**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the 2010 Annual Filing of Columbus Southern Power Company and Ohio Power Company Required by Rule 4901:1-35-10, Ohio Administrative Code. | )  ) Case Nos. 11-4571-EL-UNC  ) 11-4572-EL-UNC  ) |

**REPLY BRIEF**

**BY**

**THE Office of the Ohio Consumers’ Counsel,**

BRUCE J. WESTON

INTERIM CONSUMERS’ COUNSEL

Melissa R. Yost, Counsel of Record

Kyle L. Kern

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Telephone: (Yost) (614) 466-1291

Telephone: (Kern) (614) 466-9585

[yost@occ.state.oh.us](mailto:yost@occ.state.oh.us)

[kern@occ.state.oh.us](mailto:kern@occ.state.oh.us)

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# I. INTRODUCTION

The state’s protection against rate adjustments from public utilities’ Electric Security Plans (“ESP”) that result in significantly excessive utility profits is a fundamental consumer protection. Through the significantly excessive earnings test (“SEET”), the Legislature determined that Ohio consumers should not fund significantly excessive utility profits resulting from an ESP plan. However, Columbus Southern Power Company (“CSP”) seeks to deny its customers the return of the excessive profits that the law requires. It argues that it should be allowed an unreasonably high threshold of earnings (22.62%) before refunds should be ordered.[[1]](#footnote-1)

Upon review of the record in this proceeding, the Commission should find that CSP failed to meet its burden of proof—that its earnings in 2010 were not significantly excessive. More specifically, OCC urges the Commission to find the following in regard to the 2010 SEET analysis for CSP: 1) the PUCO Staff’s comparable group, comparable group’s return on equity of 10.97 percent and baseline adder of fifty percent are reasonable and comply with the law; 2) the PUCO Staff’s adder should be adjusted downward because of CSP’s over-stated and declining capital investments in Ohio; and 3) CSP’s earned return on equity for 2010 was 19.42% because Ohio law mandates that off-system sales be included for purposes of the SEET. Finally, CSP’s significantly excessive earnings for 2010 should be refunded to its customers through a SEET adjustment rider on a per kilowatt-hour basis, similar to the refund mechanism approved in the 2009 SEET Proceeding.[[2]](#footnote-2)

# II. ARGUMENT

## A. Constitutional Issues Are Not Within the Jurisdiction Of The Commission And The Void For Vagueness Statute Is Not Applicable To R.C. 4928.143(F).

### 1. The Commission cannot decide constitutional issues.

The Company acknowledges in its initial brief that the Commission “lacks authority to declare a statute constitutional.”[[3]](#footnote-3) And the Commission determined in the 2009 SEET Proceeding that “it is the province of the courts, and not the Commission, to judge the constitutionality of Section 4928.143(F).”[[4]](#footnote-4) The Ohio Supreme Court has confined the scope of the Commission’s jurisdiction to utility-related matters;[[5]](#footnote-5) however, the Company argues that R.C. 4928.143(F) is unconstitutional because it “fails to give fair notice to Ohio EDUs as to what the law requires and likewise fails to provide standards to guide the Commission’s discretion in enforcing the law.”[[6]](#footnote-6)

Title 49 of the Ohio Revised Code defines the entire scope of the PUCO’s jurisdiction. Under Title 49, the PUCO has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying jurisdiction to all courts, except the Supreme Court.[[7]](#footnote-7) The rationale behind these grants of authority is that the determination of issues related to applicable laws and regulations, industry practices, and standards is best accomplished by the PUCO with its expert staff.[[8]](#footnote-8) But because the Commission is ultimately a creature of statute,[[9]](#footnote-9) it has only those powers conferred to it by statute. Thus, the Commission does not have the jurisdiction to decide constitutional challenges.

The Ohio Supreme Court has explicitly provided that decisions regarding the constitutionality of statutes are decisions for the courts, and not for the PUCO or for an advisory board. In this regard, the Supreme Court has emphasized: “[the fact that the] PUCO has exclusive jurisdiction over service-related matters does not diminish ‘the basic jurisdiction of the court of common pleas \*\*\* in other areas of possible claims against utilities, including pure tort and contract claims \*\*\* moreover, PUCO is not a court and has no power to judicially ascertain and determine legal rights and liabilities.’” Consequently, constitutional rights fall within the “legal rights and liabilities” that courts have the power to determine,[[10]](#footnote-10) and therefore, the Commission has no jurisdiction over the constitutionality of R.C. 4928.143(F).

The Commission must therefore presume the constitutionality of R.C. 4928.143(F).[[11]](#footnote-11) Any challenges to the constitutionality of the SEET are to be decided by the Ohio Supreme Court, on appeal, as the Supreme Court has complete and independent power of review as to all questions of law in appeals from the Commission.[[12]](#footnote-12)

### 2. The Company’s void for vagueness argument is misplaced, improperly supported, and inapplicable to R.C. 4928.143(F).

Although the Commission cannot rule on the constitutionality of R.C. 4928.143(F), OCC maintains that any court of competent jurisdiction will find that the Company’s void for vagueness argument is misplaced, improperly supported, and inapplicable to R.C. 4928.143(F). The Commission found in the 2009 SEET Proceeding that “the typical due process claim of vagueness seeks to bar enforcement of a statute which either forbids or requires the doing of an act.”[[13]](#footnote-13) The SEET is not such statute.[[14]](#footnote-14) In addition, a review of applicable case law shows that the vagueness doctrine is rarely applicable to statutes other than criminal laws.[[15]](#footnote-15) In the infrequent and extreme instances where the vagueness doctrine is applicable to civil laws, a statute must be found to be “so vague and indefinite as really to be no rule or standard at all.”[[16]](#footnote-16) Specifically, the United States Court of Appeals for the Second Circuit has held: “[t]he ‘void-for-vagueness’ doctrine is chiefly applied to criminal legislation. Laws with civil consequences receive less exacting vagueness scrutiny.”[[17]](#footnote-17)

In its Initial Brief, the Company relies heavily on *Norwood v. Horney*[[18]](#footnote-18)— a case dealing with an eminent domain ordinance. In *Norwood*, the Ohio Supreme Court found that the term “deteriorating area” was void for vagueness.[[19]](#footnote-19) The Court described the ordinance as “offer[ing] so little guidance in application that it is almost barren of any practical meaning.”[[20]](#footnote-20) The same cannot be said for the SEET.

The SEET standard is arguably more detailed than the “just and reasonable” standard used in most jurisdictions, including Ohio, for distribution rate cases.[[21]](#footnote-21) Indeed, the utilities’ rate of return in Ohio has for decades been determined by the PUCO according to the law’s relatively non-detailed standard of a “fair and reasonable rate of return.”[[22]](#footnote-22) In fact, the Federal Power Act, which was passed in 1935 to enable the Federal Power Commission, (now the Federal Energy Regulatory Commission (“FERC”)) to regulate rates and charges for interstate wholesale electric sale, also mandates that rates must be “just and reasonable,”[[23]](#footnote-23) which is far less detailed than the SEET. Further, the United States Supreme Court has also set forth a very broad constitutional standard to determine if a state ratemaking decision is constitutional: “does the decision fall within a zone of reasonableness?”[[24]](#footnote-24) Although the precise meaning of the just and reasonable standard may be considered broad, it is certainly not void for vagueness, and neither is R.C. 4928.143(F).

Notably, courts have held that “[a] statute is not void for vagueness simply because it could be worded more precisely or with additional certainty.”[[25]](#footnote-25) The critical question in all cases is whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable the individual to conform his or her conduct to the law; those that do not are void for vagueness.[[26]](#footnote-26) The parties to this proceeding are technically skilled and trained regulatory experts and attorneys who have developed different methodologies for the application of the SEET, but should be very familiar with the concepts described in R.C. 4928.143(F). Simply because the parties’ methodologies differ, does not make the statute void for vagueness.

The Company states in its Initial Brief that the SEET “offers virtually no guidance as to its proper application.”[[27]](#footnote-27) But in the 2009 SEET Proceeding, the Commission explained the proper application of R.C. 4928.143(F), stating:

[T]he statute defines earnings as excessive “as measured by whether the earned return on common equity of the electric utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk.” Additionally, the statute directs the Commission to make “such adjustments for capital structure as may be appropriate. Further, the Commission is to consider “the capital requirements of future committed investments in this state.” Finally, the Commission is directed to “not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.” **These concepts are not new or novel and have been traditionally applied in the regulatory ratemaking process.[[28]](#footnote-28)**

The January 11, 2011 Opinion and Order,[[29]](#footnote-29) the SEET Order[[30]](#footnote-30) and Entry on Rehearing,[[31]](#footnote-31) and SEET workshop provided clarity and guidance as to the meaning of R.C.4928.143(F). And the Commission’s rule sets forth the relevant information that is necessary for the annual SEET filing.[[32]](#footnote-32) As the Commission pointed out, the concepts described in R.C. 4928.143(F) are not “new or novel” and there has been an abundance of discussion and guidance as to the meaning of SEET prior to this proceeding. Accordingly, the Company’s argument is improperly supported and flawed.

The Company’s vagueness doctrine argument should be rejected because the Commission 1) cannot decide constitutional issues, 2) must presume the Constitutionality of R.C. 4928.143(F); and 3) the doctrine of vagueness is inapplicable to the SEET provisions contained in R.C. 4928.143(F).

## B. The Earned Return On Equity For CSP To Be Considered By The Commission For The Purpose Of The 2010 SEET Is 19.42 Percent.

The Company addressed the treatment of profits from off-system sales (“OSS”) in regard to the SEET at pages 11-12 of its Initial Brief. The Company argued, primarily, that the Commission should exclude off-system sales margins from the net earnings available to common shareholders (i.e., from the numerator of the ROE calculation).[[33]](#footnote-33) The OSS issue was litigated by the parties in the 2009 SEET Proceeding,[[34]](#footnote-34) in briefs before the Ohio Supreme Court, and now in this case. OCC maintains that in administering the SEET, the Commission should include off-system sales in the margins in the earnings of the utility. CSP’s off-system sales come from generation plant that was built for the benefit of Ohio customers, and CSP’s jurisdictional customers have funded a return on and a return of such generation assets. In addition, the exclusion of these OSS profits results in a biased comparison between CSP and publicly traded companies that face comparable business and financial risk. If earnings from off-system sales are ignored, as proposed by the Company, the Commission is comparing only part of the Company’s earnings with 100% of the earnings of the comparable group, which is contrary to R.C. 4928.143(F).

In this proceeding, OEG witness Lane Kollen recommends that CSP’s return on common equity for 2010 include “the OSS margins in both the net income numerator and in the common equity in the denominator.”[[35]](#footnote-35) OCC supports this approach. Kollen also recommends that the Commission find that CSP’s earned return on common equity for 2010 was 19.42 percent.[[36]](#footnote-36) The SEET statute requires “the earned return on common equity of the electric distribution utility” to be compared with the “return on common equity that was earned during the same period by [comparable] publicly traded companies, including utilities\*\*\*.”[[37]](#footnote-37) The Company’s proposal fails to do what the statute requires because it deducts OSS net margins from the numerator of the ROE calculation.

The SEET review mandated by the Legislature requires that all of CSP’s earnings be compared to all of the earnings of comparable companies. CSP’s earnings—as reported to the U.S. Securities and Exchange Commission (“SEC”) and FERC—include revenue from wholesale sales as well as costs from wholesale purchases. Accordingly, in administering the SEET the Commission should include OSS margins in both the net income numerator and in the common equity in the denominator which results in a ROE for CSP of 19.42 percent.

## C. The Commission Should Reject CSP’s Proposed SEET Analysis.

CSP maintains that its earnings for 2010 become significantly excessive only if they exceed a ROE of 22.62 percent.[[38]](#footnote-38) CSP relies on the analysis of Dr. Makhija for support of its recommended ROE threshold in regards to its 2010 earnings. The same methodology used by Dr. Makhija in this proceeding (that results in a threshold ROE of 22.62 percent) was used by Dr. Makhija in the 2009 SEET Proceeding[[39]](#footnote-39) and was rejected by the Commission.[[40]](#footnote-40) And CSP has not made any new arguments that support the Commission reversing its rejection of Dr. Makhija’s methodology in the 2009 SEET Proceeding. Accordingly, Dr. Makhija’s approach in this case—like in the 2009 SEET Proceeding—fails to comply with the mandate of the statute and should again be rejected by the Commission. The PUCO Staff’s methodology, on the other hand, complies with the statute, follows the Commission’s January 11, 2011 Opinion and Order in the 2009 SEET Proceeding, and produces a reasonable starting point for determining the threshold return above which profits are considered significantly excessive.

## D. In Determining Whether CSP’s Earnings For 2010 Were Significantly Excessive, The Commission Can Not Consider Information Regarding The Business Operations Of Ohio Power Company Or American Electric Power Company.

The General Assembly specifically mandated that in determining whether an electric utility’s earnings were significantly excessive, the Commission “shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.”[[41]](#footnote-41) The Commission has specifically held that the intent of this language “is to avoid penalizing or rewarding the electric utility for the business operations of its affiliate or parent company.”[[42]](#footnote-42) Therefore, the Commission is prohibited from considering any information regarding Ohio Power Company (OP)—an affiliate of CSP during 2010[[43]](#footnote-43)—in the SEET analysis for CSP. Furthermore, the Commission cannot consider any evidence regarding “AEP Ohio” in the SEET analysis for CSP because that includes the business operations of OP.[[44]](#footnote-44)

The Commission was very clear that the SEET filings were to be on a single-entity basis. In rejecting the arguments of AEP Ohio to perform the SEET calculation on CSP and OP jointly, the Commission held that AEP’s arguments were “not only contrary to the plain language of the statute but would neutralize the earnings of one affiliate, and its customers, over the other.”[[45]](#footnote-45) And the Commission gave further guidance to electric utilities when it specifically found “that the intent of the legislation is to extract, to the extent reasonably feasible and prudently justified, the expenses, earnings, and equity of any affiliate from the SEET calculation.”[[46]](#footnote-46)

Furthermore, as discussed above, CSP had clear instruction and guidance that its SEET filing was to be on a single-entity basis. Yet it chose to disregard both Ohio law and the direction of the Commission and presented evidence and argument on a combined basis. For example, in its Initial Brief, the Company argues that “AEP Ohio submitted evidence of $1.6 billion capital investment in Ohio during the ESP” and concludes by stating that “[a]ll of these capital commitments should be considered by the Commission, in the event it is necessary, to avoid a finding of significantly excessive earnings for CSP in 2010.”[[47]](#footnote-47)

The Company is trying to mislead the Commission into considering the alleged approximate $1.6 billion in actual and planned capital investments—which is the combined figures for both CSP and OP[[48]](#footnote-48)—in the SEET analysis for CSP that must be performed on an individual company basis. Accordingly, Ohio law prohibits the Commission from considering any legal arguments or analysis or evidence regarding OP, which is included in any reference to “AEP Ohio” in the SEET analysis for CSP.

## E. The Consideration Of Capital Requirements Of Future Committed Investments Supports A Downward Adjustment Of The 50% Baseline Adder Recommended By The PUCO Staff.

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 Ohio General Assembly directed that “**[c]onsideration also shall be given** to the capital requirements of future committed investments in this state.” OCC’s Initial Brief fully explains how future capital commitments are to be considered in a SEET analysis in accordance with the law and consistent with the Commission’s January 11, 2011 Opinion and Order.[[49]](#footnote-49)

Although CSP acknowledges that “the SEET statute requires that the Commission consider the capital requirements of future committed investments,”[[50]](#footnote-50) the Company fails to indicate anywhere in its Brief that it estimates that its capital expenditures will in fact decline in 2011 to $186.912 million.[[51]](#footnote-51) Instead, the Company— in an attempt to shield the fact that CSP’s future capital expenditures are projected to decline significantly in 2011—only provided the total amount of expenditures for capital investments for CSP during the entire ESP.[[52]](#footnote-52)

But in order to accurately assess the level of spending for CSP’s capital commitments in the future as mandated by the SEET statute—any assessment must start with the amount of money invested for capital commitments for the baseline year under review—2010—where CSP’s capital spending was $194.87 million.[[53]](#footnote-53) As stated above, CSP estimates that its capital expenditures will decline in 2011 to $186.912 million.[[54]](#footnote-54) But what is also important is that in 2009—the first year of the ESP—CSP’s expenditures for capital investments were $280.107 million,[[55]](#footnote-55) $85.237 million more than what was invested in 2010. And that is $93.195 million more than what CSP projects to spend in 2011. This means that under CSP’s flawed legal interpretation,[[56]](#footnote-56) that OCC rejects, CSP would need to retain less of its earnings in 2010 for funding future capital investments since its future capital commitments are projected to be much less in 2011.

Furthermore, as discussed in OCC’s Initial Brief, CSP had forecasted its construction expenditures for 2010 to be $256.1 million in the 2009 SEET Proceeding.[[57]](#footnote-57) However, it has been shown in this proceeding that CSP’s actual construction expenditure for 2010 was only $194.87 million.[[58]](#footnote-58) 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[[59]](#footnote-59) and adjusted the PUCO Staff’s 50 percent baseline adder upward to 60 percent.[[60]](#footnote-60) In sum, CSP’s actual capital spending in 2010 was $61.23 million (or 24 percent) less than the level projected by the Company, 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 symmetrical downward adjustment in the adder in the instant case. This adjustment is especially needed since CSP is now projecting that it will spend less in capital commitments in 2011 than it projected that it would spend for the same time-period (year 2011) in the 2009 SEET Proceeding.[[61]](#footnote-61) Therefore, it is appropriate that the Commission adopt an adder that is less than the baseline adder of 50 percent proposed by the PUCO Staff.

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 not be increased based on CSP’s projected construction spending for 2011, which has significantly decreased since 2009.[[62]](#footnote-62) Moreover, the threshold level of significantly excessive earnings should be decreased because in the 2009 SEET Proceeding the Commission gave future committed investments in Ohio $61.23 million more weight in the 2009 SEET analysis than what CSP actually expended in 2010 and CSP has decreased its projected capital expenditures for 2011.[[63]](#footnote-63)

## F. There are no “Additional Factors” That the Commission Could Consider To Support An Increase Of The 50% Baseline Adder Recommended By the PUCO Staff.

### 1. R.C. 4928.143(F) Sets Limits Regarding the Commission’s Application of the Significantly Excessive Earnings Test.

The Company states in its Initial Brief that there are “several additional factors that the Commission indicated it would also consider\*\*\*prior to concluding that significantly excessive earnings exist during a particular period for a specific utility.”[[64]](#footnote-64) Besides capital requirements of future committed investments in Ohio, the Company urges the Commission to consider the following: (1) CSP’s most recently authorized return on equity; (2) CSP’s risk, including whether CSP owns generation, whether the ESP includes a fuel and purchased power adjustment or similar mechanism, the rate design and the extent to which the electric utility remains subject to weather and economic risk; (3) indicators of management performance and benchmarks to other utilities; (4) innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio’s economy, including research and development expenditures, investments in advanced technology and innovative practices; and (5) the extent to which CSP has advanced state policy.[[65]](#footnote-65) But these “additional factors” have little to do with evaluating whether a utility’s earnings are “significantly excessive” as compared with the earnings of a group of companies of comparable risk. Further, R.C. 4928.143(F) makes no mention of these subjective factors.

The additional factors listed by the Company originated in case 09-786-EL-UNC, where the Commission issued an Order (“SEET Order”) that addressed, in part, some of the underlying SEET issues. In the SEET Order the Commission noted that “within Ohio’s electric utilities, there is significant variation, including, for example, whether the electric utility provides transmission, generation, and distribution service or only distribution service. For this reason, the Commission will give due consideration to certain factors \*\*\*.”[[66]](#footnote-66) However, these subjective criteria **are not** contained in the statute.

In this regard, R.C. 4928.143(F) states as follows:

With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. **Consideration also shall be given to the capital requirements of future committed investments in this state.** (Emphasis added).

This means that consideration *shall* be given to the requirements of **future committed** investments of the Company in Ohio. There are no other factors listed in the law that the Commission is to give consideration. The General Assembly provided specific criteria for the Commission to consider when determining significantly excessive earnings. The SEET statute therefore precludes the Commission from relying on the other subjective factors it identified in Case 09-786-El-UNC when determining whether CSP had significantly excessive earnings in 2010.

Since the Commission is “a creature of statute” and “has and can exercise only the authority conferred upon it by the General Assembly,” the Commission **may only** consider what is provided for in R.C. 4928.143(F). Accordingly, the Commission should disregard the subjective factors cited by the Company, and follow the law.

### 2. Any Consideration Of The “Additional Factors” Outlined By The Commission In The SEET Order Does Not Support An Increase Of The 50% Baseline Adder Recommended By PUCO Staff.

Even if the Commission considers the Company’s arguments regarding the additional factors, those factors do not negate, in any way, the fact that CSP’s earnings were significantly excessive in 2010. Specifically, as explained further below, CSP has not made any arguments that support any increase in the 50 percent baseline adder recommended by the PUCO Staff.

First, in regard to the Company’s most recently authorized return on equity, in the 2009 SEET Proceeding, the Commission noted that “CSP’s most recently authorized ROE was 12.46 and, while dated, it may still be influencing earned returns and should be acknowledged.”[[67]](#footnote-67) OCC maintains that having a currently authorized return of equity of 12.46% and an actual return on equity of 19.42% [[68]](#footnote-68) is strongly indicative of significantly excessive earnings.

Second, with respect to the risks of electric utilities, CSP’s risk is minimized by the Fuel Adjustment Clause (“FAC”) contained in the current ESP.[[69]](#footnote-69) And the Commission recently approved a Stipulation and Recommendation that provides for the current FAC mechanism to continue through May 31, 2015. Thereafter, a modified FAC mechanism will continue after May 31, 2015, in connection with a nonbypassable charge, if any, that is authorized in the Generation Resource Rider (“GRR”).[[70]](#footnote-70) Accordingly, the FAC is a risk-mitigating factor for CSP.

CSP also maintains in its Initial Brief that “Consideration of any current return on equity considerations applicable to distribution operations alone must be tempered by the recognition that an electric distribution utility that continues to own generation assets, faces risks above and beyond those of a distribution utility that does not own generation assets.”[[71]](#footnote-71) But this is no longer a concern for CSP because CSP has the Commission’s approval[[72]](#footnote-72) to “divest its competitive generation assets from its noncompetitive electric distribution utility to its separate competitive retail generation subsidiary.”[[73]](#footnote-73) By divesting itself of its generating assets, CSP is also divesting itself of the risks, if any, associated with those assets. Accordingly, CSP’s risk is greatly reduced and does not warrant any increase in the baseline adder proposed by the PUCO Staff.

Third, in regard to innovation and industry leadership CSP again relies on the gridSMART project and the Turning Point Solar facility. Both of these projects were considered in the 2009 SEET Proceeding. Specifically the Commission gave consideration to CSP’s gridSMART program and CSP’s agreement to initiate a Phase 2 gridSMART program.[[74]](#footnote-74)

Furthermore, in the 2009 SEET Proceeding, the Commission considered CSP’s commitment to provide $20 million in funding to a solar project in Cumberland, Ohio (Turning Point Solar).[[75]](#footnote-75) The Commission noted that various parties had concerns that the project would not move forward because it was contingent on several factors and questioned the appropriateness of giving any consideration to this investment.[[76]](#footnote-76) Ultimately the Commission held that if the “project did not move forward in 2012, such that such funds are expended in 2012, the Commission requires the $20 million to be spent in 2012 on a similar project.”[[77]](#footnote-77) And the Commission has recently approved a “placeholder mechanism to recover, if necessary, \*\*\* costs associated with \*\*\* the Turning Point solar project.”[[78]](#footnote-78)

Both of these projects were considered by the Commission in the 2009 SEET Proceeding when it adjusted the PUCO Staff’s 50 percent baseline adder upward.[[79]](#footnote-79) Accordingly, the Commission should not give any further consideration of the gridSMART project and the Turning Point Solar facility for the purpose of determining whether CSP’s earnings were significantly excessive in 2010. And because none of the above warrants an upward adjustment to the baseline adder, the Commission must find that CSP’s earnings for 2010 were significantly excessive.

# III. CONCLUSION

Through the yearly SEET review process the Legislature required this Commission to remedy its prior ratemaking decision if the utility fails to demonstrate that it has not earned significantly excessive earnings in the previous year under the approved rate plan. The OCC simply seeks the Commission’s enforcement of the law intended to protect customers. Enforcement of the law means that the Commission should now order a refund of the significantly excessive profits earned by CSP in 2010. And that refund should only go to those CSP customers who paid the rates that resulted in significantly excessive earnings. Although the Commission approved the merger of CSP and OP in its December 14, 2011 Opinion and Order,[[80]](#footnote-80) CSP and OP will maintain separate rate zones for distribution rates until the issued is addressed by the Commission in a separate proceeding.[[81]](#footnote-81) Accordingly, CSP can ensure that the refund ordered by the Commission is refunded back to CSP’s customers.

Respectfully submitted,

BRUCE J. WESTON

INTERIM CONSUMERS’ COUNSEL

*/s/ Melissa R. Yost*

Melissa R. Yost, Counsel of Record

Kyle L. Kern

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Telephone: (Yost) (614) 466-1291

Telephone: (Kern) (614) 466-9585

[yost@occ.state.oh.us](mailto:yost@occ.state.oh.us)

[kern@occ.state.oh.us](mailto:kern@occ.state.oh.us)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply Brief was served on the persons listed below via electronic mail this 10th day of February, 2012.

*/s/ Melissa R. Yost*

Melissa R. Yost

Assistant Consumers’ Counsel

**SERVICE LIST**

|  |  |
| --- | --- |
| Thomas W. McNamee  Attorney General’s Office  Public Utilities Commission of Ohio  180 East Broad Street  Columbus, Ohio 43215 | Michael L. Kurtz  Kurt J. Boehm  Jody M. Kyler  Boehm Kurtz & Lowry  36 East Seventh Street, Suite 1510  Cincinnati, Ohio 45202 |
| Samuel C. Randazzo  Frank P. Darr  Joseph E. Oliker  McNees Wallace & Nurick LLC  21 East State Street, 17th Floor  Columbus, Ohio 43215 | Steven T. Nourse  American Electric Power  1 Riverside Plaza  Columbus, Ohio 43215 |
| Lisa G. McAlister  Matthew W. Warnock  Bricker & Eckler LLP  100 South Third Street  Columbus, Ohio 43215-4291 | Colleen L. Mooney  Ohio Partners for Affordable Energy  231 West Lima Street  Findlay, Ohio 45840 |

[thomas.mcnamee@puc.state.oh.us](mailto:William.wright@puc.state.oh.us)

[sam@mwncmh.com](mailto:sam@mwncmh.com)

[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)

[stnourse@aep.com](mailto:stnourse@aep.com)

[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)

[mkurtz@BKLlawfirm.com](mailto:mkurtz@BKLlawfirm.com)

[dboehm@BKLlawfirm.com](mailto:dboehm@BKLlawfirm.com)

[jkyler@BKLlawfirm.com](mailto:jkyler@BKLlawfirm.com)

[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)

[lmcalister@bricker.com](mailto:lmcalister@bricker.com)

[mwarnock@bricker.com](mailto:mwarnock@bricker.com)

1. *See* Company Initial Brief at 34. [↑](#footnote-ref-1)
2. *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, January 11, 2011 Opinion and Order (“January 11, 2011 Opinion and Order”) at 35. [↑](#footnote-ref-2)
3. Company Initial Brief at 6. [↑](#footnote-ref-3)
4. January 11, 2011 Opinion and Order at 9. [↑](#footnote-ref-4)
5. *See Allstate Ins. Co. v. Cleveland Elec. Illuminating Co*. (2008) 119 Ohio St.3d 301, 302, 893 N.E.2d 824. [↑](#footnote-ref-5)
6. Company Initial Brief at 6. [↑](#footnote-ref-6)
7. *See* R.C. Title 49. [↑](#footnote-ref-7)
8. *See id.* [↑](#footnote-ref-8)
9. *See* R.C. Title 49, which articulates the duties of the PUCO. [↑](#footnote-ref-9)
10. *See Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, generally. [↑](#footnote-ref-10)
11. In enacting a statute, it is presumed that “[c]ompliance with the constitutions of the state and of the United States is intended.” R.C. 1.47(A). [↑](#footnote-ref-11)
12. *See Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384, 386, 856 N.E.2d 940. [↑](#footnote-ref-12)
13. January 11, 2011 Opinion and Order at 9. [↑](#footnote-ref-13)
14. *See id.* [↑](#footnote-ref-14)
15. *See Winters v. New York* (1948), 333 U.S. 507. 515, where the United States Supreme Court held, “It is well established that criminal statutes are void for vagueness under the Due Process Clause of the Fourteenth Amendment if they fail to contain ‘ascertainable standards of guilt.’” (Emphasis added). See, also, *Columbus v. Thompson* (1971), 25 Ohio St. 2d 26, 30. [↑](#footnote-ref-15)
16. *Boutilier v. INS* (1967), 387 U.S. 118,123, 87 S. Ct. 1563. [↑](#footnote-ref-16)
17. *Monserrate v. N.Y. State Senate* (2d Cir. N.Y. 2010), 599 F.3d 148, 158. [↑](#footnote-ref-17)
18. *See Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. [↑](#footnote-ref-18)
19. *See id*. at syllabus. [↑](#footnote-ref-19)
20. *Id.* at ¶88. [↑](#footnote-ref-20)
21. *See* R.C. 4909.15. [↑](#footnote-ref-21)
22. R.C. 4909.15(A)(2). [↑](#footnote-ref-22)
23. [16 U.S.C. § 824d(a)](http://www.law.cornell.edu/supct-cgi/get-usc-cite/16/824d/a). [↑](#footnote-ref-23)
24. *See Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and *Bluefield Water Works & Improvement Co. v. Pub. Service Comm. of the State of West Virginia*, 262 U.S. 679 (1923). [↑](#footnote-ref-24)
25. *Alliance v. Carbone*, 181 Ohio App.3d 500, \*505,506 2009-Ohio-l 197, citing, *Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115, 2006-Ohio-3799 at p. 84. [↑](#footnote-ref-25)
26. *See id.* [↑](#footnote-ref-26)
27. Company Initial Brief at 10. [↑](#footnote-ref-27)
28. January 11, 2011 Opinion and Order at 10 (emphasis added). [↑](#footnote-ref-28)
29. *See id.* generally. [↑](#footnote-ref-29)
30. *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, Finding and Order (June 30, 2010) “SEET Order.” [↑](#footnote-ref-30)
31. *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 (August 25, 2010) “SEET Rehearing Entry.” [↑](#footnote-ref-31)
32. *See* Ohio Adm. Code 4901:l-35-03(C)(10)(a). [↑](#footnote-ref-32)
33. Company Initial brief at 11-12. [↑](#footnote-ref-33)
34. The Ohio Energy Group appealed the Commission’s decision in the 2009 SEET Proceeding on the OSS issue to the Ohio Supreme Court on May 5, 2011. OCC intervened as appellant on May 13, 2011.48. The appeal is still pending. [↑](#footnote-ref-34)
35. OEG Ex. 1 (Direct Testimony of Lane Kollen) at 3 (emphasis added). [↑](#footnote-ref-35)
36. *See id*. [↑](#footnote-ref-36)
37. R.C. 4928.143(F). [↑](#footnote-ref-37)
38. *See* Company Initial Brief at 34. [↑](#footnote-ref-38)
39. *See* Company Ex. 3 (Direct Testimony of Dr. Anil K. Makhija) at 6 and Cross- Examination of Dr. Makhija, Vol. I, page 98. [↑](#footnote-ref-39)
40. *See* January 11, 2011 Opinion and Order at 24. [↑](#footnote-ref-40)
41. R.C. 4928.143(F). [↑](#footnote-ref-41)
42. SEET Order at 11-12. [↑](#footnote-ref-42)
43. “Affiliates” are companies that are related to each other due to common ownership or control. Ohio Adm. Code 4901:1-1-37(A). OCC notes that the Commission did not approve the merger of CSP and OP until December 14, 2011. *See* Case No. 11-346-EL-SSO, et al., December 14, 2011 Opinion and Order at 56-57. [↑](#footnote-ref-43)
44. *See* Company Ex. 1 at 1. [↑](#footnote-ref-44)
45. SEET Order at 12. [↑](#footnote-ref-45)
46. *Id.* [↑](#footnote-ref-46)
47. Company Initial Brief at 4. [↑](#footnote-ref-47)
48. *See* Company Ex. 1, Exhibit JH-1. [↑](#footnote-ref-48)
49. *See* OCC Initial Brief at 8-11. [↑](#footnote-ref-49)
50. Company Initial Brief at 5. [↑](#footnote-ref-50)
51. *See* Exhibit JH-1 attached to Company Ex. 1. [↑](#footnote-ref-51)
52. *See* Company Initial Brief at 41. [↑](#footnote-ref-52)
53. *See* Exhibit JH-1 attached to Company Ex. 1. [↑](#footnote-ref-53)
54. *See id.* [↑](#footnote-ref-54)
55. *See id.* [↑](#footnote-ref-55)
56. CSP argues that the SEET statue “allows the Commission to permit an EDU to retain earnings that might otherwise be considered to be significantly excessive, under the implied theory that the EDU could use them to meet its capital spending requirements for the future committed investments.” (Company Initial Brief at 39). [↑](#footnote-ref-56)
57. *See* OCC Brief at 9-11; January 11, 2011 Opinion and Order at p. 31 and Cross- Examination of Hamrock, Vol. I, pages 52-54. [↑](#footnote-ref-57)
58. *See* Exhibit JH-1 attached to Company Ex. 1. [↑](#footnote-ref-58)
59. *See* January 11, 2011 Opinion and Order at 33. [↑](#footnote-ref-59)
60. *See id.* at 27. [↑](#footnote-ref-60)
61. 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. [↑](#footnote-ref-61)
62. *See* Exhibit JH-1 attached to Company Ex. 1. [↑](#footnote-ref-62)
63. 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. [↑](#footnote-ref-63)
64. Company Initial Brief at 41. [↑](#footnote-ref-64)
65. *Id.* at 41-42. [↑](#footnote-ref-65)
66. The Commission indicated in the SEET Order that, in considering the SEET threshold it would “give due consideration to certain factors, including, but not limited to, the electric utility’s most recently authorized return on equity, the electric utility’s risk, including the following: whether the electric utility owns generation; whether the ESP includes a fuel and purchased power adjustment or other similar adjustments; the rate design and the extent to which the electric utility remains subject to weather and economic risk; capital commitments and future capital requirements; indicators of management performance and benchmarks to other utilities; and innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio’s economy, including research and development expenditures/investments in advanced technology, and innovative practices; and the extent to which the electric utility has advanced state policy” *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, Finding and Order (June 30, 2010) “SEET Order” at 29. [↑](#footnote-ref-66)
67. January 11, 2011 Opinion and Order at 26. [↑](#footnote-ref-67)
68. *See* OEG Ex. 1 (Direct Testimony of Lane Kollen) at 3. [↑](#footnote-ref-68)
69. *See* Company Initial Brief at 43. [↑](#footnote-ref-69)
70. *See* Case No. 11-346-EL-SSO, et al., Opinion and Order at 21-22. “The GRR in the Stipulation will provide AEP-Ohio with a placeholder mechanism to recover, if necessary, for costs associated with either the Turning Point solar project and the MR6 shale gas project.” *Id.* at 38. [↑](#footnote-ref-70)
71. Company Initial Brief at 42. [↑](#footnote-ref-71)
72. *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 11-5333-EL-UNC, Finding and Order (January 23, 2012). [↑](#footnote-ref-72)
73. Case Nos. 11-346-EL-SSO, et al., Opinion and Order at 61. [↑](#footnote-ref-73)
74. *See* January 11, 2011 Opinion and Order at 26. [↑](#footnote-ref-74)
75. *See* January 11, 2011 Opinion and Order at 26. [↑](#footnote-ref-75)
76. *See* January 11, 2011 Opinion and Order at 26. [↑](#footnote-ref-76)
77. January 11, 2011 Opinion and Order at 26-27. [↑](#footnote-ref-77)
78. *See* Case No. 11-346-EL-SSO, et al., Opinion and Order at 21-22. “The GRR in the Stipulation will provide AEP-Ohio with a placeholder mechanism to recover, if necessary, for costs associated with either the Turning Point solar project and the MR6 shale gas project.” *Id.* at 38. [↑](#footnote-ref-78)
79. *See* January 11, 2011 Opinion and Order at 26-27. [↑](#footnote-ref-79)
80. *See* Case No. 11-346-EL-SSO, et al., December 14, 2011 Opinion and Order at 56-57. [↑](#footnote-ref-80)
81. *See id*. at 25. [↑](#footnote-ref-81)