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Via Federal Express
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Secretary to the Commission, Docketing Division
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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 Reply 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**

REPLY 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 18, 2009 in the above captioned matter, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") submitted Comments in response to the Staff Recommendations issued November 18, 2009 ("Initial Comments"). Other participants did as well.

Each of the other Ohio electric distribution utilities (Duke Energy Ohio, Inc., Dayton Power and Light Company, and, jointly, Columbus Southern Power Company and Ohio Power Company) filed Comments which, in large measure, reflect positions taken earlier in their individual ESP proceedings. While there are some differences between the positions taken by the Companies and these other Ohio EDUs, those differences are not substantial and need not be addressed in this Reply. To the extent there are distinctions, however, the Companies adhere to the positions they earlier set out in their initially filed comments ("Initial Comments").

A group of the other participants comprised of the Office of the Ohio Consumers' Counsel, the Ohio Energy Group, the Ohio Manufacturers' Association, and the Ohio

Hospital Association, jointly styling themselves the "Customer Parties," filed consolidated comments ("CP Comments"). The Customer Parties, too, tend in large measure to reflect positions taken by some[1] of the group's individual members in the earlier ESP proceedings and those comments are the principal focus of the remainder of this Reply. Finally, Citizen Power, Inc., a party in the Companies' ESP proceeding[2] but which did not there address the SEET issue either by participation at the hearing or on brief, filed limited comments addressing narrow aspects of the Staff's Recommendations.

As with the Companies' Initial Comments, the organizational structure of the Staff's Recommendations (i.e. a series of eleven questions/issues, some of which are combined) set the framework for this Reply. Also, as before, since some aspects of the Staff's Recommendations are not germane to the circumstances of the Companies, they are not here addressed.[3]

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 Customer Parties offer several comments regarding the treatment of deferrals in the context of applying the SEET. (CP Comments, pp. 15-16) The Companies note that their own ESP included an express provision with respect to the exclusion of deferrals related to "deferred carrying charges" from application of the SEET to the Companies. (Case No. 08-935-EL-SSO, Stipulation filed Feb. 19, 2009, Paragraph B.6.,

[1] The Ohio Hospital Association was silent on the SEET issue in the Companies' ESP proceeding just as it was in the ESP cases of the other Ohio EDUs.
[2] Citizen Power was not a party to the ESP cases of the other Ohio EDUs.
[3] Specifically, Questions 1 and 2. See Initial Comments, p. 1, footnote 1.

p. 17) That ESP arose as the result of a unanimous Stipulation of the parties that was subsequently approved by the Commission. Its provisions, including this one relating to the treatment of these deferrals, must not be abrogated through the later adoption of proposals such as these in this docket. Moreover, as a practical matter, the fact that sufficient flexibility allowed the parties and the Commission to tailor the treatment of these deferrals to permit the parties in the Companies' ESP case to reach overall agreement and settle upon a comprehensive ESP argues against any formal rule that imposes the sort of rigidity suggested by the Customer Parties here.

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

The Customer Parties concur with the accounting definition of "earned return on common equity" set out in the Staff Recommendations. The Companies also agree with this definition, as noted in the Initial Comments. No further reply is necessary.

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

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

The Customer Parties devote more space in their comments to these two related questions[4] than any other issue and, accordingly, this Reply does as well.

[4] The Customer Parties' comments with respect to Question 7 are essentially a cross reference back to their discussion of Question 5. See CP Comments, p. 22. Accordingly, we discuss the two issues together.

As a preliminary observation, the Customer Parties seem to lament -- if not outright criticize -- that the Staff Recommendations depart from positions offered by the Staff in the ESP cases a year ago. (CP Comments, p.3) There are a couple of responses to this. First, the apparent rationale behind the Commission's deferring decisions on the SEET questions litigated in Case Nos. 08-935-EL-SSO (the Companies) and 08-917-EL-SSO (Columbus Southern and Ohio Power) to further consideration in the context of a Staff conducted workshop was to permit additional review of the SEET issues by the Staff, which review was to be made in light of further development of the ESP positions of the parties on briefing in those ESP cases and as the discussion and analysis might expand in the course of the Staff workshop. That the Staff positions may have now evolved somewhat from what they were a year ago as a result of such further consideration is, fairly, what could have been expected. Second, it is worth noting that at the time of the ESP cases (as Staff was recommending deferral of the SEET questions to the further consideration at the subsequent technical conference), Staff nonetheless even then leaned toward adoption of aspects of the approach presented by the Companies' SEET witness (Dr. Vilbert), portions of which it has now encompassed within its Recommendations.[5]

Moving past their surprise with the Staff's Recommendations, however, most of the analysis by the Customer Parties on this aspect of the Staff's Recommendations is simply wrong and, in some respects, even undercut by the very source upon which they rely. For example, the Customer Parties rely on the ESP testimony of OCC witness

[5] Staff witness Cahaan testified, "If the Commission had a strict up or down choice right now based upon the record of this case without such a technical conference, we have no objection to adopting Dr. Vilbert's method. And everybody can argue anything they want, but we happen to think Dr. Vilbert's method has much to commend it." Case No. 08-935-EL-SSO, Tr. Vol. IX, p. 119.

Woolridge in support of their criticism of the Staff's using a statistically based criterion – related to the standard deviation of the mean of the return on equity of the comparables group – to define the threshold for what will be considered "significantly excessive earnings". (CP Comments, p. 4) But Dr. Woolridge *himself* proposed use of this *same* statistically based criterion – a standard deviation measure, albeit with a different multiplier and with some additional tinkering[6] – as the mechanism by which to make this judgment. (Tr. V, p. 30[7]; Companies' Reply Br., p. 90) While there are numerous other reasons to criticize Dr. Woolridge's overall analysis and recommendations (Vilbert Rebuttal, pp. 6-17, 22-23; Companies' Initial Brief, pp. 69- 72), at least on this limited aspect, Dr. Woolridge's use of a statistical basis was consistent with the approach advocated by the Companies and now by the Staff in their Recommendations.[8]

The Customer Parties present an extensive discussion (CP Comments, pp. 5-9)[9], the essence of which is to attempt to correlate their views on application of the

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[6] Dr. Woolridge used a single standard deviation from the mean (of the equity rates of return of his comparables group) averaged with a flat basis point adder (based on a discretionary FERC return incentive used in transmission cases) to develop his threshold limit. For whatever reason, however, the Customer Parties now appear to have abandoned Dr. Woolridge, as OCC attempted to do on brief in the Companies' ESP case (Companies' Reply Br., p. 90) favoring instead the use solely of just the fixed FERC adder as the determinant of the "significantly excessive" threshold, a position which was espoused by OEG witness King in both the Companies' and AEP's ESP cases. (CP Comments, p. 9). The rationale supporting use of a 200 basis point incentive adder to equity returns in the context of FERC transmission rate cases, however, has no relationship whatever to the issue which arises under the Ohio Revised Code of what should constitute "significantly excessive earnings." In any event, the approaches of both Dr. Woolridge and Mr. King were thoroughly discredited on the record of the Companies' ESP cases which we incorporate here by reference. (Companies' Initial Brief, pp. 71-73; Companies' Reply Brief, pp. 89-91)

[7] Unless otherwise indicated, briefing, exhibit and transcript citations are references to the hearings in the Companies' ESP proceeding, Case No. 08-935-EL-SSO.

[8] The Customer Parties also cite to Dr. Woolridge's criticism of the purportedly "unreasonable result" arising from the particular methodology proposed by the AEP SEET witness for selection of the comparables group. (CP Comments, pp. 4-5) The Companies are reluctant to comment on the record developed in a proceeding to which they were not a party. Suffice it to say, however, that this criticism was not levied by Dr. Woolridge at the methodology for selection of the comparables group proposed by the Companies in their own ESP case, and, as noted in the Initial Comments, while the Staff Recommendations espouse the view that it is acceptable that method for selection of the comparables group may vary from case to case, we nonetheless believe that the approach proposed by the Companies in their own ESP is appropriate not only to them, but to the other Ohio EDUs as well.

significantly excessive earnings test with what they characterize as "well-established U.S. Supreme Court constitutional law." (CP Comments, p. 5) All of this discussion, however, is irrelevant. While it is hard to imagine that the *Bluefield* or *Hope* cases[10] would not be mentioned in any brief or witness testimony which addresses the issue of rate of return on equity that should be allowed in a utility base rate case, that body of law *has nothing whatever to do with the subject at hand*, i.e. the determination of whether, under more recent statutory Ohio Revised Code provisions, an Ohio EDU may have significantly excessive earnings in a given period as compared to businesses having similar business and financial risk.

The reason why determining the allowed return on equity in a rate case is an entirely different exercise than deciding whether a utility has significantly excessive earnings was comprehensively explained by Dr. Vilbert in the Companies' ESP case. (Vilbert Direct, pp. 3-5; Vilbert Rebuttal, pp. 3-4) First, the determination of what rate of return should be allowed in a rate case is a *forward-looking* exercise which attempts to capture the return that will be required by an investor to make a future investment. In contrast, by statutory definition, the SEET determination is a *retrospective* look at the financial results achieved in a prior fiscal period. Second, ascertaining an appropriate allowed rate of return focuses on *market*-based measures while the SEET, again by definition, relies on a comparison of accounting or *book*-based measures.

Finally, in setting an allowed rate of return, there is an inherent expectation that a utility may, going-forward, at times earn slightly more or less that the precise ROE

[9] The two attachments accompanying the CP Comments, purportedly supporting the discussion at pages 5 through 9, are likewise irrelevant to the subject at hand.
[10] *Bluefield Water Works v. West Virginia*, 262 U.S. 679 (1923); *Federal Power Comm'n. v. Hope Natural Gas*, 320 U.S. 591 (1944).

allowed – it should, however, over time and on average earn its allowed return. In contrast, with SEET, the mechanism which presents the prospect that the utility may be required to return to customers that portion of earnings which is deemed to be "significantly excessive" is not balanced out by any offsetting mechanism applicable in a period of particularly low earnings. This one-sidedness presents circumstances which potentially impose asymmetric risk on the utility,[11] with negative consequences to both the utility and its customers. Moreover, the situation is exacerbated if the threshold for the determination of what is significantly excessive is not set sufficiently high so as to preclude the prospect of false positives in the determination of whether earnings are, in fact, "significantly excessive" or merely the result of random fluctuations of a magnitude to be expected under normal situations. (Vilbert Direct, pp. 17-18)

In summary, while a financial analysis and use of financial metrics do properly enter into the determination of SEET, this determination is nonetheless fundamentally different than ascertaining the allowed rate of return in a rate case. Thus any suggestion, as the Customer Parties seem to make, that a SEET determination can or should be made by simple comparison to allowed rates of returns in the rate cases of other utilities and in other places is the proverbial comparison of apples and oranges and highly inappropriate.

Citizen Power suggests a revision to the Staff Recommendation that would eliminate the proposed "backstop" in the event that the product of the 1.28 multiplier applied to the standard deviation is less than 200 basis points. Citizen Power offers no rationale for elimination of this backstop mechanism and given the potential negative consequences of "false positives" that may arise from the threshold being set too low (as

[11] A situation which is not only unfair, but carries with it the prospect of upward pressure on the utility's cost of equity capital and its required allowed return. (Vilbert Rebuttal, p. 18)

discussed above), Citizen Power's proposed variant to the Staff's Recommendation is not only unjustified, but is bad policy.

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?

This is another instance in which the Customer Parties seemed chagrined by the evolution of the Staff's Recommendations and the principal thrust of their criticisms of the proposal that the comparable group of companies to be used in the SEET analysis should be selected on a "case by case" basis is that it will "allow the utility to self-select its comparable group [and] put the fox in charge of the hen house." (CP Comments, p. 4) The obvious flaw in this criticism is that it overlooks that under the statute[12] the utility has the burden of proof on the SEET determination and it is the Commission that will determine if that burden has been sustained. Put otherwise, it is procedurally customary for the party bearing the burden to offer and prove its methodology (in this case the composition of the comparable group of companies), and it will be up to the Commission, undoubtedly with the active participation of interested parties, to finally render a decision on the issue. Expanding on the Customer Parties' earlier use of colorful zoological metaphors to characterize the matter, we suggest their take on this issue is a "red herring".

[12] ORC 4928.143(F).

One other astounding aspect of the Customer Parties' comments is the statement relating to the proper adjustment to account for financial risk variation associated with different capital structures:

> There is consensus among the experts as to how the earnings of comparable companies should be adjusted for the financial risk difference associated with the difference in capital structure. Dr. Woolridge, Dr. Vilbert and Mr. King *all provided much the same methodology for making this adjustment.* (emphasis supplied)

Even a brief examination of the record of the Companies' ESP belies any notion that these three witnesses "all provided much the same methodology for making [the financial risk] adjustment." The mechanism for accommodation of financial risk proposed by Dr. Vilbert differed considerably from that offered by either Dr. Woolridge or Mr. King. (Companies' Initial Br., pp. 68-70) Staff witness Cahaan recognized as much at the time and, as noted earlier, favored its use. The Staff Recommendations now also recognize the distinction and, in similar fashion, have adopted it as well. (Staff Recommendations, p. 5)

If, however, contrary to the Staff Recommendation, the Commission were to favor adopting a uniform methodology for the selection of the comparable group of companies, we submit, as noted in the Initial Comments, that the approach offered in the Companies' ESP proceeding is a well-reasoned and well-supported methodology applicable not only to the Companies but to the circumstances of the other Ohio EDUs as well. (Initial Comments, pp. 5-6) While the Customer Parties' advocate use of the methodology proposed by Dr. Woolridge in the earlier ESP proceedings, the numerous shortcomings and deficiencies of that methodology were made clear in the Companies'

ESP proceeding, both in the testimony of Dr. Vilbert as well as that of Staff witness Cahaan.[13] (Companies' Initial Brief, pp. 68-70)

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

The Customer Parties offer the curious interpretation that the phrase "in the aggregate" as used in the statute should also mean "cumulative", implying that there should be some carryover of the effect of applying the SEET test from year to year. (CP Comments, p.18). This novel and unsupported view is wholly inconsistent with the statutory directive of applying the SEET *annually* ("following the end of each annual period of the [electric security] plan"). ORC 4928.143(F). It is only if, upon the application of the SEET in such an annual review and a determination that there are significantly excessive earnings, that the Commission may[14] "require the utility to return the amount of the excess by prospective adjustments." (emphasis supplied) The statute clearly contemplates discrete yearly application of the SEET with no yearly carryover of the sort the Customer Parties suggest.

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

The Companies concurred with the Staff Recommendation on this point and the Customer Parties do as well. No further comment is necessary.

[13] In particular, as Mr. Cahaan pointed out, Dr. Woolridge's and Mr. King's reliance on the use of unlevered betas in the selection of the comparables group forces the statutorily required analysis of both business and financial risk into a "black box". (Companies Initial Br., p. 69) This flaw alone undermines reliance on these methodologies.

Respectfully submitted,

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ATTORNEY FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

[14] The Commission must also give consideration to the capital requirements of the utility's future committed investments in the state. ORC 4928.143(F).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply 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 11th day of January 2010:

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