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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Investigation Into The)
Development Of The Significantly)
Excessive Earnings Test Pursuant to S.B.)
221 For Electric Utilities.)

Case No. 09-786-EL-UNC **PUCO**

**APPLICATION FOR REHEARING
BY**

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE OHIO ENERGY
GROUP, THE OHIO HOSPITAL ASSOCIATION, THE OHIO
MANUFACTURERS' ASSOCIATION AND CITIZEN POWER INC.**

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The Office of the Ohio Consumers' Counsel ("OCC") (representing 4.5 million residential customers), the Ohio Energy Group ("OEG") (representing 22 of Ohio's most energy-intensive industries), the Ohio Hospital Association ("OHA") (representing 170 primary care facilities and 40 health systems across Ohio), the Ohio Manufacturers' Association ("OMA") (representing over 1600 large and small industrial manufacturers), and Citizen Power, Inc. (a not-for-profit research education and advocacy agency) collectively referred to as "Customer Parties" each respectively submit this Application for Rehearing¹ of the Public Utilities Commission of Ohio's Entry dated July 14, 2010.

The Customer Parties assert that the Commission's Entry was unjust and unreasonable, and the Commission erred by:

(A) allowing a further one and a half month delay for all utilities, including Columbus Southern Power Company (CSP), for the filing of their applications to initiate the 2009 Significantly in Excess Earnings Test (SEET) review.

(B) failing to order that any SEET-related refunds to customers for 2009 include interest, and that such interest should accrue beginning January 1, 2011.

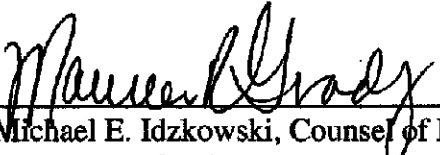
¹ This application is filed under R.C. 4903.10 and Ohio Admin. Code 4901-1-35.

Customer Parties seek for the PUCO to "abrogate or modify" its ruling, under R.C. 4903.10(B), that permitted a further delay in the SEET filings. Additionally, Customer Parties urge the PUCO to impose interest on prospective adjustments ordered for 2009. Such a ruling is essential to protect customers from delays that hinder a timely and expeditious return to customers of significantly excessive earnings that they have funded.

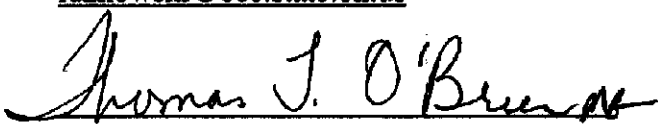
The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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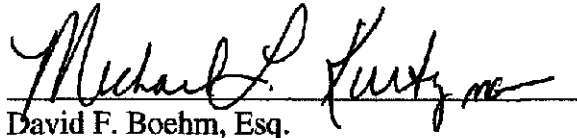

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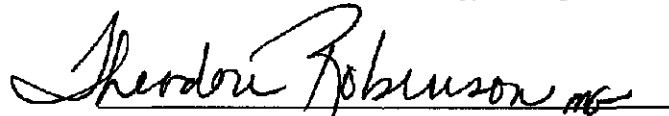
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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STANDARD OF REVIEW	2
III. ARGUMENT	3
IV. CONCLUSION.....	9

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Under R.C. 4928.143(F), the PUCO is to consider, following the end of each annual period of the electric security plan (“ESP”), if “adjustments” resulted in excessive earnings. If the Commission finds that the adjustments, in the aggregate, did result in significantly excessive earnings it “shall” require the Company to return to consumers the amount of the excess by prospective adjustments.

The Commission, in promulgating rules to enable the review required under R.C. 4928.143, established May 15 of each year as the deadline for a utility to file its application demonstrating whether adjustments authorized under the ESP resulted in significantly excessive earnings during the review period.² On May 5, 2010, the Commission, in response to a single utility’s request,³ acting *sua sponte*, extended this May 15, 2010 deadline⁴ for all the SEET applications. The Commission extended the filing date by two months, until July 15, 2010, despite the opposition of the Customer

² Ohio Admin. Code 4901:1-35-10.

³ *In the Matter of the Application of Columbus Southern Power Company And Ohio Power Company for a Limited Waiver Pursuant to Section 4901:1-35-02(B)*, Case No. 10-517-EL-WVR, Application (Apr. 16, 2010).

⁴ Under Ohio Admin. Code 4901-1-35-10, the SEET applications were to be filed at the PUCO on May 15, 2010.

Parties. The Commission based its ruling in part upon the fact that it had yet to rule upon the SEET guidelines.⁵

Subsequently, the Commission ruled upon the SEET guidelines.⁶ Duke Energy Ohio Inc. (“Duke”) then filed to add onto the July 15, 2010 extension, by filing a motion to extend the deadline until 21 days after final resolution of all applications for rehearing that it and others may file. Duke argued that it anticipates filing a rehearing on the Commission SEET guideline Order, and that the July 15, 2010 SEET filing deadline precedes the deadline by which applications for rehearing may be filed.

On July 14, 2010, the Commission not only granted Duke’s request, but also, *sua sponte*, ordered that “in fairness to the other utilities” an extension until September 1, 2010, should be granted to AEP Ohio and FirstEnergy. The Commission presented no reason for choosing that date (September 1, 2010), other than by way of finding that Duke’s request for an extension until “final resolution” of all applications for rehearing was “tenuous or unclear, at best.”⁷

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that, within thirty (30) days after issuance of an order from the Commission, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” Furthermore, the

⁵ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for a Limited Waiver Pursuant to Section 4901:1-35-02(B)*, Case No. 10-517-EL-WVR, Entry at ¶7 (May 5, 2010).

⁶ See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010).

⁷ See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order at 4 (June 30, 2010).

application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”⁸

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”⁹

Furthermore, if the Commission grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same ***.”¹⁰

Pursuant to R.C. 4903.221, OCC filed a motion to intervene on October 2, 2009. Other members of the Customer Parties moved to intervene on or around October 5, 2009. The Customer Parties have been actively involved in this proceeding, submitting comments and reply comments. Additionally, Customer Parties participated in the April 1, 2010 Commission discussion on SEET, and filed responses to the Commission questions on that date. The Customer Parties meet the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, Customer Parties respectively request that the Commission hold a rehearing on the matters specified below.

III. ARGUMENT

(A) The PUCO erred by allowing a further one and a half month delay for all utilities, including Columbus Southern Power Company (CSP), for the filing of their applications to initiate the 2009 Significantly in Excess Earnings Test (SEET) review.

⁸ R.C. 4903.10.

⁹ *Id.*

¹⁰ *Id.*

The SEET is the primary mechanism in S.B. 221 for protecting Ohio customers from unreasonable rates for electric service, which is accomplished by preventing utilities from earning significantly excessive profits. If the Commission finds that the electric security plan (ESP) provisions resulted in excessive earnings it “shall” require the EDU to return the excess to customers.

The SEET review under R.C. 4928.143(F) is an annual review that is to occur “following the end of each annual period of the plan.” The first SEET review is to determine if the earnings for 2009 were significantly excessive for the electric distribution utilities operating in Ohio. The rules established by the Commission set a reasonable filing date of May 15 for the SEET filings.¹¹ This deadline was consistent with the notion that income statement and balance sheet information necessary to review earnings is contained in the FERC Form 1 and the Security And Exchange Commission (“SEC”) Form 10K that is available at the end of April.¹² The May 15 date also allowed additional time for the utilities to file their applications demonstrating whether or not the rate adjustments resulted in significantly excess earnings during the review period. Under a May 15 filing deadline, it would be anticipated that an order addressing 2009 earnings likely would be issued in 2010—returning to customers significantly excessive earnings they have funded. This time line allows consumers to obtain a full refund to which they are entitled as promptly as possible and without delay.¹³

¹¹ See Ohio Admin. Code 4901:1-35-10.

¹² See *In the matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, Finding and Order at 4 (Sept 17, 2008). Earlier the Staff had proposed that the SEET applications be filed April 1 of each year.

¹³ See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Customer Party Comments at 23 (Dec. 14, 2009).

However, notwithstanding its May 15 established deadline, the Commission now has twice allowed utilities to delay filing their SEET applications. Most recently the PUCO granted another delay from July 15, 2010 to September 1, 2010. It is the latest unjust and unreasonable delay on top of the already month and a half delay that is unjust and unreasonable and threatens to hinder a timely and expeditious return to customers of earnings that they have funded that are significantly excessive.

A delay in the SEET filings means a delay in reviewing the SEET applications. A delay in reviewing the SEET applications equates to a delay in issuing a decision on whether a utility's earnings were significantly excessive in 2009. A delay in ruling upon the 2009 earnings under the SEET applications means a delay in getting refunds to customers. It also means that excessive earnings from the ESP plans, paid for by customers, remain in the hands of the utility many months longer than is justifiable.

This is not how the Legislature intended the primary consumer protection tool to work. While the statute does not specifically address how quickly the annual SEET review should occur "following the end of each annual period of the plan," it is reasonable to expect that the annual review should be concluded by the end of the following year. For 2009 earnings one would expect a PUCO decision on or before the end of 2010. That does not appear to be possible here where the PUCO has facilitated undue delay in the SEET applications—in the name of some perceived "fairness"¹⁴ to the utilities.

Where is the fairness to the customers here? Under the approach being currently endorsed by the PUCO, it is likely that customers will see 2010 come and go before any decision on the merits of the SEET applications. 2011 appears, at this time, to be a realistic target for when 2009 excessive earnings will be returned to customers--some two

¹⁴ "Fairness" was one of the rationale listed in the Commission's Entry. See Entry at 4.

years after significantly excessive earnings attributable to the ESP plans occurred. All the while, the utilities have a safe harbor for windfall profits that the Legislature intended to take away by way of the SEET review. And during this time period, utilities have unencumbered use of the significantly excessive earnings funded by Ohio customers. It is no wonder why the utilities have requested delay after delay of their SEET filings. And the PUCO has allowed the utilities to do so, controlling in large respect how long utilities are able to retain moneys collected from customers that resulted in utilities earning significantly excessive earnings in 2009. The Commission's actions, coupled with the utilities' requests, threaten to emasculate the protection for customers envisioned under a SEET review process.¹⁵

Customer Parties urge the Commission to reverse its ruling permitting all the electric distribution utilities additional time to file their SEET applications. Rather, in order to get the SEET review underway, the Commission should order the utilities to file their SEET applications forthwith. This will facilitate, not impede, the timely return to customers of funds that enabled the utilities to earn significantly excessive earnings in 2009.

(B) The PUCO erred by failing to order that any SEET-related refunds to customers for 2009 include interest, and that such interest should accrue beginning January 1, 2011.

Additionally, in the interest of fairness to customers, and consistent with the legislative intent to protect customers from funding significantly excessive earnings, the Customer Parties claim that the PUCO erred in failing to impose interest of any SEET-related refunds customers would receive. Customer Parties request that the Commission

¹⁵ Compare *Office of Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 372, 376 (finding that the utility's post-test year wage adjustment should be disallowed, noting that the utility controlled the filing date of its application).

impose interest at the utility's weighted cost of capital on any prospective adjustments (e.g. refunds) that may be subsequently ordered for the 2009 earnings of the Ohio EDUs. If the proceedings on the 2009 SEET applications have not been concluded and an order issued determining whether the utilities earned significantly excessive earnings by December 31, 2010, any prospective adjustment related to significantly excessive earnings for 2009 should include interest on the prospective adjustment that will begin accruing January 1, 2011. The interest calculated should be at the utility's weighted cost of capital.

Providing interest on potential refunds will provide some protection to customers for the delays that may be allowed or may be a consequence of the SEET review process. Additionally, providing interest brings much needed symmetry to the ESP plans, where customers are being charged interest on deferred expenses, with the interest going into the pockets of the utility.¹⁶

Although there is no provision in the law mandating interest on SEET prospective adjustments¹⁷, the concept and reasoning for such can be found in analogous statutes and decisions of the PUCO. For example, R.C. 4909.42 is a statute that provides for interest on refunds to consumers. This statute addresses what happens if no order is issued within 275 days of the filing of an application for a rate increase. While the utility is entitled to put the rates it has requested into effect, it must submit an undertaking and promise to refund any amounts collected over the amount awarded by the PUCO in its final order. All refunds are to include interest at the rate specified under R.C. 1343.03.

¹⁶ See e.g. *In the Matter of the Application of the Columbus Southern Power Company for Approval of an Electric Security Plan; and Amendment to its Corporate Separation Plans; and the Sale or Transfer of certain Generating Assets*, Case No. 08-917-EL-SSO, Opinion and Order (Mar. 18, 2009)(ordering carrying costs on deferred fuel expenses, environmental investment).

¹⁷ Neither is there limiting language in this section of the statute that evinces an intent to preclude interest. Nor is permitting interest a violation of any other provision of the Revised Code.

On the case law side, where the Commission has ordered refunds for over-collecting fuel costs under the fuel cost recovery rider, the Commission imposed interest on the over-recovery at the utility's embedded cost of long-term debt.¹⁸ The Commission has also ruled in the IGCC docket¹⁹, that if AEP Ohio has not commenced construction by June 28, 2011, charges collected from customers must be refunded to customers with interest.²⁰ Similarly, where the Supreme Court of Ohio ordered refunds to customers for the construction work in progress allowance they funded for the Zimmer nuclear plant, the Court imposed interest on the refunds by requiring the funds to be placed in an interest-bearing account, consistent with R.C. 4903.13.²¹ In other cases, the Commission has ruled that customers who have paid charges in excess of the amounts authorized under tariff should be entitled to refunds with a reasonable interest rate.²² In gas cost recovery proceedings, the PUCO has insisted that interest be applied to supplier refunds.²³ The PUCO has also determined that in granting emergency rate relief under

¹⁸ See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 07-1003-EL-ATA; Case No. 07-1004-EL-AAM, Entry (March 24, 2010).

¹⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC.

²⁰ *Id.* Finding and Order at 2 (June 28, 2006).

²¹ *Columbus & Southern Ohio Electric Co. v. Public Utilities Comm.* (1984), 10 Ohio St.3d 12 (appeal of PUCO Case No. 81-1058-EL-AIR).

²² See for e.g. *OCC, on Behalf of Jim and Helen Heaton et. al. v. Columbus and Southern Ohio Electric Company*, No. 83-1279-EL-CSS, Opinion and Order at 20 (April 16, 1985).

²³ See e.g. *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Pike Natural Gas Company and Related Matters*, Case No. 91-18-GA-GCR, Opinion and Order at 7 (September 26, 1991); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of the Pike Natural Gas Company and Related Matters*, Case No. 83-3-GA-GCR, Opinion and Order at 4-5 (July 13, 1983); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause contained within the Rate Schedules of The East Ohio Gas Company and Related Matters*, Case No. 82-87-GA-GCR, Opinion and Order at 5 (April 13, 1983).

R.C. 4909.16, if temporary rates authorized exceed rates ultimately determined to be reasonable, refunds shall include interest.²⁴

Thus, while there may not be an explicit statute requiring interest on refunds associated with SEET over-earnings, there is case law and statutes that the Commission can draw from to order interest on the prospective SEET adjustments. These prospective adjustments made for prior years' earnings have been specifically required by the General Assembly. Adding interest to the prospective adjustments may afford the additional customer protection of discouraging delay by utilities in filing their SEET applications and, in any event, will enhance the consumer protection tool of SEET under R.C. 4928.143(F).

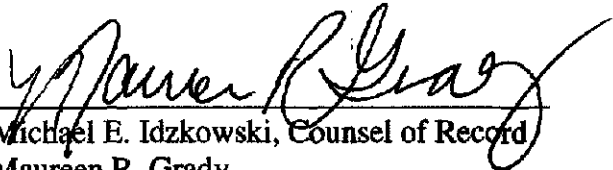
IV. CONCLUSION

In the interest of fairness to consumers who may have funded significantly excessive earnings of electric distribution utilities in Ohio in 2009, Customer Parties seek rehearing on the Commission's Entry that permitted another delay in the filing of SEET applications. The authorized delay is unjust and unreasonable, and should be ended. The Commission should reverse its ruling and order the utilities to file their applications forthwith. Moreover, it was unjust and unreasonable for the PUCO to have failed to impose interest on the prospective adjustments that may be ordered for 2009 excessive earnings. The Commission should impose interest on the prospective adjustments ordered for 2009, so that any SEET-related refunds are returned to customers with interest.

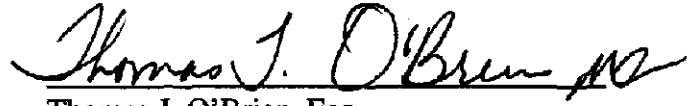
²⁴ *In the Matter of the Application of the Dayton Power and Light Company for authority to modify and increase its rates for electric service to jurisdictional consumers, 80-826-EL-AEM, Opinion and Order at 10 (November 26, 1980).*

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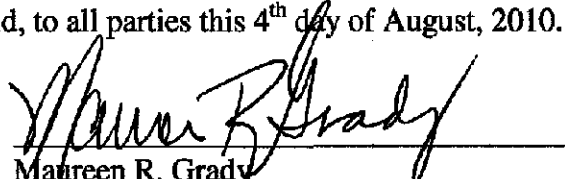
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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Application for Rehearing* by the Office of Ohio Consumers' Counsel, the Ohio Manufacturers' Association, the Ohio Hospital Association, The Ohio Energy Group and Citizen Power Inc. was served by regular U.S. Mail service, postage prepaid, to all parties this 4th day of August, 2010.


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