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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 2009 Annual Filing of	)	
Columbus Southern Power Company and	)	
Ohio Power Company Required by Rule	)	Case No. 10-1261-EL-UNC
4901:1-35-10, Ohio Administrative Code.	)	

POST-HEARING REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, APPALACHIAN PEACE AND JUSTICE NETWORK AND THE OHIO ENERGY GROUP

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TABLE OF CONTENTS

PAGE

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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 and is an essential piece of the new law. Through the significantly excessive earnings test the Legislature determined that Ohio consumers cannot be made to fund significantly excessive utility profits resulting from an ESP plan. The Legislature's wisdom in protecting Ohioans against paying for significantly excessive utility profits is especially apparent now that Columbus Southern Power ("CSP" or "Company") customers have the unwelcome distinction of paying the highest equity return in the country to an electric utility in 2009.

CSP, however, seeks to deny its customers the return of the excessive profits that the law requires. It argues for an unreasonable threshold of earnings (22.51%) before refunds should be ordered and seeks to wrongfully exclude elements of its earned return in order to minimize the amount subject to refund—so that CSP can "avoid a finding of significantly excessive earnings."[1]

Moreover, the Company argues that even if the Public Utilities Commission of Ohio ("Commission" or "PUCO") finds significantly excessive earnings, it should not return these excess earnings to customers. In sum, what the Company seeks, if granted, would result in a travesty of justice to the detriment of consumers, businesses, jobs, and the Ohio economy given that the record supports a finding of $156 million in excessive earnings. The 2009 ESP rate increase awarded to CSP of $156 million resulted in retrospect to be unjustified and returning that amount would provide the average residential consumer with a refund of approximately $102.[2] A refund of $102 to the average residential consumer would provide a much needed boost to a weak economy and would affirm the Legislative wisdom of mandating an annual SEET review.

Accordingly, the Customer Parties[3] file this reply brief in furtherance of such a return to customers, through direct bill credits, of the significantly excess earnings that Ohio law requires.

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] Company Initial Brief at 60.

[2] See Company Ex. 1, FERC Form 1. Residential customers provide CSP with 43.61% of its revenue from retail sales. 43.61% of the $155.9 million maximum refund is $67,972,400. There are approximately 667,018 residential customers, so the average residential refund would be $101.90.

[3] Customer Parties, for purposes of this brief, consist of OCC, Ohio Energy Group, and the Appalachian Peace and Justice Network.

1. The Commission cannot decide constitutional issues.

In its Initial Brief, CSP argues that "R.C. 4928.143(F) is void and unenforceable because it is impermissibly vague and fails to provide CSP and OPCo with fair notice, or the Commission with meaningful standards, as to what is meant by 'significantly excessive earnings.'"[4] CSP is mistaken. The void for vagueness doctrine is a judicially created doctrine employed to challenge the constitutionality of a particular statute.[5] As discussed below, this doctrine is most commonly seen in cases where a statute defining a crime is so vague that a reasonable person of at least average intelligence could not determine what elements constitute the crime.[6] Therefore, it is not applicable to R.C. 4928.143(F).

The Ohio Supreme Court has confined the scope of the Commission's jurisdiction to utility-related matters;[7] however, the Company argues that R.C. 4928.143(F) is unconstitutional because it is "impermissibly vague and fails to provide CSP and OPCo with fair notice or the Commission with meaningful standards, as to what is meant by "significantly excessive earnings."[8] This is not an issue that the Commission can decide, and the Company's argument is misplaced and unsound for the reasons that follow.

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,

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[4] Company Initial Brief at 8.

[5] See *Connally v. General Construction Co.*, 269 U.S. 385 (1926) generally.

[6] See Id, see also, *Norwood v. Horney*, 110 Ohio St.3d 353 ¶87, where the Ohio Supreme Court stated, "[t]he vagueness doctrine is usually applied in criminal law….".

[7] See *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.* (2008) 119 Ohio St.3d 301, 302, 893 N.E.2d 824.

[8] See Company Initial Brief at 8.

effectively denying jurisdiction to all courts, except the Supreme Court.[9] 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.[10] But because the Commission is ultimately a creature of statute,[11] 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. To this end, 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.'"[12] Consequently, constitutional rights fall within the "legal rights and liabilities" that courts have the power to determine,[13] and therefore, the Commission clearly has no jurisdiction over the constitutionality of R.C. 4928.143(F).

Similarly, in *Herrick v. Kosydar*, the Supreme Court of Ohio ruled that: "[t]he plaintiffs' claim is based solely upon the constitutionality of R. C. 145.56 and 3307.71, and it is well established that an administrative agency is without jurisdiction to

[9] R.C. Title 49.

[10] Id.

[11] See R.C. Title, which articulates the duties of the PUCO.

[12] *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.* (2008) 119 Ohio St.3d 301, 302, 893 N.E.2d 824 (Citation omitted) (Emphasis added).

[13] See *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, generally.

determine the constitutional validity of a statute."[14] In *Herrick*, state retirees sought a declaration as to their liabilities when the law was changed to provide that their pensions were subject to state income tax.[15] Ultimately, the Supreme Court of Ohio found that "administrative proceedings in the case would be futile because an administrative agency was without jurisdiction to determine the constitutional validity of a statute."[16] The same is true of the PUCO.

Further, administrative agencies must assume statutes are constitutional,[17] and only courts can rule on the constitutionality of statutes. In *East Ohio Gas Co. v. Public Utilities Commission*, the Ohio Supreme Court explicitly stated: "[i]t was the manifest duty of the [PUCO] to proceed under and in accordance with the terms and provisions of the statute ***with the assumption of its constitutionality. Constitutionality of statutes is a question for the courts and not for a board or commission***."[18] The Ohio Supreme Court has also specifically stated: "[a]n administrative agency such as the commission may not pass upon the constitutionality of a statute."[19] The PUCO itself has also acknowledged its lack of authority to determine constitutional issues. In the past, the PUCO has refused to deal with constitutional issues involving property rights because the issues were "beyond [its] jurisdiction."[20]

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[14] *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, 130.

[15] Id.

[16] Id.

[17] See also R.C. 1.47(A).

[18] *East Ohio Gas Co. v. Public Utilities Commission* (1940), 137 Ohio St. 225, 238-39, 28 N.E. 2d 599 (Emphasis added).

[19] *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 247, 638 N.E.2d 550.

[20] *Monongahela Power Co. v. Schriber* (S.D. Ohio 2004) 322 F.Supp.2d 902, 911.

In short, the Commission must presume the constitutionality of R.C. 4928.143(F). 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.[21]

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), the Customer Parties maintain 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). Even the Company acknowledges in its Initial Brief that "the vagueness doctrine arises most often in the context of ***criminal laws*** that implicate First Amendment values."[22] And a review of applicable case law shows that the vagueness doctrine is ***rarely*** ever applicable to statutes other than criminal laws.[23] In the rare 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."[24] 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."[25]

[21] See *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384, 386, 856 N.E.2d 940.

[22] Company Initial Brief at 9. (Emphasis added).

[23] 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.

[24] *Boutilier v. INS* (1967), 387 U.S. 118, 123, 87 S. Ct. 1563.

[25] *Monserrate v. N.Y. State Senate* (2d Cir. N.Y. 2010), 599 F.3d 148, 158.

Furthermore, the Company's argument is certainly not applicable to the SEET. The cases that the Company relies on and discusses in great length are simply not relevant. For example, the Company relies on *Ashton v. Kentucky*[26]--a case that dealt with the common law of *criminal* libel in Kentucky, *Cline v. Frink Dairy Company*[27] --a case that examined the constitutionality of the "Colorado Anti-Trust Act," and *Norwood v. Horney*[28]-- a case dealing with an eminent domain ordinance.

The purpose of the Colorado Anti Trust Act, as discussed in *Cline*, was to "denounce and punish conspiracies and combinations, in restraint of trade; to fix prices, prevent competition, except when necessary in order to enable participants to obtain a reasonable profit from products dealt in."[29] Ultimately, the Supreme Court held that the "exception leaves the statute without a fixed standard of guilt, rendering it void."[30] The Colorado-Anti-Trust Act was a criminal statute, and consequently, violation of the statute would result in criminal penalties. As such, *Cline* is completely distinguishable from the proceeding at hand.

In *Norwood*, the Ohio Supreme Court found that the term "deteriorating area" was void for vagueness.[31] However, the Court ultimately decided that "The unconstitutional portion of R.C. 163.19 [could] be severed from the rest of the statute, and, accordingly, the remainder of the statute remains in effect."[32] In further support, R.C. 1.50 clearly states: "If any provisions of a section of the Revised Code or the application thereof to

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[26] See *Ashton v. Kentucky*, 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966).

[27] See *Cline v. Frink Dairy Company et al.*, 274 U.S. 445, 47 S.Ct. 687, 71 L.Ed. 1146 (1927).

[28] See *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799.

[29] *Cline v. Frink Dairy Company et al.*, 274 U.S. 453.

[30] Id.

[31] *Norwood v. Horney*, 110 Ohio St.3d 353 at syllabus.

[32] Id.

any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable." The Company has failed to explain what portion(s) of R.C. 4928.143(F) are vague. Clearly, there is a difference between the vagueness of the term "deteriorating area" and the term "significantly excessive earnings," which is further explained in R.C. 4928.143(F). Significantly, the Company failed to cite any public utilities cases where a statute had been challenged for vagueness. This may be easily explained.

The void for vagueness doctrine is a constitutional law concept that was created to protect individuals from statutes that are too vague for the average citizen to understand in the criminal realm.[33] As such, the doctrine is mainly cited in instances where an average citizen cannot generally determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed.[34] A void for vagueness argument is typically used to prevent the harshest of consequences; the deprivation of liberty (criminal) or a "chilling effect" (free speech). It is used to prevent these harms, because one cannot know when one "crosses the line" and therefore unfairly be subject to punishment. In the SEET context, "the detriment" for the Company is that it does not know when it crosses the line from earning excessively to earning significantly excessively. The "punishment" is for it to simply return (prospectively) that which it has no right to collect. There is little question that the vagueness doctrine was not intended to apply to a statute like R.C. 4928.143(F); it was never intended to protect utilities who earn too much from being required to return their "significantly excessive earnings."

[33] *Connally v. General Construction Co.*, 269 U.S. 385 (1926) generally.

[34] Id.

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. Simply because the parties' methodologies differ, does not make the statute void for vagueness.

To this end, in *Norwood v. Horney*, the Ohio Supreme Court struck down a municipal ordinance that allowed private property in a deteriorating area to be taken by eminent domain. However, the Court described the ordinance as "offer[ing] so little guidance in application that it is almost barren of any practical meaning."[35] The same cannot be said for the SEET.

Interestingly, and in direct contradiction to the Company's vagueness doctrine argument, the Company argues (from page sixteen through seventy-eight of its Initial Brief) the meaning and application of the SEET. Moreover, the Company sponsored three witnesses who provided extensive testimony on the application of and/or their or their counsel's understanding of the SEET. In fact, the Company relies on "the clear and unambiguous language in the SEET statute"[36] in a desperate attempt to convince the Commission that they can avoid a finding that CSP had significantly excessive earnings.

Undoubtedly, Dr. Makhija and Mr. Hamrock[37] had sufficient guidance to draft their pre-filed testimony and develop the Company's methodology to implement the significantly excessive earnings test. Furthermore, neither Dr. Makhija nor Mr. Hamrock stated in their pre-filed testimony or at the hearing that the statute is so vague and ambiguous that it is incomprehensible. Instead, Mr. Hamrock and Dr. Makhija laid out

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[35] *Norwood v. Horney*, 100 Ohio St. 3d 353, 2006-Ohio-3799, ¶ 88.

[36] See Company Initial Brief at 68.

[37] It should be noted that witness Mitchell made calculations "Following the AEP Ohio recommended methodology supported by AEP Ohio witness Hamrock". See Company Ex. 4 at 5.

their or their counsel's interpretation of how the SEET should be applied to the Company's earnings. Only now—when CSP may rightfully be concerned that it did not satisfy its burden of proof as established in R.C. 4928.143(F)— is the Company claiming R.C. 4928.143(F) is so vague that it is unconstitutional.

Certainly the SEET standard is not so vague that it provides no "standard at all." And the SEET standard is arguably more detailed than the "just and reasonable" standard used in most jurisdictions, including Ohio, for distribution rate cases.[38] Indeed, in Ohio the utilities' rate of return 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."[39] In fact, the Federal Power Act, which was passed in 1935 to enable the FERC to regulate rates and charges for interstate wholesale electric sale, also mandates that rates must be "just and reasonable", 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***?[40] 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).

The Company argues in its Initial Brief that R.C. 4928.143(F) "fails to give any definitive notice or guidance whatsoever as to what is meant by "significantly excessive earnings."[41] The Company goes on to state that "the SEET offers virtually no guidance

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[38] See R.C. 4909.15.

[39] R.C. 4909.15(A)(2).

[40] 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).

[41] Company Initial Brief at 12.

as to its proper application, [and it is] barren of any practical meaning ***."[42] The Company's argument is misplaced. Courts have held that "[a] statute is not void for vagueness simply because it could be worded more precisely or with additional certainty. 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."[43]

In the case at hand, R.C. 4928.143(F) is not vague. Further, it is not the meaning of R.C. 4928.143(F) that is under debate in this proceeding, rather it is a question of which expert's methodology the Commission will adopt in this case to determine whether CSP's earnings were significantly excessive earnings in 2009.

The Company also complains that "the Commission failed to cure the vagueness of the statute when it had the opportunity to do so in the AEP-Ohio ESP cases and in the SEET investigation cases."[44] However, the SEET Order[45] and Entry on Rehearing,[46] and SEET workshop provided further 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.[47]

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[42] Company Initial Brief at 15.

[43] *Alliance v. Carbone*, 181 Ohio App.3d 500, *505,506 2009-Ohio-1197, citing, *Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115, 2006-Ohio-3799 at p. 84.

[44] Company Initial Brief at 15.

[45] 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."

[46] 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."

[47] See Ohio Adm. Code 4901:1-35-03(C)(10)(a).

The idea of significantly excessive earnings is certainly not difficult to comprehend when considering that in 2009 CSP had the highest equity return in the country, by far.[48] In addition, and as discussed in the Initial Brief of the Customer Parties,[49] CSP's earned return on equity for 2009, as reported in its Federal Energy Regulatory Commission ("FERC") Form 1 and Securities and Exchange Commission ("SEC") 10-K, was 20.84%. This is significantly excessive when compared to publicly traded companies, including utilities that face comparable business and financial risk. It is also significantly excessive when compared to the 142 other investor-owned regulated electric utilities in the United States.[50] It is significantly excessive when compared to the 2009 utility rate case decisions across the nation where the average rate of return authorized was 10.48%. And it is significantly excessive given the hardships being faced by almost all other segments of the Ohio economy during 2009.

In addition, the Company argues that "the vagueness of R.C. 4928.143(F) is further compounded by the fact that the statute applies in a retrospective manner, requiring an EDU to forfeit earnings from a prior year."[51] This argument is nonsensical. Clearly, a statute that determines whether earnings for a previous year were "significantly excessive" would have to be retroactive. The only way to determine whether a company's earnings were significantly excessive earnings is to examine the company's return for that year – which clearly cannot be completed until the year has ended.

[48] See Customer Parties' Initial Brief at p. 6

[49] Id., see also, Joint Ex. 2 at 20-21, LK-3 (Kollen).

[50] Id.

[51] Company Initial Brief at 1.

Ohio's other electric utilities have apparently had no difficulty understanding the SEET test. Ohio Edison, Toledo Edison, Cleveland Electric and Duke have all been able to comply with the statute and have submitted stipulations in their SEET cases. To this end, the Commission has issued two opinions and orders approving and adopting the stipulations in these proceedings.[52]

Interestingly, Duke's return earned on average common equity for 2009 was 9.46% and Duke stated that this return was not significantly excessive.[53] Further, Duke ***included proceeds from off-system sales*** in its calculation[54]. In addition, Duke stated that its earnings were "not excessive, regardless of the inclusion or exclusion of ESP-related deferrals."[55] Accordingly, the PUCO found that "the Stipulation entered into by the parties [was] reasonable and should be adopted."[56]

Similarly, FirstEnergy explained that their "2009 returns on equity for SEET purposes [were] less than the 10.5 percent return on equity authorized by the Commission in the Companies' most recent distribution rate case, while additionally pointing out that their returns are also below the "safe harbor" threshold of 200 basis points above the

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[52] See *In the Matter of the Application of Duke Energy Ohio, Inc. 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. 10-656-EL-UNC, Opinion and Order, (November 22, 2010); and *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison 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. 10-1265-EL-UNC, Opinion and Order (November 22, 2010).

[53] *In the Matter of the Application of Duke Energy Ohio, Inc. 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. 10-656-EL-UNC Opinion and Order, (November 22, 2010) at 3.

[54] Id.

[55] Id.

[56] Id. at 5.

mean of the comparable group recognized by the Commission in 09-786."[57] The PUCO also found that the FirstEnergy stipulation was reasonable and should be adopted.[58]

R.C. 4928.143(F) is not unconstitutionally vague, as Duke and FirstEnergy were able to resolve their SEET proceedings. The Company is merely attempting to manipulate the statute to its benefit, while complaining of "confusion" in the process.

In summary, the Company's vagueness doctrine argument should be rejected because 1) the Commission 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). R.C. 4928.143(F) is not void for vagueness for the reasons articulated above. If CSP somehow is arguably correct regarding its vagueness argument, then equally arguable is that OP is not in a safe harbor, since there can be no safe harbor from a test too vague.

B. The Company's Comparable Analysis Should Be Rejected Because, Among Other Things, It Violates R.C. 4928.143(F) By Considering Directly Or Indirectly The Revenue, Expenses, Or Earnings Of Its Parent, In Measuring Business Risk.

In its Initial Brief, Customer Parties argued that the Company's comparable analysis was flawed in a number of respects[59] and most importantly had failed to comply with the statute, R.C. 4928.143(F). Customer Parties focused on three primary and fundamental flaws that illustrate the Company has not complied with the statute. As a

[57] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison 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. 10-1265-EL-UNC, Opinion and Order (November 22, 2010) at 3-4.

[58] Id. at 5.

[59] See Customer Parties' Brief at 15-16 noting that Dr. Makhija's methodology is a black box approach, and produces an unstable comparison year to year.

result the Commission must reject Dr. Makhija's analysis. There is, however, a fourth flaw to consider as well.

The first flaw Customer Parties highlighted is that in using unlevered beta to measure business risk under the statute Dr. Makhija misses the very point of the statute—measuring what return is typical for a company like CSP.[60] That the statute requires such an analysis is clear from the words used-- the earned return on common equity of the EDU is to be compared to the return on common equity earned during the same time period by publicly traded companies, including utilities. Focusing on what risks the investor faces falls short, as noted by the Staff, as well. The group of comparables chosen by Dr. Makhija flows from its flawed analysis and hence his comparable return on equity of 11.07% cannot be adopted.

The second flaw which renders Dr. Makhija's analysis inconsistent with the statute is that under the standard deviation approach to defining significantly excessive, Dr. Makhija has switched the burden of proof under the statute away from CSP and onto parties challenging the earnings.[61] Because R.C. 4928.143(F) clearly mandates that the burden of proof lies with the electric distribution utility to prove that its earnings are not significantly excessive, switching the burden to other parties cannot be tolerated. Indeed the statute precludes it.

The third flaw in the Company's analysis is that the Company uses the unadjusted earnings of the publicly traded companies, including utilities, and compares them to the adjusted earnings of CSP. The adjusted earnings of CSP reflect reduced earnings associated with taking out the profits from off-system sales and the deferrals (fuel

[60] See Customer Parties' Brief at 33; Staff Brief at 5-9.

[61] See Customer Parties' Brief at 10.

expenses and economic development). That the Company accomplishes this in a second step apart from Dr. Makhija's analysis does not matter. The end result is that by Mr. Mitchell's adjustments, as directed by Mr. Hamrock, the earnings of CSP are adjusted and the earnings of the comparables, from which the comparison is made, are not. This makes the analysis that Dr. Makhija conducts incompatible with the statute that requires an apples to apples comparison of the earned return of the electric distribution utility with the earned return of publicly traded companies, including utilities.

The fourth flaw that renders the Company's analysis deficient under the statute is that Dr. Makhija considers the betas of AEP in measuring the business risk of CSP (and OP).[62] As explained by the Company in its brief, it used AEP's beta as a basis for measuring the business risk that CSP and OP face.[63] The unlevered beta has been described by Dr. Makhija as a "summative" measure that captures all the risks including the risk of uncertainty with regard to revenue stream, uncertainty with regard to operation and maintenance stream, fluctuations in weather and demand, and the "Ohio" specific risks including shopping, and those generally associated with S.B. 221. [64]

While the Company claims that its use of AEP's beta was a matter of practicality, and fulfills the objective of identifying firms that have comparable risks, the statute clearly prohibits this. R.C. 4928.143(F) states that "in making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company." The statute permits, indeed requires, a measuring of the financial risks of the

[62] Customer Parties' Ex. 1 at 24-25 (Woolridge).

[63] Company Initial Brief at 21.

[64] Company Initial Brief at 19-20.

utility. The risks of the subsidiary can be estimated in the comparable analysis. However, this cannot be done by considering, directly or indirectly, the earnings of the parent. Here, that is being done by CSP in measuring business risk. This contradicts the clear mandates of the statute, and for that reason cannot be adopted by the PUCO.

C. The Earned Return On Equity To Be Considered By The PUCO Is 20.84% As Reported To FERC And The SEC

1. The Company's exclusion of profits from off-system sales should be rejected.

The Company addressed the treatment of profits from off-system sales at pages 45-53 of their Initial Brief. It had two primary arguments. "There are two primary reasons that support subtracting OSS net margins. First, Section 4928.143(F), Revised Code, specifically provides that only earnings resulting from adjustments included in the EDU's ESP are subject to the SEET. Second, as set forth in more detail below, it would be unlawful to treat earnings that result from wholesale transactions and also that are not the result of any adjustment included in a provision of the EDU's ESP as being subject to refund under the SEET statute."[65] These arguments should be rejected for the reasons discussed below.

a. The Company confuses the refund cap (ESP adjustments that are subject to refund) with total company earnings (all revenue from all sources less all expenses).

The Customer Parties are not attempting to "claw back" profits from off-system sales. *We are not seeking a refund of off-system sales profits.* The Company confuses the SEET refund cap (ESP adjustments that are subject to refund) with total company earnings, which is comprised of all revenue from all sources less all expenses.

[65] Company Initial Brief at 45.

CSP's after tax profits from off-system sales in 2009 was $32.977 million.[66] Profits from off-system sales were included in CSP's total after tax earnings of $271.504 million.[67] These total earnings of $271.504 million went into the 20.84% Return on Equity ("ROE") determination used by all witnesses in this case.

Only a fraction of CSP's earnings were the result of ESP adjustments. Mr. Mitchell testified that the ESP adjustments increased after tax earnings by $59.645 million, resulting in a pre-tax SEET refund cap of $93.007 million.[68] Mr. Mitchell's refund cap was comprised of the equity return on environmental investments, enhanced vegetation control, gridSmart, and incremental POLR charges. Mr. Kollen determined that the SEET refund cap was $155.906 million, which was the total of all ESP rate increases, both cash ($118.924) and deferred ($36.982).[69] Significantly, neither Mr. Mitchell nor Mr. Kollen included profits from off-system sales in their SEET refund cap calculation.

Mr. Kollen does not propose that off-system sales profits be refunded as a result of this SEET proceeding.[70] If CSP received no ESP adjustments (rate increases) in 2009, then the Customer Parties would be seeking no refund no matter how much profit CSP made from off-system sales. But profits from off-system sales are included in total earnings and CSP's 20.84% ROE.

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[66] Exhibit TEM-1, page 3 of 3.

[67] Company Ex. 4 at TEM-1, page 3 of 3.

[68] Company Ex. 4 at 7.

[69] Customer Parties' Ex. 2 at 13.

[70] OCC nonetheless has an appeal pending in the Ohio Supreme Court that seeks to use the profits from off-system sales to reduce the fuel costs under the ESP.

The Company's argument that only ESP adjustments can be included in revenue for calculating CSP's ROE would mean that the vast majority of CSP's revenue must be ignored. In 2009, CSP had $2.057 billion of revenue (base rates, FAC, POLR, riders, wholesale sales, and more) and expenses of $1.785 billion (interest, depreciation, fuel, emission allowances, wholesale purchases, and more).[71] Only some of this revenue was the result of ESP adjustments. The fact that revenue from off-system sales was not the result of an ESP adjustment is not relevant to the ROE computation because the vast majority of CSP's $2.057 billion of revenue was not the result of an ESP adjustment.

Whether a revenue source was the result of an ESP adjustment only goes to the refund cap determination. But all revenue goes into the ROE calculation.

b. There is no legal prohibition against using CSP's earnings as reported to the SEC and FERC in the SEET.

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 SEC and FERC include revenue from wholesale sales as well as costs from wholesale purchases. CSP argues that this Commission is preempted by federal law from: "1) ordering that off-system sales profits be refunded to retail customers; and 2) considering wholesale revenue in the ROE calculation."[72]

As to CSP's first point, we agree. It would be unlawful to refund off-system sales profits through the SEET. But we are not requesting that. Profits from off-system sales are not included in our SEET refund cap. Customer Parties are only seeking the refund

[71] Company Ex. 1 at pages 114-117, FERC Form 1.

[72] Company Initial Brief at 47.

of ESP adjustments (rate increases) that contributed to excessive profits. As stated above, if CSP had no ESP rate increases in 2009 then we would be seeking no refund-no matter how large profits from off-system sales may have been.

As to its second point, we strongly disagree. CSP would have this Commission believe that the only way to comply with federal law would be to change the financial results certified by AEP's auditors under Sarbanes-Oxley and reported to the SEC and FERC. It is a peculiar argument that the only way to comply with federal law is to change federal law.

CSP can point to no FERC Order which allegedly would be violated if its reported financial results were used in SEET. It only makes vague references to the proposition of law--with which we agree--that FERC has exclusive jurisdiction over wholesale power transactions. Tellingly, CSP has no objection to wholesale purchases being included in costs, only to wholesale sales being included in revenue. CSP cites without discussion to the seminal United States Supreme Court preemption cases to support its argument. *Nantahala Power & Light Co. v. Thornburg*,[73] and *Mississippi Power & Light v. Mississippi*.[74] Neither of those cases applies here.

In those cases the Court held that when FERC determines that certain wholesale costs are reasonable (nuclear power plant allocation), then a state must reflect those wholesale costs in retail rates. No such fact pattern exists here. To the contrary, it is CSP that wants this Commission to ignore and change the accounting rules of the SEC and FERC.

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[73] 476 U.S. 190 (1983).

[74] 487 U.S. 354 (1988).

CSP operates under a FERC-approved power pooling agreement with Ohio Power, Appalachian Power (Virginia and West Virginia), Indiana & Michigan, and Kentucky Power.[75] Whatever energy is not used by the members of the AEP Power Pool is sold off-system. Profits from off-system sales are allocated among the AEP Power Pool members pursuant to this FERC agreement no matter which utility's power plant actually made the sale. Our position does not seek to disturb this FERC-approved allocation. We accept the profits from off-system sales as recorded on CSP's books and reported to the SEC and FERC. It is CSP that seeks to disturb the FERC- approved allocation of profits from off-system sales by having them eliminated.

AEP reported in its SEC 10-K that in all of the jurisdictions where it operates (except Ohio), off-system sales profits are used to reduce retail rates.[76] If there was a valid federal preemption reason why reflecting off-system earnings in retail ratemaking was illegal, then the state commissions in Virginia, West Virginia, Indiana, Kentucky, Michigan, Texas, Oklahoma, Louisiana and Arkansas would all be in violation of the law. They are not. There is no conflict with federal law if off-system sales profits allocated pursuant to the FERC approved AEP Power Pool Agreement, and as reported to the SEC and FERC for accounting purposes, are reflected in retail ratemaking.

c. Mr. Cahaan's quantification of the exclusion of off-system sales was conceptually correct.

The Companies assert at pages 45-46 that the correct method to remove profits from off-system sales is to adjust only the numerator (earnings) and that the denominator (equity capitalization) need not be changed. They make this argument for the first time

[75] Customer Parties' Ex. 2 at 19 (Kollen).

[76] Customer Parties' Ex. 2 at 24, Ex. LK-6, Kollen.

on brief. They could have addressed Mr. Cahaan's recommendation (to adjust both the numerator and denominator in order to exclude the effect of off-system sales) in their rebuttal testimony, but they did not.

In their brief the Companies do not make a substantive accounting or finance argument as to why Mr. Cahaan is conceptually incorrect. They merely point to a prior Commission order which seems to indicate that an adjustment to equity capitalization is not required. The Companies take this order out of context and distort its meaning. The issue has never been raised before and there was therefore no need for the Commission to address it. The method for properly quantifying this adjustment was not addressed in the SEET workshop or in any prior Commission order.

As indicated in our Initial Brief, the Customer Parties believe that Mr. Cahaan's method of adjusting both sides of the equation is conceptually correct, even though we believe Mr. Cahaan misapplied the concept in the Companies' favor. Our primary position is that no adjustment to the reported earnings should be made to eliminate off-system sales profits. But if there is an adjustment made, then Mr. Cahaan's approach is certainly superior to the Companies' approach, which ignored one complete side of the equation.

2. No adjustment to CSP's earned return should be made to exclude deferred fuel and economic development expenses.

The Company supports its proposal to eliminate Fuel Adjustment Clause ("FAC") and Economic Development Rider ("EDR") deferrals from the Company's 2009 actual return on equity in its brief, stating, "[a]s discussed in AEP Ohio witness Hamrock's testimony, the Companies submit that it is inappropriate for the Commission to consider refunding earnings based on revenue that has not actually been collected from customers."[77] As thoroughly articulated in the OCC's Initial Brief, this argument is unsound.[78]

Again, there likely will not be any meaningful FAC deferral balance remaining for CSP to collect at the end of 2010.[79] Thus, if a refund is ordered by the PUCO in late 2010 or early 2011, the Company will not be in a position in which it will have to pay a refund out of funds not yet received (deferrals). In that case, the entire excess earnings should be returned to customers in the form of a bill credit over the shortest period of time possible, consistent with the testimony presented by Customer Party Witness Kollen.[80]

However, the Company is now further arguing that "whether the Commission needs to exclude the deferrals "***depends on what ROE threshold it adopts and what 2009 earnings for CSP are used in applying the SEET statute***."[81] (Emphasis added.) The Company specifically states: "if the Commission adopts Staff witness Cahaan's ROE threshold of 16.05%, both the OSS and deferral adjustments should be employed to help avoid a finding of significantly excessive earnings."[82] The Company's recommendation is illogical, absurd, and contrary to the language of R.C. 4928.143(F).

CSP's argument with respect to the treatment of deferrals provides no guidelines for the PUCO to administer and leaves great uncertainty. Further, the Company is recommending that the Commission treat deferrals a certain way if it will help avoid a

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[77] Company Initial Brief at p. 59.

[78] See Customer Parties' Brief at 32-38.

[79] The deferral balance cited by the Company on page 60 of its Initial Brief is not accurate as much of that balance has been received by the Company, and will be received when a refund will be distributed.

[80] Joint Ex. 2 at 25-26.

[81] Company Initial Brief at 59.

[82] Company Initial Brief at 60.

finding of significant excess earnings -- which is a biased and unsupported approach that excludes the very group the statute was enacted to protect, customers.

The Company complains in its Initial Brief that "R.C. 4928.143(F) is void and unenforceable because it is impermissibly vague."[83] The Customer Parties take issue with the Company's vagueness argument altogether, but also recommend that a more objective and simplistic standard, which leads to **certainty**, is to treat deferrals as reported, regardless of whether it will help avoid a finding of significant excess earnings.

The Company's reading of R.C. 4928.143(F) is that the Commission should make rulings to avoid a finding of significant excess earnings—which undermines the very intent of the statute—to provide a consumer protection tool. This interpretation of the statute is not only wrong, it is outrageous!

R.C. 4928.143(F) states: "[i]f the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, **it shall require the electric distribution utility to return to consumers** the amount of the excess by prospective adjustments***." The language of the statute clearly protects consumers from an EDU's significantly excessive earnings by returning the amount of the excess. Thus, the Company's absurd proposal will undermine the notion of consumer protection embedded in the language of the statute. The Company now wants to manipulate the language of the statute to its benefit. But, contrary to the Company's proposal to nullify the statutory provision for refunds to customers, R.C. 1.47 provides that "[t]he entire statute is intended to be effective."

[83] Company Initial Brief at 8.

Off-system sales and deferral adjustments should not be "employed" to the benefit of the Company, as the Company has requested. Instead, deferrals **should be included** in CSP's return on equity because the deferrals fall within the definition of "rate adjustments" adopted by the Commission in the SEET Order, and because deferrals are included in the ROE reported for financial accounting purposes. Simply stated, earnings for SEET should be the same as earnings reported to the SEC and the FERC – this approach complies with basic accounting principles, and was explained by Witness Kollen.

3. The refund to customers applies to all ESP rate adjustments and not just to selective adjustments as proposed by the Company.

The Company argues that earnings from only four of the ESP rate adjustments are subject to refund.[84] Those adjustments are limited to tariff rate increases authorized by the ESP, paid by customers during 2009, and that directly produced earnings.[85] The Company points to the SEET order, where the PUCO directed the utilities to "include in their SEET filings the *difference in earnings* between the ESP and what would have occurred had the preceding rate plan 'earnings been in place.'"[86] It then concludes that this language means earnings must be cash earnings (those paid by customers during 2009) and excludes rate adjustments that do not provide "earnings opportunities" for an EDU.[87] It reasons that if revenues are returned related to rate adjustments that merely

[84] Company Ex. 6 at 13.

[85] Company Initial Brief at 62.

[86] Company Initial Brief at 62.

[87] Company Initial Brief at 63.

pass through costs, the Companies will "under-recover the expenses actually incurred and that would defeat the purpose of the rider involved."[88]

The Company is wrong in several respects. First, the Commission SEET order did not define "earnings" from the ESP. Rather, it is the Company who now wants to define it to exclude non-cash earnings and exclude revenues derived from riders. Second, the distinction between cash and non-cash earnings is meaningless, provided that customers do not receive refunds from cash not yet collected. As Customer Parties indicated in their initial brief, refunds ordered should first be applied to any outstanding deferrals so that the Company is not forced into paying refunds when it has not yet received the cash associated with the underlying costs.[89] Third, the underrecovery of expenses is a red-herring argument at best. Every dollar of increased revenue achieved through an ESP rate increase also increases earnings by a like amount. This Commission does not regulate costs. It only regulates rates charged to consumers and revenues received by the utility. The statute does not single out cash earnings or specific revenues from riders. Rather "adjustments" under the ESP are considered as a whole and compared to the earned return on equity of comparable publicly traded companies, including utilities.

D. In Determining Whether CSP's Earnings For 2009 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

[88] Company Initial Brief at 63.

[89] Customer Parties' Brief at 34.

consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company."[90] 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."[91] Therefore, the Commission is prohibited from considering any information regarding Ohio Power Company (OP)—an affiliate[92]—or American Electric Power Company (AEP)—the parent company[93] — 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.[94]

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."[95] 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."[96]

[90] R.C. 4928.143(F).

[91] SEET Order at 11-12.

[92] "Affiliates" are companies that are related to each other due to common ownership or control. Ohio Adm. Code 4901:1-1-37(A).

[93] See Company Ex. 4 at 1.

[94] See Company Ex. 6 at 1.

[95] *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 12.

[96] Id.

Contrary to the clear and unambiguous language in the SEET statute, and the Commission's SEET Order, AEP Ohio relies on argument and evidence regarding the business operations of its parent company—AEP—in an attempt to convince the Commission that CSP's earnings for 2009 were not significantly excessive. For example, in response to the Commission's instruction for each electric utility to include information about its "innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio's economy,"[97] the Company instead includes information about the business operations of its parent company—AEP.[98] Specifically, the Company includes information about the AEP's Columbus-based Dolan Technology Center, the efforts that AEP has taken to strengthen interoperability standards and cyber security, and AEP's collaborative efforts with the U.S. DOE.[99] Yet the Commission has already determined that it cannot consider these types of business operations of a parent company in a SEET analysis.[100]

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 $1.67 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 as necessary to avoid a finding of significantly excessive earnings for CSP

[97] SEET Order at 29.

[98] See Company Initial Brief at 77.

[99] See Company Initial Brief at 77; Company Ex. 6 at 22-23.

[100] See SEET Order at 11-12.

in 2009."[101] And again in its Initial Brief, the Company states that "Exhibit JH-1 shows that AEP Ohio has planned capital investments of approximately $1.67 billion during the ESP term alone" and that "this is a substantial capital investment in Ohio and should carry significant weight in the Commission's 2009 SEET analysis for AEP Ohio."[102] The Company is clearly trying to mislead the Commission into considering the alleged approximate $1.67 billion in planned capital investments—which is the combined figures for both CSP and OP[103]—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"[104] in the SEET analysis for CSP.

E. The Consideration Of Capital Requirements Of Future Committed Investments Must Be Accomplished In A Manner That Does Not Contravene the Ohio General Assembly's Mandate That The Commission Order A Return of Any Significantly Excessive Earnings To Customers.

1. The statute is clear that the Commission shall give consideration to the capital requirements of future committed investments in Ohio when determining whether the ESP adjustments resulted in significantly excessive earnings for CSP in 2009.

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

[101] Company Initial Brief at 5.

[102] Company Initial Brief at 69.

[103] See Company Ex. 6, Exhibit JH-1.

[104] See also the Company Initial Brief (on pages 75-78) and the testimony of Mr. Hamrock (Company Exhibit 6 at pages 20-23) regarding AEP Ohio and AEP in the SEET analysis for CSP.

Ohio General Assembly directed that "*Consideration also shall be given* to the capital requirements of future committed investments in this state." The Customer Parties' Initial Brief fully explains how future capital commitments are to be considered in a SEET analysis in accordance with the law.[105]

As indicated in Customer Parties' Initial Brief, a return to customers of excess is required by law. The Company's argument that it has future capital commitments to meet that negate the return should be rejected. It is statutorily unsound and would create inter-generational inequity. Intergenerational inequities occur when current customers pay for costs attributable to customers in past or future periods (which, due to timing, will not necessarily be the same customers), or when future customers receive a windfall in benefits that past customers should have received. A delay in time between the return of refunds between two generations of customers is particularly inequitable in this case because the law provides for refunds for excessive rates and if the refunds are not made and instead used to fund future projects, the customers who paid the excessive rates are less likely to receive the benefit of the refund to which they are entitled.

2. CSP's future committed capital investment in Ohio cannot be considered as a basis under which the Commission can permit CSP to retain significantly excessive earnings instead of returning the excess to customers.

After initially dedicating approximately 8 pages of its Brief in an attempt to convince the Commission that the SEET statute should be considered unconstitutional because of its vagueness,[106] on or before page 68 of its Brief, the Company starts to argue out of the other side of its mouth and urges the Commission to find that "the clear and

[105] See id. at 47-58.

[106] See Company Initial Brief at 1, 9-15.

unambiguous language in the SEET statue allows the Commission to avoid a finding of significantly excessive earnings based on the capital requirements of future committed investments in Ohio."[107] Although Mr. Hamrock did not provide an expert opinion, because he merely testified to the advice of his counsel, his testimony states that the statute 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 future committed investments."[108] Therefore, the Customer Parties were well aware of the Company's attempt to rewrite the SEET statute and fully responded to the Company's argument in their Initial Brief.[109]

3. The Commission should only consider CSP's capital requirements of future committed investments in Ohio that will occur during the ESP.

a. The Commission should not consider any future capital investments that go beyond the ESP period.

As explained in the Customer Parties' Initial Brief, the Commission should only consider CSP's capital requirements of future committed investments in Ohio that will occur during the period of the current ESP, which lasts through the end of 2011.[110] Yet CSP maintains in its Initial Brief that the Commission should also consider CSP's "incremental capital investments in Ohio involving a large solar farm, substantial environmental investments and expansion of its gridSMART initiative ***."[111] In regards to the solar farm, if it is actually constructed, it is projected to be a 239,400-panel

[107] See Company Initial Brief at 68.

[108] Company Ex. 6 at 16.

[109] See Customer Parties' Brief at 56-58.

[110] See Customer Parties' Brief at 51-52.

[111] Company Initial Brief at 68.

solar array in southeast Ohio.[112] And Company Exhibit 9 states that "Company officials said they hope to have their facilities operational next year, which would allow work on the solar array to begin in 2012 ***."[113] Therefore, the Commission should not consider any evidence of the solar farm[114] in CSP's SEET analysis because construction on the solar farm (array) will not begin until 2012[115]—after the ESP period in this case.

And in regards to the expansion of the gridSMART project and the future environmental investments, Mr. Hamrock testified, upon cross-examination, that both of those capital commitments will be beyond the ESP period.[116] Accordingly, the Commission cannot consider the solar farm, future environmental investments or the expansion of the gridSMART project because they are beyond the ESP period, and—as explained further below—they are not "committed" future investments.

b. The Commission can not consider any future capital projects that are not "committed."

Contrary to the Company's position, the Commission is statutorily prohibited from giving any consideration to the "incremental capital investments in Ohio involving a large solar farm, substantial environmental investments and expansion of its gridSMART initiative ***"[117] because these are not "committed" investments under the law. The Company's own evidence shows that the solar farm is far from being committed. Specifically, Company Ex. 9 indicates that the total cost of the project is estimated to be $250 million and all of the following would need to be in place before the project can

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[112] See Company Ex. 9.

[113] Company Ex. 9.

[106] See Company Ex. 8 at 7; Company Initial Brief at 70-71.

[115] See Company Ex. 9.

[116] See Tr. IV at 685-686 and 693-694; Company Ex. 9 at 7.

[117] Company Initial Brief at 68.

proceed: 1) a federal loan guarantee; 2) other various financing; 3) state tax incentives; and 4) local tax incentives. Tellingly, the evidence (Company Ex. 9) showed that none of these contingencies had been worked out.

The Commission can not consider the future environmental investments and the expansion of the gridSMART project in the SEET analysis because these projects are not committed. And, importantly, these projects are so far from being "committed" that the Company can not even provide the "[c]apital budget requirements" for these projects as required by the Commission's rule.[118] This deficiency means that since the Company failed to even provide a cost for these projects, and it bears the burden of proof, the Commission cannot even assess a value for purposes of the SEET analysis.

c. Future committed investments that are being funded or will be funded by any governmental entity or through any non-affiliated in-kind contributions or by customers through Commission-approved riders do not merit any increase to the threshold of significantly excessive earnings.

Moreover, as the Customer Parties maintained in their Initial Brief, capital investments which are funded by third parties, including governmental entities, or funded by customers through Commission-approved riders, do not merit any increase to the ROE threshold for purposes of the SEET. For example, in 2009, CSP received approval for federal grant funding of $75 million from the U. S. Department of Energy for the Ohio gridSMART demonstration program.[119] And by letter dated July 21, 2010, CSP requested that the PUCO approve CSP's continued implementation of the enhanced gridSMART initiative based on CSP being awarded $75 million through the U.S.

[118] See Ohio Adm. Code 4901:1-35-03(C)(10)(a)(iii).

[119] See Company Ex. 3 at I-1.

Department of Energy and an additional non-affiliated in-kind contribution of $10.85 million.[120]

Therefore, in regards to any consideration of future capital expenditures for the gridSMART project, the Commission should consider that CSP will be receiving $85.85 million from the government and other sources described above. Furthermore, CSP anticipates seeking Commission approval to recover both a return of and a return on its investments regarding the solar farm, future environmental compliance and the expansion of the gridSMART project from its customers.[121] For all of the reasons state above, the Commission should not consider the solar farm, environmental investments and expansion of its gridSMART initiative in CSP's SEET analysis. [122]

4. The Company's future committed capital investment in Ohio should not be used in this case as a basis to increase the threshold level of significantly excessive earnings or to support an "egregiously excessive"[123] threshold.

Even though the law requires the Commission to give consideration to the capital requirements of future committed capital investments in Ohio, the threshold level of significantly excessive earnings should not be increased in this case based on CSP's projected construction spending.[124] In fact, Mr. Hamrock conceded in cross-examination that the 2010 and 2011 budgeting spending was "nothing extraordinary."[125] But the Company apparently ignored the testimony of its President and argues to the Commission

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[120] See *In the Matter of the Application of Columbus Southern Power Company to Update its gridSMART Rider*, Finding and Order at 1, 11-12 (August 11, 2010).

[121] See Tr. IV at 693-694

[122] Company Initial Brief at 68.

[123] Mr. Cahaan characterized the threshold of 22% as "egregiously excessive." Tr. III at 527. We agree.

[124] See Joint Ex. 2 at 29-30.

[125] Tr. IV at 679.

that CSP has committed to make "exceptional" capital investments in Ohio.[126] Yet none of the Company's arguments or CSP's projected construction spending support the need for a 22.51% earnings threshold.

In order to accurately assess the level 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—2009—where the spending was at a level of $280.11 million. These expenditures are expected to decline in 2010 to $256.100 million. They

are expected to decline even further in 2011 to $186.96 million.[127] Meaning that under CSP's flawed legal interpretation,[128] that Customer Parties reject, CSP would need to retain less earnings since its future capital commitments are projected to be much less than year 2009—the year that its earnings were significantly excessive. Moreover, as explained in Customer Parties' Initial Brief, the evidence that CSP offered to show its "future committed investments" in Ohio[129] includes projects for years 2010 and 2011 that have not yet been through all the necessary steps of approval.[130] Thus those investments cannot be considered "committed" investments under R.C. 4928.143(F) because, according to Ohio's rules of statutory construction, "[w]ords and phrases shall be read in

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[126] See Company Initial Brief at 68.

[127] See Joint Ex. 2 at 29, see also Exhibit JH-1 attached to Company Ex. 6. Notably, CSP's construction spending, for 2011 is projected to be only 43% of actual construction spending in 2008. As shown on Mr. Hamrock's Exhibit JH-1 (attached to Company Ex. 6), CSP's actual construction expenditures were $435.713 million in 2008.

[128] CSP argues that the SEET statute 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." (CSP Initial Brief at 68).

[129] Exhibit JH-1 attached to Company Exhibit 6

[130] See OCC Ex. 7 at paragraph e.

context and construed according to the rules of grammar and common usage."[131] This fact alone should prove fatal to CSP's arguments. And CSP's case on this point is all the more ineffectual because it, and not the intervenors, bears the burden of proof.

For the reasons stated above, the testimony of Mr. Hamrock (Company Exhibit 6) and Exhibit JH-1 (attached to Company Exhibit 6) does not accurately reflect what is required by law and rule.[132] Accordingly, the Commission should give no weight to the alleged future "committed" investments of CSP in this proceeding. Specifically, such future expenditures should not be the basis for bumping up the threshold of significantly excessive earnings.

Nor do the "future capital expenditures" support the need for an egregiously excessive threshold return on equity of 22.51%. To the contrary, the evidence introduced by OCC during the cross-examination of Mr. Hamrock regarding the Companies "committed" capital investments for 2010 and 2011[133] supports a finding by the Commission that the threshold ROE for this proceeding should be at the lower range. For the Customer Parties, this evidence justifies a 200 basis point adder to ROE, which amounts to 11.58%.[134]

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[131] R.C. 1.42.

[132] R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-03(C)(10)(a)(iii).

[133] See OCC Ex. 10 at 2; OCC Ex. 7 at paragraph e; see also cross examination of Hamrock, Tr. II at 186, 190, 198, 200-202, 205-206.

[134] Joint Ex. 1 at 19-23.

F. Any Consideration Of The "Additional Factors" Outlined By The Commission In The SEET Order Does Not Support An Unlawful ROE Threshold For Significantly Excessive Earnings Of 22.51%.

The Commission has noted that there is significant variation within Ohio's electric utilities.[135] For this reason, 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;[136] 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."[137] Then the Commission was very clear in directing "the electric utilities to include this information in their SEET filings."[138]

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[135] *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.

[136] CSP's capital commitments are addressed in section (E) of this Reply Brief.

[137] Id.

[138] Id.

In its Initial Brief, CSP states that it addressed each of the factors listed above in AEP Ohio's filing.[139] But CSP did not comply with the Commission's directive that each electric utility include the above-listed information in its SEET filing.[140] In fact, CSP failed to include certain required information, provided some of the required information on a combined basis (meaning that the information is consolidated for AEP Ohio—not specific to CSP or OP as single entities) and included information that is specifically prohibited by Ohio law—being information regarding the parent company, AEP. Under R.C. 4928.143(F), as explained earlier in this Reply Brief, the Commission cannot consider information that is not specific to CSP for purposes of the SEET analysis for CSP. This means that information regarding AEP Ohio and AEP—CSP's parent company—cannot be considered. Furthermore, the information that CSP provided in accordance with the SEET Order does not negate, in any way, the fact that CSP's earnings were significantly excessive in 2009.

1. CSP's most recently authorized return on equity for the purposes of the weighted average cost of capital (10.5%) is clearly indicative that CSP's earnings for 2009 were significantly excessive.

The Commission could not have been any clearer when it instructed the electric utilities to include their most recently authorized return on equity in their SEET filings. Beyond the initial instruction included in the SEET Order,[141] the Commission reiterated in its Entry on Rehearing, as a reminder to FirstEnergy that "it [FirstEnergy] has already been directed to provide its last return on equity as part of the additional information in

[139] See Company Initial Brief at 72.

[140] SEET Order at 29.

[141] See id. at 29.

its SEET application."[142] Yet CSP chose not to include its most recently authorized return on equity in any of the documents that it filed in this proceeding.[143] Instead of providing the required information, CSP rants about stale data and maintains that "any current return on equity considerations should reflect the new risks attendant to an electric utility operating under the new hybrid form of regulation in Ohio."[144] And only in response to cross-examination did Mr. Hamrock acknowledge that the authorized return on equity in its last general rate case was 12.46%.[145]

But the Customer Parties maintain that the Commission should consider the most recently authorized return on equity of 10.50%,[146] that was authorized by the Commission on August 25, 2010,[147] in the proceeding to establish the environmental investment carrying costs riders for both CSP and OP. Having an authorized return of equity of 10.50% and an actual return on equity of 20.84%[148] is strongly indicative of significantly excessive earnings.

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[142] *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 at ¶23 (August 25, 2010) "SEET Rehearing Entry."

[143] Tr. II at 214-215.

[144] Company Initial Brief at 73.

[145] See Tr. II at 214-216; Company Ex. 6 at 18; Company Stipulation at Tr. II at 215-216.

[146] At hearing, Mr. Hamrock testified that the most recent rider cases were the environmental investment carrying cost rider case and the gridSMART rider case. See Tr. II at 217. The most recent case approved by the Commission was the environmental investment carrying cost rider case that was decided on August 25, 2010. See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Establish Environmental Investment Carrying Costs Riders*, Case No. 10-155-EL-RDR, Finding and Order (August 25, 2010). The gridSMART rider case was decided on August 11, 2010. See *In the Matter of the Application of Columbus Southern Power Company to Update its gridSMART Rider*, Case No. 10-164-EL-RDR, Finding and Order (August 11, 2010).

[147] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Establish Environmental Investment Carrying Costs Riders*, Case No. 10-155-EL-RDR, Finding and Order at 10 (August 25, 2010) and Cross-Examination of Company Witness Mitchell, Tr. I at 49-50.

[148] See Company Ex. 4, Exhibit TEM-1 (Page 1 of 3).

2. The Commission should not give any additional consideration to the "alleged risks" faced by CSP.

As discussed previously, the Commission indicated that in regards to the SEET analysis, it would give due consideration to additional factors that included the electric utility's risk.[149] And, in the Companies' Initial Brief, reference is made to Exhibit JH-2 (attached to Mr. Hamrock's testimony (Companies' Ex. 6)) as being a detailed list of the business and financial risks applicable to CSP.[150] Mr. Hamrock testified that Exhibit JH-2 was submitted as a partial list of the business and financial risks that CSP faced in 2009.[151]

But the Customer Parties maintain, and the evidence demonstrates, that the Commission should not give any consideration to arguments in the Companies' Initial Brief regarding the "alleged risks" that CSP faces, for two reasons. First, Dr. Makhija testified that he already considered the risks that CSP faced in his comparable analysis.[152] This fact was also confirmed by Mr. Hamrock who testified that because Dr. Makhija's methodology relies on the market's perception of risk—Dr. Makhija's analysis would incorporate all of the risks included on Exhibit JH-2 and other risks.[153] Therefore, the Commission should not give any additional consideration to a factor—risk— that has already been given due consideration in CSP's SEET analysis.

Second, Exhibit JH-2 does not accurately reflect the risks faced by CSP in 2009. Mr. Hamrock testified that the purpose of Exhibit JH-2 was to illustrate some of the

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[149] See SEET Order at 29.

[150] See Company Initial Brief at 73.

[151] See Tr. II at 217.

[152] See Tr. I at 115-116.

[153] See Tr. II at 232.

business and financial risks that CSP faced in 2009.[154] But this Exhibit JH-2 was originally filed on July 31, 2008 as Exhibit JCB-1 in the ESP case.[155] At the time of the filing, CSP had not received the Commission's approval of the POLR charge[156] which more than compensated CSP for the minimal shopping risk it faced in 2009.[157] Mr. Hamrock agreed during cross-examination that the POLR revenues are, in part, to compensate CSP for the risk of migration and the fact that customers have come-and-go rights.[158] Yet those risks were included on Mr. Hamrock's Exhibit JH-2 as risks that CSP faced in 2009. And Mr. Hamrock further acknowledged that in regards to migration risk—although CSP did not experience any switching based on government aggregation or competition from other EDUs in 2009[159]— these risks are listed on Exhibit JH-2 as risks that CSP faced in 2009.

Furthermore, during the cross-examination of Mr. Hamrock regarding the differences between the two Exhibits (Exhibit JH-2 and Exhibit JCB-1) it was noted that Mr. Hamrock's Exhibit JH-2 did not contain the language "potentially in excess of 200 million dollars per year" after the statement "Penalties for under compliance with advanced energy/DSM/EE."[160] And Mr. Hamrock admitted that CSP had not incurred any penalties in 2009 for failure to comply with any advanced energy DSM/EE targets.[161]

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[154] See Tr. II at 217.

[155] See OCC Ex. 11.

[156] See Tr. Vol. II at 223.

[157] See Joint Ex.2 at 30.

[158] See Tr. Vol. II at 222-223.

[159] See Tr. Vol. II at 224.

[160] See Tr. Vol. II at 221-222.

[161] See id. at 222.

And in fact, in his pre-filed testimony, Mr. Hamrock states that CSP achieved 202 percent of its benchmark requirement for energy efficiency programs.[162]

The cross-examination of Mr. Hamrock illustrates that his Exhibit JH-2 does not accurately reflect the actual risks that CSP faced in 2009. In responding to the Commission's directive to provide information regarding the actual risks that CSP faced in 2009, CSP relies on an outdated Exhibit from the ESP case that does not take into account the POLR charge that the Commission authorized in the ESP case. CSP's reliance on the outdated data means that the risks presented in Exhibit JH-2 (attached to Company Ex. 6) are not as dire as presented given: 1) the POLR charge, 2) the minimal shopping, and 3) lack of any penalty regarding energy efficiency programs in 2009. For all the reasons stated above, the Commission should not consider Exhibit JH-2 (attached to Company Ex. 6) in determining the SEET ROE threshold for CSP, especially since Dr. Makhija already incorporates all of the risks included on Exhibit JH-2 and other risks into his analysis.[163]

3. Evidence that CSP has: 1) improved its interruption frequency and duration; 2) implemented gridSMART; and 3) exceeded its benchmark requirements for energy efficiency programs does not support an unlawful ROE threshold for significantly excessive earnings of 22.51%.

As previously discussed, the Commission cannot, under law, consider any information contained in the Companies' Initial Brief (on pages 75-78) and the testimony of Mr. Hamrock (Company Exhibit 6 at pages 20-23) regarding AEP Ohio and AEP, in the SEET analysis for CSP. Therefore, the only evidence regarding indicators of management performance of CSP that the Commission can consider is CSP's statement

[162] See Company Initial Brief at 78; Company Ex. 6 at 23.

[163] See Tr. II at 232.

that the System Average Interruption Frequency Index for CSP improved ".64" over a six-year period and CSP's Customer Average Interruption Duration Index improved "26" over the same 6-year period.[164]

As stated, the Commission directed each utility to include company data regarding "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."[165] But, in this regard, the only information that the Commission can consider is CSP's gridSMART Demonstration project (because that project is CSP's investment.) Finally, with regard to the extent to which CSP has advanced state policy, CSP's evidence—limited to CSP achieving 202 percent of its benchmark requirement for energy efficiency programs—is insufficient for justifying a higher threshold.[166] Because none of the above warrants an unlawful ROE threshold for significantly excessive earnings of 22.51%, the Commission must find that CSP's earnings for 2009 were significantly excessive.

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[164] See Company Initial Brief at 75.

[165] See SEET Order at 29.

[166] See Company Initial Brief at 78; Company Ex. 6 at 23.

4. **Evidence that CSP had the highest ROE of all of the investor-owned regulated electric utilities in the United States and that CSP's earned ROE for the 2009 annual period was more than double the weighted average of the earned returns for all the electric utilities in the SNL Financial data base is relevant to the Commission finding that CSP's earnings were significantly excessive in 2009.**

As stated above, the Commission indicated in the SEET Order that, in considering the SEET threshold, it would give due consideration to certain factors.[167] Contrary to the assertions of CSP, the Commission—by its own Order—clearly indicated that it was not limiting itself to those additional factors that it identified in the SEET Order.[168] And additional factors that are relevant to CSP's SEET analysis are included in the testimony of Mr. Kollen.

Specifically, Mr. Kollen testified: 1) that CSP's ROE (20.84%) was the highest reported ROE in any SEET filing in Ohio;[169] 2) that CSP's ROE was the highest by a significant margin when compared to the ROEs for CSP's affiliates in the AEP East power pool;[170] 3) that, in 2009, sales to consumers in Ohio was by far the most profitable line of business for AEP;[171] and 4) that CSP has the highest ROE of all of the investor-owned regulated electric utilities in the United States and that CSP's earned ROE for the 2009 annual period was more than doubled the weighted average of the earned returns for

[167] See SEET Order at 29.

[168] See SEET Order at 29.

[169] The other reported returns were: Ohio Power – 10.81%, The Toledo Edison Company – 3.8%, Ohio Edison – 6.2%, The Cleveland Electric Illuminating Company – 5.2%, and Duke Energy Ohio – 9.46%. Dayton Power &Light Company was not required to make a 2009 SEET filing. Joint Ex. 2 at 18.

[170] The 2009 returns on equity for the CSP affiliates were: Appalachian Power – 6.01%, Kentucky Power – 5.77%, and Indiana & Michigan Power – 13.84%. With a return on equity of 20.84%, CSP is by far the most profitable utility in the AEP Power Pool. Joint Ex. 2 at 19.

[171] See Joint Ex. 2 at 20.

all the electric utilities in the SNL Financial data base.[172] There is no doubt that this evidence is both relevant and dispositive to the decision that the Commission must make regarding CSP's earnings in 2009.

It is an unwelcome distinction for CSP's Ohio customers that they are paying for the most profitable of all the investor-owned regulated electric utilities in the United States. It is all the more egregious for customers that CSP's earned ROE for the 2009 annual period was ***more than double*** the weighted average of the earned returns for all the electric utilities in the SNL Financial data base.[173]

CSP states that Mr. Kollen's comparisons above are "irrelevant as a matter of law and should be disregarded."[174] The PUCO should roundly reject CSP's proposed legal standard for "relevance." Mr. Kollen's comparisons are relevant, and vitally important under the law, to show that CSP's earnings for 2009 were significantly excessive. When CSP says that evidence is "irrelevant," it would seem that in CSP's parlance it means that the evidence is damaging to its case.

Furthermore, CSP tries to confuse the Commission by arguing that Mr. Kollen's testimony does "not relate to any of the criteria set forth by the Commission in its rules or in the June 30 Finding and Order or the August 23 Entry on Rehearing."[175] But as explained above, the Commission did not limit itself to the factors it would consider.[176] And, for a statute (R.C. 4928.143(F)) that makes reference to comparability among publicly traded companies, there is obvious significance to considering the evidence from

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[172] See Joint Ex. at 20-21.

[173] See Joint Ex. at 20-21.

[174] See Company Initial Brief at 56.

[175] See Company Initial Brief at 57.

[176] See SEET Order at 29.

Mr. Kollen that CSP is in a class by itself when it comes to profits. But customers, not CSP, comprise the protected class under the law. And the PUCO should now fulfill its statutory duty to protect customers from paying the highest ROE in the United States, a ROE for the 2009 annual period that was ***more than double*** the weighted average of the earned returns for all the electric utilities in the SNL Financial data base.[177]

G. The Commission Should Consider The Regulatory Protections That Are Afforded To CSP To Minimize Risk As Part Of The CSP SEET Analysis.

1. CSP's risk is minimized by the Fuel Adjustment Clause.

In general, riders that track costs serve to reduce risk or volatility.[178] As discussed previously in this Reply Brief, the Commission indicated that, in regards to the SEET analysis, it would give due consideration to "whether the ESP includes a fuel and purchased power adjustment or other similar adjustments."[179] Since these types of adjustments minimize or reduce certain risks that electric utilities face[180] they should be considered by the Commission in determining whether CSP's earnings for 2009 were significantly excessive.

Specifically, the rates that CSP's customers pay include a "fuel and purchase power cost recovery mechanism that includes recovery of environmental system consumables costs and renewable power purchases ***."[181] Fuel adjustment clauses—such as the one that CSP has in place—"permit periodic adjustments to fuel costs recovery from customers and therefore provide protection against exposure to fuel cost

[177] See Joint Ex. at 20-21.

[178] See Exhibit 6 at 24 (attached to Staff Ex. 1, Prefiled Testimony of Richard Cahaan.)

[179] See SEET Order at 9.

[180] See generally, Company Ex. 3 at 20.

[181] Company Ex. 6 at 20 and Company's Initial Brief at 74.

changes."[182] And the presence of such a feature,[183] tends to argue for a lower threshold ROE. Accordingly, the Commission should consider this risk-mitigating factor in determining the SEET ROE threshold.

2. Even though CSP experienced no shopping in the residential and industrial customer classes and minimal shopping in the commercial customer class, CSP collected $89.9 million for the Provider of Last Resort Charge.

In its Initial Brief, CSP refers to Exhibit JH-2 (attached to Mr. Hamrock's testimony) as a detailed list of the business and financial risks that CSP faces.[184] Included on the list, under the "Migration Risk" heading, is that "[c]ustomers have come and go rights (rules to be determined) –Company retains provider of last resort status at tariff rates."[185] However, the Company fails to mention that, although the Company experienced no shopping in the residential customer and industrial classes and only minimal shopping in the commercial class in 2009,[186] it still collected $89.9 million for the Provider of Last Resort (POLR) charge.[187]

Specifically, Mr. Kollen testified that at the end of 2009, none of CSP's residential or industrial customers had shopped for competitive generation, and only 1.871% of the commercial load had shopped.[188] Yet CSP was more than generously compensated for that supposed risk through the POLR charge that generated $89.9

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[182] Company Ex. 3 at 20.

[183] Mr. Cahaan testified that the presence of riders, deferrals and unavoidable charges tends to argue for a lower threshold. See Exhibit 6 at 24 (attached to Staff Ex. 1, Prefiled Testimony of Richard Cahaan.)

[184] See Company's Initial Brief at 73.

[185] Company Ex. 6, attachment Exhibit JH-2.

[186] See Joint Ex. 2 at 30.

[187] See id.

[188] See id.

million.[189] In other words, CSP received $89.9 million in POLR revenue, or $128.7 for each mWh that was actually shopped, which more than compensated CSP for its shopping risk.[190] Accordingly, the Commission should consider this risk-eliminating factor—the POLR charge— in determining the SEET ROE threshold.

III. CONCLUSION

In 2009 when the rest of Ohio was suffering through severe economic hardship and record unemployment, CSP was awarded a 7% ESP rate increase of at least $155.9 million for customers to pay. In retrospect, that rate increase was not justified. Through the yearly SEET review process the Legislature required this Commission to remedy its prior ratemaking decision. The Customer Parties simply seek the PUCO's enforcement of the law intended to protect customers. Enforcement of the law means that the PUCO should now order a refund of the excess profits earned by CSP. This would result in a refund to the average residential customer of approximately $102 and would provide a much needed job-creating economic stimulus for Ohio.

[189] See id.

[190] See id.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Post-Hearing Reply Brief by the Customer Parties was served on the persons listed below via electronic mail this 30th day of November, 2010.

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