BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

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.[1] 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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1 *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.[2]

(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.[3]

(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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2 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.

3 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.[4]

(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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4 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, OPAE 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. OPAE emphasizes that the utilities can justify the approach used to calculate the revenues from the prior rate plan. OPAE 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. OPAE 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. (OPAE 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) OPAE 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.[5] 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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5 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 ESP

case,[6] 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

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6 *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.[7] 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

7 *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

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GNS/vrm

Entered in the Journal

AUG 25 2010

Reneé J. Jenkins
Secretary