires the Commission to compare *all* of the utility's earnings, including earnings from off-system sales, to *all* of the earnings of a comparable group of companies.

B. Appellees' argument that earnings not directly associated with an ESP should be excluded from the SEET misinterprets and misapplies the plain language of R.C. 4928.143(F).

Appellees argue that off-system sales earnings cannot be considered for purposes of the SEET comparison because such sales are not provided for in an ESP nor are they considered to be ESP "adjustments."[29] This argument is based on the part of R.C. 4928.143(F) that provides "[w]ith regard to the provisions that are included in an electric security plan under this section, the commission shall consider***if any such adjustments resulted in excessive earnings***." The PUCO and CSP interpret and apply that statutory language in a manner that is contrary to the plain language of R.C. 4928.143(F).[30] That language serves to limit the amount of "significantly excessive" earnings that can be returned to customers, not the actual earnings components that must be included in the SEET.

When the Commission approves ESP "adjustments" (rate increases), it does so prospectively so that the utility can charge customers for certain expenses in the event the utility

[29] PUCO Brief at 14; CSP Brief at 5.
[30] R.C. 1.42 provides "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage***."

needs to do so. R.C. 4928.143(F) requires the Commission, on an annual basis, to retrospectively examine the utility's profits and determine whether the utility actually needed all of the rate increase it was awarded or whether any of that rate increase merely "resulted in excessive earnings". As the Commission has noted, "S.B. 221 created an approach to establishing ESP rates with significant regulatory flexibility including flexibility in what the utility may propose...The SEET examination included in S.B. 221 provides a check to this flexible approach."[31]

If the utility's yearly earnings are found to be "significantly excessive" under a proper SEET comparison, this demonstrates that the utility did not actually need the ESP rate increases ("adjustments") authorized by the Commission. The statute directs the Commission to return the unnecessary revenues that resulted from ESP "adjustments" back to customers. In this way, R.C. 4928.143(F) protects customers from the possibility of unjust and unreasonable rates resulting from rate increases that turned out to be unnecessary.

The phrase "***if any such adjustments resulted in excessive earnings***" caps the amount of the "significantly excessive" earnings that can be returned to customers at the total level of authorized rate increase. Thus, the amount of "significantly excessive" earnings that can be returned to customers after a SEET review is dependent on the level of "adjustments" approved in a utility's ESP. As CSP correctly notes, "the statute specifically provides that only earnings resulting from adjustments included in the EDU's ESP are subject to refund under the SEET."[32] If a utility's ESP did not include any "adjustments," then none of the utility's earnings could be returned to customers because any significantly excessive earnings would not be the result of increased revenues from ESP "adjustments." We agree that returning any earnings to

[31] Appx. 17-18 (SEET Order at 9-10).
[32] CSP Brief at 4.

customers in that circumstance would be contrary to the statutory language because there would be no ESP "adjustments" that could unnecessarily increase customers' rates.

CSP's approved ESP did include "adjustments" of $155.9 million in 2009.[33] Accordingly, pursuant to the statute, the amount of CSP's revenue eligible to be returned to customers was $155.9 million. For example, if the Commission had found that CSP had "significantly excessive" earnings of $200 million in 2009, customers would receive the $155.9 million resulting from ESP "adjustments" and CSP would keep the additional $44.1 million of significantly excessive earnings because the $44.1 million did not result from ESP "adjustments."

After excluding off-systems sales earnings from the SEET comparison, the Commission found that CSP had significantly excessive earnings of $42.683 million.[34] This amount was less than the $155.9 million in revenues resulting from CSP's ESP "adjustments" which could be returned to customers in accordance with R.C. 4928.143(F). Had the PUCO included CSP's 2009 off-system sales earnings in the SEET comparison, as required by R.C. 4928.143(F), CSP's customers would have received an additional $22.24 million over and above the refund ordered by the PUCO.[35] Accordingly, under a lawful SEET review, a total of $64.923 million would be returned to CSP's customers. With CSP's off-system sales earnings included in the SEET

[33] Supp. 36, Company. Ex. 4. Mr. Mitchell quantified the components of the cash rate increases as $20.934 million for the 2001-2008 environmental investments (Supp. 55, Ex. TEM-2), $9.352 million for enhanced vegetation management investments (Supp. 56, Ex. TEM-3), $8.429 million for gridSMART investments (Supp. 57, Ex. TEM-4), $80.209 million for net incremental POLR (Supp. 58, Ex. TEM-5), and a rate increase for fuel adjustment clause expenses of $36.982 million (Supp. 59-60, Ex. TEM-6). CSP Brief at 3.

[34] Appx. 43 (SEET Order at 35).

[35] Unjustified return on equity (20.84) minus adjusted return (19.73) multiplied by 20.039 equals $22.24 million. See Supp. 134 (Joint Intervenor Ex. 2, LK-2), which explains that every *1%* excessive return on equity equals a refund of $20.039 million, which quantification was not rebutted by the Company.

determination, CSP would still retain $90.983 million of its ESP "adjustments" since that level of "adjustments" did not result in "significantly excessive" earnings.

R.C. 4928.143(F) requires the Commission to compare *all* of a utility's earnings to *all* of the earnings of a comparable group of companies. Comparing apples to apples in this manner provides a meaningful way for the Commission to conduct the SEET review. If, after a proper SEET comparison has been conducted, the Commission determines that a utility has "significantly excessive" earnings, the Commission must return the amount of those earnings to customers. But, as R.C. 4928.143(F) provides, the amount of "significantly excessive" earnings that can be returned to customers is capped at the level of any rate "adjustments" granted in the utility's ESP under review.

C. Appellees' arguments regarding how the SEET review should be conducted result in unreasonable interpretations of R.C. 4928.143(F).

Appellees' arguments regarding what items should and should not be excluded from the SEET comparison lead to a confusing and unreasonable interpretation of the statute, which fosters uncertainty regarding the statute's future application and deprives customers of the protection from unreasonable rates.

1. The PUCO's statutory interpretation is contrary to the plain language of R.C. 4928.143(F).

In an attempt to justify its improperly conducted SEET comparison, the PUCO describes a three-step SEET analysis in which the Commission must: 1) "determine what level of earnings is excessive;" 2) "decide how high the excessive earnings must be to be considered 'significantly excessive;'" and 3) "eliminate from the significantly excessive earnings the portion that the

electric distribution utility (EDU), which bears the burden of proof, has shown not to be tied to the ESP that is being reviewed."[36]

The PUCO argues that the Commission did compare all of CSP's earnings to all of the earnings of a comparable group of companies, as OEG/OCC request, but that this was merely the first step of the SEET analysis (determining what level of earnings is "excessive").[37] Even if the Commission did such an initial comparison to determine what level of earnings is "excessive," the Commission only compared *part* of CSP's earnings to *all* of the earnings of the comparable group for purposes of actually determining the level of refund to be returned to customers. The last step is the most critical since it determines the amount of refund.

Further, while the Commission pays lip service to the idea that the SEET comparison should only consider items associated with the ESP under review, the Commission's position becomes inconsistent as it attempts to juggle the arguments of the parties in this case. When arguing against OEG/OCC's position that off-system sales should have been considered for purposes of SEET, the PUCO cites the portion of R.C. 4928.143(F) providing "[w]ith regard to the provisions that are included in an electric security plan***, the commission shall consider***if any such adjustments resulted in excessive earnings***."[38] The Commission argues that off-system sales were properly excluded from the SEET comparison because "OSS are subject to regulation by the Federal Energy Regulatory Commission" and "have nothing whatever to do with the ESP under review."[39]

But when arguing against the Industrial Energy Users-Ohio ("IEU-Ohio") position, the Commission argues that restricting the SEET review only to state-regulated activities is

[36] PUCO Brief at 6.
[37] PUCO Brief at 15.
[38] PUCO Brief at 14.
[39] PUCO Brief at 14.

inappropriate. Here, in its Brief, the Commission says "[i]f the General Assembly had meant the analysis to be done based on solely regulated activities, the comparable group would have been regulated entities. The comparison then would have been regulated to regulated. The General Assembly did not do this***."[40] The PUCO expands further on this point, arguing that "[t]he statutory comparison is to companies with more than just state-regulated utility operations because the General Assembly recognized that the [electric distribution utilities] to be examined under the SEET test themselves have more than just state-regulated utility operations. The General Assembly wanted apples to apples, while Appellant IEU wants apples to oranges."[41] The PUCO made a similar argument in the SEET Order.[42] Thus, under the PUCO's inconsistent interpretation, the Commission must limit the SEET review to items associated with the ESP under review, but can somehow also consider items that the Commission had no jurisdiction to approve in that ESP.

The PUCO tries to reconcile its inconsistent position by arguing that the utility has the burden of proof to demonstrate that an earnings component is unrelated to an ESP.[43] This novel approach was never introduced (nor sanctioned) before now, despite the fact that the Commission adopted detailed guidelines for evaluating a utility's earnings under SEET after extensive comment by various parties.[44] In the third-step of the PUCO's construct, the Commission says it must "remove the effects of those items that are not related to the provisions

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[40] PUCO Brief at 9. In the SEET Order, the Commission notes that "the definition of an electric light company explicitly covers firms engaged in both activities subject to rate regulation by this Commission and activities such as transmission that are, in large part, subject to federal jurisdiction." Appx. 21 (SEET Order at 13).
[41] PUCO Brief at 9-10.
[42] Appx. 21.
[43] PUCO Brief at 6 ("Finally, the Commission must eliminate from the significantly excessive earnings the portion that the electric distribution utility (EDU), which bears the burden of proof, has shown not to be tied to the ESP that is being reviewed.").
[44] See Supp. 1-33.

of the ESP under review,"[45] but the Commission limits the removal of items to only those items that the utility has sufficiently demonstrated are not tied to the ESP under review.[46]

The Commission attempts to create an after-the-fact justification for its asymmetrical SEET comparison by allowing the utility to demonstrate which earnings items should and which earnings items should not be associated with the ESP under review. The PUCO suggests that, under R.C. 4928.143(F), the Commission can only exclude items from the SEET comparison if the utility sufficiently demonstrates that those items are not associated with the ESP under review.[47] According to the Commission, off-system sales earnings were the only item excluded from the SEET comparison because it was the only earnings item that the utility sufficiently demonstrated should be excluded.[48]

The PUCO's statutory interpretation seems to allow a mix of ESP and non-ESP related items to be considered for purposes of SEET, depending on the evidence that the utility chooses to present. This leads to biased and meaningless SEET comparisons between a utility's earnings and those of comparable companies, such as the asymmetrical comparison at issue in this case. Further, the Commission's interpretation introduces great uncertainty about which earnings items may and may not be excluded from future SEET comparisons. Such uncertainty prevents the statute from being applied in a consistent and clear manner. The Commission's complex interpretation of R.C. 4928.143(F) undermines the plain instructions given by the General

[45] PUCO Brief at 13-14.
[46] PUCO Brief at 6.
[47] PUCO Brief at 6.
[48] PUCO Brief at 4 ("The Commission reduced the significantly excessive earnings of CSP to eliminate the effect of the only non-ESP effect supported by the record, off system sales, as required by statute.") and PUCO Brief at 19 ("With regard to additional jurisdictionalization, the companies failed to meet that burden of proof.").

Assembly by allowing the Commission to alter the words of the statute depending upon which evidence it elects to accept.

Although the statute does provide that "[t]he burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility," R.C. 4928.143(F) does not place any burden of proof on a utility to demonstrate whether earnings items are ESP or Non-ESP related. The PUCO inserts that additional element into the statute. The Commission would have the statute read that the PUCO shall determine excessive earnings "as measured by whether the earned return on common equity of the electric distribution utility, as altered by any adjustments that the utility has met its burden of proof to demonstrate are not associated with the electric security plan, 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 ***." No matter what evidence the utility presents, the Commission cannot alter the plain language of the statute. Although the Commission accuses others of creating alternative SEET reviews, in fact, it is the PUCO that is manufacturing "a SEET that might have been."[49]

The statute requires the PUCO to compare *all* of a utility's earnings to *all* of the earnings of a comparable group of companies. The PUCO is a creature of statute and therefore is required to abide by the statute.[50] The PUCO cannot insert additional language into R.C. 4928.143(F) to create an after-the-fact justification for its asymmetrical SEET comparison. As the Commission itself notes, "[i]t is improper to read words into a statute to interpret it."[51]

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[49] PUCO Brief at 2.
[50] *Akron & Barberton Belt Rd. Co. et al. v. Pub. Util. Comm.* (1956), 165 Ohio St. 316, 319, 135 N.E.2d 400, 402 ("the [PUCO] is solely a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.)"
[51] PUCO Brief at 11 (citing *State v. Hughes* (1999), 86 Ohio St. 3d 424, 427, 715 N.E. 2d 540).

The PUCO attests that it "applied the statutory test *reasonably*...."[52] But the PUCO is required to apply the statute *properly*. In accordance with the plain language of R.C. 4928.143(F), the PUCO should have compared *all* of CSP's 2009 earnings to *all* of the earnings of the comparable group of companies.

2. CSP's statutory interpretation is contrary to the plain language of R.C. 4928.143(F).

Like the Commission, CSP's arguments about what earnings components can be considered for purposes of the SEET review hinge on whether CSP is addressing OEG/OCC or IEU-Ohio. When arguing against OEG/OCC, CSP claims that "[f]or purposes of the SEET, the only relevant earnings – and the only earnings that may properly be at issue – are those derived from sales within the Commission's jurisdiction."[53] CSP further argues that "[t]he Commission's decision that revenue derived from off-system sales should be excluded from the determination of an EDU's return on common equity for the purpose of the SEET fully comports with R.C. 4928.143(F) because the statute specifically provides that only earnings resulting from adjustments included in the EDU's ESP are subject to refund under the SEET."[54]

But when arguing against IEU-Ohio, CSP argues that R.C. 4928.143(F) "does not state or imply that the SEET calculation should include a determination of the earned return on equity for some other entity created to reflect only that portion of the EDU's business governed by the ESP."[55] In Brief, CSP states that "[t]he General Assembly knew that an EDU could incur costs and derive revenue and earnings from activities and services outside of those tied to the rate

[52] PUCO Brief at 6 (emphasis added).
[53] CSP Brief at 8.
[54] CSP Brief at 4.
[55] CSP Brief at 11.

adjustments in the ESP."[56] And CSP admits that its other non-jurisdictional activities were not excluded from the SEET comparison.[57]

Like the PUCO, CSP's arguments result in a statutory interpretation that is unnecessarily complex and inconsistent. When attempting to justify the exclusion of off-system sales, CSP says it is important that earnings considered for SEET purpose are items tied to the ESP under review. Yet CSP maintains that revenues and earnings from activities outside of those governed by the ESP can also be considered.[58] Neither CSP nor the PUCO provide a valid bright line to justify the Commission's exclusion of only one particular revenue item, off-system sales earnings, from the SEET. Although CSP and the PUCO argue that federally-regulated revenue should be excluded from the SEET comparison, this argument is inconsistent with the manner in which the 2009 SEET review for CSP was actually conducted wherein federally-regulated costs were included.

The statutory interpretations by CSP and the PUCO merely introduce unnecessary complexity and uncertainty to the SEET comparison. A statute should not be interpreted to yield an absurd result.[59] This Court should not approve an absurd and asymmetrical SEET comparison contrary to the plain language of R.C. 4928.143(F). Instead, the Court should simply follow the plain language of R.C. 4928.143(F) and find that the Commission erred by comparing only *part* of CSP's 2009 earnings to *all* of the earnings of the comparable group of companies.

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[56] CSP Brief at 12.
[57] CSP Brief at 12.
[58] CSP Brief at 11-12.
[59] *Elston v. Howland Local Schools*, 113 Ohio St. 3d 314, 2007-Ohio-2070, 865 N.E. 3d 845 at ¶25.

D. R.C. 4928.143(F) acts as an explicit exception to *Keco* and, therefore, returning CSP's total "significantly excessive" earnings resulting from ESP "adjustments" to customers is appropriate in this case.

The Commission suggests that *Keco* should apply to this situation, arguing that OEG/OCC "simply want restitution of amounts they believe were overpaid and they want to avoid the step of obtaining a stay."[60] But, as OEG/OCC argued in the previous brief, the General Assembly unambiguously provided for the prospective return to customers of "significantly excessive earnings" resulting from ESP "adjustments" in R.C. 4928.143(F). Accordingly, R.C. 4928.143(F) acts as an explicit exception to *Keco*. Further, the bond requirements of R.C. 4903.16 do not apply in this situation because OEG/OCC do not seek to stay the execution of a PUCO order. Rather, OEG/OCC merely seek the prospective return of "significantly excessive" earnings to customers that is explicitly permitted and required by R.C. 4928.143(F).

E. The void-for-vagueness doctrine does not apply to R.C. 4928.143(F).

CSP argues that R.C. 4928.143(F) violates the Due Process Clauses of the Fifth and Fourteenth Amendment because the statute is unconstitutionally vague.[61] CSP's void-for-vagueness argument is misplaced, improperly supported, and inapplicable to R.C. 4928.143(F).

A review of applicable case law shows that the vagueness doctrine is rarely if ever applicable to statutes other than criminal laws.[62] Even the Company acknowledges that the void-for-vagueness doctrine is most commonly seen in the context of criminal laws.[63] The United States Court of Appeals for the Second Circuit has held: '[t]he 'void-for-vagueness' doctrine is

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[60] PUCO Brief at 21 (citing *Keco Indus. Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 141 N.E.2d 465).
[61] CSP Brief at 15-23.
[62] See *Winters v. New York* (1948), 333 U.S. 507, 515 68 S.Ct. 665, 92 L.Ed. 840; See, also, *Columbus v. Thompson* (1971), 25 Ohio St. 2d 26, 30, 266 N.E.2d 571.
[63] CSP Brief at 16.

chiefly applied to criminal legislation. Laws with civil consequences receive less exacting vagueness scrutiny."[64] In the rare and extreme instances where the vagueness doctrine is applicable to civil laws, a statute must be found to be "so vague and indefinite as really to be no rule or standard at all."[65]

The nature of the statute is critical in determining whether a statute is void for vagueness.[66] The United States Supreme Court has found that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow,[67] and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.[68] Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process."[69] The SEET statute is an economic regulation, warranting less strict vagueness scrutiny. Further, CSP had opportunities to clarify the meanings of the statute both by its own inquiry and through the PUCO's SEET investigation, in which CSP participated.[70]

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[64] *Monserrate v. N.Y. State Senate* (2d Cir. N.Y. 2010), 599 F.3d 148, 158.
[65] *Boutilier v. INS* (1967), 387 U.S. 118,123, 87 S. Ct. 1563, 18 L.Ed.2d 661.
[66] *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362, *reh. denied* 456 U.S. 950 (1982) ("The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment.").
[67] *Village of Hoffman Estates* at 498 (citing dictum in *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972) ("In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed.")).
[68] *Village of Hoffman Estates* at 498 (citing, *e.g. U.S. v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Cf. *Smith v. Goguen*, (1974), 415 U.S. 566, 574, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605).
[69] *Village of Hoffman Estates* at 498-99 (citing See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, (1966), 384 U.S. 35, 49, 86 S.Ct. 1254, 1263, 16 L.Ed.2d 336; *McGowan v. Maryland* (1961), 366 U.S. 420, 428, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393).
[70] See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Electric Utilities*, PUCO Case No. 09-786-EL-UNC, Columbus Southern Power Company's and Ohio Power Company's Initial Comments (Dec. 14, 2009), Columbus Southern Power Company's and Ohio Power Company's Reply Comments (Jan. 11, 2010).

The void for vagueness doctrine is a constitutional law concept that was created to protect individuals from statutes that are too vague for the average citizen to understand in the criminal realm.[71] As such, the doctrine is mainly cited in instances where an average citizen cannot generally determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed.[72] A void for vagueness argument is typically used to prevent the harshest of consequences; the deprivation of liberty (criminal) or a "chilling effect" (free speech). It is used to prevent these harms, because one cannot know when one "crosses the line" and therefore unfairly be subject to punishment.

CSP claims that "R.C. 4928.143(F) is unconstitutionally vague because it does not put the [electric distribution utility] on notice as to the action or conduct that can be undertaken to avoid the forfeiture penalty imposed."[73] As the Commission itself noted, in the SEET context, there is no "penalty" to CSP.[74] The utility must simply return revenues that it had no right to keep. The Commission stated that the statute "does not forbid or require the doing of an act but merely directs that prospective adjustments to rates be made in the future period if there is a finding that past rate adjustments resulted in significantly excessive earnings."[75] Further, as a practical matter, CSP is unlikely to take actions that would reduce its profits merely to avoid the possibility of a refund. There is little question that the vagueness doctrine was not intended to apply to a statute like R.C. 4928.143(F). The doctrine was never intended to protect utilities who earn too much from being required to return their "significantly excessive earnings."

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[71] See *Connally v. General Construction Co.* (1926), 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322.
[72] See *Connally*.
[73] CSP Brief at 22.
[74] Appx. 17.
[75] Appx. 17.

It is noteworthy that CSP failed to cite any public utilities cases where a statute had been challenged for vagueness. This may be easily explained. The SEET standard is not so vague that it provides no "standard at all," particularly in the context of public utility regulation. The SEET standard is more detailed than the "just and reasonable" standard used in most jurisdictions, including Ohio, for utility distribution rate cases.[76] The Federal Power Act, which grants FERC jurisdiction to regulate wholesale and transmission rates in interstate commerce, also mandates that rates must be "just and reasonable." The "just and reasonable" standard in public utilities regulation is far less detailed than the SEET standard.

One way that courts have assessed whether rates are "just and reasonable" is through the traditional "comparable earnings" standard established in U.S. Supreme Court case law.[77] The "comparable earnings" standard is similar to the standard set forth in R.C. 4928.143(F) in that both standards require a comparison of the profits of a utility to the profits of other businesses with similar risks.[78] Although CSP is correct that Senate Bill 221 established a new ratemaking structure in Ohio,[79] the SEET standard is still very similar to the "comparable earnings" standard, except that, unlike the "comparable earnings" standard, R.C. 4928.143(F) allows for "excessive" profits provided those profits are not "significantly excessive." The "comparable earnings" standard was not too vague to be understood and neither is the SEET statute.

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[76] See R.C. 4909.15.

[77] *Bluefield Water Works v. West Virginia* (1923), 262 U.S. 679, 692-93, 43 S.Ct. 675, 67 L.Ed. 1176; *Federal Power Comm. v. Hope Natural Gas* (1944), 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333.

[78] *Bluefield* at 692-93 ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures."); *Federal Power Commission* at 603 ("the return to the equity owner should be commensurate with the returns on investments in other enterprises having corresponding risks.").

[79] CSP Brief at 6.

Likewise, the rate of return for utilities has for decades been determined by the PUCO according to the law's relatively non-detailed standard of a "fair and reasonable rate of return."[80] The United States Supreme Court has also set forth a very broad constitutional standard to determine if a state ratemaking decision is constitutional: does the decision fall within a zone of *reasonableness*?[81] Although the precise meaning of the just and reasonable standard may be considered broad, it is certainly not void for vagueness, and neither is R.C. 4928.143(F). A broad standard in no way equates to one that must be characterized as unconstitutionally vague, particularly in the context of public utility regulation.

Courts have held that "[a] statute is not void for vagueness simply because it could be worded more precisely or with additional certainty. Rather, the 'critical question in all cases is whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable the individual to conform his or her conduct to the law."[82] CSP's reliance on *Norwood v. Horney* is misplaced. In *Norwood*, the Ohio Supreme Court found that the term "deteriorating area" was void for vagueness. In *Norwood*, the Ohio Supreme Court struck down a municipal ordinance that allowed private property in a deteriorating area to be taken by eminent domain. However, the Court described the ordinance as "offer[ing] so little guidance in application that it is almost barren of any practical meaning."[83] The same cannot be said for the SEET.

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[80] R.C. 4909.15(A)(2).
[81] See *Federal Power Commission* and *Bluefield.* (emphasis added).
[82] *Alliance v. Carbone*, 181 Ohio App.3d 500, 2009-Ohio-1197 at ¶15 (citing *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶86).
[83] *Norwood* at ¶ 97.

R.C. 4928.143(F) is not unconstitutionally vague. As the PUCO noted, the statute "provides a clear benchmark for identifying 'excessive earnings.'"[84] The determination of how "significantly excessive earnings" will be measured is described in R.C. 4928.143(F).[85] And Ohio's other electric utilities have apparently had no difficulty understanding the SEET test. Ohio Edison, Toledo Edison, Cleveland Electric Illuminating (collectively, "FirstEnergy") and Duke Energy Ohio ("Duke") have all been able to comply with the statute and have submitted stipulations in their SEET cases. To this end, the Commission has issued two opinions and orders approving and adopting the stipulations in these proceedings.[86] Interestingly, Duke's return earned on average common equity for 2009 was 9.46% and Duke stated that this return was not significantly excessive.[87] Further, and of particular significance, Duke *included proceeds from off-system sales in its calculation.*[88]

Similarly, FirstEnergy explained that their "2009 returns on equity for SEET purposes [were] less than the 10.5 percent return on equity authorized by the Commission in the Companies' most recent distribution rate case, while additionally pointing out that their returns are also below the "safe harbor" threshold of 200 basis points above the mean of the comparable

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[84] Appx. at 18.

[85] R.C. 4928.143(F) requires a determination of significantly excessive earnings "as measured by whether the earned return on common equity of the electric 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."

[86] See *In the Matter of the Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-656-EL-UNC, Opinion and Order, (November 22, 2010) ("Duke SEET Order"); and *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison 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*, Case No. 10-1265-EL-UNC, Opinion and Order (November 22, 2010) (FirstEnergy SEET Order").

[87] Duke SEET Order at 3.

[88] Id.

group recognized by the Commission in 09-786."[89] The PUCO also found that the FirstEnergy stipulation was reasonable and should be adopted.[90] R.C. 4928.143(F) is not unconstitutionally vague, as Duke and FirstEnergy were able to resolve their SEET proceedings. Here, CSP is merely attempting to manipulate the statute to its benefit, while complaining of "confusion" in the process.

Further, the idea of significantly excessive earnings is certainly not difficult to comprehend when considering that in 2009 CSP had the highest equity return of all 142 investor-owned electric utilities in the United States, by far.[91] During the depths of the worst economic recession since the Great Depression, in 2009 CSP had an after-tax return-on-equity of 20.84%. The full amount of the PUCO's $155.9 million rate increase which contributed to such excess profits must be returned to consumers.

This Court should reject CSP's argument that R.C. 4928.143(F) is void-for-vagueness. The statute itself should not be disturbed. Instead, this Court should apply the plain language of the statute by finding that the Commission erred in comparing only *part* of CSP's 2009 earnings to *all* of the earnings of the comparable group of companies.

CONCLUSION

WHEREFORE, Appellants respectfully submit that the Commission's January 11, 2011 Opinion and Order, January 27, 2011 Finding and Order, and March 9, 2011 Entry on Rehearing in PUCO Case No. 10-1261-EL-UNC are unlawful to the extent that they excluded the profits

[89] FirstEnergy SEET Order at 3-4.
[90] Id. at 5.
[91] Supp. 69 and 136-37 (Customer Parties' Ex. 2, LK-3).

from off-system sales from the earned return on equity of CSP. Accordingly, this Court should direct the Commission to correct the error complained of herein by requiring CSP to return to customers through prospective adjustments the additional $22.24 million that CSP's customers would have received if the PUCO had conducted a proper SEET comparison in accordance with R.C. 4928.143(F).

Respectfully submitted,

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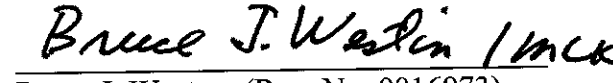

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CERTIFICATE OF SERVICE

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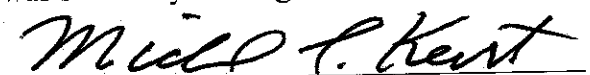

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INDUSTRIAL ENERGY USERS-OHIO

IN THE SUPREME COURT OF OHIO

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	:	Case No. 2011-0751
	:	
	:	Appeal from the Public Utilities Commission Of Ohio Case No. 10-1261-EL-UNC
	:	
	:	

REPLY APPENDIX

1.42 Common, technical or particular terms.

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Effective Date: 01-03-1972

000001

4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Effective Date: 10-01-1953

000002

4909.15 Fixation of reasonable rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good

000003

cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used

for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date . The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas company, not later than the end of the test period.

(D) A natural gas company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded,

exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

Amended by 129th General Assembly File No. 20, HB 95, § 1, eff. 9/9/2011.

Effective Date: 11-24-1999

000006

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[Laws in effect as of January 3, 2007]
[CITE: 16USC824]

[Page 1280-1282]

TITLE 16--CONSERVATION

CHAPTER 12--FEDERAL REGULATION AND DEVELOPMENT OF POWER

SUBCHAPTER II--REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Sec. 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric

utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

[[Page 1281]]

(d) ``Sale of electric energy at wholesale'' defined

The term ``sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) ``Public utility'' defined

The term ``public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),\1\ 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

\1\ So in original. Section 824e of this title does not contain a subsec. (f).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of--

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall--

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms ``affiliate'', ``associate company'', ``electric utility company'', ``holding company'', ``subsidiary company'', and ``exempt wholesale generator'' shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, Sec. 201, as added Aug. 26, 1935, ch. 687, title II, Sec. 213, 49 Stat. 847; amended Pub. L. 95-617, title II, Sec. 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102-486, title VII, Sec. 714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109-58, title XII, Secs. 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

References in Text

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (Sec. 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (Sec. 16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

Amendments

2005--Subsec. (b)(2). Pub. L. 109-58, Sec. 1295(a)(1), substituted ``Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ``The provisions of sections 824i, 824j, and 824k of this title'' and ``Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ``Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109-58, Sec. 1295(a)(2), substituted ``section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ``section 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109-58, Sec. 1291(c), which directed amendment of subsec. (f) by substituting ``political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ``political subdivision of a state,'', was executed by making the substitution for ``political subdivision of a State,'' to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109-58, Sec. 1277(b)(1), substituted ``2005'' for ``1935''.

1992--Subsec. (g). Pub. L. 102-486 added subsec. (g).

1978--Subsec. (b). Pub. L. 95-617, Sec. 204(b)(1), designated existing provisions as par. (1), inserted ``except as provided in paragraph (2)'' after ``in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95-617, Sec. 204(b)(2), inserted ``(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ``under this subchapter''.

Effective Date of 2005 Amendment

Amendment by section 1277(b)(1) of Pub. L. 109-58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109-58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

[[Page 1282]]

State Authorities; Construction

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 796 of this title.

Prior Actions; Effect On Other Authorities

Section 214 of Pub. L. 95-617 provided that:

``(a) Prior Actions.--No provision of this title [enacting sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

``(b) Other Authorities.--No provision of this title [enacting sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d

of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

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FIFTH AMENDMENT

U.S. Constitution MAIN PAGE ANNOTATIONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

‹ Fourth Amendment up Sixth Amendment ›

CONSTITUTION TOOLBOX

- CRS Annotated Constitution

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14TH AMENDMENT

U.S. Constitution MAIN PAGE ANNOTATIONS

AMENDMENT XIV

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

‹ 13th Amendment up 15th Amendment ›

CONSTITUTION TOOLBOX

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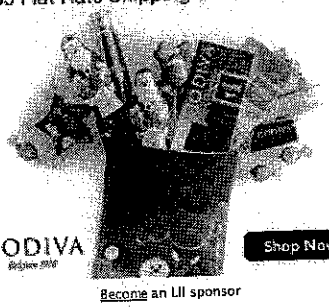

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