BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of 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. 11-4571-EL-UNC
In the Matter of the Application of Columbus Southern 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. 11-4572-EL-UNC

OHIO POWER COMPANY'S
MEMORANDUM IN OPPOSITION TO THE APPLICATION FOR REHEARING
OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Commission issued its Opinion and Order on October 23, 2013 in this case. The Office of the Ohio Consumers' Counsel (OCC) filed an application for rehearing on November 22, 2013. Ohio Power Company (AEP Ohio) hereby files its memorandum in opposition to the OCC's application for rehearing.

I. OCC's Application for Rehearing is without merit and should be rejected.

A. OCC is wrong in claiming that AEP Ohio is in violation of the 2009 SEET decision.

OCC makes a vacuous claim that AEP Ohio has been in violation of the 2009 SEET decision since January 1, 2013. (OCC AFR at 2, 5.) AEP Ohio has diligently pursued fulfillment of its $20 million investment obligation and the Commission has continued to

consider it through the course of multiple proceedings. There is no basis to claim that AEP Ohio stands in violation of the 2009 SEET decision.

The 2009 SEET capital commitment was one of several factors that the Commission took into account when it established the return on equity ("ROE") threshold for CSP in the 2009 SEET Proceeding. Specifically, the Commission stated:

> CSP continues its innovation efforts and dedication to Ohio's energy policy by its commitment to provide $20 million in funding to a solar project in Cumberland, Ohio. Not only will this project advance the state's energy policy, but it will also bring much needed economic development activity to Ohio. Various parties noted that this commitment was contingent on several other factors and questioned the appropriateness of giving any consideration to this investment. The Commission remains confident that this project will move forward and the funds will be expended for this project in the near future. Nevertheless, should this project not move forward in 2012, such that the funds are expended in 2012, the Commission requires the $20 million to be spent in 2012 on a similar project.

2009 SEET Case, Opinion and Order (Jan. 11, 2011) at 26-27.

In its Entry on Rehearing in the 2009 SEET Case, the Commission reaffirmed its positive consideration of the $20 million solar project capital commitment in its establishment of CSP's SEET threshold ROE, but it also allowed that some flexibility in the schedule by which AEP Ohio would make the investment was appropriate:

> As part of the Commission's application of the SEET, the Commission gave consideration to CSP's future committed capital expenditure in the [Turning Point] project. Given the Commission's consideration of CSP's expenditure in a solar project in the development of the 2009 SEET threshold, it is reasonable for the Commission to require that the expenditure occur by a date certain. *However, we agree that CSP should propose, during the course of its next ESP proceeding, a firm schedule setting forth its expenditure in the [Turning Point] project or other similar project.*

2009 SEET Case, Entry on Rehearing (Mar. 9, 2011) at 10 (emphasis added). Thus, the issue was extended to be addressed in conjunction with ESP II and resolution of the related Turning Point Solar project.

On January 9, 2013, the Commission issued its Opinion and Order in the 2010 Long Term Forecast Cases for Ohio Power Company[1], finding that the signatory parties to the Stipulation "have not demonstrated a need for the Turning Point project during the LTFR planning period." After that decision, AEP Ohio examined other areas to pursue its outstanding obligation to invest $20 million consistent with the 2009 SEET decision (while continuing to have discussions with the developers of TPS project regarding a potential investment). A few months later, on September 13, 2013, the Company proposed in Case No. 13-1939-EL-RDR (gridSMART Phase 2) that the Commission approve satisfying the Company's $20 million investment obligation through investment in Volt/Var technology. That request remains pending. Finally in this regard, of course, the Opinion and Order in this 2010 SEET docket also refers to the Company making the $20 million investment "by the end of 2013" – not 2012 . (Opinion and Order at 18-19.) This 2013 deadline is the subject of AEP Ohio's separate application for rehearing that is currently pending.

In sum, there is no basis for OCC to claim that the Company has been in violation of the 2009 SEET decision since January 1, 2013.

B. It would be unlawful and unreasonable to convert the $20 million investment obligation into a refund or offset costs that the Company is entitled to recover from ratepayers.

[1] *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Columbus Southern Power Company and Related Matters*, Case Nos. 10-501-EL-FOR and 10-502-EL-FOR.

On December 6, 2012, the Supreme Court of Ohio affirmed the Commission's 2009 SEET decision. *See In re Application of Columbus S. Power Co.*, 2012-Ohio-5690, ¶ 2. The Commission's consideration of the $20 million capital commitment in the establishment of CSP's SEET threshold ROE was not a subject of that appeal. Accordingly, the Commission's consideration of that capital expenditure commitment became final at that point and the Commission presently lacks jurisdiction to modify the decision. Accepting OCC's position would retroactively modify the Commission's final order in the 2009 SEET Proceeding, which the Supreme Court of Ohio already affirmed, by converting the capital investment obligation into a $20 million dollar refund obligation. Such a modification, however, is unreasonable and unlawful because the time for modifying or revising the decision made in the 2009 SEET Proceeding has long since passed. Moreover, imposing such a requirement would violate the SEET statute and conflict with the record and decision in the 2009 SEET case.

1. The 2009 SEET Order considered the capital commitment capital provision enumerated in R.C. 4928.143 and the record in the 2009 SEET case; it was never a refund obligation and was not used to reduce the Company's refund obligation by $20 million.

The 2009 SEET Order established the capital commitment in accordance with the committed capital provision in the SEET statute, R.C. 4928.143(F), and based on the record in the 2009 SEET case. The 2009 SEET Order considered AEP Ohio obligation to invest $20 million in the Turning Point project or a similar project – along with a long list of other factors – in establishing the threshold level of earnings above which it would consider any additional earnings as significantly excessive. *Id.* at 25-27. The OCC suggestion in its rehearing application in this case (along with its similar position in Case Nos. 13-1939-EL-RDR and 12-3255-EL-RDR) – that the 2009 SEET capital commitment should instead be used to offset major storm damage costs – is inconsistent with the controlling statute, the record in the 2009 SEET

proceeding and the final order in that case. The 2009 SEET Order considered AEP Ohio's plan to make a $20 million capital investment. It did not direct AEP Ohio to refund $20 million directly to customers, which is what using the money to offset major storm damage costs would accomplish. The 2009 SEET decision is consistent with the controlling statute and the record in that case; whereas, the OCC's position conflicts with both the statute and the record.

a. The 2009 SEET capital commitment is a consideration of the capital requirements of future committed investments, not a refund otherwise due to ratepayers. R.C. 4928.143.

The SEET statute, R.C. 4928.143(F), provides that an electric distribution utility ("EDU") operating pursuant to an electric security plan ("ESP") with a term of less than three years will be subject to an annual test to determine whether it had significantly excessive earnings during the prior year. Specifically, the SEET statute requires the Commission to consider if an EDU's ESP "resulted in excessive earnings" such that the EDU's earned return on common equity was "significantly in excess of" the ROE that publicly traded companies, including utilities, that face comparable business and financial risk earned during the same period. R.C. 4928.143(F). Importantly, the SEET statute also expressly directs the Commission to consider "the capital requirements of future committed investments [by the EDU] in this state." *Id.*

This provision in the SEET statute confers flexibility on the Commission to permit an EDU to retain earnings that might otherwise be considered to be significantly excessive where an EDU has committed to make capital investments in Ohio. Nothing in the SEET statute, however, indicates that such capital investments to be refund obligations or were otherwise "giveaway" investments that would not be recovered in rates. Indeed, the Commission's filing requirement requires submittal with the annual SEET filing of "capital budget requirements for

future committed investments in Ohio for each annual period remaining in the ESP." OAC 4901:1-35-03(C)(10)(a)(iii). This filing requirement obviously does not assume that any part of an EDU's entire capital budget is being put up for a free giveway never to be recovered in rates – thus, the rule confirms that capital investments under the SEET statute are not tied to refund obligations or otherwise constitute free capital not recovered in rates. Even presuming (wrongly) that such a relationship exists, there is also no basis in the statute to assume that there is a linear mathematical or dollar-for-dollar relationship between such investments and an EDU's SEET threshold ROE.

In sum, nothing in the SEET statute or the Commission's rules promulgated thereunder requires the amount by which the Commission increases an EDU's SEET threshold ROE in consideration of its future capital commitments to directly correlate with the costs of those commitments.

b. The record in the 2009 SEET is manifestly clear that the proposed $20 million investment was to be recovered in rates and the 2009 SEET decision accepted the scope and extent of the proposed investment along with all of the "other factors" considered under the guidelines (i.e., the factors set forth in Case No. 09-786-EL-UNC).

In the 2009 SEET Case, AEP Ohio presented substantial evidence of the capital requirements of its planned future investments in Ohio and demonstrated that it was appropriate for the Commission to recognize that retained equity was needed to enable those planned investments to occur in the future. *See* 2009 SEET Proceeding, AEP Ohio Initial Br. at 67-71 (Nov. 19, 2010). Specifically, Company witness Hamrock demonstrated that AEP Ohio had planned capital investments of approximately $1.67 billion during the term of its first ESP alone. *See id.*; 2009 SEET Proceeding, Cos. Ex. 6 at 17 and Ex. JH-1. That $1.67 billion of planned investment included planned capital investment of $20 million in a planned solar project. 2009

SEET Proceeding, AEP Ohio Initial Br. at 5, 68, 71; 2009 SEET Proceeding, Cos. Ex. 8 at 7. Both Company witness Hamrock and AEP Ohio's post-hearing briefing made clear that AEP Ohio contemplated that its planned investments (including but not limited to its investment in the solar project) would be capital investments for which the Company would recover in rates; the investment plans were never portrayed as donations or payments to ratepayers, either by the Company or by the Commission. There is no basis to distinguish the $20 million investment plan for Turning Point from any of the other investments comprising the $1.67 billion planned capital investment discussed in the Company's testimony. By contrast, AEP Ohio's explicit testimony and positions on brief in the 2009 SEET case were consistent with the SEET statute.

In its 2009 SEET Order, after considering the Company's $1.67 billion capital investment commitments, including the commitment to invest $20 million in the solar project, as well as numerous other factors, the Commission concluded that it was appropriate to adjust the baseline adder used to determine the Company's SEET threshold ROE from 50% to 60%. 2009 SEET Order at 22-27. In its prior generic SEET investigation proceeding (Case No. 09-786-EL-UNC), the Commission developed a list of various factors that it would consider when establishing a SEET threshold on a case-by-case basis. 2009 SEET Order at 22, 25. In accordance with the 09-786 guidelines, the 2009 SEET Order separately considered several factors other than the $20 million Turning Point commitment when it decided to increase the earnings adder by 10%: (i) the Commission found (at 25-26) that "CSP is facing various business and financial risks," including various mandates under SB 221, carbon regulation and changing generation investment risks, (ii) the Commission found (at 26) that CSP's service reliability has improved through fewer outages and decreased duration of outages, (iii) the Commission acknowledged (at 26) that CSP's most recently authorized ROE was higher than the ROEs being advocated for use in

the SEET, (iv) the Commission found (at 26) that "consideration should be given to CSP's commitment to innovation, including its work with the gridSMART program, and (v) the Commission found (at 26) that it "must also include in its consideration CSP's efforts to advance Ohio's energy policy and future capital commitments. Only as part of this fifth and final category of factors for consideration did the Commission consider the $20 million Turning Point commitment – and it was only part of one of the five categories of consideration factors (*i.e.*, it was the last consideration mentioned in the category of advancing State policy which also included the fact that CSP far exceeded the benchmarks of both energy efficiency and peak demand response). 2009 SEET Order at 26.

An obvious and compelling observation must be drawn from, and acknowledged based upon, the Commission's consideration of these factors: there is no basis in the record or the order to conclude that the 10% increase in the adder (from the default of 50% to 60%) is tied exclusively or even primarily to the $20 million Turning Point commitment. The 2009 SEET Order did not place any particular weighting on the various list of factors considered. 2009 SEET Order at 27, 34. Indeed, the proposed $20 million investment was only one consideration as part of one of the factors (*i.e.*, it was the last consideration mentioned in the category of advancing State policy which also included the fact that CSP far exceeded the benchmarks of both energy efficiency and peak demand response).

Thus, the planned $20 million investment did not, on its own, lead to the increase in the 2009 SEET threshold ROE, but rather was only one component of the basis for the additional 10% adder. Pursuant to the record-based numbers used in the 2009 SEET order, the entire 10% adder would be equivalent to $22 million. This straightforward calculation is derived by subtracting the SEET ROE threshold of 16.5% that would have resulted from the 50% adder

from the SEET ROE threshold actually adopted of 17.6% based on the 60% adder, which yields a difference of 1.1% or approximately $22 million.[2] Given that the Commission relied upon no less than five different categories of consideration factors in increasing the adder by 10% and given that the $20 million commitment was only one part of the final category discussed in the Opinion and Order, there is no direct or quantifiable connection between the $20 million commitment and the Commission's decision to elevate the SEET ROE threshold by $22 million. Hence even if the Commission did attempt to transform the capital investment requirement into a refund obligation (improperly and over AEP Ohio's objection), any such obligation would only be a small fraction of $22 million and absolutely not the full $20 million.

In reality, under the 2009 SEET Order, only earnings *beyond* that 60% adder (which equated to a 17.6% ROE) were considered excessive and were to be returned to customers.[3] The $20 million investment, which was included among the factors supporting the 60% adder, was not intended to be returned to customers. Indeed, nowhere in its 2009 SEET Order did the Commission suggest such a relationship – and there would have been no basis in the record or the SEET statute to do so. For that reason, there is no basis in the 2009 SEET record or decision to support the notion that the capital investment commitment would not be recovered in rates or would otherwise be used to offset costs that would be recovered in rates. Similarly, the 2009 SEET Order cannot be interpreted to require AEP Ohio to offset actual operation and maintenance expenses incurred in response to the 2012 major storms by $20 million. Such a

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[2] As used by the 2009 SEET Order (at 35), Joint Intervenor Exhibit 2 calculated each 1% of ROE change as being equivalent to $20.039 million of earnings.

[3] The Company has fully complied with its refund obligations under the 2009 SEET Order and has returned to customers more than $42 million in earnings that the Commission deemed to be significantly excessive. *See* 2009 SEET Order at 35; 2009 SEET Proceeding, CSP Revised Tariff Filing (Jan. 21, 2011); 2009 SEET Proceeding, Finding & Order (Jan. 27, 2011) (approving, as modified, CSP's January 21, 2011 tariff filing).

proposal has no basis in the SEET statute, the record in the 2009 SEET proceeding or the final order in that case.

2. Converting the 2009 SEET capital commitment to a refund obligation would not only violate the SEET statute but would also be unlawful as a retroactive modification of the final order in the 2009 SEET Case, because res judicata applies and the Commission lacks jurisdiction to modify prior adjudicative orders that have become final.

While the Commission can prospectively change policy decisions and ratemaking determinations, the Supreme Court of Ohio has held that *res judicata* applies to an adjudicatory decision made in a prior final order. *See Office of the Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10 (1984) ("OCC is barred by the doctrines of *res judicata* and collateral estoppel from attempting to relitigate [an issue that was previously litigated] in the prior proceeding and was passed upon by the commission. OCC cannot now attempt to reopen the question."); *see also Baltimore & Ohio R. Co. v. Pub. Util. Comm.*, 22 Ohio St.3d 275, 279 (1986) (stating that after the Commission has made a final order, it may not lawfully reopen a closed case and change the order); *Cincinnati Bell v. Pub. Util. Comm*., 12 Ohio St.3d 280 (1984) (citing *State Corp. Comm. of Kansas v. Wichita Gas Co*. (1934), 290 U.S. 561, 569, 54 S.Ct. 321, 324, 78 L.Ed. 500).

This rule is not unique to the Commission. Indeed, it is a well-established general rule that, in the absence of a specific statutory limitation to the contrary, an administrative agency is divested of its jurisdiction to reconsider or modify a decision after an appeal from that decision has been taken or the time for an appeal has expired. *See Hal Artz Lincoln Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20, para. 3 of syllabus (1986), *citing State ex rel. Borsuk v. Cleveland*, 28 Ohio St.2d 244 (1972). There is no express statutory language to the contrary applicable

here. For these reasons, the Commission is without jurisdiction to modify its decision in the 2009 SEET Proceeding in this proceeding.

Similarly, the Commission violates the prohibition against retroactive application of the law if it attempts to modify the 2009 SEET Order. The General Assembly may not constitutionally impose a new standard upon past conduct. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 104 (1988). What the legislature cannot do directly, it cannot do indirectly through the Commission. See *Discount Cellular v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53. As a related matter, the Commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88 (1999). If the Commission accepts the positions advanced by OCC and Staff, it will be clear that the Commission is retroactively changing the scope and consequences of the $20 million commitment as originally presented and discussed in the 2009 SEET Order. If so, the Commission would be unlawfully imposing "new or additional burdens, duties, obligations, or liabilities as to a past transaction," *Van Hossen*, 36 Ohio St.3d at 107, and it would be violating AEP Ohio's "reliance interest or reasonable expectation of finality," *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶ 48. These principles of law and equity are especially compelling in light of the fact that AEP Ohio has diligently attempted to pursue the $20 million investment.

C. The Commission gave appropriate consideration of capital requirements of CSP's future committed investments when it established the SEET threshold ROE.

In its second assignment of error on rehearing, OCC contends that the SEET Threshold ROE should be reduced from 17.56% to 17.05% based on a consideration of the capital requirements of AEP Ohio's future committed investments in Ohio. OCC argues that this

downward adjustment to the SEET Threshold ROE is necessary for two reasons. First, OCC notes, AEP Ohio forecasted in this proceeding that CSP would expend less capital in 2011 than what it actually expended in 2010 or 2009. OCC AFR, at page 9. Second, OCC complains that the amount of capital CSP actually expended in 2010 was less than what AEP had previously forecasted (at the time of the 2009 SEET proceeding) that CSP would expend in 2010. OCC AFR, at pages 9-10. OCC made essentially identical arguments at the hearing and in its initial post-hearing brief. The Commission rejected those arguments, and declined to make any adjustment to the SEET Threshold ROE based on them, stating as follows:

> It is not unusual that an electric utility's capital investment projections or actual expenditures fluctuate over the years. Therefore, the Commission finds it unreasonable to conclude that the decline in capital spending, or any increase in capital spending in future years, for that matter, should be the basis for adjusting the SEET threshold.

Opinion and Order, at page 19.

When making the evaluation required by Section 4928.143(F), Ohio Rev. Code, the Commission is directed to consider the utility's "capital requirements for future committed investments." The statute does not state or imply that the consideration should focus on whether the utility expects to increase its investment over a prior year or on whether the utility was able to complete all the capital improvements it committed to undertake in a prior year. OCC's complaint that AEP Ohio's capital forecast of $187 million for CSP during 2011 is less than what CSP expended in 2010 misses a very basic point: $187 million equates to a very substantial investment in Ohio, for which a very substantial source of capital is obviously required. In addition, OCC's criticism fails to consider the forecasted expenditure of $187 million in 2011 in the context of AEP Ohio's entire capital expenditure program for both CSP and OPCo over the three-year period of the ESP, which totals in excess of $1.5 billion. That is

an even more substantial investment in Ohio, for which AEP Ohio requires an even more substantial source of capital.

With regard to OCC's criticism of how much capital CSP actually expended in 2010, there is no rational basis for penalizing CSP for not spending the full amount it expected, in 2009, to spend in 2010. As Mr. Hamrock explained, the two major contributors to the difference between forecasted capital expenditures and actual expenditures in 2010 were the grant CSP received from the Department of Energy to support the gridSMART program and the timing of certain environmental expenditures tied to generation output. (Tr. v. I at 52-54.) OCC, in essence, continues to ask the Commission on rehearing to punish CSP for being a good steward of its resources.

The Commission correctly concluded in its Opinion and Order, at page 19, that declines or increases in future years from forecasted capital expenditures do not warrant an adjustment to the SEET Threshold ROE. OCC has offered nothing new on rehearing in support of its argument that the SEET Threshold ROE should be adjusted downward on the basis of CSP's actual and forecasted capital expenditures during the term of the ESP, and the Commission should reject OCC's arguments on this point again.

D. The Commission did not err by not adopting OCC's recommended threshold SEET ROE of 17.05%.

OCC's third assignment of error, at pages 11-12, simply requests that the Commission flow through the consequences of granting its second assignment of error and, thus, increase the earnings to be returned to customers by the amount that results from using a 17.05% SEET Threshold ROE. Because OCC's second assignment of error should be rejected, for the reasons given above, so should its third assignment of error.

CONCLUSION

OCC's application for rehearing should be rejected in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by electronic mail upon the persons listed below this 2nd day of December, 2013.

/s/ Steven T. Nourse
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