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

MEMORANDUM CONTRA COLUMBUS SOUTHERN POWER COMPANY'S AND INDUSTRIAL ENERGY USERS-OHIO APPLICATIONS FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO ENERGY GROUP, AND THE APPALACHIAN PEACE AND JUSTICE NETWORK

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February 22, 2011

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the 665,000 residential electric customers of Columbus Southern Power Company ("CSP") ("Company" or "AEP Ohio"), the Ohio Energy Group ("OEG") (representing 22 of Ohio's most energy-intensive industries) and the Appalachian Peace and Justice Network ("APJN") (a not for profit organization whose members include low-income customers in southeast Ohio) (collectively "Customer Parties") file this memorandum contra the Company's and industrial Energy Users-Ohio ("IEU") Applications for Rehearing of the January 11, 2011 Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this proceeding. Through this Memorandum Contra, the Customer Parties seek to protect the interests of customers of CSP.

The protection against ESP rate increases 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 overwhelmingly

determined that Ohio consumers cannot be made to fund significantly excessive utility profits even if the rates paid by them are alleged to be low by some other measure. The public policy and purpose of the annual earnings test of S.B. 221 was to protect consumers and not provide a safe harbor for windfall profits reaching 22.51%.

The Commission's decision in large part[1] enables the law to work as intended so that customers are not required to fund significantly excessive profits of Columbus Southern Power Company. The Commission should reject the Companies' attempt to pick apart a reasonable and lawful resolution of the issues in the case, in favor of lining the Companies' pockets with more money—money that has been collected from customers of the utility. Moreover, the Commission should also reject Industrial Energy Users-Ohio attempt to whittle down the refunds to SSO customers by ordering credits to be applied to economic development customers, who are already receiving discounts paid for by SSO customers of CSP.

II. ARGUMENT

A. The Commission Did Not Err In Rejecting The Companies' Method For Establishing The SEET Threshold

The Companies applied for rehearing seeking for the PUCO to reconsider the *method* that it used to determine the additional amount that, when added to the baseline ROE, established the SEET threshold.[2] The Companies had proposed using 11.47% as the adder to the threshold, based on a 1.96 standard deviation measure (representing a 95% confidence interval) coupled with 5.85% of the standard deviation of the

[1] Customer Parties did file an application for rehearing contesting parts of the Commission's Opinion and Order.

[2] Application for Rehearing at 7-9.

Companies' comparable group. The overall result was to establish the threshold for Columbus Southern Power Company at 22.51%.[3] In other words, an electric utility ROE of less than 22.51 percent is not significantly excessive for 2009.

The Commission determined that the Companies' recommendation is "unreasonable and inconsistent with the statute."[4] The Commission found that AEP had exclusively relied upon "a bright line statistical test for its SEET threshold" and produced an "unrealistic and indefensible result." It concluded that if it were to accept AEP's analysis it would be forced to accept that an electric utility ROE of less than 22.51% as not significantly excessive. The Commission's determination here was correct.

The Companies' recommendation that companies earning less than 22.51% during 2009 are not earning significantly excessive profits is unreasonable. Earning 20.84% ROE for 2009 (let alone 22.51%) is significantly excessive when compared to publicly traded companies, including utilities that face comparable business and financial risk. It is significantly excessive when compared to the 142 other invest-owned regulated utilities in the United States. CSP had the highest equity return in the country, followed by Dayton Power & Light, giving Ohio (and the Ohioans who pay utility rates) the dubious distinction of having the two most profitable investor-owned electric utilities in America in 2009.[5] 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%.[6]

[3] Makhija Direct Testimony at 28-33.

[4] Opinion and Order at 24.

[5] Joint Ex. 2 at 20-21, LK-3 (Kollen).

[6] Id. at 21, LK-5.

And it is significantly excessive given the hardships being faced by almost all other segments of the Ohio economy during 2009.

The Companies' reliance upon a statistical test to determine an appropriate ROE threshold is also inconsistent with the statute, as the PUCO noted. Under R.C. 4928.143(F), the utility has the burden of proof to demonstrate that significantly excessive earnings did not occur. As noted by Staff Witness Cahaan, the level of statistical significance (95%) proposed by the Company, which results in a threshold ROE of 22.51%, is equivalent to putting the entire burden of showing excessive earnings on other parties[7] because Dr. Makhija sets up "a system such that it is extremely unlikely that [showing excessive earnings] would be ever able to be done." This shifting of the burden is contrary to statute and as a matter of law cannot be accepted by the Commission.

B. The Commission Properly Determined That No Adjustment to CSP's Earned Return Should Be Made to Exclude Deferred Fuel and Economic Development Expenses.

The Company continues to argue on rehearing that the Commission should "remove deferral earnings from CSP's earned ROE."[8] 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 by citing to Witness Hamrock's testimony, which states: "it is inappropriate for the Commission to refund earnings based on revenue that has not actually been collected from the customers."[9] The Company maintains that "the deferral earnings associated with deferred

[7] Tr. III at 527.

[8] Columbus Southern Power Company Application for Rehearing at 10.

[9] *Id.*

fuel costs and the economic development discounts that the Commission concludes result in significantly excessive earnings in 2009 should only be considered during the subsequent period when the revenues are actually collected from customers if earnings are significantly excessive."[10] CSP's arguments are unsound because every dollar of increased revenue achieved through an ESP rate increase also increases earnings by a like amount. Further, deferrals should be included in CSP's return on equity because they 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.

The Company was found to have earned excessively in 2009.[11] The Commission clearly held that deferrals should be included in the Company's return on equity.[12] In adopting the Customer Parties' approach, the Commission ordered CSP to apply the significantly excessive earnings first to any deferrals in the FAC account on CSP's books as of the date.[13] As such, the Company is not required to return to customers "amounts which it has not received."

In the Opinion and Order the Commission followed generally accepted accounting principles, and did not adjust the Company's earnings to exclude deferrals. To this end, the Commission stated:

> Consistent with **generally accepted accounting principles,** deferred expenses and the associated regulatory liability are reflected on the electric utility's books when the expense is incurred. Subsequently, with the receipt of deferred revenues, there

[10] *Id.*

[11] Opinion and Order at 31.

[12] *Id.*

[13] *Id.* at 36.

> is an equal amortization of the deferred expenses on the electric utility's books, such that there is no effect on earnings in future years. Accordingly, we are not persuaded by the arguments of AEP-Ohio to adjust CSP's 2009 earnings to account for certain significant deferred revenue. (Emphasis added)[14]

It is appropriate that the deferred rate increases recognized as regulatory assets be reflected in the return on equity calculation for SEET in the year when booked. This is proper because the deferrals fall within the definition of "rate adjustments" adopted by the Commission in the SEET Order, and because the deferrals are booked this way for financial accounting purposes. Thus, recognizing the deferrals in 2009 is consistent with the PUCO's use of per books earnings for calculating the earned ROE for the annual SEET review. 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.

Further, it would be contrary to R.C. 4928.143(F) to exclude deferrals from the Company's return on equity. If deferred expenses are excluded from CSP's earned return on equity in 2009, as advocated by Witnesses Mitchell and Hamrock, it biases CSP's earnings downward in comparison to the group of comparable companies used to determine the comparable ROE and the SEET threshold. It therefore renders the comparison biased, meaningless, asymmetrical, and contrary to the plain language of 4928.143(F).

The Company further states that "the SEET should not be applied in a manner that undermines the probability of future recovery of deferrals."[15] The Company argues that to do so is contrary to Section 4928.144 Revised Code, which allows phase-ins and the

[14] Opinion and Order at 31.

[15] Columbus Southern Power Company Application for Rehearing at 10.

recovery by EDUs of the underlying deferrals.[16] R.C. 4928.144 is not applicable to the proceeding at hand. What is in question is whether deferrals should be included in the Company's return on equity under R.C. 4928.143(F). Accordingly, the Commission properly determined that deferrals should be included based upon generally accepted accounting principles. CSP's application for rehearing should be rejected.

C. The Commission Properly Rejected The Company's "Void for Vagueness" Doctrine Argument.

The Company fails to present any new arguments in their Application for Rehearing to support their "void for vagueness" argument. Thus, the Customer Parties hereby incorporate their previously made counter arguments as if fully articulated herein.[17]

Although the Company concedes that the Commission lacks authority to declare a statute unconstitutional,[18] they argue that the Opinion and Order impermissibly deprives it of its "lawful" earnings because the Commission seeks to apply an unconstitutionally vague statute.[19] However, the Company fails to acknowledge that administrative agencies must assume statutes are constitutional.[20] 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

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[16] *Id.*

[17] See *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, Reply Brief of Customer Parties, (November 17, 2010), at 2-14.

[18] Columbus Southern Power Company Application for Rehearing at 1.

[19] *Id.*

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

the statute ***with the assumption of its constitutionality.***"[21] Further, under the Rule of Statutory Construction, not only is it presumed that a statute is in compliance with the constitutions of the state and the United States,[22] "[t]he entire statute is intended to be effective."[23]

The Company's arguments with respect to the constitutionality of R.C. 4928.143(F) are flawed, and should be rejected, for the reasons discussed below.

1. The Commission rightfully determined that the void for vagueness doctrine is not applicable to R.C. 4928.143(F).

The Commission explained in the Opinion and Order that R.C. 4928.143(F) is not unconstitutional and the "void for vagueness" doctrine is simply not applicable because 4928.143(F) does not "forbid or require the doing of an act but merely directs that prospective adjustments to rates be made in a future period if there is a finding that past rate adjustments resulted in significantly excessive earnings."[24] As the Commission points out, the Company was well aware that there would be a SEET review when the rate plans were proposed.[25] Further, the Commission explained that "[the] statute does not forbid or require the doing of an act but merely directs that prospective adjustments to

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

[22] See R.C. 1.47.

[23] *Id.*

[24] *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, Opinion and Order, (January 11, 2011), at 9; see also, *Connally v. General Construction Co.*, 269 U.S. 385 (1926), holding that the typical due process claim of vagueness seeks to bar enforcement of "a statute which either forbids or requires the doing of an act."

[25] *Id.*

rates be made in a future period if there is a finding that past rate adjustments resulted in significantly excessive earnings."[26]

The void for vagueness doctrine is a judicially created doctrine employed to challenge the constitutionality of a particular statute.[27] 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.[28] The doctrine is not applicable to R.C. 4928.143(F).

The Company relies on *Norwood v. Horney*, 110 Ohio St.3d 353-2006-Ohio 3799, to establish their argument that the void for vagueness statute can, in certain instances, be applicable to civil laws.[29] Although the void for vagueness doctrine can be applied to civil laws, it is not applicable to the SEET. In *Norwood*, 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."[30] The same cannot be said for R.C. 4928.143(F).

Norwood is not analogous to the proceeding at hand, and the Company's reliance is therefore misplaced. In *Norwood*, the Ohio Supreme Court found that the term "deteriorating area" was void for vagueness. However, the Court ultimately decided that "[t]he unconstitutional portion of R.C. 163.19 [could] be severed from the rest of the

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[26] *Id.*

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

[28] *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 ***."

[29] Columbus Southern Power Company Application for Rehearing at 5.

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

statute, and, accordingly, the remainder of the statute remains in effect." In further support, R.C. 1.50 clearly states: "If any provisions of a section of the Revised Code or the application thereof to 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). It is noteworthy that the Company failed to cite any public utilities cases where a statute had been challenged for vagueness.

2. The Commission Rightfully Determined There is Sufficient Legislative Direction to Reasonably Apply R.C. 4928.143(F) In This Case.

The Commission explains that the "disagreement about how to define and apply this benchmark is not new."[31] Thus, simply because there may be disagreement about how to define and apply SEET, does not mean that the statute is unconstitutional. The parties to this proceeding are technically skilled and trained regulatory experts and attorneys who have developed different methodologies for the application of the SEET – but each expert has found sufficient guidance in the statute to develop an approach to apply the SEET.

The Company sponsored three witnesses who provided extensive testimony on the application of and/or their or their counsel's understanding of the SEET. They authored an Initial Brief, Reply Brief, and now an Application for Rehearing --all arguing

[31] Opinion and Order at 10.

how the SEET statute is to be applied. But because the Commission did not decide in the Company's favor, the Company continues to argue that the statute is "unconstitutional." One must wonder that if the Commission had decided to apply the SEET as CSP argued would CSP still consider the statute vague?

The Commission explained in the January 11, 2011 Opinion and Order that the statute provides ample clarity to determine excessive earnings. To this end, the Commission states:

> Contrary to AEP-Ohio's argument, Section 4928.143(F), Revised Code, provides a clear benchmark for identifying 'excessive earnings.' For example, the statute defines earnings as excessive 'as measured by whether the earned return on common equity of the electric utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities that face comparable business and financial risk.' Additionally, the statute directs the Commission to make 'such adjustments for capital structure as may be appropriate.' Further, the Commission is to consider 'the capital requirements of future committed investments in this state.' Finally, the Commission is directed to 'not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.' These concepts are not new or novel and have been traditionally applied in the regulatory ratemaking process. *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U.S. 591.[32]

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.[33] Indeed, in Ohio the utilities' rate of return has for decades been determined by the PUCO according to the

[32] Opinion and Order at 10.

[33] R.C. 4909.15.

law's relatively non-detailed standard of a "fair and reasonable rate of return."[34] 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*?[35] Although the precise meaning of the just and reasonable standard can be considered broad, a broad standard in no way equates to one that must be characterized as unconstitutionally vague. Neither is the standard set forth in R.C. 4928.143(F). Indeed, the Commission echoed these sentiments in the Opinion and Order stating: "we do not find this issue to be fundamentally different from those in which the Commission regularly decides under Ohio's statutory provisions for utility regulation."[36]

In the case at hand, R.C. 4928.143(F) is not vague. Further, it was not the meaning of R.C. 4928.143(F) that was under debate in this proceeding, rather it was a question of which expert's methodology the Commission would adopt in this case to determine that CSP's earnings were significantly excessive in 2009. The Commission eloquently pointed out: "[u]tility regulation is not so mechanical that it can be performed without any expert judgment."[37] In rate cases, the various parties argue precisely what rate of return they believe is a "just and reasonable" one. Likewise, the SEET case offered similar competing arguments by the parties of what constituted "significantly

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

[35] 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).

[36] Opinion and Order at 10.

[37] *Id.*

excessive earnings." Simply because CSP's expert had a different approach to determining "excessive earnings" does not make the statute vague.

The Company complains that the Commission received a "morass of conflicting opinions" in this case.[38] However, the SEET Order[39] and Entry on Rehearing,[40] 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.[41] In addition, and as discussed in the Initial Brief of the Customer Parties,[42] 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.[43] 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, not to mention the hardships facing ratepayers who must provide the funds to AEP's overflowing coffers.

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[38] Columbus Southern Power Company Application for Rehearing at 6.

[39] *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."

[40] *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."

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

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

[43] *Id.*

In further support, 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.[44]

There has been ample guidance provided to the Company regarding excessive earnings – they are attempting to change the rules after the fact; this is unacceptable.

3. The Commission rightfully concluded that the Company is not being penalized for its earnings under the statute.

The Company complains that the SEET:

> [T]akes away earnings lawfully achieved in a prior year on the theory that those one-year earnings are later deemed to be excessive, but provides no mechanism for augmenting earnings in a year in which they fell significantly short. Because of the retroactive and asymmetrical nature of the SEET, the statute needed to provide greater guidance than that level of guidance than might constitutionally suffice in traditional ratemaking.[45]

The Company is not being penalized for its earnings under the statute. 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 is to examine the company's return for that year - which clearly cannot be completed until the year has ended.

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[44] 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).

[45] Columbus Southern Power Company Application for Rehearing at 6.

In summary, the Company's vagueness doctrine argument should be rejected because 1) the Commission rightfully determined that the void for vagueness doctrine is not applicable to R.C. 4928.143(F); 2) the Commission properly determined there is sufficient legislative direction to reasonably apply R.C. 4928.143(F) in this case; and 3) the Commission justly concluded that the Company is not being penalized for its earnings under the statute.

D. CSP's Request That The Commission Now Modify Its January 11, 2011 Opinion And Order To Delete The Requirement That CSP Expend $20 Million In 2012 On The Turning Point Project Or Some Similar Project Warrants A Decrease In The SEET Threshold Adjustment Of 17.6 Percent If The Commission Grants CSP's Requested Modification.

Throughout this proceeding CSP has advocated that its "commitment" to make a $20 million investment in a solar farm, and other capital investments in Ohio, "should be considered by the Commission as necessary to avoid a finding of significantly excessive earnings for CSP in 2009."[46] But now that the Commission has considered the commitment as a factor meriting adjustment of the SEET threshold upward by 10%, allowing CSP to avoid returning an additional $20 million to consumers, CSP wants to backpedal. CSP is now asking the Commission to "modify its Order to delete the requirement that CSP expend $20 million in 2012 on the Turning Point project or some similar project."[47] In other words, CSP argues that the solar farm should be a commitment investment that should be considered in setting the SEET threshold for 2009, but not a commitment that it must meet at the end of 2012. The word "committed" under Ohio law cannot mean both things that AEP suggests: committed for purposes of

[46] Company Initial Brief at 68, 71-72.

[47] Columbus Southern Power Company Application for Rehearing at 12.

allowing CSP to retain moneys earned in 2009 that are otherwise returnable to customers but not committed for purposes of actually funding the project by the end of 2012—three years after the applicable period for the 2009 SEET analysis. CSP wants it both ways and the Commission here should reject CSP's duplicity.

As argued in the Customer Parties' Initial and Reply Briefs,[48] the Commission is statutorily prohibited from giving any consideration to the solar farm in CSP's 2009 SEET analysis because it is not a "committed" investment under the law. R.C. 4928.143(F)[49] provides that the Commission shall consider whether the return on common equity earned by an electric distribution utility is significantly excessive when compared to risks that publicly traded companies face, with adjustments for capital structure. As part and parcel to such an analysis, the General Assembly directed that "[c]onsideration also shall be given to the capital requirements of future *committed* investments in this state."

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

However, as discussed above, the Commission ultimately considered CSP's "commitment" to provide $20 million in funding to a solar project in Cumberland, Ohio

[48] *See* Customer Parties' Reply Brief at 31-33; see also Customer Parties' Brief at 51-56.

[49] R.C. 4928.143(F). (Emphasis added).

when the Commission found that Staff's 50 percent baseline adder should be adjusted upward to 60 percent, yielding a SEET threshold of 17.6 percent.[50] Specifically, the Commission found that the solar project would "[n]ot only *** advance the state's energy policy, but it will also bring much needed economic development activity to Ohio."[51]

Yet now, CSP is asking the Commission to modify its Order and remove the requirement that CSP expend $20 million before the end of 2012 on the Turning Point project or some similar project.[52] CSP now maintains that it cannot guarantee that all the necessary details will be agreed upon that the project will move forward at a pace that will enable CSP to expend $20 million before the end of 2012.[53] At this point, CSP acknowledges that if sufficient progress in made in the ensuing months, "it will be in a position to propose a firm schedule for this project, or a replacement project, during the course of it next ESP proceeding."[54] And the next ESP proceeding is here and its term spans out to 2014.[55]

Only now through CSP's Application for Rehearing does it argue that the solar project is far from being "committed." Here months later CSP cannot provide a firm schedule for the solar project and CSP is still considering replacement projects. Any

[50] *See* Opinion and Order at 26-27.

[51] *Id.* at 26.

[52] *See* Columbus Southern Power Company Application for Rehearing at 12.

[53] *See id.*

[54] *See id.* at 13.

[55] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan,* Case Nos. 11-346-EL-SSO and Case No. 11-348-EL-SSO.

consideration of the solar project in the 2009 SEET analysis would render the word "committed" in the statute without meaning. Such an application is inconsistent with the plain meaning of the term "committed" and inconsistent with the rules of statutory construction in Ohio, which create a presumption that the entire statute is intended to be effective.[56] "The presumption always is that every word in a statute is designed to have some legal effect, and putting the same construction on a statute, every part of it is to be regarded and so expounded if practicable, to give some effect to every part of it."[57]

Accordingly, the Commission cannot consider any evidence of the solar farm[58] in CSP's 2009 SEET analysis because—as evidenced by CSP's Application for Rehearing— it is not a "committed" investment. Therefore, the Commission should modify its Order and decrease the SEET threshold adjustment of 17.6 percent because it should not adjust the 50 percent baseline adder due to a solar project that is unknown as to when, where, or if it will be completed. If, in the future, CSP commits to such an investment, it may be appropriate for consideration in a future SEET analysis. But the solar project should not have any effect on the Commission's determination as to whether CSP's earnings were significantly excessive in 2009 because, at this time, it is not a "committed" future investment as intended by the Ohio General Assembly.

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[56] *See* R.C. 1.47(B).

[57] *Richards v. Market Exch. Bank Co.* (1910), 81 Ohio St. 348, 90 N.E. 100.

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

E. The Commission Rightfully Determined That Special Contract Customers Should Not Receive Part Of The SEET Refunds Made To SSO Customers.

IEU applied for rehearing on, among other things, the Commission's directive in its Finding and Order of January 27, 2011 that CSP's tariff should exclude a SEET refund to reasonable arrangement customers receiving service under a discounted rates supported by delta revenues.[59] IEU claims that the Opinion and Order, as implemented by the January 27, 2011 Finding and Order, was unreasonable and unlawful. IEU concludes that there is no statutory basis to exclude special contract customers from participating in the prospective adjustment. Additionally, IEU claims that there is nothing in the record to support excluding reasonable arrangement customers from receiving the refunds. IEU is mistaken in both its statutory arguments and its evidentiary argument.

Under R.C. 4928.143(F) excessive earnings that are ultimately refunded to "consumers" are those that result from the utility's electric security plan "adjustments." CSP's ESP adjustments were made and exclusively applied to standard service offer rates collected from standard service offer customers. In order for the statute to be internally consistent "consumers" must be interpreted within the provisions of R.C. 4928.143 as meaning standard service offer customers who paid the SSO rates that produced the excessive earnings under CSP's ESP.

Special arrangement customers, however, by definition are not standard service offer customers. While SSO customers are subject to rates set through offerings

[59] IEU Application for Rehearing at 20-21.

approved by the PUCO in ESP proceedings,[60] special contract customers are not. Special contract customers enter into or establish reasonable arrangements through an entirely different process - a process which recognizes the unique nature of each customer or group of customers. Under R.C. 4905.31 service under a reasonable arrangement allows for unique prices, terms, and conditions as denoted by the flexible provisions of the statute permitting variable rates based on a number of scenarios. Moreover, R.C. 4905.31 also establishes a discrete application process to be followed to obtain approval of reasonable arrangements.

R.C. 4905.31 delineates a separate PUCO approval process for a proposed reasonable arrangement along with a discrete filing of the schedule of rates conforming to the approved reasonable arrangement. Not only are reasonable arrangements controlled by their own statute, but they are judged by a separate set of standards that have been specifically developed and codified in the Ohio Administrative Code[61] as the enabling rules of R.C. 4905.31. Those standards are not the same standards that apply to SSO rates established in the companies' ESP, pursuant to R.C. 4928.143.

Special arrangement customers are separate and apart from SSO customers, and yet IEU argues that they are entitled to the best of all possible worlds—flexibility and discounts under R.C. 4905.31, and refunds under R.C. 4928.143 for excessive earnings that are generated as a result of SSO rates paid for in full by standard service offer customers. Even assuming arguendo that some portion of the special contract customers take service based on standard service offer rates (as opposed to any other basis), there is

[60] These rates are set according to R.C. 4928.142 or 4928.143.

[61] See Ohio Admin. Code 4901:1-38 et seq.

no question that the standard service offer rates paid by such customers are generally discounted and not the full tariffed SSO rates paid for by SSO customers. To argue that such customers are entitled to the full SEET refund on the same footing as SSO customers paying full SSO rates is unreasonable.

Neither does IEU Ohio set forth a convincing argument that there is nothing on the record that would support not applying the SEET refund to special contract customers. In doing so it completely ignores the testimony of Customer Party Witness Lane Kollen who specifically addressed this topic. Mr. Kollen testified that "No refund should go to customers on economic development contracts because their rates have been separately set based on their particular circumstances. In addition, there is no basis to conclude that customers on these subsidized rates contributed to excess profits."[62] Mr. Kollen's testimony was not rebutted by any Staff or Company witness. IEU-Ohio failed to present any testimony at all in this proceeding. Mr. Kollen's testimony presents ample reason to exclude the SEET refund to special contract customers. If special contract customers wish to share in whatever benefits result from a SEET refund, they must first contribute to the costs created by the ESP adjustments that created the significantly excessive earnings. The Commission should affirm its holding in its January 27, 2011 order.

III. CONCLUSION

For the reasons set forth in this Memorandum Contra Applications for Rehearing, the Commission should affirm its Opinion and Order, subject to the issues raised in

[62] Joint Ex. 2 at 27.

OCC's Application for Rehearing. Doing so would assure that the consumers who paid significantly excessive SSO rates get the full refunds they deserve, consistent with the way the law is supposed to work.

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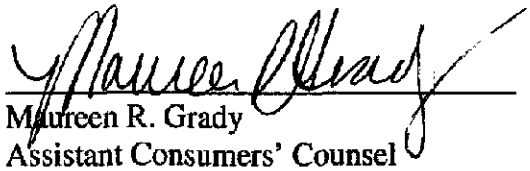
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Columbus Southern Power Company and Industrial Energy Users Ohio Applications for Rehearing was served electronically to the persons listed below, on this 22nd day of February, 2011.



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