

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus)
Southern Power Company and Ohio Power)
Company for Administration of the) Case No. 10-1261-EL-UNC
Significantly Excessive Earnings Test under)
Section 4928.143(F), Revised Code, and Rule)
4901:1-35-10, Ohio Administrative Code.)

ENTRY ON REHEARING

The Commission finds:

- (1) On July 31, 2008, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (jointly, AEP-Ohio or the Companies) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. The application was for an electric security plan (ESP) in accordance with Section 4928.143, Revised Code.
- (2) On March 18, 2009, the Commission issued its opinion and order (ESP Order) modifying and approving AEP-Ohio's ESP.¹ By entries on rehearing issued July 23, 2009 (First ESP EOR), and November 4, 2009 (Second ESP EOR), the Commission affirmed and clarified certain issues raised in AEP-Ohio's ESP Order.
- (3) On September 1, 2010, AEP-Ohio filed the instant application for the administration of the significantly excessive earnings test (SEET), as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.). By entry issued September 21, 2010, as amended on October 8, 2010, a procedural schedule was established for this proceeding.
- (4) Motions to intervene were timely filed by, and intervention granted to, the following entities: the Office of the Ohio Consumers' Counsel (OCC), Ohio Energy Group (OEG), Appalachian Peace and Justice Network (APJN), Ohio Manufacturers' Association (OMA), Ohio Hospital Association (OHA), Ohio Partners for Affordable Energy (OPAE), and

¹ *In re AEP-Ohio*, Case Nos. 09-917-EL-SSO and 09-918-EL-SSO.

Industrial Energy Users-Ohio (IEU-Ohio). Pursuant to the entry issued December 1, 2010, The Kroger Company (Kroger) was granted limited intervention to participate in the SEET case.

- (5) On January 11, 2011, the Commission issued its Opinion and Order (SEET Order), pursuant to the requirements of Section 4928.143(F), Revised Code, and the Commission's directives in *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 (09-786). In the SEET Order, the Commission found that under any party's proposed SEET analysis presented in this proceeding, OP's earned return on equity (ROE) is less than 200 basis points above the mean of the comparable group of companies. Thus, the Commission concluded that OP did not have significantly excessive earnings for 2009 pursuant to Section 4928.143(F), Revised Code, and the Commission's directives in 09-786.

As to CSP, the Commission ultimately concluded that, based on an earned ROE of 20.84 percent for 2009, CSP had significantly excessive earnings of \$42.683 million. Accordingly, the Commission directed CSP to apply the significantly excessive earnings, first to any deferrals in the fuel adjustment clause (FAC) account on CSP's books as of the date of the SEET Order, with any remaining balance to be credited to CSP's customers on a per kilowatt hour (kWh) basis beginning with the first billing cycle in February 2011 and coinciding with the end of the current ESP period. The Commission also concluded that any balance credited to CSP's customers would not be deducted from CSP's earnings for purposes of the 2011 SEET review.

- (6) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (7) On February 10, 2011, applications for rehearing were filed by Customer Parties,² CSP, IEU-Ohio and OP&E. Memoranda

² Originally, Customer Parties included OMA and OHA. However, neither the reply brief nor the application for rehearing filed by Customer Parties included OMA or OHA as parties to the pleadings. Only OCC, APJN, and OEG are listed as parties to the reply brief and application for rehearing.

contra the various applications for rehearing were filed by CSP, IEU-Ohio, Customer Parties, and OP&AE. In their applications for rehearing, the parties raise a number of assignments of error, alleging that the SEET Order is unjust, unreasonable, and/or unlawful.

- (8) On January 21, 2011, CSP filed tariffs to implement the directives in the SEET Order. CSP proposed that any over or under reconciliation be addressed in the subsequent FAC audit and determined that based on its calculations, all CSP customers, including reasonable arrangement customers, will receive a credit of \$.001256 per kWh. By entry issued January 27, 2011, the Commission approved the proposed SEET tariff, with clarification that reasonable arrangement customers who receive service under a discount rate supported by delta revenue recovery are not entitled to both the discount rate and a SEET credit. Therefore, the Commission directed CSP to revise the SEET credit calculation to omit such reasonable arrangement customers and file revised tariffs.
- (9) The Commission has reviewed and considered all of the arguments on rehearing. Any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and are being denied.

Constitutionality and Application of Section 4928.143(F), Revised Code

- (10) CSP argues that the Commission erred by concluding that Section 4928.143(F), Revised Code, provides ample direction to reasonably apply the statute in this case. CSP presents three arguments in support of this assignment of error. First, CSP notes that the Commission erred by concluding that Section 4928.143(F), Revised Code, is not void for vagueness. Next, CSP claims that the Commission erred by determining that there is ample legislative direction to reasonably apply Section 4928.143(F), Revised Code, in this case. Last, CSP asserts that the Commission erred in finding that the SEET issue is not fundamentally different from concepts the Commission regularly decides under Ohio's statutory provisions for utility regulation. (CSP App. at 4-6.)

- (11) The Commission fully addressed the arguments CSP raises in its first assignment of error at pages 9-10 of the SEET Order. As CSP has raised no new argument not already considered and addressed by the Commission, we find that CSP's first assignment of error should be denied.
- (12) IEU-Ohio raised eight arguments in support of its position that the SEET Order was unjust and unreasonable.³ IEU-Ohio argues that it was unreasonable for the Commission to have failed to order CSP and OP to refile their testimony and supporting materials to properly address the requirements of Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C. IEU-Ohio next submits that the Commission erred by failing to properly apply the SEET as outlined in Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C. Next, IEU-Ohio argues that the Commission erred by determining that the SEET may be measured by the total company return on common equity rather than the electric distribution utility's (EDU) earned return on common equity from the ESP. Even if reliance on total company data was lawful, IEU-Ohio asserts that the Commission failed to adjust appropriately net income and common equity to account fully for the removal of off-system sales (OSS) and other non-jurisdictional effects from the calculation of excessive earnings. (IEU-Ohio App. at 5-14.)
- (13) The Commission fully addressed at pages 13-14 of the SEET Order the first four arguments raised by IEU-Ohio in its application for rehearing. As IEU-Ohio has raised no new argument not already considered and addressed by the Commission, we find that IEU-Ohio's first four arguments of error should be denied.
- (14) IEU-Ohio next argues that the Commission erred by failing to use the appropriate annual period to conduct the SEET as required by Section 4928.143(F), Revised Code. IEU-Ohio submits that the start date of the ESP was April 1, 2009, and thus, the annual period should have ended on March 31, 2010, but that the Commission once again relied on the noncompliant position that the ESP was retroactive to January 1, 2009. (IEU-Ohio App. at 14-15.)

³ IEU-Ohio's first four assignments of error were grouped together for discussion in its application for rehearing and will be treated similarly in this entry on rehearing.

- (15) As noted in the SEET Order at page 13, the Commission has on several prior occasions addressed the start date of AEP-Ohio's ESP. See AEP-Ohio ESP Order at 64; Entry Nunc Pro Tunc (March 30, 2009); and First ESP EOR at 41-45. As the Commission has already fully addressed this issue and because IEU-Ohio has raised no new argument not already fully considered and addressed by the Commission, we deny IEU-Ohio's assignment of error on this matter.
- (16) IEU-Ohio further argues that the SEET Order was unlawful and unreasonable because the Commission failed to comply with the policy of the state as outlined in Section 4928.02, Revised Code, to ensure the availability to consumers of reasonably priced electric service and encourage the competitiveness of Ohio's economy (IEU-Ohio App. at 17-19).
- (17) IEU-Ohio's concern with the Commission's order on this issue appears to be one of degree as the Commission sided with IEU-Ohio and with the intervenors on the argument that CSP benefitted from significantly excessive earning during 2009. In other words, IEU-Ohio's argument appears to be predicated on the position that the Commission's order did not go far enough in ordering customer refunds. IEU-Ohio's assignment of error is predicated on the position that there may be an understatement of the amounts by which CSP exceeded the significantly excessive threshold and that Ohio's competitiveness is being harmed because AEP-Ohio retail customers may be carrying more than their fair share of the profitability achieved by the parent, American Electric Power Company, Inc. The Commission fully explained, in the SEET Order, the rationale for rendering the determination that CSP benefitted from significantly excessive earnings during 2009 and the appropriate level of refunds to be returned to customers pursuant to Section 4928.143(F), Revised Code. Aside from the issues addressed in the SEET Order, IEU-Ohio has not demonstrated the presence of any other significant factors that has caused Ohio customers to carry more than their fair share of the parent company's profitability. IEU-Ohio's assignment of error on this matter is, therefore, denied.

Comparable Group of Companies, Return on Equity of Comparable Companies and SEET Threshold

- (18) OP&A argues the SEET Order is unreasonable and unlawful under the requirements of Section 4928.143(F), Revised Code, in its rejection of Customer Parties' methodology and composition of the comparable group of companies, the comparable companies' benchmark ROE of 9.58 percent, and the establishment of the SEET threshold range of 11.58 percent to 13.58 percent based on a 200-400 basis points adder over the comparable companies' ROE. OP&A also argues that the SEET Order is unreasonable and unlawful for failing to make, in OP&A's opinion, the statutory refund required based on the arguments of Customer Parties. (OP&A App. at 3-8, 14-16.)
- (19) Similarly, CSP also argues that the SEET Order is unlawful and unreasonable in its failure to adopt AEP-Ohio's method for establishing the benchmark ROE, determination of significantly excessive earnings at approximately two standard deviations above the benchmark ROE, and adoption of the 2009 SEET threshold of 22.51 percent (CSP App. at 7-9). Customer Parties and OP&A support the Commission's rejection of CSP's proposed method for establishing and adopting the SEET threshold (Customer Parties Memo at 2-4; OP&A Memo at 4-5). IEU-Ohio, however, maintains that CSP and OP failed to file a SEET application which complied with the statutory requirement to demonstrate that the electric utilities did not have significantly excessive earnings. (IEU-Ohio Memo at 5-6.)
- (20) The Commission thoroughly considered and discussed in the SEET Order each party's process to determine the comparable group of companies, the comparable companies' benchmark ROE, and the SEET threshold to determine the significantly excessive earnings subject to refund. The SEET Order also presented the Commission's rationale and justification for its decision on each component of the SEET analysis. Neither OP&A nor CSP presents any new arguments that the Commission did not already consider. Accordingly, OP&A's and CSP's requests for rehearing, on the basis that the Commission did not adopt their respective positions, are denied.
- (21) OP&A contends that the SEET Order is unreasonable and unlawful to the extent that it adopts Staff's proposed 50 percent

add to the benchmark ROE and considered "utility specific factors related to investment requirements, risk and investor expectations" to adjust the adder applied to the mean ROE of the comparable group of companies. OPAE insists that the Commission should have only considered CSP's capital requirements for future committed investments in Ohio to occur during the current ESP period, through December 2011, which are not funded by riders paid by ratepayers. OPAE argues that CSP's capital investment budget for 2009 was below its actual construction expenditures in 2007 and 2008. For these reasons, OPAE concludes that the Commission should not have accorded any consideration to the solar project, the gridSMART project, future environmental investments, or for any shopping risk. (OPAE App. at 8-12.)

- (22) As the Commission indicated in the order and entry on rehearing in 09-786 and as thoroughly discussed in the SEET Order at pages 23-27, the Commission must recognize, in applying the SEET, the variation among Ohio's electric utilities and our obligation to ensure that the electric utility is allowed to operate successfully, to maintain its financial integrity, attract capital, and to compensate its investors. OPAE has not raised any new arguments for the Commission's consideration. As such, the Commission affirms its decision in the SEET Order and denies OPAE's request for rehearing on this matter.

Adjustments to CSP's 2009 Earnings

- (23) OPAE and Customer Parties request that the Commission reconsider the exclusion of OSS margins from CSP's earnings for the SEET. OPAE and Customer Parties assert that OSS are an inherent component of CSP's earnings and further argue that excluding OSS from CSP's earnings skews the comparison to the earnings of the comparable group of companies in violation of the language in Section 4928.143(F), Revised Code. (OPAE App. at 13; Customer Parties App. at 6-7.)
- (24) These are the same arguments presented to the Commission on brief by Customer Parties and OPAE regarding OSS in the SEET calculation and considered in the Commission's decision. OPAE and Customer Parties have not presented any new arguments for the Commission's consideration. As such, the requests for rehearing regarding the exclusion of OSS from the SEET calculation are denied.

- (25) Further, Customer Parties and OP&A argue that the Commission's adoption of the Staff's adjustment to account for the impact of excluding OSS from the SEET calculation is incomplete as no evidence was presented to correctly quantify the necessary adjustment. Customer Parties and OP&A claim that the adjustment in the SEET Order understates the significantly excessive earnings subject to refund and argue that, because there is a lack of record evidence to correctly quantify the exclusion of OSS, CSP failed to meet its burden of proof in accordance with Section 4928.143(C)(1), Revised Code. Therefore, Customer Parties and OP&A contend that the Commission must include OSS in CSP's earnings for purposes of the SEET. (OP&A App. at 13-14; Customer Parties App. at 3-5.)
- (26) The arguments presented by Customer Parties and OP&A on rehearing do not persuade the Commission that OSS should be included in the electric utility's earnings for purposes of the SEET. We also note that, in their brief, Customer Parties acknowledged, at least conceptually, Staff's adjustment as a starting point for excluding OSS. The Commission affirms its decision to exclude CSP's OSS from the SEET analysis for the reasons stated in the SEET Order. Further, while it is always our intent to correctly calculate any adjustment, in this instance we used the best information available in the record to account for the equity effect in the numerator and the denominator. Thus, we affirm the SEET Order and deny Customer Parties' and OP&A's requests for rehearing on this matter.
- (27) IEU-Ohio also finds error in the Commission failing to remove the operating expenses of the Waterford and Darby generating stations from the calculation of the SEET when the Commission previously ordered that the expenses be removed from the ESP (IEU-Ohio App. at 15-17).
- (28) The Commission fully addressed this issue at pages 13 and 14 of the SEET Order. Having raised no new argument for the Commission's consideration, IEU-Ohio's assignment of error on this issue is denied.
- (29) CSP contends that the SEET Order is unlawful and unreasonable to the extent the Commission included non-cash earnings, deferrals of FAC revenues, and economic development rider revenues in the calculation of the company's

earnings. CSP reiterates its position that including deferrals in the company's earnings jeopardizes the electric utility's ability to create deferrals and the Commission's ability to phase-in rate increases in contrast to the policy expressed in Section 4928.144, Revised Code. CSP argues that if an electric utility is determined to have significantly excessive earnings and has deferrals, the electric utility should not have to refund amounts not yet received nor refund amounts that are merely a recovery of costs which do not contribute to earnings. CSP advocates that, in the year the deferral is collected, when cash is received from customers, if the electric utility has significantly excessive earnings in that year, an adjustment be made to exclude the amortized deferral expenses to recognize recovered revenues in the earnings subject to refund. (CSP App. at 10-11.)

- (30) Consistent with the Commission's conclusion in the SEET Order, Customer Parties, OPAE, and IEU-Ohio ask the Commission to deny CSP's request for rehearing on this issue. IEU-Ohio explains that CSP's process would shift earnings to later periods and, by definition, understates income. Customer Parties offer that deferrals fall within the definition of "rate adjustments" as adopted in 09-786 and, because deferrals are included in the ROE reported for financial accounting purposes, it is appropriate to include deferrals in CSP's earnings for the SEET analysis. (OPAE Memo at 5; IEU-Ohio Memo at 6; Customer Parties Memo at 4-7.)
- (31) The Commission thoroughly considered AEP-Ohio's position and presented the Commission's justification for including deferrals in the SEET analysis at pages 30-31 of the SEET Order. CSP has not presented any new arguments for the Commission's consideration on rehearing. Accordingly, CSP's request for rehearing on this issue is denied.
- (32) CSP also argues that the SEET Order is unreasonable and unsupported by the record to the extent that the Commission required CSP to expend \$20 million by the end of 2012 on the Turning Point solar project in Cumberland, Ohio, or other similar project. CSP states that, although it is fully committed to the solar project, there are outstanding details, including federal loan guarantees and state and local tax incentives, which must be finalized for the project to go forward. The company argues that the regulatory requirement to spend \$20 million by the end of 2012 is detrimental to CSP's ability to

negotiate the best terms for its investment and, therefore, is not in the public interest, which is not ameliorated by the option to invest in another similar project. CSP requests the flexibility necessary to make the best decision as to how the Turning Point project or similar project is structured and implemented. CSP expects that sufficient progress will be made in the upcoming months to allow the company to propose a firm schedule for the solar project or similar project, during the course of its next ESP proceeding.⁴ In the alternative, CSP asks that the Commission require the company to submit a status report on the Turning Point project or other similar project in 2012 so that the Commission can consider and determine whether sufficient progress is being made. (CSP App. at 11-13.)

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

Application of the SEET Credit

- (34) IEU-Ohio offers that the SEET Order, as implemented by the January 27, 2011 entry, addressing the applicable tariffs, is unreasonable and unlawful to the extent that reasonable arrangement customers paying rates under the SSO do not receive the SEET credit in violation of Sections 4928.143(F) and 4903.09, Revised Code (IEU-Ohio App. at 19-21).
- (35) Special arrangement customers receive a discount off of the otherwise applicable tariff rate and the difference between the tariff rate and the discounted rate is recoverable from the electric utility's remaining customers. As such, special

⁴ *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO and 11-348-EL-SSO; and *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority*, Case Nos. 11-349-EL-AAM and 11-350-EL-AAM.

arrangement customers did not fully contribute to CSP's 2009 significantly excessive earnings as determined in the SEET Order and should not be entitled to the SEET credit. Accordingly, the Commission denies IEU-Ohio's request for rehearing on this issue.

Other Issues

- (36) Customer Parties argue that the SEET Order is unreasonable and inconsistent with paragraphs (A) and (L) of Section 4928.02, Revised Code, as the Order failed to require CSP to honor the \$1 million commitment to the Partnership with Ohio, as set forth in the Stipulation filed November 30, 2010. Given the slow economic recovery in the state, Customer Parties admonish the Commission for not requiring CSP to honor the \$1 million commitment to the Partnership with Ohio. (Customer Parties App. at 7-10.)
- (37) Customer Parties note, but then ignore the fact, that CSP withdrew from the Stipulation but "unilaterally and voluntarily agreed" to fulfill certain obligations under the Stipulation which did not include the negotiated commitment to the Partnership with Ohio. The SEET Order merely recognized CSP's voluntary agreement to fulfill certain obligations with shareholder funds pursuant to its notice of withdrawal of the Stipulation. Since the Stipulation was withdrawn, the Commission finds it inappropriate to hold any party to a select provision of the Stipulation unless the party elects to do so voluntarily. Accordingly, Customer Parties' request for rehearing to enforce the Partnership with Ohio provision of the withdrawn Stipulation is denied.

It is, therefore,

ORDERED, That the applications for rehearing be denied. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties and other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman


Paul A. Centolella


Valerie A. Lemmie


Steven D. Lesser

Cheryl L. Roberto

GNS/JRJ/vrm

Entered in the Journal

MAR 09 2011


Renee J. Jenkins

Renee J. Jenkins
Secretary

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CONCURRING AND DISSENTING OPINION
OF COMMISSIONER CHERYL L. ROBERTO

I concur with my colleagues in each aspect of the majority opinion, excepting the demarcation as to which "consumers" are due SEET credit.

We previously found, and affirm here on rehearing, that CSP, as a result of provisions (or "adjustments")¹ included in its most recent electric security plan, enjoyed significantly excessive earnings of \$42.683 million. Pursuant to Section 4928.143(F), Revised Code, having made such a finding, the Commission "shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustment...." It falls to the Commission to identify which consumers are due SEET credit.

CSP's electric security plan included provisions (adjustments) relating to the supply and pricing of generation service, as well as provisions relating to CSP's distribution service. Any or all of these provisions could have been the source of the significantly excessive earnings. In the absence of a record otherwise, we must assume that all such provisions did contribute to the significantly excessive earnings and, as such, any consumer class² that contributed revenue pursuant to one of these provisions is due SEET credit. Thus, on the facts before us, a SEET credit would be due to any consumer on CSP's distribution system.

On a more complete record, I believe it would have been possible and appropriate for the Commission to determine that the significantly excessive earnings were principally due to provisions relating to supply and pricing of generation service. On these

¹ Section 4928.143, Revised Code, uses "provisions" and "adjustments" interchangeably.

² Because Section 4928.143, Revised Code, directs that significantly excessive earnings must be returned to consumers "by prospective adjustment," I believe we must reject any of the arguments on rehearing that suggest an individual consumer's status or magnitude of usage during the previous year is relevant to whether the consumer receives a SEET credit. The "return" of significantly excessive earnings is prospective not retrospective. Thus, the "return" is to a consumer class prospectively. Those current members of the recipient class will be the consumers receiving the SEET credit.

hypothetical facts, the consumers due a SEET credit would be those consumers purchasing power pursuant to the standard service offer only. On these circumstances, it would have been appropriate to exclude from receipt of the SEET credit any consumer who does not purchase power from CSP via the standard service offer, e.g. consumers on reasonable arrangements or consumers who shop competitive suppliers for their energy.

In the case before us, however, we have made no finding that the significantly excessive earnings were due principally to provisions relating to supply and pricing of generation. Yet the majority excludes CSP distribution service consumers who purchase power via a reasonable arrangement from receipt of the SEET credit. The majority, however, does not exclude CSP distribution consumers who shop for their energy. In ruling thus, the majority has stated that "reasonable arrangement customers who receive service under a discount rate supported by delta revenue recovery are not entitled to both the discount rate and a SEET credit." I can find no statutory support for this distinction, therefore I dissent from this portion of the Entry on Rehearing.

A handwritten signature in cursive script, reading "Cheryl L. Roberto", is written over a horizontal line.

Cheryl L. Roberto