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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO 2011 AUG -9 PM 4: 12

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

MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY BY THE OFFICE OF OHIO CONSUMERS' COUNSEL, THE OHIO ENERGY GROUP, THE OHIO HOSPITAL ASSOCIATION, THE OHIO MANUFACTURERS' ASSOCIATION AND CITIZEN POWER INC.

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I. INTRODUCTION

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," submit this Memorandum Contra to the Application for Rehearing of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") filed on July 30, 2010 at the Public Utilities Commission of Ohio ("PUCO" or "Commission"). FirstEnergy's Application for Rehearing was filed in response to the Commission's Finding and Order ("Order") dated June 30, 2010.

As explained in this memorandum, FirstEnergy's Application for Rehearing and Memorandum in Support ("Memo in Support") provide no basis for FirstEnergy's contention that the June 30, 2010 Order is either unlawful or unreasonable. Therefore, the Customer Parties urge the Commission to deny FirstEnergy's Application for Rehearing. Additionally, Customer Parties urge the PUCO to modify its June 30, 2010 Order consistent with the Customer Parties' Application for Rehearing filed on July 30, 2010.

II. APPLICABLE LAW

Applications for rehearing are governed by R.C. 4903.10 and may be sought by any party who has entered an appearance in the proceeding on any matter determined in the proceeding. 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."[1] Further, 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 ***."[2]

[1] R.C. 4903.10.

[2] Id.

III. ARGUMENT

A. It Is Within The Commission's Discretion To Require Each Electric Utility To Include In Its SEET Filing The Difference In Earnings Between Its Current Electric Security Plan ("ESP") And What Would Have Occurred Had The Preceding Rate Plan Been In Place, As Well As The Difference In Earnings With And Without The Consideration Of Deferrals.

In its Memo in Support, FirstEnergy argues that the Commission's Order is unreasonable in directing electric utilities to include in their SEET filings the difference between the ESP and what would have occurred had the preceding rate plan been in place.[3] FirstEnergy further argues that the Commission's Order is unreasonable in directing electric utilities to identify any deferrals and the effects of excluding and including the deferrals in the SEET calculation.[4] FirstEnergy contends that neither of these requirements "bear on the initial, threshold question of whether, for a given period, an electric utility had significantly excessive earnings."[5]

FirstEnergy admits that this information regarding earnings under a preceding plan and the impact of deferrals may be relevant to determining the amount and manner of a return of significantly excessive earnings to customers. But FirstEnergy contends "[T]hat question is considered only if (and after) significantly excessive earnings are found to exist."[6] FirstEnergy argues that such a general requirement is burdensome and unnecessary.[7]

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[3] FirstEnergy's Application for Rehearing, at 2.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

Notwithstanding FirstEnergy's arguments regarding the Commission's requirement that electric utilities determine the difference between earnings under the ESP and the earnings that would have occurred had the preceding rate plan been in place, it is clear that the PUCO was merely exercising discretion in carrying out the mandates of R.C. 4928.143(F). That statute directs the Commission to consider if any "adjustments" resulted in excessive earnings. For the purposes of R.C. Section 4928.143(F), the Commission has determined that an adjustment "includes any change in rates when compared to the rates in the electric utility's preceding rate plan."[8] In order to facilitate a valuation of the ESP adjustments, the Commission directed utilities to include in their SEET filings the difference in earnings between the ESP and what would have occurred had the preceding rate plan been in place"[9] The Commission also directed utilities to identify the effects of deferrals on the earnings of the utility.

Requiring such information is related to determining the ESP adjustments, which establish the maximum amount of the refund that may be ordered. The PUCO is not proposing that the pre-ESP revenues be provided in order to permit a "claw back" of the utility's earnings.

Regarding the Commission's requirement that electric utilities file an analysis comparing earnings with and without the consideration of deferrals, information regarding deferrals is crucial to the Commission's determination of significantly

[8] Id.

[9] Id., at 15.

excessive earnings. As FirstEnergy stated in its Application for Rehearing, deferrals are relevant to the issue of refunds.[10]

From an accounting standpoint, there are essentially two types of deferrals, deferred expenses and deferred rate increases, each of which is treated differently for accounting and ratemaking purposes.[11] While deferrals generally function to reduce expenses and boost earnings, the specific financial impact of deferrals as they relate to an electric utility's earnings is a crucial consideration in the Commission's SEET analysis for that utility. Thus, the Commission's requirement to file an earnings analysis with and without the inclusion of deferrals is reasonable as it functions to provide the Commission with data that will assist it in making an informed decision on the impact of deferrals on company earnings and how to treat potential refunds.

In directing electric utilities to include in their SEET filings the difference between the ESP and what would have occurred had the preceding rate plan been in place, as well as directing electric utilities to identify any deferrals and the effects of excluding and including the deferrals in the SEET calculation, the PUCO is merely attempting to implement the statute and fill in gaps the General Assembly has left in defining the SEET review process. "As the agency with the expertise and statutory mandate to implement the statute, the PUCO is entitled to deference."[12] The Supreme Court of Ohio has traditionally "deferred to the judgment of the commission in instances involving the commission's special expertise and its exercise of discretion, when the

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[10] FirstEnergy Application for Rehearing at 2. In addition, the issue of deferrals is relevant because the Commission has not yet been determined whether deferrals will be paid down in the event of a refund to customers.

[11] See Order at 16.

[12] *Payphone Assn. of Ohio* (2006), 109 Ohio St.3d 453, 2006 Ohio 2988, 849 N.E.2d 4, citing *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530 at P51.

record supports either of two opposing positions."[13] The Supreme Court "will reverse a commission order only where it is unreasonable, unlawful, or against the manifest weight of the evidence or shows misapprehension, mistake, or willful disregard of duty."[14]

Thus, the Commission has broad statutory authority in determining whether any adjustments under the Company's ESP resulted in excessive earnings. Where the Commission has determined that information is needed in order to assess the earnings of an electric distribution utility, and that information is reasonably related to doing so, it is neither unlawful nor unreasonable to order the utilities to provide such information in their SEET application.

FirstEnergy's argument that the Commission's filing requirements regarding preceding plan earnings and deferrals do not "bear on the initial, threshold question of whether, for a given period, an electric utility had significantly excessive earnings[,]"[15] is misleading. It requires the Commission (and parties) to assume and accept that (1) the company's treatment of earnings, including off-system sales and deferrals is appropriate, and (2) the company has appropriately defined its comparable group.

FirstEnergy's argument that the Commission's requirement to submit analyses reflecting earnings with and without deferrals is unnecessarily burdensome[16] is unfounded. Deferrals are generally an expense line item, and thus, readily available.

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[13] *Cincinnati Bell Tel. Co. v. PUC.* (2001), 92 Ohio St.3d 177, 180, citing *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (1990) 51 Ohio St. 3d 150, 555 N.E.2d 288; *Dayton Power & Light Co. v. Pub. Util. Comm.* (1962), 174 Ohio St. 160, 21 Ohio Op. 2d 427, 187 N.E.2d 150.

[14] *Cincinnati Gas & Elec. Co.*, 86 Ohio St. 3d 53, 711 N.E.2d 670; *Ohio Edison Co. v. Pub. Util. Comm.* (1992), 63 Ohio St. 3d 555, 589 N.E.2d 1292; see R.C. 4903.13.

[15] FirstEnergy's Application for Rehearing, at 2.

[16] FirstEnergy's Application for Rehearing, at 2, 4.

B. The Commission's Requirement Of And Reliance On A Discussion Of The Various Factors Listed By The Commission As Relevant To Its Investigation Of Significantly Excessive Earnings Is Reasonable And Lawful.

In its Application for Rehearing, FirstEnergy contends that the Commission's decision to not adopt a so-called "bright line statistical analysis test for the evaluation of earnings" while requiring and relying on a discussion of the various factors listed by the Commission as relevant to its investigation of significantly excessive earnings is unlawful and unreasonable.[17] FirstEnergy characterizes the discussion and analysis required by the Commission as a reliance on "highly subjective and uncertain criteria"[18] offering "little if any precedental guidance"[19] and so subject to interpretation and subjectivity "as to be completely arbitrary."[20]

Citing the canon of statutory construction, *expressio unius est exclusio alterius*, (that the expression of one thing is the exclusion of another) FirstEnergy argues that because the General Assembly has only provided for a comparison of comparable companies and a consideration of capital requirements of future committed investments in Ohio, the Commission's consideration of whether significantly excessive earnings exist is limited to those two factors.[21] FirstEnergy's argument is misplaced, as rules for construing statutory language are applied only where the statute is ambiguous,[22] and

[17] FirstEnergy's Application for Rehearing, at 4.

[18] FirstEnergy's Application for Rehearing, at 4.

[19] FirstEnergy's Application for Rehearing, at 6.

[20] Id.

[21] FirstEnergy Application for Rehearing at 5.

[22] *Proctor v. Kardassilaris*, (2007) 115 Ohio St. 3d 71; 2007 Ohio 4838; 873 N.E.2d 872.

FirstEnergy has not argued, much less demonstrated, that R.C. 4928.143(F) is ambiguous.

Further, it is a basic rule of statutory construction that "words in statutes should not be construed to be redundant, nor should any words be ignored."[23] The last sentence of the R.C. 4928.143(F) specifically excludes from the Commission's consideration the "revenue, expenses, or earnings of any affiliate or parent company."[24] If the General Assembly intended to limit the Commission's consideration to a comparison of comparable companies and future committed investments in Ohio, it would have similarly included limiting language such as, "shall *not* consider."[25] Contrary to FirstEnergy's argument, the only factors that the General Assembly excluded from the Commission's consideration are the "revenue, expenses, or earnings of any affiliate or parent company." Thus FirstEnergy's reading of 4928.143(F) would render the final sentence in R.C. 4928.143(F) redundant.

Notwithstanding the preceding, FirstEnergy contends that because the statute lists only one factor, the capital requirements of future committed investments in Ohio, the Commission is precluded from requiring additional factors.[26] In other words, utilities

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[23] *E. Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875, 879.

[24] The final sentence of 4928.143(F) provides: "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."

[25] Further, the United States Supreme Court has stated that "the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives." *U.S. v. Vonn*, 535 U.S. 55, 65, 152 L. Ed. 2d 90, 122 S. Ct. 1043 (2002); see also *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003) (stating that "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence").

[26] FirstEnergy's Application for Rehearing, at 5.

should be excused from undergoing a complete analysis simply because the statute does not set specifically set forth one in detail. As demonstrated above in Section A, however, the Commission is well within its legal authority in requiring both methods of analysis, as the Commission has been granted broad discretion in carrying out the state's policy goal of returning excessive earnings to customers.

FirstEnergy's arguments that the Commission is unreasonable and arbitrary fail because the Commission has determined that it will rely on **both** the statistical analysis and additional analysis. The Commission is not rejecting a statistical analysis and relying solely on a discussion of the various factors listed by the Commission as relevant to its investigation of significantly excessive earnings. The Commission's decision to consider both methods of analysis is entirely reasonable – the antithesis of arbitrary. The use of a standard deviation test is but one tool by which to determine whether an electric utility had significantly excessive earnings.[27] The Commission's decision to analyze factors outside of a statistical bright line test is especially reasonable in light of the Commission's finding that "within Ohio's electric utilities, there is significant variation, including, for example, whether the electric utility provides transmission, generation, and distribution service or only distribution services."[28] The information the Commission seeks is relevant to the significantly excessive earnings test because in order determine whether the ESP has resulted in significantly excessive earnings, the Commission must know whether the companies being compared do in fact "face comparable business and financial risk."

[27] Id.

[28] Order at 29.

The Commission found, after due consideration of the numerous comments in the record requesting a bright line statistical analysis for the evaluation of earnings, that "utilizing only a statistical method for establishing the SEET threshold is insufficient by itself to meet the electric utility's burden of proof pursuant to Section 4928.143(F), Revised Code."[29] Further, it would not satisfy the Company's burden of proof and would not provide the Commission with a complete understanding of how the Company accounted for its earnings. Relying solely on a statistical analysis would require the Commission and other parties to accept that (1) the company's treatment of earnings, including off-system sales and deferrals is appropriate, and (2) the company has appropriately defined its comparable group. This would improperly shift the burden of proof from the utility to the Commission and other parties. The express provisions of R.C. 4928.143(F) place the burden of proof for demonstrating that significantly excessive earnings did not occur on the utility. It would be inappropriate to allow utilities under the guise of self-analysis to preclude the review of information the PUCO determined to be relevant to its analysis. Therefore, FirstEnergy's arguments should be rejected.

C. The Commission Did Not Err In Not Establishing A Second So-Called "Safe Harbor" Test.

FirstEnergy's request for a second, so-called "safe harbor" based on the rate of return allowed in the utility's last rate case is contrary to the purpose of the statute. Revised Code 4928.134(F) requires a comparison of the Company's earnings under the ESP to the current earnings of comparable companies. The earnings of the Company in its last rate case, while relevant to determining the value of the Company's ESP

[29] Id.

adjustments, is not relevant to a comparison between the earnings of comparable companies in the current year. Comparing the Company's earnings in a previous year to the earnings of comparable companies in the current year is the equivalent of comparing apples to oranges, and would be inconsistent with R.C. 4928.134(F).

Further, certain Ohio electric utility companies have not had a rate case in a considerable length of time. When their rates were established, they were deemed reasonable at that time, and under the circumstances at the time of the Commission's decision. There is no certainty that the Commission would now find those rates to be reasonable.

IV. CONCLUSION

For the reasons explained above, the Customer Parties urge the Commission to deny FirstEnergy's Application for Rehearing. The SEET analysis, the consumer protection tool of S.B. 221, should be a full and complete analysis where significantly excessive earnings can be discovered, and if found, returned to customers. This requires that the utilities produce information that will allow a reasoned analysis of utilities' earnings. Limiting the scope of the information presented in the SEET filings threatens to impair the investigation, and unreasonably shift the burden of proof away from the utilities to those challenging the earnings. This is not what was intended by the Legislature. The PUCO should not go down this slippery slope. It should act to protect consumers from significantly excessive electric utility earnings and excessively high electric rates by maintaining the integrity of the SEET investigation.

Respectfully submitted,

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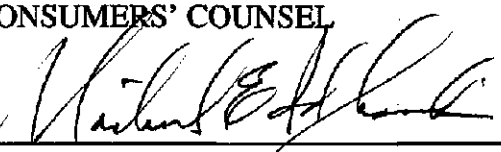

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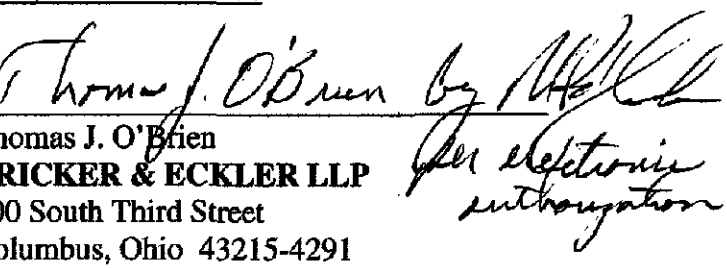

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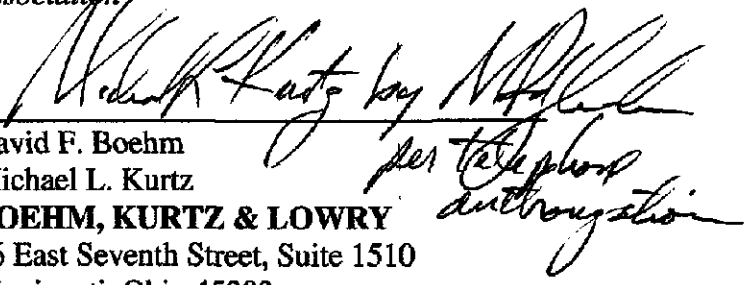

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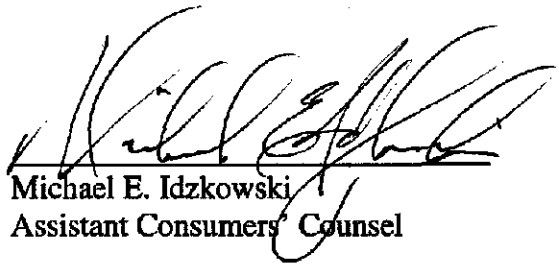
CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing *Memorandum Contra FirstEnergy's Application for Rehearing* was served upon the persons listed below first class U.S. Mail, postage prepaid, this 9th day of August 2010.



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