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Via Federal Express
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Ms. Renee J. Jenkins
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Secretary to the Commission, Docketing Division
The Public Utilities Commission of Ohio
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Re: In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Case No. 09-786-EL-UNC.

Dear Ms. Jenkins:

Enclosed for filing, please find the original and seventeen (17) copies of the Comments filed by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company relating to the above referenced case. Please file the enclosed in the above-referenced docket, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

Arthur E. Korkosz

AEK:sbs
Enclosures
Cc: All Parties of Interest

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Electric Utilities

Case No. 09-786-EL-UNC

COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

Pursuant to the procedure set out in the Attorney Examiner's Entry of November 19, 2009 in the above captioned matter, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") herein submit their Comments in response to the Staff Recommendations issued November 18, 2009. As was evident during the course of Case No. 08-935-EL-SSO, the Companies' ESP proceeding, the Companies consider the matter of correctly developing a significantly excessive earnings test (SEET) methodology to be of considerable importance. The Companies believe they developed and supported an appropriate methodology in that case, reflecting positions which the Companies later reiterated during the course of the SEET workshop held October 5, 2009.

In some cases the Staff Recommendations reflect concurrence with the positions which have been advanced by the Companies. In some other cases, the Staff Recommendations address matters which were not issues germane to the Companies.[1]

[1] For instance, issues associated with the SEET treatment of off-system sales (Staff Question 1) do not apply in the Companies' circumstances. Additionally, as the Companies filed their ESP case on a stand alone utility basis, the subject matter raised by Staff Question 2 was not put in issue in their case. Finally, although the Companies' divestiture of previously owned generation assets make the SEET provisions of

Accordingly, in the interest of brevity, these Comments are directed to only certain of the issues discussed in the Staff Recommendations. Moreover, to further avoid unduly burdening these Comments with repetition, the Companies request that the record in support of their positions on the SEET issue from their ESP case be incorporated by reference here and further request the Commission's favorable consideration of the Companies' positions advanced therein.

The structure of the remainder of these Comments tracks the specific Staff Recommendations.

3. What adjustments should be included in the SEET calculation? and 11. How should write-offs and deferrals be reflected in the return on equity calculation for SEET?

The Companies generally concur with the apparent thrust of the Staff Recommendation, but find portions of the Recommendation unclear. The Recommendation states that the SEET should use *unadjusted* (emphasis added) financial results, but further states that extraordinary items should be excluded and that adjustments should be made to remove items associated with non-Ohio service areas. The Companies agree that extraordinary or nonrecurring items, or those which are otherwise non-representative of a utility's operations, should be excluded from the calculation. As a clarification of this position, the Companies suggest the following prescription for the SEET calculation:

R.C. 4928.142 inapplicable to their circumstances, the Companies believe their views as to the proper application of the statutory SEET are applicable to its formulation for purposes of both R.C. 4928.142 and R.C. 4928.143. The Staff Recommendation does not appear to distinguish between the two statutory sections.

> **For purposes of calculating SEET, net income applicable to common shareholders shall be adjusted to exclude extraordinary or nonrecurring items, those which are otherwise non-representative of a utility's operations, and any specific adjustments defined in a utility's Electric Security Plan then in effect. The denominator shall be the average monthly common equity balance during the measurement period, adjusted to exclude the related effects of any items excluded from net income above.**

The resulting adjusted return on common equity becomes the reference point as described further below in the Companies' response to Question 5.

4. What is the precise accounting definition of "earned return on common equity" that should be used?

The Companies concur with the Staff Recommendation on this question, a particularly important aspect of which is its adoption of a methodology which captures an average of common equity over all months of the year rather than risking the prospect of the calculation being improperly skewed by the use of a potentially unrepresentative single point measure of equity. Additionally, as the Companies urged in their ESP case, it is appropriate to exclude extraordinary or nonrecurring items, or those which are otherwise non-representative of a utility's operations, in order to maintain comparability with the sample of companies against which the utility's earnings are being considered.

5. What is the definition of "significantly in excess of the return on common equity"?

This issue of determining the threshold above which a return on equity is determined to be "significantly in excess of the return on common equity" was among the most contentious and fully developed SEET related issue in the Companies' ESP proceeding. The Staff's Recommendation here reflects a methodology which the Companies believe uses the minimum (i.e. most conservative) acceptable statistical confidence level (90%) and, assuming a sample group as proposed by the Companies, also helps protect against the prospect of a "false positive" result (i.e. the SEET would incorrectly identify the utility's earnings as significantly excessive). It also mitigates the problem of imposing an asymmetric risk upon the utilities with respect to not being able to actually earn the return allowed by the Commission in application of the SEET.[2]

It is important to recognize, however, that the recommendation of the 90% confidence level (corresponding to the 1.28 multiplier applied to the standard deviation) was dependent upon the sample proposed in the Companies' case, which sample, consistent with the language of the statute, included companies from industries other than the utility, or more specifically, just the electric utility industry. If, however, the sample of other companies used was more restrictive, for example, being limited only to regulated utilities or just electric utilities, it would be appropriate to use a higher confidence level (e.g., 95% or 97.5%) since the distribution of returns within these more restricted samples would likely be less variable and, accordingly, increase the danger of the test resulting in false positives and yielding the incorrect implication of significantly

[2] See Companies' Exhibit 8, Direct Testimony of Michael J. Vilbert, pp. 14-20, Case No. 08-935-EL-SSO.

excessive earnings.[3] Moreover, it should be remembered that an additional consideration beyond the mechanical application of a mathematical test is imposed by the statute in its requirement that "[c]onsideration shall also be given to the capital requirements of future committed investments in this state." R.C. 4928.143(F).

The Companies concur in the Staff's application of a 200 basis point minimum increment above the mean return of the sample group as a "backstop" which would "keep the threshold for excess at a reasonable distance from the mean when earning on an industry-wide basis contract." The Companies agree with the Staff that "[t]his approach will lend consistency and fairness to the process."

6. How should companies "that face comparable business and financial risk" be determined? and 9. How should the earnings of a comparable company be adjusted to compensate for the financial risk difference associated with the difference in capital structure?

The Companies have no particular objection to the Staff's view that "it is appropriate that a comparable group sample be determined and utilized on a case-by-case basis." The Companies believe, however, that the sample selection methodology they proposed for selecting companies of comparable business risk in their ESP case continues to be applicable not only to them but, given its theoretical underpinnings, would be appropriate more broadly in the application of the SEET to all electric utilities in the state. A benefit of having a uniformly applied methodology would be to reduce potential uncertainty in application of the SEET from year to year and from utility to utility. Of

[3] Id. at p. 16.

course if the circumstances in a particular situation justified a departure from application of the uniform methodology, a departure in that case could be made on a one-off basis.

As to the recognition of financial risk in the comparison of the utility to the sample group, the Staff "prefers" the approach which reflects that advocated by the Companies[4] and which does not use leverage as a "factor in group selection" but, instead, adjusts "the resulting returns for the comparable group companies". The benefit, as Staff recognizes, is that this approach "enables a larger sample [of comparable companies] to be used" and thus "enables greater validity for the results." Here again, although the Staff has stopped short of recommending application of this approach in all cases, the Companies believe that general application of this "preferable" approach for the SEET test is appropriate and would reduce uncertainty in its application while still permitting a departure from the methodology if circumstances warrant.

7. How are "significantly excessive earnings" to be determined? (Located in the third sentence of Section 4928.143(F), Revised Code.)

Please see the Companies' Comments with respect to Staff Recommendation 5, *supra*.

8. What does "in the aggregate" mean in relation to the adjustments resulting in significantly excess eanings?

The Companies have no comment on the Staff's views with respect to this question at this time.

[4] In both their ESP case and in the determination of allowed return on equity in their most recent distribution rate case (Case No. 07-551-EL-AIR).

10. What mechanism should be employed to return to customers the amount of excess earnings?

The Companies concur in the Staff Recommendation that the return mechanism should be decided on a case-by-case basis which provides flexibility in crafting an approach which best addresses the particular circumstances of a utility and its customers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments filed by Ohio Edison, The Cleveland Electric Illuminating Company and The Toledo Edison Company was served by United States Mail, prepaid, to the following persons, this 14th day of December 2009:

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