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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 4901:1-35-10, Ohio Administrative Code) Case No. 10-1261-EL-UNC

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

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APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

Pursuant to Section 4903.01, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing from the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") on January 11, 2011 ("Opinion and Order" or "January 11 Opinion and Order") on the determination whether Columbus Southern Power Company ("CSP") or Ohio Power Company ("OP") (collectively the "Companies" or "AEP-Ohio") earned significantly excessive earnings during the first year of their respective Electric Security Plans ("ESP") under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C. As explained more fully in the attached Memorandum in Support, the Commission's January 11 Opinion and Order is unreasonable and unlawful for the following reasons:

A. The Opinion and Order was unlawful and unreasonable because the Commission failed to order CSP or OP to refile its testimony and supporting materials to address properly the requirements of Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C.

B. The Opinion and Order was unlawful and unreasonable because the Commission failed to follow the legal standard required by Section

4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C., to apply the significantly excessive earnings test ("SEET").

C. The Opinion and Order was unlawful and unreasonable because the Commission found that the SEET may be measured based upon the total company return on common equity rather than the electric distribution utility's ("EDU") earned return on common equity from the ESP.

D. If reliance on total company data was lawful and appropriate for purposes of commencing the SEET analysis, the Opinion and Order was unlawful and unreasonable because the Commission failed to adjust net income and common equity to account fully for the removal of off system sales and other non-jurisdictional effects from the calculation of excessive earnings.

E. The Opinion and Order was unlawful and unreasonable because the Commission failed to use the appropriate annual period to conduct the SEET as required by Section 4928.143(F), Revised Code.

F. The Opinion and Order was unlawful and unreasonable because the Commission failed to remove the operating expenses for Waterford and Darby generating stations from the calculation of the SEET when the Commission previously ordered that the expenses be removed from the ESP.

G. The Opinion and Order was unlawful and unreasonable because the Commission failed to comply with the policy of the State to ensure the availability to consumers of reasonably priced retail electric service and encourage the competitiveness of the State's economy.

H. The Opinion and Order as implemented through the January 27, 2011 Finding and Order was unlawful and unreasonable because the Commission did not allow reasonable arrangement customers, particularly those that were paying rates under the Standard Service Offer ("SSO") in 2009, to participate in the SEET credit in violation of Sections 4928.143(F) and 4903.09, Revised Code.

For these reasons, discussed in greater detail below, IEU-Ohio requests that the Commission grant this Application for Rehearing, order OP and CSP to make the necessary filings in compliance with the statutory and regulatory requirements, and conduct further hearings consistent with requirements of Section 4927.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C.

Respectfully submitted,

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

MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

I. BACKGROUND AND ARGUMENT

On January 11, 2011, the Commission issued its Opinion and Order in these matters, finding that CSP had earned significantly excessive earnings. Because the results were based on a flawed filing that affected both the remainder of the hearing and the Commission's Opinion and Order when viewed in light of Section 4928.143(F), Revised Code, IEU-Ohio urged (both before testimony began and at the conclusion of the hearing) the Commission to order CSP and OP to refile the appropriate information and to refrain from acting until that was done. Certainly, IEU-Ohio's motion was not made in the belief that one or the other company was not significantly over-earning, but rather in the expectation that proper information would result in a more accurate and lawful result. Once again, IEU-Ohio urges the Commission to take the opportunity to require the Companies to comply with the statutory requirements so that a proper evaluation can take place.

For the following reasons, IEU-Ohio requests that the Commission order rehearing in this matter.

A. **The Opinion and Order was unlawful and unreasonable because the Commission failed to order CSP or OP to refile its testimony and supporting materials to address properly the requirements of Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C.**

B. **The Opinion and Order was unlawful and unreasonable because the Commission failed to follow the legal standard required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C., to apply the significantly excess earnings test ("SEET").**

C. **The Opinion and Order was unlawful and unreasonable because the Commission found that the SEET may be measured based upon the total company return on common equity rather than the electric distribution utility's ("EDU") earned return on common equity from the ESP.**

D. **If reliance on total company data was lawful and appropriate for purposes of commencing the SEET analysis, the Opinion and Order was unlawful and unreasonable because the Commission failed to adjust net income and common equity to account fully for the removal of off system sales and other non-jurisdictional effects from the calculation of excessive earnings.**

The starting point for defining the scope of the Commission's authority is the applicable statute. Section 4928.143(F), Revised Code, provides (emphasis added):

> **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. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the **electric distribution utility**. If 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; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall

> be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. 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**.

As demonstrated during the hearing and found in the Opinion and Order, neither OP nor CSP met its burden to show that it did not experience significantly excessive earnings as a result of its individual ESP in the first annual period. By law, the Commission should find that OP and CSP experienced significantly excessive earnings because, as a threshold matter, neither OP nor CSP offered any evidence to show that the EDU earned a return on equity arising from its particular ESP during the required annual period. [1] Short of holding both Companies over-earned, however, the Commission should reconsider its decision to go forward on the deeply flawed record. While IEU-Ohio is eager to have the Commission remove the significantly excessive economic burden that was imposed on customers when the Commission approved the OP and CSP ESPs, the Commission, nonetheless, must comply with Section 4928.143(F), Revised Code, before doing so.

At the heart of the problem is the failure of the Commission to limit its review to the ESP earnings of the EDU. Section 4928.143(F), Revised Code, contains words that are defined by Ohio law and, as stated in Section 4928.01, Revised Code, these definitions control for purposes of construing and applying the SEET. Section 4928.143(F), Revised Code, explicitly directs the Commission to review the earnings of the EDU operating under the ESP. In turn, Section 4928.01, Revised Code, defines

[1] As the statute does not provide a remedy for a failure to meet the prima facie burden, the logical solution is to require the company to refile its case in compliance with the statute.

"electric distribution utility" as an "electric utility" that supplies retail electric distribution service and defines an "electric utility" as an "electric light company"; an electric light company has an Ohio certified territory and also provides retail service in Ohio.

The definitions in Section 4928.01, Revised Code, apply to Section 4928.143(F), Revised Code, and these definitions control the scope of the SEET. Based on these definitions and the plain meaning of Section 4928.143(F), Revised Code, the SEET must be applied to measure the earned equity return on the EDU's retail service which is the service that is subject to the Commission's jurisdiction.[2] This is the only service that can be covered by a rate plan that the Commission is empowered to approve under Section 4928.143, Revised Code. Therefore, the SEET mandated by Section 4928.143(F), Revised Code, requires the Commission to design and apply the SEET to identify the EDU's earned return on equity as that earned return is measured from the retail service rate plan approved by the Commission under Section 4928.143, Revised Code. Section 4928.143(F), Revised Code, further states that the Commission may not consider, "directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company."

Nothing in Section 4928.143(F), Revised Code, suggests that the Commission has authority to measure significantly excessive earnings based on total company

[2] Utility applications for rate increases have historically been filed with explicit reference to the service that is subject to the Commission's jurisdiction. *In the Matter of the Application of The Toledo Edison Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service*, Case Nos. 95-299-EL-AIR, *et al.*, Opinion and Order (April 11, 1996). Section 4928.39, Revised Code, required the Commission to jurisdictionalize any transition cost allowance that the Commission authorized EDUs to collect in conjunction with Ohio's approach to restructuring its electric laws and regulations. *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP, *et al.*, Opinion and Order at 31-36), (July 19, 2000). The notion that the Commission must apply the SEET so as to respect this fundamental legal principle is hardly new. But whether new or old, this principle must also be respected because it is an explicit requirement of Section 4928.143(F), Revised Code.

earnings. On the contrary, Ohio law directs that the SEET must exclude any consideration of net income and the earned return on equity attributable to non-retail transactions such as those subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").[3] The SEET must be applied based on the earnings achieved by an EDU as a result of an ESP.

The testimony (prefiled and oral) and exhibits sponsored by all the witnesses in this proceeding demonstrate that none of the witnesses based his calculations and opinions on parameters required by Section 4928.143(F), Revised Code. The problem is not limited to the analysis that focused on CSP.

For example, AEP-Ohio's Mr. Mitchell did not develop his calculations or opinions based on the understanding that "electric distribution utility" and "electric utility" are defined terms under Ohio law. Prior to the hearing, Mr. Mitchell did not ask if these terms have specific meaning in Ohio. Tr. Vol. I at 36. During the hearing and after sponsoring his prepared testimony, he apparently became aware that these terms are defined by Ohio law. Tr. Vol. I at 36-39.

Mr. Mitchell's testimony and attached exhibits show that the math behind his earned return on equity numbers for 2009 is driven by total company numbers. For CSP and OP, he used $271.5 million and $305.8 million, respectively, as the earned return on common equity for 2009.[4] These 2009 earned return on equity numbers are the total company earned returns for OP and CSP. In other words, Mr. Mitchell's calculation of earned return on common equity is for all lines of CSP and OP business,

[3] As noted in IEU-Ohio's reply brief, the companies conceded that the calculations had to be adjusted for non-jurisdictional effects. IEU-Ohio Reply Brief at 6.

[4] Companies' Exhibit 4, Exhibit TEM-1.

not just the equity return earned by each EDU as a result of the retail rate plan. Tr. Vol. I at 37-38. As he explained, his calculation of the earned return on common equity for 2009 includes income from wholesale transactions involving affiliates of OP and CSP and subject to FERC's jurisdiction. Tr. Vol. I at 43.

AEP-Ohio's Mr. Hamrock confirmed that CSP and OP are engaged in multiple lines of business including nonutility business. He also confirmed that the net income and earned return calculations contained in AEP-Ohio's testimony included income from FERC-jurisdictional activities, including the various pool agreements that allocate costs and revenue among other operating companies affiliated with OP and CSP. Tr. Vol. I at 134, 136-137, 141-152. In his testimony, Mr. Hamrock conceded that AEP-Ohio's total company earned return on equity calculations for OP and CSP include non-jurisdictional activities and gains or losses affecting CSP's and OP's earnings. He testified that "there are ... non-jurisdictional activities and gains or losses that impact CSP's and OPCo's earnings" but that " the Companies did not attempt to fully jurisdictionalize the 2009 earnings ...." Companies' Exhibit 6 at 7.

Like Mr. Mitchell and Mr. Hamrock, Dr. Makhija's analysis was conducted without knowledge that "electric utility" has a specific statutory definition for purposes of the SEET. Tr. Vol. I at 100-101. During cross-examination, he acknowledged that the term "electric distribution utility" is "suggestive of distribution activities" and that the earned return calculations required by the SEET are to be focused on the EDU. Tr. Vol. I at 102. Although Dr. Makhija was not responsible for calculating the EDU earned returns on common equity, Tr. Vol. I at 103-104, the calculations he used were based on total company data, rendering Dr. Makhija's opinions irrelevant.

Professor Woolridge did not look at OP's earnings; he limited his analysis to CSP. Tr. Vol. II at 319. He did not know that "electric distribution utility" and "electric utility" are defined terms in Ohio. Tr. Vol. II at 320. He testified that if there are statutory definitions for these terms, he did not take them into account. Tr. Vol. II at 320-321.

The direct case presented by the Joint Intervenors[5] was structured so that Mr. Kollen's opinions and recommendations relied significantly on the opinions of Professor Woolridge. Tr. Vol. II at 385. Mr. Kollen did not address the SEET as applied to OP and he did not take issue with Mr. Mitchell's calculation of CSP's earned return[6] even though Mr. Mitchell relied on total company numbers.

Like the other witnesses, Mr. Kollen was, when he offered his testimony, unaware that "electric utility" is a defined term in Ohio. Tr. Vol. II at 387. By focusing on the total company numbers for CSP, Mr. Kollen adopted OP's and CSP's erroneous approach to calculating the earned return on equity component of the SEET. Tr. Vol. II at 387. During cross-examination, Mr. Kollen acknowledged that CSP has various lines of business (involving generation, transmission and distribution functions) and that he did not know the extent to which each line of business was responsible for the significantly excessive earnings in 2009. Joint Intervenors' Exhibit 2 at 27; Tr. Vol. II at 400.

Like Professor Woolridge and Mr. Kollen, Mr. Cahaan offered no testimony on the SEET as applied to OP. Tr. Vol. III at 445. As with the other witnesses, Mr. Cahaan

[5] The Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Manufacturers' Association ("OMA"), the Ohio Hospital Association ("OHA"), Appalachian Peace and Justice Network ("APJN") and the Ohio Energy Group ("OEG") are the "Joint Intervenors." Joint Intervenors' Exhibit 2 at 2.

[6] Joint Intervenors' Exhibit 2 at 18.

did not approach his assignment with an understanding that "electric utility" is a defined term in Ohio. Tr. Vol. III at 444. Mr. Cahaan also relied on total company numbers. The $271.5 million net income in Mr. Cahaan's testimony is the same total company net income number ($271.5 million) identified in Mr. Mitchell's testimony. Tr. Vol. III at 474-475.

As might be expected, the erroneous SEET analysis relied upon by the various witnesses flowed into the Commission's decision. In its Opinion and Order, the Commission stated:

> [W]e reject IEU-Ohio's contention that the Companies' application cannot proceed as AEP-Ohio did not perform a comprehensive jurisdictional allocation study. Nowhere in Section 4928.143(F), Revised Code, is a comprehensive jurisdictional allocation study required in order to determine an earned ROE appropriate for use in the SEET. Nor do we find that a comprehensive jurisdictional allocation study is the only manner in which to determine an earned ROE for SEET. Rather, we find that it is acceptable to make appropriate adjustments to FERC Form 1 data in order to develop an earned ROE for SEET. In making this determination, we note that, under applicable provisions of Section 4928.01, Revised Code, and under Section 4905.03, Revised Code, an electric utility is not limited to a subset of a firm's activities that may be regulated under an ESP. Additionally, the definition of an electric light company explicitly covers firms engaged in both activities subject to rate regulation by this Commission and activities such as transmission that are, in large part, subject to federal jurisdiction. Thus, while adjustments to FERC Form 1 data may be appropriate to isolate the effects on ROE of the adjustments in the ESP under review, **the SEET, in the first instance, may be measured based upon the return of common equity of the electric utility viewed as a company without a complete jurisdictional cost and revenue allocation study.**

January 11, 2011 Opinion and Order at 13 (emphasis added). The Commission then accepted only a single adjustment for off system sales despite the testimony that other non-ESP services, revenue, and income were in the SEET analysis that each witness relied upon. January 11, 2011 Opinion and Order at 27-31. The Commission did not require OP or CSP to provide it with the correct data on which to make the required determinations, and it did not make the full range of adjustments.

The apparent premise of the Commission's Opinion and Order is that an "electric utility is not limited to a subset of a firm's activities that may be regulated under an ESP." January 11, 2011 Opinion and Order at 13. While that statement may be true "in the first instance" and as a place to start the SEET analysis, it does not answer and is inconsistent with the further requirement that the Commission should remove non-jurisdictional off-system sales ("OSS") and make other adjustments suggested by the Commission's next finding. *Id.* Moreover, the Commission's statement has little or nothing to do with the test provided by Section 4928.143(F), Revised Code, which specifically provides that the review is limited to "to the provisions that are included in an electric security plan under this section."

It follows then that the Commission's failure to require the companies to file testimony and exhibits consistent with the statutory requirements caused the SEET analysis to end prematurely, before the statutory SEET analysis could possibly be performed. In light of this uncontested reality, the solution was dutifully straight-forward: the Commission should have required that the Companies not only refile, but do so in a way that would allow the required SEET analysis to be performed. Thus, it was error to go forward on the data provided, and it was error for the Commission to not impose on the Companies an obligation to show the earned return on common equity arising from the ESP.

As discussed above, the Commission endorsed in its Opinion and Order AEP-Ohio's failure "to fully jurisdictionalize" the total company earnings. Companies' Exhibit

6 at 7. But even if the Commission ignores the fact that the SEET requires reliance upon the EDU's ESP and retail jurisdictional numbers, the total company analysis provided by AEP-Ohio and utilized by the Commission is based on one-sided, selective and misleading adjustments to the total company numbers.

For example and with regard to the math performed by AEP-Ohio in the case (and only in the case) of CSP, AEP-Ohio reduced CSP's total company net income by the "net margins" which AEP-Ohio attributed to OSS. Companies' Exhibit 4 at 5. Mr. Mitchell was responsible for the computation performed to remove OSS net margins from CSP's total company dollar return on equity (the numerator in the percentage earned return calculation) for 2009 but he was directed to make this adjustment by Mr. Hamrock. Companies' Exhibit 4 at 3; Companies' Exhibit 6 at 6-7; Tr. Vol. I at 35.

In his testimony, Mr. Hamrock claimed that the adjustment to CSP's total company net income to remove "net margins" which AEP-Ohio attributed to "OSS" was required because the "[o]ff-system-sales margins, which result from wholesale, not retail, transactions, are not the result of a rate adjustment included in CSP's or OPCo's ESP. They result from wholesale transactions approved by the Federal Energy Regulatory Commission (FERC)." Companies' Exhibit 6 at 6-7. Mr. Hamrock also acknowledged, however, that "there are other non-jurisdictional activities and gains or losses that impact CSP's and OPCo's earnings" but that "the Companies did not attempt to fully jurisdictionalize the 2009 earnings." Companies' Exhibit 6 at 7. AEP-Ohio's testimony, therefore, acknowledged that its adjustment to CSP's total company earnings or net income for 2009 to remove net margins from OSS was a selective application of AEP-Ohio's theory regarding the relationship between SEET and jurisdictional transactions and that a comprehensive application of this theory was not attempted by AEP-Ohio.

Mr. Cahaan's testimony identified one effect (at least directionally) of AEP-Ohio's selective application of AEP-Ohio's theory regarding the relationship between SEET and jurisdictional rate plan transactions. As Mr. Cahaan testified, the theory relied upon by AEP-Ohio to adjust the numerator (net income available for common shareholders) would require, if adopted, an adjustment to the denominator (the dollar value of common shareholder equity). Staff Exhibit 1 at 19-21. While Mr. Cahaan's testimony demonstrated the one-sided and misleading effect of AEP-Ohio's selective application of its theory, his quantification of the effect of this theory on the denominator (the dollar value of common shareholder equity) relied upon assumptions that did not account fully for the removal of the off-system sales. For example, he assumed that there was no further adjustment necessary for transmission investment associated with making OSS, an assumption that has no support in the record or anywhere else. Tr. Vol. III at 477; Tr. Vol. I at 137.

Beyond failing to hold that OP and CSP failed to meet their burden to come forward with evidence showing no significantly excessive earnings as measured by the SEET, the Commission compounded the problem when it assessed the ESP by using inappropriate data. For this reason as well, rehearing should be granted.

E. The Opinion and Order was unlawful and unreasonable because the Commission failed to use the appropriate annual period to conduct the SEET as required by Section 4928.143(F), Revised Code.

Section 4928.143(F), Revised Code, requires that the SEET be applied following the end of each "annual period **of the plan**." The start date of the first ESP annual period for OP and CSP was April 1, 2009. Mr. Mitchell testified that the revenue collection opportunity enabled by the retail rate plan did not commence until April 1, 2009. Tr. Vol. I at 44-46. As the Commission knows from its own public records, the first effective date of the rates and charges collected by CSP and OP pursuant to the retail rate plan approved by the Commission is also April 1, 2009. The annual period thus commenced on April 1, 2009 and ended on March 31, 2010.

In the January 11 Opinion and Order, the Commission apparently concluded that using the retroactive start date of January 1, 2009 was appropriate.[7] Once again, however, the issue is compliance with the statute. The ESP did not and cannot be construed to have commenced any earlier than the first billing cycle. The Commission's attempt to avoid a revenue gap by annualizing the recovery to January 1, 2009 in the ESP Order did not change that fact. Thus, the annual period of the SEET analysis should have been for the period of April 1, 2009 through March 31, 2010. Any other result fails to capture the period required by Section 4928.143, Revised Code, and is unlawful and unreasonable.

F. The Opinion and Order was unlawful and unreasonable because the Commission failed to remove the operating expenses for Waterford and Darby generating stations from the calculation of the SEET when the Commission previously ordered that the expenses be removed from the ESP.

Over the objection of IEU-Ohio, the Commission refused to remove from the SEET calculation expenses associated with the Waterford Energy Center and the Darby Generating Station. There apparently is no argument that the Companies for purposes of this filing included the expenses. Despite the Commission's prior decision to remove

[7] Opinion and Order at 13 ("The Commission has already fully addressed the start date of AEP-Ohio's ESP." [Citations to various ESP orders omitted.]).

expenses for the two facilities from expenses recoverable under the ESP, the Commission's January 11 Opinion and Order indicated that removing the $51 million expense in calculating the SEET would be unreasonable. January 11 Opinion and Order at 13-14. Although two adjustments must be made to avoid overstating expenses and understating the earned return on equity, neither was done.

In *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case Nos. 08-917-EL-SSO, *et al.,* Opinion and Order at 51-52 (March 18, 2009) (hereinafter refered to as the "*AEP-Ohio ESP Case*"), the Commission initially authorized CSP to increase revenues for the jurisdictional portion of expenses associated with Waterford Energy Center and the Darby Electric Generating Station. On rehearing, however, the Commission reversed this determination because AEP-Ohio had not presented evidence showing that the revenue produced by its rates was insufficient to cover such expenses and directed "AEP-Ohio to modify its ESP and remove the annual recovery of $51 million of expenses including associated carrrying charges related to these generation facilities." *AEP-Ohio ESP Case,* Entry on Rehearing at 35-36 (July 23, 2009). CSP subsequently perfected an appeal to the Ohio Supreme Court and alleged that the "Commission unlawfully and unreasonably denied CSP the authority to recover, as part of its Electric Security Plan, costs associated with its ownership of the Waterford Energy Center and the Darby Electric Generating Station". *Columbus Southern Power Company v. Public Utilities Commission of Ohio,* Ohio Supreme Court Case No. 09-2298, Notice of Appeal of Columbus Southern Power Company at 3 (December 22, 2009).

Despite the prior Commission order excluding recovery, the net income and earned return computations performed by the parties who used the Companies' numbers included expenses associated with the Waterford Energy Center and the Darby Electric Generating Station as if they are properly recoverable under the CSP ESP. They were included in CSP's 2009 per book net income number. Tr. Vol. I at 139-140. As explained above, AEP-Ohio, Joint Intervenors, and the Commission's Staff copied AEP-Ohio's net income number into their analyses and thereby picked up AEP-Ohio's inclusion of the expenses associated with the Waterford Energy Center and the Darby Electric Generating Station in their otherwise defective recomendations regarding the SEET. To exclude such expenses, it would be necessary to make two adjustments. The first necessary change is an adjustment to CSP's 2009 per book net income number. Tr. Vol. I at 141. The second necessary adjustment would be one to the common equity balance of CSP, for the same reasons suggested by Mr. Cahaan noted above. Thus, the income statement (expenses, revenue and net income) and balance sheet (common equity) effects attributable to the Waterford Energy Center and the Darby Electric Generating Station must be removed to apply the SEET to the ESP plan that is currently in effect. [8] The failure of the Commission to take these steps, therefore, requires the Commission to grant this Application for Rehearing.

G. The Opinion and Order was unlawful and unreasonable because the Commission failed to comply with the policy of the State to ensure the availability to consumers of reasonably priced retail electric service and encourage the competitiveness of the State's economy.

Beyond the issues raised above, however, the Commission's decision failed to advance public policy requirements that the Commission is required to follow. In

[8] Similar adjustments are required for the Lawrenceburg Generating Station. Tr. Vol. I at 141-142.

particular, the goals of stable and reasonably priced retail rates and global competitiveness suffer as a result of this decision.

Under current law, the Commission is directed to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." Section 4928.02(A), Revised Code. While it was readily apparent even under CSP's presentation at hearing that CSP's earned return was significantly excessive, there was a fundamental breakdown in the process which as noted above likely resulted in an understatement of the amounts by which at least CSP exceeded the threshold. Quantification of the error has been made impossible by the failure to specify properly the SEET analysis. When there are obvious mistakes that deflate the signficantly excessive earnings and these mistakes can be addressed by requiring the proper accounting and allocation, then State policy to ensure reasonably priced service requires that effort be made. See *Elyria Foundry Co. v. Public Util. Comm'n of Ohio*, 114 Ohio St. 3d 305, 2007-Ohio-4164, 871 N.E.2d 1176 (2007).

Further, Section 4928.02, Revised Code, requires the Commission, among other things, to administer Chapter 4928 in ways that facilitate Ohio's competitiveness. Businesses in Ohio compete with businesses in Indiana, Michigan, Kentucky and West Virginia. As demonstrated in IEU-Ohio's Brief at 15–22, AEP-Ohio retail customers appear according to AEP financial information to be carrying more than their fair share of the profitability achieved by the AEP-East companies. In this case, the Commission is obligated to take action because this undue burden on Ohio customers affects their ability to, among other things, compete in the global economy.

> We are tasked, under Chapter 4928 of the Revised Code, with approving generation charges that are market-based and consistent with the State

> policy set forth in this Chapter. Although, in some instances, costs or changes in costs may serve as proxies for reasonable market valuations or changes in such valuations, this is not the same as establishing prices based on costs. Similarly, a market-based SSO price is not the same as a deregulated price. SSOs remain subject to Commission jurisdiction under Chapter 4928 of the Revised Code. And, SSOs must be consistent with State policy under Section 4928.02, Revised Code. *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Thus, while an SSO price need not reflect the sum of specific cost components, the result must produce reasonably priced retail electric service, avoid anticompetitive subsidies flowing from noncompetitive to competitive services, be consistent with protecting consumers from market deficiencies and market power, and meet other statutory requirements.[9]

Running the SEET to identify the revenues, costs, net income available for common shareholders, and the portion of OP's and CSP's equity capital directly assignable or allocable to the retail service provided by each EDU pursuant to the retail rate plan (making sure the SEET is applied to the retail jurisdiction subject to the Commission's jurisdiction) is required by law. Based on the evidence in this record, applying the SEET as written by the General Assembly may also help to identify and eliminate a significantly excessive burden that now rests on the backs of the retail customers of AEP-Ohio in ways that will permit the Commission to discharge its duties under Section 4928.02, Revised Code.

H. The Opinion and Order as implemented through the January 27, 2011 Finding and Order was unlawful and unreasonable because the Commission did not allow reasonable arrangement customers, particularly those that were paying rates under the Standard Service Offer ("SSO") in 2009, to participate in the SEET credit in violation of Sections 4928.143(F) and 4903.09, Revised Code.

In its Finding and Order entered January 27, 2011, the Commission directed that the tariffs should be adjusted so as to exclude the application of any credit to

[9] *In the Matter of the Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-ATA, *et al.*, Order on Remand at 36-37 (October 24, 2007).

reasonable arangement customers who receive service under a discount rate supported by delta revenue recovery. Finding and Order at 1 (January 27, 2011). The only explanation provided by the Commission was a conclusion that customers currently receiving service under a discount rate supported by delta revenue recovery were not entitled to both the discount rate and a SEET discount. *Id.* For several reasons, the Opinion and Order as implemented by the January 27, 2011 Finding and Order was unlawful and unreasonable.

As a statutory matter, there is no basis for the Commission to exclude the special contract customers from participating in the prospective adjustment. Section 4928.143(F), Revised Code, provides that the Commission shall require the EDU to return to consumers the amount of the excess by prospective adjustments. The provision does not segregate special arrangement customers from the recovery; it states that "consumers" shall be permitted to recover.[10] This conclusion is even clearer when applied to those consumers that were taking service under the SSO in 2009 and subsequently moved to a reasonable arrangement, as noted below.

Second, neither the Commission's Opinion and Order nor the Finding and Order points to anything in the record that would support the revision of the tariff to exclude reasonable arrangements consumers who were previously served under the general tariff. In fact, the record evidence suggested the opposite result in the case of customers that had been taking service in 2009 under an SSO. OCC's witness Lane Kollen offered that all consumers that were receiving service under the SSO should be eligible. Tr. Vol. III at 396. Nonetheless, the Commission, in apparent violation of

[10] Section 4905.31, Revised Code, similarly recognizes that the contracting parties to a reasonable arrangement may be a customer, consumer, or employee.

Section 4903.09, Revised Code, failed to tie together anything to support the conclusion that these current special arrangement customers should be denied the benefit of the SEET determination based on the subsequent arrangement.

Finally, the Commission's January 27, 2011 Finding and Order unreasonably denies recovery of the adjustment for a customer who may have been on a tariff rate during 2009 and then moved from that rate. As suggested by Mr. Kollen's conclusion, a customer that was paying the standard rates in 2009 that are later found to be producing significantly excessive returns is no better off in 2011 for prior improper charges regardless of what rate the customer may later have paid. Customers that paid rates in 2009 subsequently judged to produce significantly excessive refunds should benefit, at least proportionately, from the determination of excessive earnings, as suggested by Mr. Kollen.

On these grounds, the January 11 Opinion and Order as implemented by the January 27, 2011 Finding and Order was unlawful and unreasonable.

II. CONCLUSION

For the reasons stated above, IEU-Ohio urges that the Commission grant rehearing of its January 11 Opinion and Order in this matter. The Companies' failure to present a *prima facie* case began a process that resulted in numerous errors, the effect of which renders the Opinion and Order unreasonable and unlawful for the reasons stated above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio* was served upon the parties of record this 10th day of February 2011 *via* electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.

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