

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Columbus Southern Power Company for	)	Case No. 11-4571-EL-UNC
Administration of the Significantly	)	
Excessive Earnings Test under Section	)	
4928.143(F), Revised Code, and Rule	)	
4901:1-35-10, Ohio Administrative Code.	)	

In the Matter of the Application of Ohio	)	
Power Company for Administration of the	)	
Significantly Excessive Earnings Test	)	Case No. 11-4572-EL-UNC
under Section 4928.143(F), Revised Code,	)	
and Rule 4901:1-35-10, Ohio	)	
Administrative Code.	)	

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**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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November 22, 2013

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This case involves the determination of the amount of refund customers should receive because Columbus Southern Power Company's ("CSP" or "the Company" or "AEP Ohio") 2010 earnings were "significantly excessive."<sup>1</sup> The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the October 23, 2013 Opinion and Order ("October 23, 2013 Order" or "Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO").

Through this filing, OCC seeks rehearing of the PUCO's Order pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The October 23, 2013 Order was unjust, unreasonable, and unlawful because:

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<sup>1</sup> R.C. 4928.143(F).

- A. The PUCO Erred When It Failed To Order AEP Ohio to Use The \$20 Million Originally Intended for the Turning Point Solar Project to Offset Prudently Incurred Storm Costs that AEP Ohio Seeks to Charge Customers in Case No. 12-3255-EL-RDR.
- B. The PUCO Erred When It Failed to Find that The Consideration Of Capital Requirements Of Future Committed Investments Results in A Significantly Excessive Earnings Test Threshold of 17.05 Percent (Which, If Adopted, Would Protect Customers from Paying Unjust and Unreasonable Rates for Electric Service).
- C. The PUCO Erred When It Failed to Order the Return of \$17.3 Million To Customers As A Result of The Significantly Excessive Earnings of Columbus Southern Power in 2010.

The bases for this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its October 23, 2013 Order.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") files this Application for Rehearing in furtherance of the legislative intent to protect Ohio customers from paying unjust and unreasonable rates for their electric service. In Senate Bill 221 ("S.B. 221") the 127th General Assembly determined that the Public Utilities Commission of Ohio ("PUCO" or "Commission") must protect Ohio customers by requiring electric distribution utilities to return to customers the amount of any significantly excessive earnings.<sup>2</sup>

Specifically, S.B. 221 requires the Commission, on an annual basis, to compare the earnings of Ohio investor-owned utilities with electric security plans ("ESPs") to the

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<sup>2</sup> See R.C. 4928.143(F).

earnings of publicly-traded companies with comparable risk.<sup>3</sup> If, after conducting such a comparison, the Commission determines that a utility's ESP rate "adjustments" resulted in "significantly excessive" earnings, then the utility must refund the excess earnings to the utility's customers.<sup>4</sup> Through the significantly excessive earnings test ("SEET") the Legislature determined that Ohio consumers cannot be made to fund significantly excessive utility profits resulting from an ESP.

The PUCO applied the SEET for the first time ("2009 SEET Proceeding") when it reviewed the 2009 earnings of Columbus Southern Power Company.<sup>5</sup> On January 11, 2011, the PUCO issued an Opinion and Order that found CSP's earnings to be excessive in the amount of \$42.6 million and ordered that amount to be refunded to customers.<sup>6</sup>

Additionally, in the 2009 SEET Proceeding, AEP Ohio made the commitment to invest \$20 million in the Turning Point solar project.<sup>7</sup> The PUCO ordered that if the Turning Point project did not move forward in 2012, then AEP Ohio had to spend \$20 million on a similar project in 2012.<sup>8</sup> To date, AEP Ohio has not spent that \$20 million. AEP Ohio has been in violation of that PUCO order since January 1, 2013.

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<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, generally.

<sup>6</sup> *See id.* at 35.

<sup>7</sup> Rebuttal Testimony of Joseph Hamrock (October 26, 2010) at 7; PUCO Case No. 10-1261-EL-UNC.

<sup>8</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*, Case No. 10-1261-EL-UNC, Opinion and Order at 26 (January 11, 2011).

The PUCO's October 23, 2013 Order in this case makes it the *third* time that the PUCO has directed AEP Ohio to spend the \$20 million<sup>9</sup> that the Company committed to spending in 2010.<sup>10</sup> Customers should not have to continue to wait to see the benefits of the \$20 million investment. Customers should see the benefits now. Accordingly, the PUCO should order a \$20 million reduction to AEP Ohio's prudently incurred storm costs that it seeks to collect from customers. Such action by the PUCO will ensure 1) that customers do in fact benefit from the money, consistent with the PUCO's expectations, and 2) that customers benefit **now** from the money.

As explained in detail below, the PUCO also erred when it adopted the top of the range (17.56 percent) for the SEET threshold.<sup>11</sup> The SEET threshold should be the 17.05 percent (the bottom of the range) because of AEP Ohio's over-stated and declining capital investments in Ohio. The bottom of the range is more favorable to customers. Accordingly, the PUCO should grant rehearing on this issue so that CSP's customers can receive the \$17.3 million refund that they are entitled to under Ohio law.

## **II. STANDARD OF REVIEW**

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the PUCO, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the

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<sup>9</sup> See, for example, Case No. 10-1261-EL-UNC, Opinion and Order at 26 (January 11, 2011); Case No. 10-501-EL-FOR, Opinion and Order at 28 (January 9, 2013); and Case No. 11-4571-EL-UNC, et al., Opinion and Order at 18-19 (October 23, 2013).

<sup>10</sup> Rebuttal Testimony of Joseph Hamrock (October 26, 2010) at 7; PUCO Case No. 10-1261-EL-UNC.

<sup>11</sup> October 23, 2013 Order at 27.

proceeding.”<sup>12</sup> Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”<sup>13</sup>

In considering an application for rehearing, Ohio law provides that the PUCO “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.”<sup>14</sup> Furthermore, if the PUCO grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same \* \* \*.”<sup>15</sup>

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the PUCO’s rule on applications for rehearing.<sup>16</sup> Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

### **III. LAW AND ARGUMENT**

#### **A. The PUCO Erred When It Failed To Order AEP Ohio to Use The \$20 Million Originally Intended for the Turning Point Solar Project to Offset Prudently Incurred Storm Costs that AEP Ohio Seeks to Charge Customers in Case No. 12-3255-EL-RDR.**

R.C. 4928.143(F) dictates that as part of a SEET analysis the PUCO shall consider a utility’s capital requirements for future committed investments in the state.<sup>17</sup>

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<sup>12</sup> R.C. 4903.10.

<sup>13</sup> R.C. 4903.10(B).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See* Ohio Adm. Code 4901-1-35.

<sup>17</sup> R.C. 4928.143(F).



In its 2009 SEET Proceeding (Case No. 10-1261-EL-UNC), AEP Ohio provided testimony that it was committed to provide \$20 million in funding to a solar project in Cumberland, Ohio known as Turning Point.<sup>18</sup> The OCC, the Appalachian Peace and Justice Network, and the Ohio Energy Group argued that the PUCO was statutorily prohibited from giving any consideration (for the purposes of the SEET) to that solar project because it was not a “committed” investment under the SEET law and because that it was beyond the ESP period under review.<sup>19</sup> Though various parties questioned the appropriateness of the PUCO giving consideration to this investment, the PUCO expressed its confidence that the Turning Point project would move forward and that the funds would be expended for the project in the “near future.”<sup>20</sup> However, the PUCO also ordered that if the Turning Point project did not move forward in 2012, AEP Ohio had to spend the \$20 million on a similar project in 2012.<sup>21</sup> But instead, AEP Ohio violated the 2009 SEET Order. 2012 has come and gone. The Turning Point project never came to fruition. And AEP Ohio has yet to spend the \$20 million for the benefit of its customers.

In this regard, in Case No. 10-501-EL-FOR (AEP Ohio’s 2010 Long Term Forecast Case), the PUCO again directed AEP Ohio “to expend the \$20 million to the

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<sup>18</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*, Case No 10-1261-EL-UNC, Rebuttal Testimony of Joseph Hamrock (October 26, 2010) at 7; Opinion and Order at 26 (January 11, 2011).

<sup>19</sup> Post-Hearing Reply Brief by OCC, Appalachian Peace and Justice Network and the Ohio Energy Group (November 30, 2010) at 32, Case No 10-1261-EL-UNC.

<sup>20</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*, Case No 10-1261-EL-UNC, Opinion and Order at 26 (January 11, 2011).

<sup>21</sup> *Id.*

extent it had not already done so.”<sup>22</sup> But more importantly, the PUCO concisely explained that AEP Ohio was to “ensure that the benefits of the \$20 million investment **flow through to the Company’s ratepayers.**”<sup>23</sup> The PUCO also stated that if AEP Ohio were unable to make the \$20 million investment in Turning Point or a similar project by the end of 2013, then “the Company should submit a proposal for another appropriate use for the \$20 million investment, such as applying the amount to offset major storm damage costs that are deferred under the Company’s recently approved storm damage recovery mechanism.”<sup>24</sup>

In this proceeding, the PUCO again—for the third time—ordered AEP Ohio to expend the \$20 million that was once designated for Turning Point. Specifically, the PUCO directed AEP Ohio to “expend \$20 million, to the extent it has not already done so, on Turning Point or another investment in a similar project subject to Staff approval, by the end of 2013.” The PUCO made this finding despite the fact that it already found in AEP Ohio’s 2010 Long Term Forecast Case that the Turning Point Solar Project was not needed.<sup>25</sup> The PUCO should have done more to address AEP Ohio’s violation of the PUCO’s 2009 SEET Order. The PUCO erred by not ensuring that customers benefit now from AEP Ohio monies not yet expended as it is almost 2014.

OCC agrees with the PUCO’s finding (in AEP Ohio’s 2010 Long Term Forecast Case) that an appropriate use of the \$20 million is to apply that amount to offset major

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<sup>22</sup> *In the Matter of the 2010 Long Term Forecast Report of the Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR, Opinion and Order at 28 (January 9, 2013).

<sup>23</sup> *Id.* (Emphasis added.)

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 25 and 27.

storm costs.<sup>26</sup> AEP Ohio now seeks to collect storm costs<sup>27</sup> from its customers in Case No. 12-3255-EL-RDR. Reducing AEP Ohio's prudently incurred deferred storm costs by \$20 million will undoubtedly allow customers to benefit now from AEP Ohio monies not yet expended. The PUCO Staff echoed these sentiments in comments filed in another AEP Ohio proceeding when the PUCO Staff explained that they would prefer to see the funds "used in a manner that does not create an additional burden on ratepayers [such as offsetting deferred costs]." <sup>28</sup> OCC agrees.

In September of this year, AEP Ohio proposed--in another proceeding--to spend the \$20 million on Volt/Var Optimization ("VVO").<sup>29</sup> The PUCO Staff and OCC filed comments advocating that if the VVO project was to be approved, then the \$20 million should not be collected from customers.<sup>30</sup> And just this week AEP Ohio indicated that it reserves the right to withdraw the VVO investment proposal if the PUCO Staff's and OCC's positions are adopted.<sup>31</sup>

It is now nearly 2014, and AEP Ohio has not yet spent the \$20 million for the benefit of its customers. The PUCO should grant rehearing on this issue and order AEP Ohio to use the \$20 million to offset prudently incurred major storm damage costs that the Company now seeks to collect from its customers in Case No. 12-3255-EL-RDR.

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<sup>26</sup> *Id.* at 28.

<sup>27</sup> In PUCO Case No. 11-346-EL-SSO, AEP Ohio proposed a storm damage recovery mechanism be created to recover any incremental expenses incurred due to major storm events.

<sup>28</sup> PUCO Case No. 13-1939-EL-RDR, PUCO Staff Comments at 8.

<sup>29</sup> Application (September 13, 2013) at 4; PUCO Case No. 13-1939-EL-RDR.

<sup>30</sup> PUCO Staff Comments (November 1, 2013) at 8; OCC Reply Comments at 10 (November 18, 2013) at 4; PUCO Case No. 13-1939-EL-RDR.

<sup>31</sup> Ohio Power Company Reply Comments (November 18, 2013) at 4; PUCO Case No. 13-1939-EL-RDR.

**B. The PUCO Erred When It Failed to Find that The Consideration Of Capital Requirements Of Future Committed Investments Results in A Significantly Excessive Earnings Test Threshold of 17.05 Percent (Which, If Adopted, Would Protect Customers from Paying Unjust and Unreasonable Rates for Electric Service).**

**1. R.C. 4928.143(F) is clear that the PUCO shall give consideration to the capital requirements of future committed investments in Ohio when determining whether the Electric Security Plan adjustments resulted in significantly excessive earnings for Columbus Southern Power in 2010.**

R.C. 4928.143(F) provides that the Commission “shall consider” whether the return on common equity earned by an electric distribution utility is significantly excessive when compared to the business and financial risk that publicly traded companies face, with adjustments for capital structure. In the very next sentence, the Legislature directed that “[c]onsideration also shall be given to the capital requirements of future committed investments in this state.” (Emphasis added). In applying the statute, this language requiring “consideration” to “also” be given to “future committed investment” is read in the context it is found—directly following the comparable analysis language. The placement of the capital requirement language, along with the language linking the capital requirements to the comparable analysis (“consideration also shall be given”), means that capital requirements of “future committed investments” is another factor that must be considered in conjunction with the comparable analysis and the establishment of the SEET threshold. And in the AEP Ohio 2009 SEET Proceeding, the Commission specifically held that “[a]s required by statute \*\*\*, the Commission

considered the electric utility's future committed capital investments when rendering its decision on the SEET.”<sup>32</sup>

**2. Columbus Southern Power projects that it will invest \$93 million less in capital investments in 2011 than in 2009.**

In order to accurately assess the level of spending for CSP's capital commitments in the future—any assessment must start with the amount of money invested for capital commitments for the baseline year under review (2010)—when CSP's capital spending was \$194.870 million.<sup>33</sup> CSP estimated that its capital expenditures would decline in 2011 to \$186.912 million.<sup>34</sup> But what is also important is that, in 2009, CSP's expenditures for capital investments were \$280.107 million<sup>35</sup>—\$85.237 million more than what was invested in 2010. And that is \$93.195 million more than what CSP projected to spend in 2011. Consequently, CSP's expected future capital expenditures warrant a SEET threshold at the bottom of the range for 2010, especially since capital expenditures are projected to be \$93.195 million less in 2011 than what CSP invested in 2009.

**3. Columbus Southern Power over-stated its projected capital commitments for 2010 in the 2009 Significantly Excessive Earnings Test Proceeding by \$61.230 million.**

In the 2009 SEET Proceeding the Commission found that the PUCO Staff's recommended 50 percent was a reasonable guide for establishing a baseline adder<sup>36</sup> but ultimately the Commission adjusted the PUCO Staff's 50 percent baseline adder to 60

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<sup>32</sup> January 11, 2011 Opinion and Order at 33, PUCO Case No 10-1261-EL-UNC.

<sup>33</sup> See Exhibit JH-1 attached to Company Ex. 1.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See January 11, 2011 Opinion and Order at 25 and 27, PUCO Case No 10-1261-EL-UNC.

percent after considering other factors,<sup>37</sup> including the capital commitments made by CSP for 2010 and 2011.<sup>38</sup> And in its January 11, 2011 Opinion and Order the Commission noted that “Customer Parties raised a concern that CSP was not making a firm commitment to its 2010 budget.”<sup>39</sup> But the Commission ultimately found that, “on cross-examination, it was demonstrated that CSP is indeed committed to spending the projected capital budget for 2010.”<sup>40</sup>

In the 2009 SEET Proceeding, CSP had forecasted its capital expenditures for 2010 to be \$256.100 million.<sup>41</sup> However, it has been shown in this current proceeding that CSP’s actual capital expenditures for 2010 was \$194.870 million,<sup>42</sup> an amount equal to 76 percent of the projected capital spending for the year.<sup>43</sup> This over-stated investment projection of CSP was considered by the Commission in the 2009 SEET Proceeding when it rendered its decision on the SEET<sup>44</sup> and adjusted the PUCO Staff’s 50 percent baseline adder upward to 60 percent.<sup>45</sup> In sum, CSP’s actual capital spending in 2010 was \$61.230 million (or 24 percent) less than the level projected by AEP Ohio, which was one of the factors that led the Commission to adjust the PUCO Staff’s 50 percent adder to 60 percent in the 2009 SEET Proceeding. Accordingly, there is a need for a

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<sup>37</sup> *See id.* at 27.

<sup>38</sup> *See id.* at 25.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 31 and Cross- Examination of Hamrock, Vol. I, pages 52-54.

<sup>42</sup> *See* Exhibit JH-1 attached to Company Ex. 1.

<sup>43</sup> OCC notes that in the 2009 SEET Proceeding, CSP projected its 2011 construction expenditures at \$186, 969 million. *See* January 11, 2011 Opinion and Order at p. 31. In this proceeding CSP has reduced its projected construction expenditures for 2011 to \$186, 912 million. *See* Exhibit JH-1 attached to Company Ex. 1.

<sup>44</sup> *See* January 11, 2011 Opinion and Order at 33.

<sup>45</sup> *See id.* at 27.

“downward adjustment” in the instant case. Therefore it is appropriate, at the very least, that the PUCO adopt a SEET threshold that is at the bottom of the range—17.05 percent.

As discussed above, the law requires the Commission to give consideration to the capital requirements of future committed capital investments in Ohio. In this case, the threshold level of significantly excessive earnings should be at the bottom of the SEET threshold range based on CSP’s projected construction spending.<sup>46</sup> Moreover, at the least, the threshold level of significantly excessive earnings should be at the bottom of the SEET threshold range because in the 2009 SEET Proceeding the Commission gave future committed investments in Ohio \$61.230 million more weight in the 2009 SEET analysis than what CSP actually expended in 2010. The PUCO should grant rehearing on this issue and adopt a SEET threshold of 17.05 percent to ensure that CSP does not get to retain 2010 earnings that were significantly excessive.

**C. The PUCO Erred When It Failed To Order The Return Of \$17.3 Million To Customers As A Result Of The Significantly Excessive Earnings Of Columbus Southern Power In 2010.**

As discussed above, the PUCO erred because it should have adopted a lower SEET threshold of 17.05 percent which is at the bottom of the range that the Commission found to be appropriate.<sup>47</sup> Using a SEET threshold of 17.05 percent, CSP’s 2010 Significantly Excessive Earnings subject to return is \$11,118,213 based on the adjusted shareholder equality of \$1,308,025,000.<sup>48</sup> The pre-tax 2010 significantly excessive earnings to be returned to customers is \$17,381,102 based on a Gross Revenue

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<sup>46</sup> See Exhibit JH-1 attached to Company Ex. 1.

<sup>47</sup> Case No. 11-4571-EL-UNC, et al., Opinion and Order at 27 (October 23, 2013).

<sup>48</sup>  $\$11,118,213 = \$1,308,025,000 * (17.90\% - 17.05\%)$ .

Conversion Factor of 1.5633.<sup>49</sup> The PUCO should grant rehearing so that customers receive the full amount of refund that they are entitled to under Ohio law.

#### IV. CONCLUSION

For all the reasons discussed above, the PUCO should grant rehearing on OCC's claims of error and modify or abrogate its October 23, 2013 Order consistent with Ohio law and reason. The PUCO should provide CSP customers with the greater refund intended under Ohio law in this circumstance where CSP had significantly excessive earnings in 2010. Additionally, the amount of prudently incurred storm costs that AEP Ohio seeks to collect from its customers should be reduced by \$20 million because of AEP Ohio's failure to comply with the 2009 SEET Order.

Respectfully submitted,

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<sup>49</sup> \$17,381,102=\$11,118,213\* 1.5633.



## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Application for Rehearing* was served electronically on the persons stated below this 22nd day of November, 2013.

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**in**

**Case No(s). 11-4571-EL-UNC, 11-4572-EL-UNC**

Summary: Application Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Yost, Melissa Ms.