

**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application of Columbus : Case No. 2011-0751  
Southern Power Company and Ohio Power :  
Company for Administration of the : Appeal from the Public Utilities  
Significantly Excessive Earnings Test under : Commission of Ohio, Case No.  
Section 4928.143(F), Revised Code and Rule : 10-1261-EL-UNC  
4901:1-35-10, Ohio Administrative Code :

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**BRIEF OF AMICI CURAE OHIO EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON  
COMPANY**

**BRIEF DOES NOT EXPRESSLY SUPPORT THE POSITION OF ANY PARTIES  
TO THIS APPEAL**

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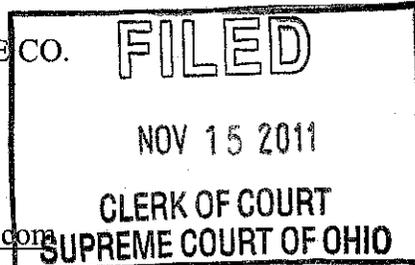
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## STATEMENT OF THE CASE

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “FirstEnergy Utilities”) file the within brief as Amici Curiae urging reversal of the Opinion and Order<sup>1</sup> of the Public Utilities Commission of Ohio (“Commission”) upon grounds related to the assertion of error on the cross-appeal of Columbus Southern Power Company (“CSP” ).<sup>2</sup> The error asserted in CSP’s notice of cross-appeal provides:

It was unlawful and unreasonable for the Commission to conclude that R.C. 4928.143(F) provides ample direction to reasonably apply the statute in this case and that the concept of “significantly excessive earnings is not fundamentally different from concepts the Commission regularly decides under Ohio statutory provisions for utility regulation.” Order, pp. 9-10; Entry on Rehearing, p. 4. Section 4928.143(F) of the Ohio Revised Code is unconstitutionally vague in that it fails to provide CSP with fair notice, or the Commission with meaningful standards, as to what is intended by “significantly excessive earnings.” (Notice of Cross-Appeal of CSP.)

That assertion of error is essentially captured in CSP’s Proposition of Law No. 4 that states:

R.C. 4928.143(F) is void and unenforceable because it is impermissibly vague and fails to provide electric distribution utilities with fair notice, or the Commission with meaningful standards, as to what is meant by “significantly excessive earnings.”

(CSP Br. at 2.) As Amici, the FirstEnergy Utilities do not expressly support the position of any party.

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<sup>1</sup> *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 (“CSP Case”),* Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011); Industrial Energy Users-Ohio (“IEU”) Appx. at 34-71.

<sup>2</sup> As distinguished from the issues raised in the initial appeals of Ohio Energy Group/Ohio Consumers’ Counsel and the Industrial Energy Users-Ohio.

The precise question addressed herein is whether the Commission utilized criteria that exceeded those permissible under the Ohio Revised Code in determining whether CSP's earnings under its Electric Security Plan ("ESP") were "significantly excessive" within the meaning of R.C. 4928.143(F). The FirstEnergy Utilities submit the answer to that question is in the affirmative.

The FirstEnergy Utilities are electric light companies and electric distribution utilities ("EDU") within the meaning of Title 49 of the Ohio Revised Code and are, therefore, public utilities subject to the jurisdiction of the Commission. Like cross-appellant CSP, the FirstEnergy Utilities' existing charges for utility service are, at least in part, established by the Commission's approval of an ESP pursuant to R.C. 4928.143. The same is also true for the other Ohio EDUs regulated by the Commission<sup>3</sup>. As a result, the FirstEnergy Utilities, as well as the other Ohio EDUs, are subject to the annual review required under R.C. 4928.143(F) for the determination whether, for the prior calendar year, they had "significantly excessive earnings" under their ESPs. If, under this significantly excessive earnings test ("SEET"), the Commission finds that such significantly excessive earnings have occurred, the Commission can order that the EDUs return them to customers. Accordingly, the Commission's interpretation and application of R.C. 4928.143(F) will affect all of the regulated EDUs in the state, including the FirstEnergy Utilities, in their future annual SEET reviews.

The importance of the Commission's decision was that it was the Commission's first opportunity to articulate the application of its interpretation of R.C. 4928.143(F) in

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<sup>3</sup> Duke Energy Ohio, Inc., Dayton Power & Light Company, and CSP's affiliate, Ohio Power Company.

an annual SEET review.<sup>4</sup> For the reasons that follow, the FirstEnergy Utilities submit that it did so erroneously. Therefore, this case is significant in that it provides the first opportunity for the Court to review and correct the Commission's error, providing guidance for future application of R.C. 4928.143(F).

### STATEMENT OF FACTS

The 2008 enactment of Amended Substitute Senate Bill No. 221 ("S.B. 221") created a framework under which each of the EDUs in the state implemented an ESP, approved by the Commission.<sup>5</sup> In doing so, each of them became subject to a mandatory, annual SEET review. Just as the mechanism of the ESP was an entirely new creation of the General Assembly, so was the concept of SEET. The Commission itself, on brief, acknowledges the concept as "novel" and there has been considerable controversy regarding its application. (Commission Br. at 4.) As CSP correctly observes, "[t]he

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<sup>4</sup> Although other EDUs, including the FirstEnergy Utilities, filed applications before the Commission in 2010 initiating their annual SEET reviews for the annual 2009 periods, those cases were resolved by Stipulations among parties to the proceedings which recommended a determination that the EDUs' earnings in that period were not "significantly excessive." The Commission accepted those Stipulations and entered Orders adopting their recommended findings. In contrast, the SEET filings for CSP and its affiliate, Ohio Power Company, were fully litigated and resulted in the Opinion and Order from which the appeals and cross-appeal have been taken. (See CSP Case, Opinion and Order; IEU Appx. at 34-71.)

<sup>5</sup> The Commission's Opinion and Order in the CSP Case as well as the Commission's Finding and Order in Case No. 09-786-EL-UNC ("SEET Investigation Case"), provide a discussion of the history and development of SEET. See CSP Case, Opinion and Order at 2-4; IEU Appx. at 35-37 and *In the Matter of the Investigation on the Development of the Significantly Excessive Earnings Test Pursuant to SB 221 for Electric Distribution Utilities.*, Case No. 09-786-EL-UNC ("SEET Investigation Case"), Finding and Order at 3-7 (June 30, 2010).; CSP Appx. at 3-7. Likewise, the Court's decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 128 Ohio St. 3d 512, 2011-Ohio 1788, 947 N.E. 2d 655, ¶¶ 2-6, provides a background as to the circumstances of enactment of S.B. 221 of which SEET was an integral component, albeit not one at issue in that case. The FirstEnergy Utilities also concur in the Statement of Facts set out in CSP's Brief. (CSP Br. at 2-4.)

meaning of the SEET has confounded the Commission, the EDUs and the customer advocates since its enactment.” (CSP Br. at 2.)

Interpretation of the standards for evaluating SEET began with litigation over the interpretation of R.C. 4928.143(F) in the initial ESP approval cases for the individual EDUs. Although the Commission ultimately approved ESPs for each of the state’s EDUs, most of the questions of interpretation of the SEET provisions of the statute went unresolved in those initial ESP cases.

In order to address the unresolved SEET issues, the Commission initiated a generic proceeding *In the Matter of the Investigation on the Development of the Significantly Excessive Earnings Test Pursuant to SB 221 for Electric Distribution Utilities.*, Case No. 09-786-EL-UNC (“SEET Investigation Case”). The SEET Investigation Case was initially framed to direct interested stakeholders to address a series of interpretive questions posed by the Commission at a workshop facilitated by the Commission’s Staff. *SEET Investigation Case*, Finding and Order at 3; CSP Appx. at 3. The Commission’s Staff was thereafter directed to develop and file its Recommendations with respect to the issues addressed at the workshop. Following development of the Staff Recommendations, the Commission directed the interested parties to file comments and reply comments with respect to those Recommendations. Finally, following the comment and reply period, the Commission took the unusual step of scheduling a public question and answer session, held before the entire Commission, in which the participants who filed comments<sup>6</sup> would further address the SEET issues and respond to the Commissioners’ inquiries. At the end of this multi-month process, the Commission

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<sup>6</sup> Including the FirstEnergy Utilities.

issued a Finding and Order in which many of the issues that it had framed for consideration in the SEET Investigation Case still remained unresolved, instead being deferred to “be determined based on the reasonable judgment of the Commission on a case by case basis” (i.e. in the future annual SEET reviews for each of the EDUs.) *Id.* at 29; CSP Appx. at 29.

What is most striking about the Finding and Order in the SEET Investigation Case is not that it failed to resolve outstanding issues regarding the SEET analysis – the very reason the Commission opened the case in the first place – but that the Commission, *sua sponte*, chose to expand dramatically the scope of the SEET analysis set out in the statute. The Commission did not clarify the mechanics of the analysis mandated in the statute, which had been the subject of attention through the ESP approval cases of each the EDUs and, subsequently, the focus of the SEET Investigation Case. Instead, the Commission chose to create an additional, entirely new set of its own subjective criteria, not suggested in the statute and not previously raised by or discussed by the interested stakeholders.<sup>7</sup>

The Commission’s list of new factors for consideration in a SEET review is as follows:

[T]he Commission will give due consideration to certain factors, including, but not limited to, the electric utility’s most recently authorized return on equity, the electric utility’s risk, including the following: whether the electric utility owns generation; whether the ESP includes a fuel and purchased power adjustment or other similar adjustments; the rate design and the extent to which the electric utility remains subject to

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<sup>7</sup> The Commission’s newly identified “factors” were not promulgated as formal regulations. Rather, the EDUs were simply directed to include information regarding them in the future SEET review filings. In their application for rehearing upon the Commission’s SEET Investigation Case, the FirstEnergy Utilities asserted that the Commission’s new criteria were unreasonable and unlawful. The Commission denied that application in its Entry on Rehearing. *SEET Investigation Case*, Entry on Rehearing at 12 (August 25, 2010); FirstEnergy Utilities Appx. at 31.

weather and economic risk; capital commitments and future capital requirements; indicators of management performance and benchmarks to other utilities; and innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio's economy, including research and development expenditures, investments in advanced technology, and innovative practices; and the extent to which the electric utility has advanced state policy.

*SEET Investigation Case*, Finding and Order at 29; CSP Appx. at 29.

In CSP's first annual filing for a SEET review under its ESP, which gives rise to the appeal and cross-appeal here, the Commission unlawfully and unreasonably applied these new criteria to the SEET review process.<sup>8</sup> It is these newly created criteria, invented by the Commission in the SEET Investigation Case and first applied in its Opinion and Order in the underlying case, to which this brief is addressed.

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<sup>8</sup> The Commission overlay its new factors on the statutory SEET analysis as follows. First, as required by the statute, the Commission determined the return on equity benchmark for the selected group of companies having comparable risk at 11%. (*CSP Case*, Opinion and Order, at 21; OEG/OCC Appx. at 29.) The Commission next determined what it termed the "starting point" for determining the threshold above which earnings would be "significantly excessive" by increasing the mean of the comparable group with a 50% adder ((11%) + (50% of 11%) = 16.5%). (*Id.* at 25; OEG/OCC Appx. 33; Commission Br. at 12-13.) Then, following an evaluation of its new criteria, it chose to "adjust" the threshold upwards from 50% to 60% ((11%) + (60% of 11%) = 17.6%). (*CSP Case*, Opinion and Order at 25 – 27; OEG/OCC Appx. at 33-35.) Thus, the increment of CSPs ESP earnings greater than 17.6% were considered "significantly excessive" and subject to return to customers.

In the instant case, the Commission's application of its own criteria benefitted CSP in that the Commission's reliance on its additional factors raised the threshold at which it would consider earnings to be significantly excessive, and, in turn, reduced the amount of such significantly excessive earnings that were subject to return to CSP's customers (had the threshold remained defined by the 50% adder). In any given SEET review, however, the Commission's evaluation of these new factors could produce an opposite result, thus increasing the amount of the potential return of the utility's prior period earnings to customers.

The Ohio Partners for Affordable Energy (OPAE), a party in the proceeding below, criticized the Commission's use of these criteria as part of the SEET analysis in its own application for rehearing in CSP's SEET Case. (*CSP Case*, OPAE Memorandum in Support of Application for Rehearing at 8-12 (February 10, 2011); FirstEnergy Utilities Appx. at 8-12.) The Commission denied OPAE's application for rehearing. (*Id.*, Entry on Rehearing at 6-9 (March 9, 2011); OEG/OCC Appx. at 58-61.)

## ARGUMENT

### PROPOSITION OF LAW NO. 1.

#### **The Commission unlawfully and unreasonably applied R.C. 4928.143(F) in a manner inconsistent with the express statutory language**

The Commission unlawfully and unreasonably applied R.C. 4928.143(F) in a manner inconsistent with the statute's own express language. In distinction to CSP's assignments of error in its notice of cross-appeal and addressed in its Proposition of Law No. 4 in its Brief, the FirstEnergy Utilities do not assert that R.C. 4928.143(F) is unconstitutionally vague or that it was unlawful and unreasonable for the Commission to conclude that R.C. 4928.143(F) provides ample direction to reasonably apply the statute in this case. Rather, the FirstEnergy Utilities submit that the Commission unlawfully and unreasonably disregarded the express direction that *is* in the statute regarding how the Commission determines whether significantly excessive earnings exist.

R.C. 4928.143(F) provides in pertinent part:

With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. . . . In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

The statute is explicit. In determining whether significantly excessive earnings exist, the statute directs the Commission to make a comparison between the return on

equity earned for the prior annual period by the electric utility under review and a group of publicly traded companies having comparable risk characteristics (adjusting as appropriate for capital structure). A single additional factor is articulated by the General Assembly for the Commission to consider in making its determination – “the capital requirements of future committed investments in this state.”

The Commission, however, rather than making a SEET determination consistent with the strict criteria expressly set out in the statute, erroneously and unlawfully departed from them, choosing instead to embellish the General Assembly’s language by adding a diverse potpourri of new factors of its own selection to consider in its SEET review. As discussed above, those new factors first arose in the SEET Investigation Case Finding and Order, but had not been applied in the actual annual SEET review for any EDU until the Opinion and Order below. Expressly relying upon its Finding and Order in the SEET Investigation Case, the Commission reiterated and applied these new factors, stating:

In regards to the determination of the SEET threshold, in 09-786, a number of commenters requested a “bright line statistical analysis test for the evaluation of earnings.” While the Commission agreed that “statistical analysis can be one of many useful tools,” we declined to adopt such a test. We concluded, instead, that “significantly excess[ive] [*sic*] should be determined based on the reasonable judgment of the Commission on a case-by-case basis.” Our Order noted the significant variation among Ohio electric utilities and went on to identify specific factors which the Commission would consider in its case-by-case analysis.

[T]he Commission will give due consideration to certain factors, including, but not limited to, the electric utility’s most recently authorized return on equity, the electric utility’s risk, including the following: whether the electric utility owns generation; whether the ESP includes a fuel and purchased power adjustment or other similar adjustments; the rate design and the extent to which the electric utility remains subject to weather and economic

risk; capital commitments and future capital requirements; indicators of management performance and benchmarks to other utilities; and innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio's economy, including research and development expenditures, investments in advanced technology, and innovative practices; and the extent to which the electric utility has advanced state policy.

(*CSP Case*, Opinion and Order, at 23-24; OEG/OCC Appx. at 31-32.)

As a general proposition the FirstEnergy Utilities do not disagree with the Commission's observation that "[t]he General Assembly has directed the Commission to utilize its experience and technical expertise in deciding a broad range of ratemaking issues." (*Id.* at 10; OEG/OCC Appx. at 18.) Deference to the Commission's experience and expertise, however, is not unlimited and certainly does not go so far as to permit the Commission to add to or to change the scope of the statute. "The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly." *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 88, 1999-Ohio-206, 706 N.E.2d 1255. The result of the Commission's *ultra vires* exercise below is to add to and, thus, exceed substantially the criteria intended by the General Assembly to be considered in the SEET analysis. This is improper for several reasons.

**A. The Commission's application of the statute violates established principles of statutory construction.**

First, the Commission's application of the statute violates established principles of statutory interpretation. R.C. 4928.143(F), quoted above, starts with the articulation of a general process for making a comparison of the utility earnings with the earnings of companies bearing comparable risk to ascertain whether the utility's earnings are "significantly excessive". The statute then provides that one additional factor – the

capital requirements of future committed investments in Ohio – *shall* be considered by the Commission in the determination as to whether significantly excessive earnings exist. Importantly, it is the *only* such additional factor specified by the General Assembly. *Inclusio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is a fundamental principle of statutory construction and is applicable here. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945, ¶21.

In specifying that the Commission is to consider this one additional element in the significantly excessive earnings determination, the statute precludes the Commission from relying on the potpourri of other discretionary, subjective factors which it listed in the Finding and Order in the SEET Investigation Case and applied in CSP’s case here. The Commission committed error when it did so.

**B. The Commission’s application of R.C. 4928.143(F) is contrary to this Court’s interpretation of the statute**

The Commission’s approach below flies in the face of the rationale expressed by this Court in *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 128 Ohio St. 3d 512, 2011-Ohio 1788, 947 N.E. 2d 655 (“*Consumers’ Counsel 2011*”). In that recent case, this Court rejected the broad interpretation of R.C. 4928.143 urged by the Commission, instead adopting a less expansive construction of the Commission’s authority. Specifically, the Court unanimously held that the Commission had no discretion to add categories of cost recovery in an ESP beyond those types that were expressly provided for in the statute. *Consumers’ Counsel 2011* at ¶35. In so doing, the Court dismissed the Commission’s argument that the items explicitly listed in the statute were only “illustrative” of what the Commission could choose to include in an ESP, stating:

The plain language of the statute controls, and this interpretation leads to a reasonable result. However, the [Commission's] interpretation would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended.

*Id.* at ¶34. The Court's direction in *Consumers' Counsel 2011* – a case that examined the statutory parameters under SB 221 – is directly applicable here. In R.C. 4928.143(F) the General Assembly determined – and stated – that for the SEET, a comparative analysis of the electric utility with a group of comparable risk companies would be undertaken and that *one* specific additional factor is to be considered by the Commission. The General Assembly set the statutory bounds of the SEET determination. The Commission, however, instead chose to add its own list of additional factors to the mix and additionally, implied that it reserved the right to add still more. This effectively removed “any substantive limit” to the Commission's determination under SEET, a result contrary to this Court's direction in *Consumers' Counsel 2011*. The Court's rationale for, and the constraint imposed on the Commission's attempt to expand the legislative list of categories of cost recovery in *Consumers' Counsel*, requires the same result here with respect to SEET.

It is apparent that any application of the Commission's added factors in a SEET analysis can become highly subjective and uncertain, and would offer little, if any, precedential guidance as to future application.<sup>9</sup> Consideration of these factors, which in themselves are subject to interpretation, would make the SEET analysis potentially so

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<sup>9</sup> The absence of such direction for future application is a flaw that Cross Appellant CSP argues rises to the level of constitutional infirmity. (CSP Br at 22-23.)

subjective as to be completely arbitrary.<sup>10</sup> Moreover, the Commission expressly states that its list of factors is by no means all inclusive and that it may, at its choosing, add even more, although now unknown, factors in the future. *SEET Investigation Case*, Finding and Order at 29; CSP Appx. at 29. As in *Consumers' Counsel 2011*, such unchecked discretion cannot be what the legislature intended.

C. **The Commission's reliance upon extra-statutory criteria in its SEET analysis is not justified based upon the scope of discretion afforded the Commission under the Revised Code to determine the "fair and reasonable rate of return" in a ratemaking proceeding.**

The Commission also appears to justify its reliance on its new criteria in analogizing the SEET determination to the more familiar determination of the allowed rate of return in a traditional base rate proceeding brought under R.C. 4909.18.

These concepts are not new or novel and have been traditionally applied in the regulatory ratemaking process. *Federal Power Commission v. Hope Natural Gas Co.*, (1944), 320 U.S. 591.

Moreover, the fact that there may be disagreement about how to define and apply this benchmark is not new. Parties frequently present the Commission with different views about a utility's return on common equity.

(Opinion and Order at 10; OEG/OCC Appx. at 18.)

Certainly there are some similarities between the underlying analytical methodology applied in determining the allowed return on common equity in a ratemaking proceeding and a SEET analysis. Moreover, there is nothing remarkable about the fact that the Commission will resolve disagreements among the parties in both

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<sup>10</sup> Not only is this an inappropriate regulatory outcome, but it is one that has the likely consequence of increasing costs to customers as the uncertainty in application of the test is likely to be viewed as increasing regulatory risk and, in turn, the utility's cost of capital, a cost which, ultimately, is passed on to its customers. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, (1983) 6 Ohio St.3d 405, 453 N.E.2d 584.

situations. However, the important distinction is that the scope of the statutory discretion afforded the Commission in the two situations is quite different.

In the rate case context, the sole statutory direction is provided by a brief statement in R.C. 4909.15(A)(2) that requires the Commission determine:

“the fair and reasonable rate of return on the valuation” [of the property used and useful in rendering utility service]

That is it – the totality of the statutory direction. From there, the Commission is obviously given broad discretion in determining what is “fair and reasonable”, albeit to be guided by precedent and constrained by the long-established constitutional criteria of *Federal Power Commission v. Hope Natural Gas Co* (1944) 320 U.S. 591, a case the Commission cited in its decision in the underlying case, and *Bluefield Water Works v. West Virginia* (1923) 262 U.S. 679, 692. (Opinion and Order at 10; OEG/OCC Appx. at 18.)<sup>11</sup>

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<sup>11</sup> See also *SEET Investigation Case*, Finding and Order at 19; CSP Appx. at 19. The Court has had prior occasions to review the Commission’s determination of “fair and reasonable return.” See e.g., *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, (1984) 12 Ohio St.3d 280, 466 N.E.2d 848 *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, (1980) 64 Ohio St. 2d 71, 79, 413 N.E.2d 799, 804 (“By omitting a specific formula in R.C. 4909.15 for determining an appropriate rate of return, the General Assembly has vested the commission with broad discretion.”)

The explicit statutory constraints for a SEET determination are different, in addition to being both more extensive and more explicit.<sup>12</sup> For a SEET determination, R. C. 4928.143(F) states that the Commission is to determine if the provisions of an ESP resulted in excessive earnings as measured by:

- Whether the earned return on common equity of the EDU is significantly in excess of that earned during the same period by companies having comparable business and financial risk (with appropriate adjustment for capital structure);
- Consideration given to the capital requirements of future committed investments in this state; and
- No consideration, directly or indirectly, given to the revenue, expenses, or earnings of any affiliate or parent company.

The Commission acknowledges as much in the Opinion and Order in the underlying case:

Contrary to AEP-Ohio's argument, Section 4928.143(F), Revised Code, provides a *clear benchmark* for identifying "excessive earnings." For example, the statute defines earnings as excessive "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." Additionally, the statute directs the Commission to make "such adjustments for capital structure as may be appropriate" Further, the Commission is to consider "the capital requirements of future committed investments in this state." Finally, the Commission is directed to "not consider, directly or indirectly, the

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<sup>12</sup> Moreover, the discussion in the Commission's Finding and Order in the Commission's SEET Investigation Case demonstrates that the process for determination of a fair and reasonable rate of return for ratemaking and the determination of SEET are fundamentally different in other key respects: 1) the focus of ratemaking is forward looking, attempting to capture investor expectations, while SEET is retrospective, looking at the earnings of a prior year, and 2) the metrics used in ratemaking are market measures whereas the SEET looks to earnings, an accounting measure. *SEET Investigation Case, Finding and Order at 20; CSP Appx. at 20.* Moreover, there is symmetry with respect to the setting of an allowed rate of return in ratemaking, i.e. in any given future period, the utility has the opportunity or expectation to earn somewhat more, or somewhat less, than the allowed return. In contrast, SEET is asymmetric. A utility's prior earnings may be returned to customers if they are determined to be significantly excessive, but there is no mechanism to augment the utility's earnings if they were significantly deficient. *Id.*

revenue, expenses, or earnings of any affiliate or parent company."  
(emphasis supplied).

(Opinion and Order at 10; OEG/OCC Appx. at 18.) Inexplicably, however, the Commission then goes on to ignore that “clear benchmark” and creates its own new factors. In so doing, it exceeds the discretion afforded it by the General Assembly.

**D. The Commission’s selection of additional factors in its application of the SEET is arbitrary and capricious and an abuse of the Commission’s discretion.**

Next, even assuming, *arguendo*, the statute permitted the Commission to add new criteria of its own to those specified by the General Assembly, its choice of such additional factors is arbitrary and capricious and an abuse of the Commission’s discretion. Even a cursory review of the list demonstrates that most of the factors added by the Commission are logically irrelevant, if not counterintuitive, to any reasonable determination of what level of earnings should be deemed significantly excessive.

Take, for instance, that the Commission states it will consider the utility’s rate design as part of its SEET analysis. Rate design addresses the allocation of responsibility for how, or the mechanism by which, a predetermined level of a utility’s costs (i.e. a utility’s revenue requirements) are recovered from its customers. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, 926 N.E.2d 261.

How does that concept bear in any way on assisting in resolving the question of whether the amount of a utility’s earnings in a prior period are “significantly excessive”?

Moreover, a utility’s rates – and the rate design they reflect – require pre-approval by the Commission before they are implemented. That preapproval is the Commission’s opportunity for review of rate design. Once that approval has been granted, the utility

has no discretion to vary from it absent subsequent Commission approval. How then, does it relate to the question of whether earnings resulting from an ESP were excessive?

The Commission also indicated it will consider a variety of factors which, essentially, touch on the state policy objectives articulated in R.C. 4928.02. Specifically, the Commission stated it would consider:

innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio's economy, including research and development expenditures, investments in advanced technology, and innovative practices; and the extent to which the electric utility has advanced state policy.

*SEET Investigation Case at 29; CSP Appx. at 29.* Again, the threshold question is: what do these factors have to do with evaluating whether the level of a utility's earnings in a prior period are "significantly excessive" as compared with the earnings of a group of companies of comparable risk? The FirstEnergy Utilities submit there is none.<sup>13</sup> The Commission considers an ESP's conformance with state policy objectives at the outset of the process, during approval of the ESP. *See* Rule 4901:1-35-03, Ohio Administrative Code; FirstEnergy Utilities Appx. at 37-47. This group of factors may appropriately be factors under the Commission's rules for consideration whether a particular ESP is to be adopted at all, but they no way assist in ascertaining whether a utility's earnings were significantly excessive.

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<sup>13</sup> The FirstEnergy Utilities do not dispute that, for example, some parts of this group of factors, notably "investments in advanced technology" may fall within the statutory directive for the Commission to consider the capital requirements for future committed Ohio investments. The problem is that the Commission's list of new criteria includes several factors which are outside of those directed by the General Assembly to be used in the SEET determination. As a group, they put the Commission in the position of exceeding the bounds of its authority.

## CONCLUSION

The FirstEnergy Utilities do not ask here that the Court venture into the statutory province reserved to the discretion of the General Assembly. They do, however, ask that it exercise its power to preclude the Commission from doing so. If the General Assembly had intended the Commission to have the range of discretion the Commission asserts it has in determining whether earnings are “significantly excessive”, the General Assembly would not have inserted the specific metric against which significant excessiveness is to be measured (i.e. the group of comparable companies), nor would have it articulated expressly what additional factor may be considered in the assessment (capital requirements of future committed investments in the state). The fact that the General Assembly provided such specific criteria leaves no room for the Commission to create an additional list of factors from whole cloth.

The Opinion and Order should be reversed and remanded to the Commission with direction that the Commission reasonably and lawfully apply R.C. 4928.143(F).

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**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application of Columbus : Case No. 2011-0751  
Southern Power Company and Ohio Power :  
Company for Administration of the : Appeal from the Public Utilities  
Significantly Excessive Earnings Test under : Commission of Ohio, Case No.  
Section 4928.143(F), Revised Code and Rule : 10-1261-EL-UNC  
4901:1-35-10, Ohio Administrative Code :

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**APPENDIX FOR BRIEF OF AMICI CURAE OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO  
EDISON COMPANY**

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**FILE**

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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. )

**PUCO**

Case No. 10-1261-EL-UNC

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
APPLICATION FOR REHEARING**

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Ohio Partners for Affordable Energy ("OPAE") hereby applies for rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") on January 11, 2011 in this proceeding concerning the application of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") for administration of the Significantly Excessive Earnings Test ("SEET") made pursuant to Ohio Revised Code ("R.C.") Section 4928.143(F) and Rule 4901:1-35-10, Ohio Administrative Code. OPAE submits that the Commission's January 11, 2011 Opinion and Order is unreasonable and unlawful in the following particulars:

- 1) The Commission's Opinion and Order is unreasonable and unlawful pursuant to R.C. Section 4928.143(F) because it rejects the reasonable and lawful benchmark return on equity ("ROE") of a comparable group of companies for CSP of 9.58%, establishes a comparable group ROE benchmark in a range between 10% and 11%, and then establishes an excessive ROE benchmark for CSP at the top of the Commission's range, i.e., 11%. Opinion and Order at 21.
- 2) The Commission's Opinion and Order is unreasonable and unlawful pursuant to R.C. Section 4928.143(F) because it rejects the

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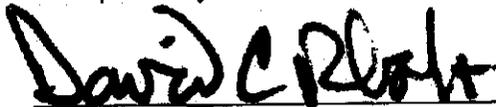
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reasonable and lawful SEET threshold range of 11.58% to 13.58% and the use of a 200-400 basis point adder to the benchmark ROE of the comparable group of companies of 9.58% to establish significantly excessive earnings. Opinion and Order at 24.

- 3) The Commission's Opinion and Order is unreasonable and unlawful pursuant to R.C. Section 4928.143(F) in that the Commission found that "utility specific factors related to investment requirements, risk and investor expectations" resulted in a 60% adder to the mean of the comparable group of companies, which yielded an unreasonable and unlawful SEET threshold of 17.6%. Opinion and Order at 25-27.
- 4) The Commission's Opinion and Order is unreasonable and unlawful pursuant to R.C. Section 4928.143(F) in that it excluded off-system sales margins from the SEET analysis. Opinion and Order at 29-30.
- 5) The Commission's Opinion and Order is unreasonable and unlawful because it did not make the refund required by R.C. Section 4928.143(F).

The reasons for granting this Application for Rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,



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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'  
MEMORANDUM IN SUPPORT  
OF THE APPLICATION FOR REHEARING**

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- 1) **The Commission's Opinion and Order is unreasonable and unlawful pursuant to R.C. Section 4928.143(F) because it rejects the reasonable and lawful benchmark return on equity ("ROE") of a comparable group of companies for CSP of 9.58%, establishes a comparable group ROE benchmark in a range between 10% and 11%, and then establishes an excessive ROE benchmark for CSP at the top of the Commission's range, i.e., 11%. Opinion and Order at 21.**

The Office of the Ohio Consumers' Counsel, the Ohio Manufacturers' Association, the Ohio Hospital Association, the Appalachian Peace and Justice Network, and the Ohio Energy Group (together "Joint Intervenors") presented the testimony of J. Randall Woolridge who computed a benchmark return on equity ("ROE") for a group of comparable public companies and adjusted the benchmark ROE for the capital structure of CSP. Dr. Woolridge first identified a peer group of electric utility companies and developed a list of business and financial risk measures for this electric utility group. He then identified a group of 45 comparable public companies whose business and financial risk indicators fell within the ranges of the electric utility group. He then computed a benchmark ROE of 9.45% for 2009 for the group of comparable public companies and adjusted the

benchmark ROE for the capital structure of CSP. Tr. II at 314-317. The adjusted benchmark ROE for CSP was 9.58%.

The Commission rejected the Joint Intervenors' comparable group of companies because, according to the Commission, it was developed from an electric only proxy group without any direct relationship to the electric utility, and, most significantly, again according to the Commission, produces the same comparable group of companies for all Ohio electric utilities. Opinion and Order at 21. The Commission then accepted the Staff of the Commission's ("Staff") comparable benchmark ROE in the general higher range of between 10 and 11%. Opinion and Order at 20-21. The Commission then found that the benchmark at the top of the range, 11%, was warranted, rather than the Staff's recommended 10.7%.

The Commission should have accepted the Joint Intervenors' benchmark ROE of 9.45% for 2009 for the group of comparable public companies and the adjusted benchmark ROE for CSP of 9.48%. The Joint Intervenors' witness Dr. Woolridge started his analysis with an electric only proxy group but he also developed a group of four business and financial risk indicators to use in screening for a group of comparable publicly traded companies that have similar business and financial risk characteristics to his electric utility proxy group. When the screens were applied, it produced another 30 companies for the comparable group and when added to the proxy group, produced a comparable set of 45 companies. Jt. Ex. 1 at 12-13.

The Commission's criticism of the Joint Intervenors' comparable group is without foundation. First, the comparable group is properly a group of companies, including, but not all utilities, that have similar business and financial risk characteristics of electric utilities. Given the distinctive risk profiles of public

utilities, it is not surprising, nor is it inappropriate, that most of the comparable companies are public utilities. Dr. Wooldridge's analysis complies with R.C. Section 4928.143(F) because it compares publicly traded companies, including utilities, that face comparable business and financial risks as CSP. Dr. Woolridge also adjusted to account for differences in the financial risk between CSP and the comparable companies, making his analysis between CSP and the group even more comparable. The end result, a benchmark ROE for CSP of 9.58%, should have been accepted by the Commission.

Moreover, the Commission's selection of 11%, the very top of the range of the Commission's comparable group benchmark ROE, only serves to thwart the application of the SEET as a check against significantly excessive earnings by the utility. The Commission's adoption of an ROE benchmark for CSP at the very highest point in the Commission's range has no other purpose ultimately than to limit the amount of earnings that the Commission considers significantly excessive. The proper operation of the SEET does not allow for such transparent gaming on the part of the Commission to reduce the amount of significantly excessive earnings that should be refunded to customers. The Commission should grant rehearing and adopt the lawful and reasonable benchmark ROE of 9.45% for 2009 for the group of comparable public companies and the adjusted benchmark ROE for CSP of 9.48% as recommended and supported by the Joint Intervenors.

- 2) The Commission's Opinion and Order is unreasonable and unlawful pursuant to R.C. Section 4928.143(F) because it rejects the reasonable and lawful SEET threshold range of 11.58% to 13.58% and the use of a 200-400 basis point adder to the benchmark ROE of the comparable group of companies to establish significantly excessive earnings. Opinion and Order at 24.**

After he calculated the adjusted benchmark ROE for CSP of 9.58%, the Joint Intervenors' witness Dr. Woolridge added an ROE premium (200-400 basis points) to establish the SEET threshold ROE. Setting the SEET threshold at 200 basis points over returns of comparable companies is consistent with the Commission's adoption of a 200 basis point safe harbor for the SEET. Above the 200 basis point safe harbor, the earnings are excessive. The SEET threshold ROE for CSP is in the range of 11.58% (200 basis points above 9.58%) to 13.58% (400 basis points above 9.58%). Earnings above 11.58% or 13.58% should have been considered significantly excessive. Tr. II at 314-317; Joint Intervenors' Ex. 1 at 23; Joint Intervenors' Ex. 1A at JRW-7. CSP's earned return on equity of 20.84% is clearly far outside the range and clearly significantly excessive.

Just as the Commission rejected the Joint Intervenors' development of the comparable group of companies, the Commission also rejected the Joint Intervenors' SEET threshold range of 11.58% to 13.58%. The Commission did not believe that the use of a 200-400 basis point adder to the benchmark ROE of the comparable group of companies was "optimally related to the purpose of the SEET." Opinion and Order at 24. This was determined in spite of the fact that the Commission itself established the 200 basis point safe harbor provision for the SEET.

Instead of using the 200-400 basis point adder, the Commission followed the position taken by its own Staff, which recommended that the threshold ROE be expressed as a percentage of the comparable group companies' ROE. Staff advocated a 50% adder to the comparable group of companies' ROE to establish the SEET threshold. The Commission found that the Staff's use of a percentage of the average of comparable companies more appropriately related to the purpose of the SEET. This is apparently because the Commission does not view the purpose of the SEET to be a protection of consumers against a utility's significantly excessive earnings. The Commission found that while the SEET is to be a statutory check on rates that result in excessive earnings, the Commission was also concerned that the utility operate successfully, maintain financial integrity, attract capital and compensate its investors for the risk assumed. Opinion and Order at 25. The Commission found that the Staff's proposal created "symmetry" with the Commission's obligations to the utility.

The intent of the SEET is to protect consumers against significantly excessive earnings by a utility. R.C. 4928.143(F). Ignoring the purpose of the statute, the Commission actually thwarted its purpose and intent to protect consumers. The Commission transparently went out of its way to protect the utility from the statutorily required refunds. The Commission should grant rehearing and find that the SEET threshold ROE for CSP is in the range of 11.58% (200 basis points above 9.58%) to 13.58% (400 basis points above 9.58%). Earnings above 11.58% or 13.58% should have been considered significantly excessive. Tr. II at 314-317; Joint Intervenors' Ex. 1 at 23; Joint Intervenors' Ex. 1A at JRW-7. CSP's earned return on equity of 20.84% was clearly far outside the range and clearly significantly excessive. The Commission's "obligations" to the utility and need for symmetry serve no other

purpose here than to deny CSP's customers the protections of R.C. 4928.143(F). The Commission is without authority to thwart the purpose of R.C. 4928.143(F) and to deny customers its protections.

- 3. The Commission's Opinion and Order is unreasonable and unlawful pursuant to R.C. Section 4928.143(F) in that the Commission found that "utility specific factors related to investment requirements, risk and investor expectations" resulted in a 60% adder to the mean of the comparable group of companies, which yielded an unreasonable and unlawful SEET threshold of 17.6%. Opinion and Order at 27.**

The Commission did not stop at its finding adopting the Staff's use a 50% adder to the comparable group of companies' benchmark ROE to establish the SEET threshold. The Commission unreasonably and unlawfully found that the Staff's 50% adder should be adjusted even further upward. The Commission found that the appropriate percentage to be added to the mean of the comparable group companies was 60%, which yielded a SEET threshold of 17.6%. Opinion and Order at 27. The Commission made this leap due to "utility specific factors" of the utility's actual performance or factors unrelated to the ESP. The Commission considered utility specific factors related to investment requirements, risk and investor expectations. Opinion and Order at 25.

The Commission found that CSP continues to make "extensive" capital investments in the state of Ohio, that CSP demonstrated that it is "committed to spending the projected capital budget for 2010"; that CSP is facing various business and financial risks; that CSP is committed to innovation, in particular its gridSmart program; and that CSP made efforts to advance Ohio's energy policy. Opinion and Order at 25-26. The Commission also stated that electric utilities are not assured of recovery of their generation assets due to the change in the regulatory environment, the prospect of future industry restructuring and carbon

regulation. The Commission stated that market prices for generation-related services are volatile. The Commission also mentioned the "challenge of fulfilling the various mandates of SB 221, within the context of a rapidly changing electric market." Opinion and Order at 26. The Commission referred to the benchmark requirements in the areas of energy efficiency and peak demand response and CSP's proposal to provide \$20 million in funding to a solar project in Cumberland, Ohio. However, the Commission also acknowledged that this solar project was only in the early stages of development and might not actually be a commitment. Should this project not move forward, the Commission required the \$20 million be spent in 2012 on a similar project. Opinion and Order at 27. In the end, all these special factors meant that instead of Staff's 50% baseline adder, the adder was adjusted upward so that the Commission found the appropriate percentage to be added to the mean of the comparable group companies was 60%, which yielded the SEET threshold of 17.6%. Opinion and Order at 27.

The Commission's findings with regard to the 60% adder are both unreasonable and unlawful. The Commission should only have considered CSP's capital requirements for future **committed** investments in Ohio that would occur **during the period of the current electric security plan ("ESP")**, which lasts through the end of 2011. For example, with regard to the solar project mentioned by the Commission, it is only now in the development stages and cannot be considered a committed investment. Moreover, if the solar project is actually constructed, it is not expected that work on the project will begin until 2012. Because construction on the project will not begin until 2012, after the ESP period in this case, the Commission should not have considered this project. With regard to the gridSmart project and future environmental investments, these capital projects also extend beyond the ESP period. Moreover, like the solar

project, the environmental investments and gridSmart are not "committed" investments. These projects are so far from being committed that CSP cannot even provide the capital budget requirements for these projects, nor can the Commission assess a value to these projects for purposes of the SEET. Future committed investments do not include any investment that CSP merely intends to make at some time in the future. Committed must mean an actual commitment.

In addition, capital investments that are funded by third parties, including the federal government, or funded by customers through Commission-approved riders, do not merit any increase to the ROE threshold for purposes of the SEET. For example, in 2009, CSP received approval for federal grant funding of \$75 million from the U. S. Department of Energy for the Ohio gridSmart demonstration program. CSP also requested that the Commission approve CSP's continued implementation of the enhanced gridSmart initiative based on CSP being awarded the \$75 million and an additional non-affiliated in-kind contribution of \$10.85 million. Therefore, CSP will be receiving \$85.85 million from the government and other sources. *In the Matter of the Application of Columbus Southern Power Company to Update its gridSmart Rider*, Case No. 10-164-EL-RDR, Finding and Order at 1, 11-12 (August 11, 2010). CSP also will seek to recover both a return of and a return on its investments in the solar project, future environmental compliance and the gridSmart project. Tr. IV at 693-694. Therefore, with all these funding sources available to CSP, including the government and ratepayers, the Commission should not have considered these projects in the SEET analysis.

CSP itself did not contend that its 2010 and 2011 capital investment was anything extraordinary. Only the Commission apparently believes that the capital investments are exceptional. To put some reality into its belief, the Commission

should have considered the money CSP invested for capital commitments for the baseline year under review, 2009. In 2009, the spending was at a level of \$280.11 million. Jt. Ex. 2 at 29. In reality, expenditures are expected to decline in 2010 to \$256.1 million and to decline even further in 2011 to \$186.96 million. Jt. Ex. 2 at 29, Ex, JH-1 attached to CSP Ex. 6. CSP's forecasted construction expenditures in 2010 and 2011 are below its actual level of construction expenditures in 2007-2008. Therefore, CSP's future capital commitments are projected to be much less than in year 2009, the year that its earnings were significantly excessive. When considering that these investments for 2010 and 2011 are not actually even committed in any event, it makes no sense for the Commission to have increased the earnings threshold as a result of these projects.

Consideration of capital requirements of future committed investments should have been limited to the investments during the period of the ESP and not beyond the ESP. Future committed investments should not reflect business as usual because business as usual does not merit any adjustment to the threshold of excessive earnings. Future committed investments that are being funded or will be funded by governments or non-affiliated in-kind contributions do not merit any increase in the threshold of excessive earnings. Future committed investment that are being funded or will be funded by customers through riders do not merit any increase in the threshold of excessive earnings. There should have been no payment of future construction costs with excess earnings. Given the reduced level of capital expenditures and the fact that some of the capital expenditures are being recovered from ratepayers through riders, there should have been no upward adjustment in the SEET or a reduction in refunds for capital expenditures. Joint Intervenor's Ex. 2 at 29-30. The actual committed

capital investments for 2010 and 2011 support a finding by the Commission that the threshold ROE for this proceeding should have been at the lower range. It argued for the 200 basis point adder to the ROE, which amounts to 11.58%.

Finally, there should have been no an increase in the SEET earnings threshold for shopping risk. At the end of 2009, none of CSP's residential or industrial customers were shopping for competitive generation and only a small amount, less than 2%, of commercial load had shopped. Moreover, CSP was more than adequately compensated for shopping risk through the receipt of \$92.138 million in Provider of Last Resort revenues in 2009. Joint Intervenors' Ex. 2 at 30. Increasing the range defining the earnings threshold or settling on a high point within the range was not warranted for shopping risk. The Commission has now compensated CSP twice for shopping risk, first through the POLR revenue and then again through the SEET.

Thus, the Commission has thwarted the return to customers of significantly excessive earnings as the Ohio General Assembly intended. It is fundamentally inconsistent with R.C. 4928.143(F) to give excess profits to the utility to fund future construction projects, which are funded by other sources including ratepayers in any event, rather than refund the excess profits to consumers. The intent of the SEET is to protect consumers, not to benefit the utility by pre-funding its construction costs or compensating it for risks it does not face. Jt. Ex. 2 at 30. Significantly excessive earnings are not to help finance future investment projects or otherwise compensate a utility for some unforeseen risk. Upon a finding of excessive earnings, the Commission must comply with the statute. The Commission must return to consumers the entire amount of the excess profit by prospective adjustments.

**4. The Commission's Opinion and Order is unreasonable and unlawful pursuant to R.C. Section 4928.143(F) in that it excluded off-system sales margins from the SEET analysis. Opinion and Order at 29-30.**

The Commission determined that it would exclude off-system sales and the portion of generation that supports off-system sales from the SEET analysis. The Commission reduced CSP's earnings to exclude off-system sales and similarly adjusted the calculation to account for that portion of the generation facilities that support off-system sales. This led to a recalculation of CSP's ROE to 19.73%. Opinion and Order at 30.

The Commission should not have excluded off-system sales from the SEET calculation. Off-system sales are an inherent component of CSP'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 CSP's 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 off-system sales from the SEET analysis means that the Commission is comparing only 87.9% of CSP's earnings to 100% of the earnings of the comparable companies. Joint Intervenors' Ex. 2 at 21-23. 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 Commission's exclusion of off-system sales revenues biased the SEET in favor of CSP in other ways as well. The Commission recalculated the off-system sales revenues to exclude the portion of generation that supports off-system sales. The adjustment to the denominator from all of CSP's equity capitalization to only the generation-related component of equity capitalization meant that there was a mismatch where the off-system sales margins are totally

removed from the numerator but only partially removed from the denominator. Total equity capitalization should have been used. The record was insufficient to allow the Commission to make the correct calculations when it determined to exclude off-system sales. Given the lack of record that demonstrated the correct exclusion of off-system sales, the Commission should have found that no exclusion be made. Because CSP has the burden of proof in this proceeding, the failure of the record to provide for a correct calculation for the exclusion of off-system sales should not have been a benefit to CSP. All of CSP's earnings including off-system sales should have been judged against the earnings of the companies in the comparable group.

**5. The Commission's Opinion and Order is unreasonable and unlawful because it did not make the statutory refund required by R.C. Section 4928.143(F).**

CSP's earned ROE for 2009 was 20.84%. The Commission's earned ROE for 2009 for CSP including its adjustment for off-system sales was 19.73%. The Commission's threshold ROE for the 2009 SEET, including its 60% adder, was 17.6%. The difference between the 19.73% and the 17.6% resulted in a refund to customers of \$42,683,000. Opinion and Order at 35.

The customer parties in this case recommended a refund to CSP customers as high as \$155.906 million, the maximum amount allowed under the law. Because the SEET refund is limited under the law to the earnings resulting from the current ESP compared to what the earnings would have been under the prior rate plan, the SEET refund was limited to \$155.906 million.

Each 100 basis points over the SEET threshold is equivalent to a refund to ratepayers of \$20.039 million. The \$155.906 million is based on significantly excessive earnings threshold of 11.58% reflecting 200 basis points above the

comparable group, or a refund of \$145.483 million based on significantly excessive earnings threshold of 13.58%, reflecting 400 basis points above the comparable group. Joint Intervenors' Ex.2 at 17. In short, from a proper and lawful refund of \$145.483 based on significantly excessive earnings threshold of 13.58%, the Commission ordered a refund of a mere \$42,683,000, over \$100 million less than the refund should have been.

The Commission 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 Commission to return to consumers the amount of the significantly excessive earnings. The Commission's decision to allow CSP to retain such a large portion of the refunds, over \$100 million, effectively returned the amount of the excess earnings to CSP, not consumers.

CSP's earned return on equity of 20.84% was the highest by a significant margin for all affiliates in the American Electric Power ("AEP") East power pool. The 2009 gross profit margin on sales to Ohio consumers by CSP and OP was \$57.6/mWh, or 57% higher than the gross profit margin earned on retail sales by the other AEP East utilities. In 2009, selling power to consumers in Ohio was by far the most profitable line of business for AEP. Joint Intervenors' Ex. 2 at 20.

In 2009, CSP had the highest earned return on equity of any of the 142 investor-owned regulated electric utilities in the United States that filed Form 1 reports with the Federal Energy Regulatory Commission. Id. The CSP earned return on equity for the 2009 annual period was more than double the weighted average of the earned returns for all the electric utilities in the SNL Financial data base. Joint Intervenors' Ex. 2 at 21.

These significantly excessive earnings, allowed under the current ESP, must be returned to CSP's ratepayers in accordance with Ohio law. To follow the

law, the Commission should have made the refunds recommended by the Joint Intervenors and other customer parties whose recommended refund reflects a benchmark ROE of 9.55% adjusted for CSP to 9.58%.

The Commission unlawfully and unreasonably 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 over \$100 million in significantly excess earnings, rather than to refund the significantly excess earnings to consumers.

Thus, the Commission should have found reasonable and lawful the Joint Intervenors' recommendation of a \$155.906 million refund to ratepayers based on the significantly excessive earnings threshold of 11.58% reflecting 200 basis points above the comparable group's 9.55% and adjusted for CSP's capital structure to 9.58% or, in the alternative, a refund of \$145.483 million based on significantly excessive earnings threshold of 13.58% reflecting 400 basis points above the comparable group and adjusted for CSP's capital structure. Joint Intervenors' Ex. 2 at 17. These significantly excessive earnings, allowed under the current ESP, must be returned to CSP's ratepayers in accordance with Ohio law. R.C. Section 4928.143(F). Upon a finding of significantly excessive earnings, the Commission must comply with the statute. The Commission should grant rehearing and return to consumers the entire amount of CSP's significantly excessive profits by prospective adjustments.

Respectfully submitted,

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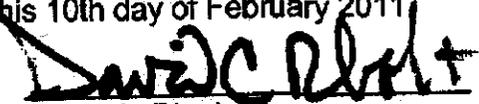
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing and Memorandum in Support was served electronically upon the following parties identified below in this case on this 10th day of February 2011

  
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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Investigation into the )  
Development of the Significantly Excessive ) Case No. 09-786-EL-UNC  
Earnings Test Pursuant to Amended Substitute )  
Senate Bill 221 for Electric Utilities. )

ENTRY ON REHEARING

The Commission finds:

- (1) On May 1, 2008, the governor signed into law Amended Substitute Senate Bill No. 221, amending various statutes in Title 49 of the Ohio Revised Code. Among the statutory amendments were changes to Section 4928.14, Revised Code, to establish a standard service offer (SSO). Pursuant to the amended language of Section 4928.14, Revised Code, electric utilities are required to provide consumers with an SSO, consisting of either a market-rate offer (MRO) or an electric security plan (ESP). Sections 4928.142(D)(4), 4928.143(E) and 4928.143(F), Revised Code, direct the Commission to evaluate the earnings of each electric utility's approved ESP or MRO to determine whether the plan or offer produces significantly excessive earnings for the electric utility.
- (2) After considering the arguments raised in the ESP and/or MRO proceedings of the electric utilities, the Commission concluded that the methodology for determining whether an electric utility has significantly excessive earnings as a result of an approved ESP or MRO should be examined within the framework of a workshop.<sup>1</sup> The Commission directed Staff to conduct a workshop to allow interested stakeholders to present concerns and to discuss and clarify issues raised by Staff. The workshop was held on October 5, 2009. After considering the issues discussed at the workshop, Staff filed recommendations for the significantly excessive earnings test (SEET) on November 18, 2009. Interested stakeholders filed comments and reply comments to Staff's recommendations. In addition,

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<sup>1</sup> *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 08-935-EL-SSO, Opinion and Order at 64 (December 19, 2008) (FirstEnergy ESP case); and *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, et al., Opinion and Order at 68 (March 18, 2009) (AEP-Ohio ESP cases).

on April 1, 2010, a question and answer session was held before the Commission for interested stakeholders who filed comments or reply comments in this case. All of the commenters, and the Staff, participated in the question and answer session before the Commission.<sup>2</sup>

- (3) On April 16, 2010, in this docket and docket number 10-517-EL-WVR, Columbus Southern Power Company and Ohio Power Company (jointly, AEP-Ohio) filed an application for a limited waiver of Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.), to the extent that the rule required the electric utility to file their SEET information by May 15, 2010. By entry issued May 5, 2010, the Commission granted AEP-Ohio's request for an extension and directed AEP-Ohio, Duke, FirstEnergy, and DP&L to make their SEET filing by July 15, 2010.<sup>3</sup>
- (4) On June 30, 2010, after extensive discussion and consideration of the SEET recommendations, the Commission issued its Finding and Order establishing policy and SEET filing directives for the electric utilities (June Order).
- (5) On July 6, 2010, Duke filed a motion to extend the SEET filing deadline until 21 days after the final resolution of all issues raised in any application for rehearing. Customer Parties filed a memorandum contra Duke's request for an extension. By entry issued July 14, 2010 (July Extension Entry), the Commission granted Duke, Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company (jointly, FirstEnergy), and AEP-Ohio an extension, until September 1, 2010, to make their respective SEET filing.
- (6) Applications for rehearing of the June Order were filed by Duke Energy Ohio, Inc. (Duke), Customer Parties, and FirstEnergy. Memorandum contra the applications for

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<sup>2</sup> In addition to participating in the question and answer session, the Office of the Ohio Consumers Counsel, Ohio Manufacturers' Association, Ohio Hospital Association, Ohio Energy Group, and Citizen Power, Inc. (jointly, Customer Parties) filed its responses to the questions on April 1, 2010.

<sup>3</sup> By entry *nunc pro tunc* dated May 13, 2010, the Commission revised its May 5, 2010 entry to recognize that pursuant to DP&L's approved electric security plan in Case No. 08-1094-EL-SSO, *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, et al.*, the significantly excessive earnings test codified in Section 4928.143(F), Revised Code, is not applicable to DP&L for the years 2009 through 2011. Accordingly, DP&L was not required to file the SEET information required pursuant to Rule 4901:1-35-40, O.A.C., by May 15, 2010 and did not require an extension.

rehearing of the June Order were filed by Ohio Partners for Affordable Energy (OPAE), Duke, AEP-Ohio, FirstEnergy, and Customer Parties.<sup>4</sup>

- (7) On August 4, 2010, Customer Parties filed an application for rehearing of the July Extension Entry. Customer Parties' arguments in regard to the July Extension Entry are, in large part an expansion of their argument on interest in their application for rehearing of the June Order. As such, these arguments will be addressed together.

Prior rate plan and deferral filing requirements

- (8) Duke and FirstEnergy assert that the June Order is unjust and unlawful inasmuch as the Commission lacks the statutory authority to and unreasonably ordered each electric utility to include in its SEET filing the difference in earnings between its current ESP and what would have occurred had the preceding rate plan been in place. In essence, Duke and FirstEnergy offer that, if the Commission accepted its interpretation of the term "adjustment" as used in Section 4928.143(F), Revised Code, as the Commission states in the Order, it is illogical to require a comparison to the utility's prior rate plan. Further, FirstEnergy continues that, if there are no significantly excessive earnings, there is no need for the information on the prior rate plan. Duke reasons that the only comparison permitted under the statute is to other publicly traded companies. Duke asserts that it is impossible to estimate its earnings under the provisions of its previous rate plan and the estimate lacks any relevance to the SEET proceeding. (Duke App. at 4-7; FirstEnergy App at 2-3.)
- (9) In opposition, OPAE reasons that the revenue that would be generated under the prior rate plan will be useful to the Commission's determination of whether the return on common equity is excessive as a result of the ESP, which is the intent of Section 4928.143(F), Revised Code. OPAE and Customer Parties reason that unless the difference between the revenue generated by the ESP and the prior rate plan is known, one

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<sup>4</sup> Customer Parties filed separate memoranda contra the applications for rehearing filed by Duke (on August 5, 2010) (Customer Parties Memo-D), and by FirstEnergy (on August 9, 2010) (Customer Parties Memo-FE).

cannot determine the delta revenue generated by the ESP. Further, OP&A explains that since a refund under the SEET can only be triggered by the impact of the ESP on revenues, the Commission must be able to quantify the "value" of the ESP relative to a baseline. Similarly, Customer Parties explain that the information is not to facilitate a "claw back" into pre-ESP revenue. OP&A emphasizes that the utilities can justify the approach used to calculate the revenues from the prior rate plan. OP&A believes that the information is a necessary component of the utility's burden of proof and that the data is required for the Commission to conclude that the burden has been met and that any refund, if warranted, is appropriate. OP&A and Customer Parties state that the Commission must determine if the ESP causes the excess earnings when compared to comparable companies. Customer Parties state that it is within the Commission's discretion in carrying out the mandates of Section 4928.143(F), Revised Code, to require the utilities to file the preceding rate plan information. (OP&A Memo at 2-3; Customer Parties-FE at Memo 4; Customer Parties-D at 3-4.)

- (10) FirstEnergy also opposes the requirement to file the SEET application with and without deferral information. FirstEnergy contends that the purpose of deferral accounting is to eliminate the impact on earnings due to a timing difference in earning revenue and incurring costs. FirstEnergy posits that deferrals are only meaningful in the SEET context if significantly excessive earnings exist and a refund to customers is ordered. In that instance, FirstEnergy asserts that deferrals can become a useful tool in effecting return of the excess earnings. FirstEnergy argues that deferrals are only an issue for some of the Ohio electric utilities and the proper handling of deferrals may have already been addressed in the utility's ESP. Therefore, FirstEnergy argues that burdening every SEET filing with a broad, universal requirement to submit analyses reflecting earnings with and without deferrals is unnecessarily burdensome, inappropriate, and unreasonable. (FirstEnergy 3-4.)
- (11) OP&A supports the Commission's request for deferral information given that the Commission specifically held that it would not make a generic finding with respect to the inclusion

or exclusion of deferrals from revenue.<sup>5</sup> Customer Parties believe the Commission's request is reasonable and provides information that will assist the Commission in making an informed decision on the impact of deferrals and how to treat potential refunds. OPAE recognizes that, without the deferral information, it will be difficult for the Commission to conduct an evaluation. The availability of such information should not be dependent on whether or not the utility thinks it relevant. OPAE believes that counting deferrals can trigger a SEET; deferrals are important for reasons beyond their use as a mechanism to refund excessive earnings to customers. (OPAE Memo at 3-4; Customer Parties Memo-FE at 4-6.)

- (12) In considering the electric utilities' arguments regarding revenue information from the prior rate plan and deferrals, we find that it is well within the Commission's discretion to require the electric utilities to provide information on the revenues from the prior rate plan and deferrals under the ESP, as such is reasonably related to the Commission's determination of whether the utility's ESP results in significantly excessive earnings, and if so, the amount of return to customers. We clarify that the Commission's request for information related to deferrals at the outset of the SEET filing is to facilitate the efficient processing of SEET applications. As stated in the June Order, the electric utility should identify any deferrals and the effect of excluding and including the deferrals in the SEET calculation. Parties to the SEET proceeding are not required to accept the utility's method for addressing earnings and deferrals as it is the utility's burden to demonstrate that *significantly excessive earnings did not occur*.

If the utility, in good faith, files its SEET application indicating that its return on equity falls within the safe harbor limit, that utility is not required to file revenue information from the prior rate plan. However, if the utility's SEET application indicates that its return on equity is above the safe harbor limit, then the utility must file revenue information from the prior rate plan with its SEET application. The Commission and Staff reserve the right to request the revenue information for its consideration in the individual SEET proceedings.

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<sup>5</sup> June Order at 18.

Accordingly, we grant the request for rehearing in regards to when prior rate plan information must be submitted and deny FirstEnergy's request for reconsideration regarding deferral information.

Twelve-month v. Thirteen-month ending balances

- (13) Duke argues that the June Order unjustly and incorrectly concludes that it will review a 12-month period of equity book values without considering 13 month-end balances contrary to existing administrative requirements. Duke requests rehearing regarding the accounting definition of SEET and how to measure earned return on common equity. Duke argues that rather than use the calculation of net income divided by average common equity, the calculation should use 13 monthly common equity book balances rather than 12 such balances (Duke App. at 7-8).
- (14) Section 4928.143(F), Revised Code, requires that the electric utility company's earnings be measured against those of its comparable group of companies. On the basis of Section 4928.143(F), Revised Code, the Commission believes that it must utilize a calculation methodology that permits it to make this comparison and Duke's recommendation would not permit the Commission to make the required comparable company comparison. However, the Commission believes that Duke is actually seeking clarity on whether the previous period's ending common equity balance and the current period's ending common equity balance would be used in the earned return common equity calculation. This is the Commission's intent. Therefore, at this time, the Commission clarifies that the companies would use in their earned return on common equity calculation a beginning balance based on the ending balance of the previous period. With that clarification of the Commission's intent, Duke's request for rehearing is denied.

June order's effect on ESP stipulations

- (15) Duke contends that the June Order is unclear as to whether Duke's stipulation, which was approved in the company's BSP

case,<sup>6</sup> stands fully as approved and, to the extent it does not so stand, the June Order violates Ohio law. Duke argues that the stipulation explicitly defined how Duke's return on common equity would be computed, the source of the financial data to be used, the specific adjustments to be made to net income and common equity, and stated the level at which the return on common equity would not be deemed excessive. As such, Duke contends that its approved stipulation adequately addresses issues relating to SEET and requests that the Commission clarify that the June Order does not alter that approved stipulation.

- (16) OPAE agrees with Duke that the June Order is unclear whether Duke's ESP stipulation is still in effect. However, OPAE observes that this issue will ultimately be decided in Duke's SEET proceeding and recommends that Duke file testimony and information addressing the issue to allow the Commission to make a final determination on the matter. (OPAE Memo at 3.)
- (17) We disagree that the June Order is unclear in relation to Duke's ESP stipulation. It was not the Commission's intention to modify Duke's stipulation, unless the issue was not addressed in the stipulation. Where SEET related issues are sufficiently addressed in the stipulation, the stipulation will guide the Commission in its excessive earnings determination. Nonetheless, it is the electric utility's burden to demonstrate that, pursuant to its stipulation and/or the directives in this proceeding, significantly excessive earnings did not occur. If, as Duke claims, the SEET determinant factors are addressed in the stipulation, the utility can file its SEET application and supporting testimony consistent with that claim. Where the stipulation did not address issues relating to SEET, Duke must file the required information in accordance with the directives in this proceeding.

Safe harbor provision

- (18) Duke argues that the June Order is unclear as to the impact of the "safe harbor" provision of 200 basis points above the mean

<sup>6</sup> *In the Matter of the Application of Duke Energy Ohio Inc. for Approval of an Electric Security Plan, Case No. 08-920-EL-SSO, Opinion and Order (December 17, 2008) (Duke ESP case).*

of the comparable group on the information required to be included in SEET filings. Duke reasons that, should the electric utility's return on common equity fall within the "safe harbor" limit, the utility should not be required to include in its SEET application a discussion of the factors listed in the June Order (June Order at 29) for the Commission's consideration to determine significantly excessive earnings under Section 4928.143(F), Revised Code. Furthermore, Duke reasons that it should be at the utility's discretion to submit testimony on the factors because the Commission listed several factors to consider, the testimony on the factors could be extensive, and require the utility to hire consultants. Duke offers that the testimony on the factors could mire the adjudication of the SEET even if the utility's earnings do not exceed the "safe harbor limit." Even in instances where the utility's return on common equity exceeds the "safe harbor" limit, Duke proposes that testimony on the factors should be at the utility's option. (Duke App. at 11-12.)

- (19) Customer Parties argue that Duke's proposal would amount to electric utilities self-regulating on SEET. Allowing the utility to forgo filing information on the factors would, according to Customer Parties, require the parties to the SEET case and the Commission to accept: (a) the utility's computation of earnings as accurate; (b) the utility's treatment of off-system sales and deferrals as appropriate; and (c) the utility's definition of its comparable group of companies as appropriate. Customer Parties contend that Duke's proposal would improperly shift the burden of proof contrary to the expressed provisions of Section 4928.143(F), Revised Code, which requires the utility to demonstrate that significantly excessive earnings did not occur. (Customer Parties Memo-D at 5-6.)
- (20) It was not the Commission's intent to allow the electric utilities to forgo the other SEET filing requirements if the utility's earnings fell within the "safe harbor" limits or to allow the electric utilities the discretion to file testimony on the SEET analysis factors enumerated by the Commission regarding how significantly excessive earnings will be determined pursuant to Section 4928.143(F), Revised Code. We agree with the rationale presented by Customer Parties and, accordingly, we deny Duke's request for rehearing of this issue.

- (21) FirstEnergy requests that the Commission establish an additional back-stop to the determination of whether the electric utility is considered to have significantly excessive earnings. FirstEnergy posits that the June Order unreasonably failed to include, within the scope of safe harbor, circumstances in which the electric utility's return on equity actually earned does not exceed, by more than 200 basis points, the return on equity allowed in the electric utility's last base rate case. Under FirstEnergy's proposal, a utility could not be found to have significantly excessive earnings if its earnings were less than 200 basis points above its last approved return on equity. This, posits FirstEnergy, reflects that the established return on equity was developed in consideration of the cost of capital for a utility's comparable risk group. To utilize a significantly excessive earnings threshold below the return on equity plus 200 basis points is to essentially deny the utility the ability to recover its cost of capital. (FirstEnergy App. at 7.)
- (22) Customer Parties respond that having such a standard is in direct contradiction of the explicit language in Section 4928.134(F), Revised Code, which requires that an electric utility's earnings be compared against comparable companies' earnings in the current year. Though the return on equity is useful to guide the amount of funds that are eligible for return, should excessive earnings be found, it should not be used in the establishment of the excessive earnings threshold itself. Customer Parties also note that certain utilities have not had rate cases for several years, and, therefore, the level of the last established return on equity for those utilities may be inappropriate. (Customer Parties Memo-FE at 10-11.)
- (23) The Commission concurs with the comments of Customer Parties. As previously discussed in this docket, the Commission will take into consideration the last approved return on equity as part of the information it seeks in addition to the SEET calculation it has established. The Commission does understand that the return on equity when established in a rate case is necessarily a forward projection of the market at that time and may not reflect current, actual market conditions as time progresses. The goal of SEET is to determine whether an electric utility has a significantly excessive return as measured against a group of comparable companies, to consider all the relevant factors surrounding each utility and its

unique circumstances, and to determine how any excess earnings should be returned to customers, if appropriate. The Commission, therefore, denies FirstEnergy's request to establish a second backstop within the SEET calculation, but reminds FirstEnergy that it has already been directed to provide its last return on equity as part of the additional information in its SEET application.

Reliance on statistical analysis

- (24) FirstEnergy argues that the June Order is unlawful and unreasonable to the extent that the Commission refuses to rely on statistical analysis as the primary SEET to determine the existence of significantly excessive earnings. FirstEnergy argues that, with one exception, the factors set forth in the June Order go far afield of the statute and the intent of the General Assembly. Thus, FirstEnergy contends that the Commission is precluded from considering the "discretionary, subjective factors" enumerated in the June Order except as to the future committed investments in Ohio and, therefore, there is no reason to include such information in the SEET application. FirstEnergy argues that the approach that the Commission takes in the June Order, abandoning primary reliance on statistical analysis and instead including consideration of a variety of highly subjective, uncertain, and irrelevant factors, is contrary to a correct interpretation of the statute, the recommendation of Staff, and the records developed in the litigated ESP proceedings of the various electric utilities. FirstEnergy opines that the process set forth in the June Order is highly likely to have an effect which is detrimental to customers. (FirstEnergy App. at 4-7.)
- (25) Customer Parties reject FirstEnergy's statutory construction argument as misplaced. FirstEnergy's premise that the expression of one thing is the exclusion of another only applies, according to Customer Parties, where the statute is ambiguous.<sup>7</sup> Customer Parties argue that, if the General Assembly intended to limit the Commission's consideration to a comparison of comparable companies and consideration of the electric utility's capital requirements of future committed investments in Ohio, it would have included specific limiting

<sup>7</sup> *Proctor v. Kardassilaris*, (2007) 115 OhioSt.3d 71; 2007 Ohio 4838; 873 N.E.2d 872.

language. Contrary to FirstEnergy's argument, the only factors the General Assembly specifically excluded from the Commission's consideration are the "revenue, expenses, or earnings of any affiliate or parent company" as provided in the last sentence of Section 4928.143(F), Revised Code. Customer Parties reason that it is well within the Commission's legal authority and broad discretion to require the utilities to file both the statistical analysis and additional analysis factors, to carry out the state's policy of returning excessive earnings to customers. Customer Parties argue that the Commission clearly indicated in the June Order that the statistical analysis, by itself, would not satisfy the electric utility's burden of proof and would not provide the Commission with a complete understanding of how the utility accounted for its earnings. Further, Customer Parties reason that to allow the utilities to forgo filing the factor analyses would require the Commission and other interested parties to accept the utility's treatment of earnings, to accept the utility's treatment of off-system sales and deferrals, and to accept that the utility appropriately defined its comparable group of companies. This would, according to Customer Parties, improperly shift the burden of proof to the Commission and other parties. As provided in Section 4928.143(F), Revised Code, the burden of proof is on the utility to demonstrate that significantly excessive earnings did not occur. For these reasons, Customer Parties ask that the Commission reject FirstEnergy's request for rehearing. (Customer Parties Memo-FE at 7-10.)

- (26) The statistical approaches advocated by AEP-Ohio and FirstEnergy in their respective ESP proceedings and by the Staff merely serve to indicate the likelihood of whether the electric utility had significantly excessive earnings in comparison to the comparable group of companies. Section 4928.143(F), Revised Code, imposes a higher burden of proof on the electric utilities. Section 4928.143(F), Revised Code, imposes on the utility the burden of proof to demonstrate that significantly excessive earnings did not occur as opposed to the mere likelihood that significantly excessive earnings did not occur. To that end, as expressed in the June Order, the Commission stated that the statistical analysis would serve as one of the available tools to establish the SEET threshold, along with the other factors. FirstEnergy has not presented any arguments that convince the Commission that the June Order is

unjust, unreasonable or unlawful in this respect. We agree with the arguments of Customer Parties and, therefore, deny FirstEnergy's request for rehearing.

Off-system sales

- (27) In their application for rehearing of the June Order, Customer Parties make two claims. First, Customer Parties argue that the June Order is unjust and unreasonable to the extent that the Commission found that the treatment of off-system sales is more appropriately addressed in the individual SEET proceedings. Customer Parties argue that addressing off-system sales in the individual proceedings is a violation of Section 4928.143(F), Revised Code. Customer Parties reason that the earned return on common equity of the electric distribution utility necessarily includes profits from off-system sales and facilitates a symmetrical comparison to the earnings of comparable companies. According to Customer Parties, the statute does not permit the Commission the discretion to consider only a portion of the earned return of the utility and, as such, there can be no individual case-by-case determination of the appropriate treatment of off-system sales. Customer Parties argue there is no public policy reason to support inconsistent treatment among utilities with respect to off-system sales and the failure to require off-system sales to be included in the SEET calculation violates Section 4928.143(F), Revised Code, and is unlawful. (Customer Parties App. at 4-8.)
- (28) AEP-Ohio retorts that there is no statutory mandate that the Commission issue guidelines addressing how it will approach or resolve any issue relating to the annual SEET proceedings pursuant to Section 4928.143(F), Revised Code. Accordingly, AEP-Ohio argues there is no legal requirement that the Commission determine, in advance of an electric utility's annual SEET filing, how it will resolve a particular issue that might arise in the upcoming SEET proceeding. Consequently, there is no basis for Customer Parties' argument that the Commission's failure to determine an issue in advance has somehow violated Section 4928.143(F), Revised Code. (AEP-Ohio Memo at 2.)
- (29) We agree with the arguments of AEP-Ohio. Nothing in Section 4928.143, Revised Code, requires the Commission to

predetermine any SEET-related issue. By deciding to evaluate the off-system sales issue on a case-by-case basis, the Commission is merely affording the electric utility and the parties to each electric utility's SEET proceeding an opportunity to present company-specific arguments on the issue. We have not predetermined the issue or inconsistently determined how off-systems sales will be addressed as Customer Parties allege. Given that the Commission has not made a decision in regard to off-system sales but elected, as it is within the Commission's discretion to do, to address the issue in each utility's SEET proceeding, we find that Customer Parties' request for rehearing of this issue should be denied.

Extension of SEET filing date and interest on excess earnings

- (30) Second, in Customer Parties' application for rehearing of the June Order, Customer Parties contend that the Commission erred when it failed to issue a guideline regarding interest on potential refunds to customers of significantly excessive earnings. Customer Parties argue that the Commission's consideration and approval of extensions of the SEET application, without any guideline on interest of the return of excess earnings, operates as an incentive for the electric utilities to delay SEET filings and review. If the Commission is going to allow repeated extensions of the SEET filing deadline, Customer Parties assert it is just and reasonable for customers to receive the time-related benefit of the return. Customer Parties assert that allowing electric utilities to avoid the payment of interest on SEET returns amounts to authorizing rates and charges that are unjust and unreasonable under Sections 4909.15(D) and 4909.151, Revised Code, and nullifies the purpose of Sections 4928.142(D) and 4928.143, Revised Code, and Section 4928.143(E), and (F), Revised Code, which is to protect Ohio customers from unreasonable rates for electric service. Customer Parties note that there is case precedent where the Commission has ordered interest on refunds to customers. (Customer Parties App. at 8-13.)
- (31) Similarly, in their application for rehearing of the July Extension Entry, Customer Parties argue that the Entry unjustly and unreasonably extended the due date for the 2009 SEET filing. Customer Parties argue that the Commission failed to present any reason for the September 1, 2010 deadline

but noted that Duke's request for an extension until final resolution was "tenuous or unclear, at best." Customer Parties state that the original May 15, 2010 due date for SEET filings was appropriately based on the fact that income statement and balance sheet information necessary to review an electric utility's earnings is part of Federal Energy Regulatory Commission Form 1 and the Security and Exchange Commission Form 10K that is available at the end of April. Customer Parties reason that, with a May 15, 2010 SEET filing date, it is expected that the Commission would issue an order on 2009 earnings during 2010 ensuring consumers a prompt refund. According to Customer Parties, the extension of the due date for SEET filings, until September 1, 2010, makes it unlikely consumers will see a refund until 2011, allows the utilities to retain excess earnings for an extended period of time, and is not fair to customers due a refund. (Customer Parties Entry App. at 4-6.)

Customer Parties also state that the July Extension Entry failed to order that any SEET-related refunds for 2009 include interest in fairness to electric utility customers. Further, the applicant requests that if 2009 SEET proceedings have not concluded and an order issued determining whether the utility had significantly excessive earnings by December 31, 2010, that interest shall accrue beginning January 1, 2011 at the utility's weighted average cost of capital. Customer Parties admit that Section 4928.143(F), Revised Code, does not specifically provide for interest on significantly excessive earnings, but argues that this is consistent with analogous statutory provisions, such as Sections 1343.03, 4909.16, and 4909.42, Revised Code, and numerous Commission decisions where interest has been ordered. (Customer Parties Entry App. at 6-9.)

- (32) In response, Duke argues that requiring the SEET applications before issues raised on rehearing are resolved could necessitate ~~refiling of the applications and delay review until amended applications are filed.~~ By Duke's calculation, the delay Customer Parties is complaining about is in practical effect about a week long. Duke offers that the extension was just, reasonable, and within the Commission's discretion. Duke asks that Customer Parties' request for rehearing be denied. (Duke Memo at 7-8).

- (33) AEP-Ohio, FirstEnergy, and Duke filed memoranda contra the interest arguments of Customer Parties. AEP-Ohio states that Sections 4909.15 and 4909.151, Revised Code, are not applicable to the rates established pursuant to an ESP under Section 4928.143, Revised Code. As with Customer Parties' arguments regarding off-system sales, AEP-Ohio contends there is no aspect of Section 4928.143(D), (E), or (F), Revised Code, which requires the Commission to issue a guideline or otherwise address interest on significantly excess earnings in advance of SEET proceedings. AEP-Ohio also notes that Customer Parties did not raise the issue of interest in its memorandum contra Duke's request for an extension of the SEET application due date (AEP-Ohio Memo at 3-4, 6). FirstEnergy proclaims that the Commission has considerable discretion in crafting an appropriate mechanism for return of any excess earnings and need not adopt a general requirement which imposes payment of interest at this time (FirstEnergy Memo at 2). Duke reasons that if the Commission determines that it is appropriate to impose interest on significantly excessive earnings to be returned to customers, the Commission will have the opportunity to do so in each electric utility's SEET proceeding and there is no need to revise the July Extension Entry to do so (Duke Memo at 9).
- (34) The Commission's primary reason for granting a limited extension of the SEET filing as set forth in the July Extension Entry was to allow the Commission an opportunity to consider the issues raised on rehearing and to allow the electric utilities a brief period to revise their filings, if necessary, after the Commission issued the entry on rehearing. We declined to grant, as Customer Parties acknowledge, Duke's requests for a more generous extension. As the Commission interpreted Duke's request, the SEET filing deadline could have easily pushed the 2009 SEET application due date to 2011. The September 1, 2010 date was selected to accommodate the Commission's obligation under Section 4903.10, Revised Code, to rule on any applications for rehearing within 30 days after the date the application for rehearing is filed. Further, the Commission notes that there is no statutorily mandated time period for the Commission to conduct or conclude annual SEET proceedings as required under Section 4928.143, Revised Code. For these reasons, we find Customer Parties' claim that the extension of time to file the SEET application, until September

1, 2010, was unjust, unreasonable, or in violation of the law to be without merit and, therefore, deny the request for rehearing.

- (35) The Commission also finds Customer Parties' arguments on interest, at this stage, to be without merit. Section 4928.143, Revised Code, does not require nor foreclose the Commission from imposing interest on the return of excess earnings. We note that in their comments, Customer Parties endorsed the Staff recommendation to determine the mechanism by which any excess earnings may be returned to customers after a determination that the electric utility had significantly excessive earnings. Nothing in Customer Parties' arguments convince the Commission that it is necessary to revise the June Order nor the July Extension Entry to specifically impose interest on the return of excess earnings. It is more appropriate, as the Commission determined in the June Order, that the mechanism for returning excess earnings, including whether interest should be imposed on the return, be determined on a case-by-case basis. On a case-by-case basis, the Commission can consider the cause of any delay in returning excess earnings. The Commission has considerable discretion in crafting an appropriate mechanism for return of any excess earnings and need not adopt a general requirement which imposes payment of interest at this time. Accordingly, the Commission denies Customer Parties' request for rehearing.

ORDER:

It is, therefore,

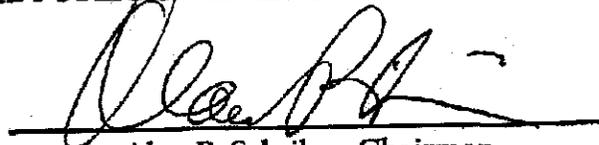
ORDERED, That the applications for rehearing of the June Order are granted, in part, and denied, in part, as discussed herein. It is further,

ORDERED, That Customer Parties' application for rehearing of the July Extension Entry is denied as discussed herein. It is further,

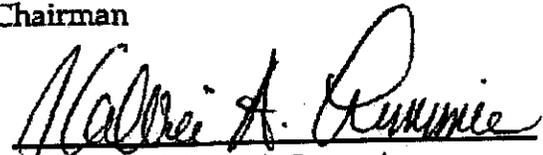
ORDERED, That, as previously directed in the July Extension Entry, AEP-Ohio, Duke, and FirstEnergy file their SEET applications, in accordance with the Commission's directives, by September 1, 2010. It is, further,

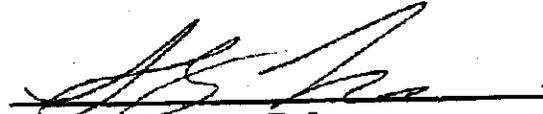
ORDERED, That a copy of this entry be served upon all commenters, and electric distribution companies in Ohio, and all other interested persons of record.

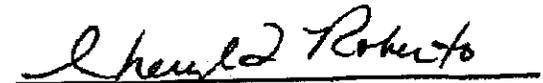
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Paul A. Centolella

  
Valerie A. Lemmie

  
Steven D. Lesser

  
Cheryl L. Roberto

GNS/vrm

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**AUG 25 2010**



Renee J. Jenkins  
Secretary

Westlaw

OAC 4901:1-35-03

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Ohio Admin. Code 4901:1-35-03

**C**

Baldwin's Ohio Administrative Code Annotated Currentness

4901 Public Utilities Commission (Refs &amp; Annos)

4901:1 Utilities (Refs &amp; Annos)

Chapter 4901:1-35. Electric Distribution Utility Service Offer (Refs &amp; Annos)

→ → 4901:1-35-03 Filing and contents of applications

Each electric utility in this state filing an application for a standard service offer (SSO) in the form of an electric security plan (ESP), a market-rate offer (MRO), or both, shall comply with the requirements set forth in this rule.

(A) SSO applications shall be case captioned as (XX-XXX-EL-SSO). Twenty copies plus an original of the application shall be filed. The application must include a complete set of direct testimony of the electric utility personnel or other expert witnesses. This testimony shall be in question and answer format and shall be in support of the electric utility's proposed application. This testimony shall fully support all schedules and significant issues identified by the electric utility.

(B) An SSO application that contains a proposal for an MRO shall comply with the requirements set forth below.

(1) The following electric utility requirements are to be demonstrated in a separate section of the standard service offer SSO application proposing a market-rate offer MRO:

(a) The electric utility shall establish one of the following: that it, or its transmission affiliate, belongs to at least one regional transmission organization (RTO) that has been approved by the federal energy regulatory commission; or, if the electric utility or its transmission affiliate does not belong to an RTO, then the electric utility shall demonstrate that alternative conditions exist with regard to the transmission system, which include non-pancaked rates, open access by generation suppliers, and full interconnection with the distribution grid.

(b) The electric utility shall establish one of the following: its RTO retains an independent market-monitor function and has the ability to identify any potential for a market participant or the electric utility to exercise market power in any energy, capacity, and/or ancillary service markets by virtue of access to the RTO and the market participant's data and personnel and has the ability to effectively mitigate the conduct of the market participants so as to prevent or preclude the exercise of such market power by any market participant or the electric utility; or the electric utility shall demonstrate that an equivalent function exists which can monitor, identify, and mitigate conduct associated with the exercise of such market power.

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(c) The electric utility shall demonstrate that an independent and reliable source of electricity pricing information for any energy product or service necessary for a winning bidder to fulfill the contractual obligations resulting from the competitive bidding process (CBP) is publicly available. The information may be offered through a pay subscription service, but the pay subscription service shall be available under standard pricing, terms, and conditions to any person requesting a subscription. The published information shall be representative of prices and changes in prices in the electric utility's electricity market, and shall identify pricing of on-peak and off-peak energy products that represent contracts for delivery, encompassing a time frame beginning at least two years from the date of the publication. The published information shall be updated on at least a monthly basis.

(2) Prior to establishing an MRO under division (A) of section 4928.142 of the Revised Code, an electric utility shall file a plan for a CBP with the commission. The electric utility shall provide justification of its proposed CBP plan, considering alternative possible methods of procurement. Each CBP plan that is to be used to establish an MRO shall include the following:

(a) A complete description of the CBP plan and testimony explaining and supporting each aspect of the CBP plan. The description shall include a discussion of any relationship between the wholesale procurement process and the retail rate design that may be proposed in the CBP plan. The description shall include a discussion of alternative methods of procurement that were considered and the rationale for selection of the CBP plan being presented. The description shall also include an explanation of every proposed non-avoidable charge, if any, and why the charge is proposed to be non-avoidable.

(b) Pro forma financial projections of the effect of the CBP plan's implementation, including implementation of division (D) of section 4928.142 of the Revised Code, upon generation, transmission, and distribution of the electric utility, for the duration of the CBP plan.

(c) Projected generation, transmission, and distribution rate impacts by customer class and rate schedules for the duration of the CBP plan. The electric utility shall clearly indicate how projected bid clearing prices used for this purpose were derived.

(d) Detailed descriptions of how the CBP plan ensures an open, fair, and transparent competitive solicitation that is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code.

(e) Detailed descriptions of the customer load(s) to be served by the winning bidder(s), and any known factors that may affect such customer loads. The descriptions shall include, but not be limited to, load subdivisions defined for bidding purposes, load and rate class descriptions, customer load profiles that include historical hourly load data for each load and rate class for at least the two most recent years, applicable tariffs, historical shopping data, and plans for meeting targets pertaining to load reductions, energy efficiency, renewable energy, advanced energy, and advanced energy technologies. If customers will be served pursuant to time-differentiated or dynamic pricing, the descriptions shall include a summary of available data regarding the price elasticity of the load. Any fixed load provides to be served by

winning bidder(s) shall be described.

(f) Detailed descriptions of the generation and related services that are to be provided by the winning bidder(s). The descriptions shall include, at a minimum, capacity, energy, transmission, ancillary and resource adequacy services, and the term during which generation and related services are to be provided. The descriptions shall clearly indicate which services are to be provided by the winning bidder(s) and which services are to be provided by the electric utility.

(g) Draft copies of all forms, contracts, or agreements that must be executed during or upon completion of the CBP.

(h) A clear description of the proposed methodology by which all bids would be evaluated, in sufficient detail so that bidders and other observers can ascertain the evaluated result of any bids or potential bids.

(i) The CBP plan shall include a discussion of time-differentiated pricing, dynamic retail pricing, and other alternative retail rate options that were considered in the development of the CBP plan. A clear description of the rate structure ultimately chosen by the electric utility, the electric utility's rationale for selection of the chosen rate structure, and the methodology by which the electric utility proposes to convert the winning bid(s) to retail rates of the electric utility shall be included in the CBP plan.

(j) The first application for a market rate offer by an electric utility that, as of July 31, 2008, directly owned, in whole or in part, operating electric generation facilities that had been used and useful in this state shall include a description of the electric utility's proposed blending of the CBP rates for the first five years of the market rate offer pursuant to division (D) of section 4928.142 of the Revised Code. The proposed blending shall show the generation service price(s) that will be blended with the CBP determined rates, and any descriptions, formulas, and/or tables necessary to show how the blending will be accomplished. The proposed blending shall show all adjustments, to be made on a quarterly basis, included in the generation service price(s) that the electric utility proposes for changes in costs of fuel, purchased power, portfolio requirements, and environmental compliance incurred during the blending period. The electric utility shall provide its best current estimate of anticipated adjustment amounts for the duration of the blending period, and compare the projected adjusted generation service prices under the CBP plan to the projected adjusted generation service prices under its proposed electric security plan.

(k) The electric utility's application to establish a CBP shall include such information as necessary to demonstrate whether or not, as of July 31, 2008, the electric utility directly owned, in whole or in part, operating electric generation facilities that had been used and useful in the state of Ohio.

(l) The CBP plan shall provide for funding of a consultant that may be selected by the commission to assess and report to the commission on the design of the solicitation, the oversight of the bidding process, the clarity of the product definition, the fairness, openness, and transparency of the solicitation

and bidding process, the market factors that could affect the solicitation, and other relevant criteria as directed by the commission. Recovery of the cost of such consultant(s) may be included by the electric utility in its CBP plan.

(m) The CBP plan shall include a discussion of generation service procurement options that were considered in development of the CBP plan, including but not limited to, portfolio approaches, staggered procurement, forward procurement, electric utility participation in day-ahead and/or real-time balancing markets, and spot market purchases and sales. The CBP plan shall also include the rationale for selection of any or all of the procurement options.

(n) The electric utility shall show, as a part of its CBP plan, any relationship between the CBP plan and the electric utility's plans to comply with alternative energy portfolio requirements of section 4928.64 of the Revised Code, and energy efficiency requirements and peak demand reduction requirements of section 4928.66 of the Revised Code. The initial filing of a CBP plan shall include a detailed account of how the plan is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. Following the initial filing, subsequent filings shall include a discussion of how the state policy continues to be advanced by the plan.

(o) An explanation of known and anticipated obstacles that may create difficulties or barriers for the adoption of the proposed bidding process.

(3) The electric utility shall provide a description of its corporate separation plan, adopted pursuant to section 4928.17 of the Revised Code, including but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to Chapter 4901:1-37 of the Administrative Code.

(4) A description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I) and (K) of section 4928.20 of the Revised Code.

(C) An SSO application that contains a proposal for an ESP shall comply with the requirements set forth below.

(1) A complete description of the ESP and testimony explaining and supporting each aspect of the ESP.

(2) Pro forma financial projections of the effect of the ESP's implementation upon the electric utility for the duration of the ESP, together with testimony and work papers sufficient to provide an understanding of the assumptions made and methodologies used in deriving the pro forma projections.

(3) Projected rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any.

(4) The electric utility shall provide a description of its corporate separation plan, adopted pursuant to section 4928.17 of the Revised Code, including, but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to Chapter 4901:1-37 of the Administrative Code.

(5) Division (A)(3) of section 4928.31 of the Revised Code required each electric utility to file an operational support plan as a part of its electric transition plan. Each electric utility shall provide a statement as to whether its operational support plan has been implemented and whether there are any outstanding problems with the implementation.

(6) A description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I), (J), and (K) of section 4928.20 of the Revised Code.

(7) A description of the effect on large-scale governmental aggregation of any unavoidable generation charge proposed to be established in the ESP.

(8) The initial filing for an ESP shall include a detailed account of how the ESP is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. Following the initial filing, subsequent filings shall include how the state policy is advanced by the ESP.

(9) Specific information

Division (B)(2) of section 4928.143 of the Revised Code authorizes the provision or inclusion in an ESP of a number of features or mechanisms. To the extent that an electric utility includes any of these features in its ESP, it shall file the corresponding information in its application.

(a) Division (B)(2)(a) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for the automatic recovery of fuel, purchased power, and certain other specified costs. An application including such provisions shall include, at a minimum, the information described below:

(i) The type of cost the electric utility is seeking recovery for under division (B)(2) of section 4928.143 of the Revised Code including a summary and detailed description of such cost. The description shall include the plant(s) that the cost pertains to as well as a narrative pertaining to the electric utility's procurement policies and procedures regarding such cost.

(ii) The electric utility shall include in the application any benefits available to the electric utility as a result of or in connection with such costs including but not limited to profits from emission allowance sales and profits from resold coal contracts.

(iii) The specific means by which these costs will be recovered by the electric utility. In this specification, the electric utility must clearly distinguish whether these costs are to be recovered from all distribution customers or only from the customers taking service under the ESP.

(iv) A complete set of work papers supporting the cost must be filed with the application. Work papers must include, but are not limited to, all pertinent documents prepared by the electric utility for the application and a narrative and other support of assumptions made in completing the work papers.

(b) Divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, authorize an electric utility to include unavoidable surcharges for construction, generation, or environmental expenditures for electric generation facilities owned or operated by the electric utility. Any plan which seeks to impose surcharge under these provisions shall include the following sections, as appropriate:

(i) The application must include a description of the projected costs of the proposed facility. The need for the proposed facility must have already been reviewed and determined by the commission through an integrated resource planning process filed pursuant to rule 4901:5-5-05 of the Administrative Code.

(ii) The application must also include a proposed process, subject to modification and approval by the commission, for the competitive bidding of the construction of the facility unless the commission has previously approved a process for competitive bidding, which would be applicable to that specific facility.

(iii) An application which provides for the recovery of a reasonable allowance for construction work in progress shall include a detailed description of the actual costs as of a date certain for which the applicant seeks recovery, a detailed description of the impact upon rates of the proposed surcharge, and a demonstration that such a construction work in progress allowance is consistent with the applicable limitations of division (A) of section 4909.15 of the Revised Code.

(iv) An application which provides recovery of a surcharge for an electric generation facility shall include a detailed description of the actual costs, as of a date certain, for which the applicant seeks recovery and a detailed description of the impact upon rates of the proposed surcharge.

(v) An application which provides for recovery of a surcharge for an electric generation facility shall include the proposed terms for the capacity, energy, and associated rates for the life of the facility.

(c) Division (B)(2)(d) of section 4928.143 of the Revised Code authorizes an electric utility to include terms, conditions, or charges related to retail shopping by customers. Any application which includes such terms, conditions or charges, shall include, at a minimum, the following information:

- (i) A listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. Such components would include, but are not limited to, terms and conditions relating to shopping or to returning to the standard service offer and any unavoidable charges. For each such component, an explanation of the component and a descriptive rationale and, to the extent possible, a quantitative justification shall be provided.
- (ii) A description and quantification or estimation of any charges, other than those associated with generation expansion or environmental investment under divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, which will be deferred for future recovery, together with the carrying costs, amortization periods, and avoidability of such charges.
- (iii) A listing, description, and quantitative justification of any unavoidable charges for standby, back-up, or supplemental power.
- (d) Division (B)(2)(e) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for automatic increases or decreases in any component of the standard service offer price. Pursuant to this authority, if the ESP proposes automatic increases or decreases to be implemented during the life of the plan for any component of the standard service offer, other than those covered by division (B)(2)(a) of section 4928.143 of the Revised Code, the electric utility must provide in its application a description of the component, the proposed means for changing the component, and the proposed means for verifying the reasonableness of the change.
- (e) Division (B)(2)(f) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for the securitization of authorized phase-in recovery of the standard service offer price. If a phase-in deferred asset is proposed to be securitized, the electric utility shall provide, at the time of an application for securitization, a description of the securitization instrument and an accounting of that securitization, including the deferred cash flow due to the phase-in, carrying charges, and the incremental cost of the securitization. The electric utility will also describe any efforts to minimize the incremental cost of the securitization. The electric utility shall provide all documentation associated with securitization, including but not limited to, a summary sheet of terms and conditions. The electric utility shall also provide a comparison of costs associated with securitization with the costs associated with other forms of financing to demonstrate that securitization is the least cost strategy.
- (f) Division (B)(2)(g) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions relating to transmission and other specified related services. Moreover, division (A)(2) of section 4928.05 of the Revised Code states that, notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs (net of transmission related revenues), including ancillary and net congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved

by the federal energy regulatory commission.

Any utility which seeks to create or modify its transmission cost recovery rider in its ESP shall file the rider in accordance with the requirements delineated in Chapter 4901:1-36 of the Administrative Code.

(g) Division (B)(2)(h) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for alternative regulation mechanisms or programs, including infrastructure and modernization incentives, relating to distribution service as part of an ESP. While a number of mechanisms may be combined within a plan, for each specific mechanism or program, the electric utility shall provide a detailed description, with supporting data and information, to allow appropriate evaluation of each proposal, including how the proposal addresses any cost savings to the electric utility, avoids duplicative cost recovery, and aligns electric utility and consumer interests. In general, and to the extent applicable, the electric utility shall also include, for each separate mechanism or program, quantification of the estimated impact on rates over the term of any proposed modernization plan. Any application for an infrastructure modernization plan shall include the following specific requirements:

(i) A description of the infrastructure modernization plan, including but not limited to, the electric utility's existing infrastructure, its existing asset management system and related capabilities, the type of technology and reason chosen, the portion of service territory affected, the percentage of customers directly impacted (non-rate impact), and the implementation schedule by geographic location and/or type of activity. A description of any communication infrastructure included in the infrastructure modernization plan and any metering, distribution automation, or other applications that may be supported by this communication infrastructure also shall be included.

(ii) A description of the benefits of the infrastructure modernization plan (in total and by activity or type), including but not limited to the following as they may apply to the plan: the impacts on current reliability, the number of circuits impacted, the number of customers impacted, the timing of impacts, whether the impact is on the frequency or duration of outages, whether the infrastructure modernization plan addresses primary outage causes, what problems are addressed by the infrastructure modernization plan, the resulting dollar savings and additional costs, the activities affected and related accounts, the timing of savings, other customer benefits, and societal benefits. Through metrics and milestones, the infrastructure modernization plan shall include a description of how the performance and outcomes of the plan will be measured.

(iii) A detailed description of the costs of the infrastructure modernization plan, including a breakdown of capital costs and operating and maintenance expenses net of any related savings, the revenue requirement, including recovery of stranded investment related to replacement of undepreciated plant with new technology, the impact on customer bills, service disruptions associated with plan implementation, and description of (and dollar value of) equipment being made obsolete by the plan and reason for early plant retirement. The infrastructure modernization plan shall also include a description of efforts made to mitigate such stranded investment.

(iv) A detailed description of any proposed cost recovery mechanism, including the components of any regulatory asset created by the infrastructure modernization plan, the reporting structure and schedule, and the proposed process for approval of cost recovery and increase in rates.

(v) A detailed explanation of how the infrastructure modernization plan aligns customer and electric utility reliability and power quality expectations by customer class.

(h) Division (B)(2)(i) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for economic development, job retention, and energy efficiency programs. Pursuant to this section, the electric utility shall provide a complete description of the proposal, together with cost-benefit analysis or other quantitative justification, and quantification of the program's projected impact on rates.

(10) Additional required information

Divisions (E) and (F) of section 4928.143 of the Revised Code provide for tests of the ESP with respect to significantly excessive earnings. Division (E) of section 4928.143 of the Revised Code is applicable only if an ESP has a term exceeding three years, and would require an earnings determination to be made in the fourth year. Division (F) of section 4928.143 of the Revised Code applies to any ESP and examines earnings after each year. In each case, the burden of proof for demonstrating that the return on equity is not significantly excessive is borne by the electric utility.

(a) For the annual review pursuant to division (F) of section 4928.143 of the Revised Code, the electric utility shall provide testimony and analysis demonstrating the return on equity that was earned during the year and the returns on equity earned during the same period by publicly traded companies that face comparable business and financial risks as the electric utility. In addition, the electric utility shall provide the following information:

(i) The federal energy regulatory commission form 1 (FERC form 1) in its entirety for the annual period under review. The electric utility may seek protection of any confidential or proprietary data if necessary. If the FERC form 1 is not available, the electric utility shall provide balance sheet and income statement information of at least the level of detail as required by FERC form 1.

(ii) The latest securities and exchange commission form 10-K in its entirety. The electric utility may seek protection of any confidential or proprietary data if necessary.

(iii) Capital budget requirements for future committed investments in Ohio for each annual period remaining in the ESP.

(b) For demonstration under division (E) of section 4928.143 of the Revised Code, the electric utility

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shall also provide, in addition to the requirements under division (F) of section 4928.143 of the Revised Code, calculations of its projected return on equity for each remaining year of the ESP. The electric utility shall support these calculations by providing projected balance sheet and income statement information for the remainder of the ESP, together with testimony and work papers detailing the methodologies, adjustments, and assumptions used in making these projections.

(D) The first application for an SSO filed after the effective date of section 4928.141 of the Revised Code by each electric utility shall include an ESP and shall be filed at least one hundred fifty days before the electric utility proposes to have such SSO in effect. The first application may also include a proposal for an MRO. First applications that are filed with the commission prior to the initial effective date of this rule and that are determined by the commission to be not in substantive compliance with this rule shall be amended or refiled at the direction of the commission. The commission shall endeavor to make a determination on an amended or refiled ESP application, which substantively conforms to the requirements of this rule, within one hundred fifty days of the filing of the amended or refiled application.

(E) Subsequent applications for an SSO may include an ESP and/or MRO; however, an ESP may not be proposed once the electric utility has implemented an MRO approved by the commission.

(F) The SSO application shall include a section demonstrating that its current corporate separation plan is in compliance with section 4928.17 of the Revised Code, Chapter 4901:1-37 of the Administrative Code, and consistent with the policy of the state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. If any waivers of the corporate separation plan have been granted and are to be continued, the applicant shall justify the continued need for those waivers.

(G) A complete set of work papers must be filed with the application. Work papers must include, but are not limited to, all pertinent documents prepared by the electric utility for the application and a narrative or other support of assumptions made in the work papers. Work papers shall be marked, organized, and indexed according to schedules to which they relate. Data contained in the work papers should be footnoted so as to identify the source document used.

(H) All schedules, tariff sheets, and work papers prepared by, or at the direction of, the electric utility for the application and included in the application must be available in spreadsheet, word processing, or an electronic non-image-based format, with formulas intact, compatible with personal computers. The electronic form does not have to be filed with the application but must be made available within two business days to staff and any intervening party that requests it.

HISTORY: 2008-09 OMR pam. #10 (R-E), eff. 5-7-09; 2003-04 OMR pam. #11 (E), eff. 5-27-04

RC 119.032 rule review date(s): 9-30-13; 9-30-08

#### CROSS REFERENCES

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RC 4928.06, Effectuation of state policy; rules; monitoring and evaluation of service; reports; determination of effective competition; authority of commission

RC 4928.14, Electric generation service supplier

RC 4928.141, Standard service offer

RC 4928.142, Market rate offer

RC 4928.143, Electric security plan

4901:1-35-03, OH ADC 4901:1-35-03

Rules are complete through July 31, 2011; Appendices are current to February 28, 2010

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