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PUCO

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

JOINT RESPONSE TO COMMISSION QUESTIONS BY THE OFFICE OF OHIO CONSUMERS' COUNSEL, THE OHIO MANUFACTURERS' ASSOCIATION, THE OHIO HOSPITAL ASSOCIATION, THE OHIO ENERGY GROUP AND CITIZEN POWER, INC.

The OCC (representing 4.5 million residential customers), the OMA (representing over 1600 large and small industrial manufacturers), the OHA (representing 170 primary care facilities and 40 health systems across Ohio) the OEG (representing 22 of Ohio's most energy-intensive industries) and Citizen Power, Inc. (a not-for-profit research education and advocacy agency) referred to herein as "Customer Parties" submit these written responses to the questions to be discussed at the question and answer session before the Commission, scheduled for April 1, 2010, at 10:00 a.m.

I. INTRODUCTION

The PUCO described the framework for S.B. 221 in the FirstEnergy MRO Order appropriately as a "roadmap of regulation in which specific provisions were put forth to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges." [1]

[1] *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 5 (Nov. 25, 2008).

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With the focus on providing consumers reasonably priced electric service, consistent with R.C. 4928.02(A), the Commission must now consider how to implement one of the primary consumer protection tools found in S.B. 221, the significantly in excess earning test "EET" review process. With the statutes at times providing little direction, the Commission should construe the provisions in a manner that will permit it to achieve a just and reasonable result [2] that ensures that consumer protection, in the form of refunds for earnings that are significantly excessive, is a reality and not an illusion.

II. RESPONSES

1. What Is The Legal Basis For Employing An Earnings Cap On Total Earnings That Does Not Consider Adjustments?

This question contains a false premise. The annual SEET process required for approved ESPs does not contain "an earnings cap on total earnings." The only earnings subject to refund in the R.C. 4928.143(F) annual SEET reviews are those earnings associated with ESP adjustments. In other words, a utility's refund exposure is limited to the amount of its ESP rate increases. All other earnings (non-ESP approved) are exempt from the SEET review and possible refund. These other earnings include the profits of the utility which would have otherwise existed without any ESP rate increase (pre-existing excess profits), earnings that result from Energy Efficiency/Peak-Demand Reduction ("EE/PDR") shareholder savings or lost distribution revenue provisions, transmission earnings approved by FERC and reflected in transmission rates, and distribution earnings approved by this Commission in distribution base rate cases under R.C. Section 4909. Therefore, the SEET review advocated by the Customer Parties does not result in a cap on total earnings.

[2] See R.C. 1.47(C) which provides that in enacting a statute, a just and reasonable result is intended.

R.C. 4928.143(F) establishes the annual SEET review which entails an after the fact review of the prior year approved ESP rate adjustments. R.C. 4928.143(F) refers to "provisions" included in the approved ESP, which we interpret to be a reference to the (B)(2) "without limitation" provisions including subsections (a) through (i)--in other words the approved ESP. The statute states that the Commission shall consider if "any such adjustments" resulted in excessive earnings. Here "any such adjustments" is not specifically defined. "Adjustments" referenced here can then be interpreted to mean all provisions approved by the Commission as part of the ESP plan, including all approved riders. The review thus is based upon the impact of approved ESP on stated financial results.[3]

2. How Should The Commission Define And Quantify "Adjustments" That Could Be Subject To Return If The Commission Found Significantly Excessive Earnings?

Adjustments can occur in three contexts: under a first MRO application, through R.C. 4928.142(D); under the prospective review of an approved ESP plan lasting three or more years, pursuant to R.C.4928.43(E)[4]; or under an ex post facto annual review process delineated in R.C. 4928.143(F). Given that the immediate concern of the Commission appears to be with respect to the annual review process of R.C. 4928.143(F), Customer Parties will direct their remarks to that process alone.

[3] Use of stated financial results would include Ohio jurisdictional earnings from off-system sales. These profits are generally recorded in FERC Account 447, sales for resale, and are a part of the total profit earned by the Ohio EDU and thus should be included in the calculation of SEET in order to avoid an asymmetrical comparison.

[4] This statute permits the Commission to terminate the ESP if continuation of the ESP will result in a return on equity that is significantly in excess of the return on equity that is likely to be earned by publicly traded companies that will face comparable business and financial risk. Along with the right to terminate, the statute permits the PUCO to "impose such conditions on the plan's termination as it considers reasonable and necessary***." Such conditions could include SEET adjustments that could be ordered to be refunded to customers.

First, it should be noted that R.C. 4928.143(F) is mandatory in several respects. It requires the PUCO to consider, following the end of each annual period of an approved ESP plan, if the ESP provisions resulted in excessive earnings as measured by SEET. Once the Commission finds that the ESP provisions did result in significantly excessive earnings it "shall" require the EDU to return to consumers the excess. Thus, in the context of the annual review process of R.C.4928.143(F), the "adjustments" that result from application of SEET are more than adjustments that "could be subject to return"—they must be returned.

In the context of an ESP, "adjustments" means ESP rate increases. For example, Columbus Southern was granted an ESP rate increase of 7% in 2009, or approximately $100 million. The ESP adjustment is pre-tax, just like any other revenue requirement calculation. The potential refund to consumers should also be on a consistent pre-tax basis. This is true even though the effect of the ESP adjustment on earnings (net income) is calculated on an after tax basis.

If the ESP rate increases (adjustments) are removed from earnings and the ROE drops below the SEET threshold, then the "excess" –the amount to bring the return down to the SEET threshold is refunded. For example, if the SEET ROE threshold is 15%, the utility's actual ROE is 19%, and elimination of all ESP rate adjustments would lower the ROE to 14.9%, then all of the ESP rate increases (except 0.1%) would be refunded. This would bring the utility's ROE down to 15%, but not below. As discussed above, there is no cap on total earnings through a claw-back of pre-existing excess profits.

Additionally, under a second scenario, if the ESP rate increases are removed from the earnings and the ROE is still above the SEET threshold, there would also be a need for a refund of the ESP rate increases. For example, if the SEET ROE threshold is 15%, the utility's actual ROE is 19% and the elimination of all ESP rate adjustments would

lower the ROE to 15.1%, then all of the ESP increases should be returned to customers. In a dollars and cents example, if a utility with $110 million of significantly excessive profits received an ESP rate increase of $40 million, the refund would be limited to the $40 million ESP rate increase. Otherwise the unjust and unreasonable rates are exacerbated, in conflict with the state policy of assuring consumers of reasonably priced electric service.

It is under this second scenario (ESP rate increase exacerbates excess profits but is not the sole cause) where Staff and the Customer Parties have a serious disagreement over statutory interpretation and legislative intent. Staff would have the Commission apply the statute as if it contained the words "all of the" before the word "significantly," as such: " If the commission finds that such adjustments, in the aggregate, did result in [all of the] significantly excessive earnings, it shall require the electric distribution utility to return to consumers..." This implicit attempt at legislating is contrary to fundamental rules of statutory construction and is the reverse of the Commission's role to implement what the Legislature enacts. "A court's paramount concern in construing a statute is the intent of the legislature. [citation omitted] In this regard, 'it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used' and to read those words and phrases in context according to the rules of grammar and common usage." *Bergman v. Monarch Construction Co.*, 2010 WL 744222 (Ohio Supreme Court, March 2, 2010).

Here is how Staff's interpretation of the statute would work in practice. The Commission granted Columbus Southern an ESP rate increase of 7% for 2009, or more than $100 million. At the time the ESP order was issued, the Commission did not know and could not have known what the utility's full year earnings for 2009 would be. As shown on Appendix A, as it turned out in 2009 Columbus Southern had a per books ROE

of 20.86%, of which the $100 million ESP rate increase contributed approximately 5%. Under Staff's interpretation, if the 2009 SEET threshold is 14%, then there would be no refund because Columbus Southern's ROE would have been 15.86% without any ESP rate increase (the $100 million rate increase exacerbated the utility's overearnings, but was not the sole cause).

Ironically, under Staff's interpretation, if the SEET threshold was raised to 16%, then almost all of the $100 million increase would be refunded. There would be an almost complete refund because without the ESP increase Columbus Southern's 2009 ROE would have been 15.86% which is below the higher threshold of 16%. The counter-intuitive result of consumers actually benefiting from a higher SEET threshold is caused by improperly adding the phrase "all of the" into the statute.

To ignore the utility's already existing significantly excessive earnings and allow it to collect even more because the excess is not caused solely by the ESP rate increases (only exacerbated by them) creates an absurd result. Staff's interpretation would allow Columbus Southern to add its 2009 ESP increase of $100 million to its already excessive ROE, and then compound the problem by adding another $100 million ESP increase in 2010 and another $100 million ESP increase in 2011. Staff's interpretation of the earnings test would turn it upside down by perpetuating excess profits, not preventing them. "It is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result." *Mishr v. Bd. Of Zoning Appeals* (1996), 76 Ohio State.3d 238, 240.

Staff's interpretation disregards the linkage between the ESP rates and the prior-approved rate plans under S.B. 3, which are the starting point for the ESP rates. Additionally, the provisions of R.C. 4928.143(F) neither require nor suggest such a result. Moreover, such a result could not have been intended when the General Assembly

enacted S.B. 221. R.C. 4928.02(A) makes this abundantly clear when it establishes a state policy ensuring that consumers have reasonably priced retail electric service. In order to make the primary consumer protection tool under S.B. 221 viable, the Commission should interpret R.C. 4928.143(F) as requiring consumer refunds in both instances discussed above.

The outcome advocated by the Customer Parties is mandated even assuming that there is more than one way to interpret the words of R.C. 4928.143(F). "When a statute is susceptible of more than one interpretation, courts seek to interpret the statutory provision in a manner that most readily furthers the legislative purpose as reflected in the wording used in the legislation. [citation omitted] Courts review several factors in order to glean the General Assembly's intent, including the circumstances surrounding the legislative enactment, the history of the statute, the spirit of the statute (the ultimate results intended by adherence to the statutory scheme), and the public policy that induced the statute's enactment. *Toledo Edison v. City of Clyde* (1996), 76 Ohio St.3d 508, 513. The public policy and purpose of the earnings test of S.B. 221 was to protect consumers, not provide a safe harbor for windfall utility profits.

3. Are Adjustments Which "Will Cause" Earnings Significantly In Excess Pursuant To Section 4928.142(D)(4), Revised Code, The Same As Those Which "Will Result" In Earnings Significantly In Excess Pursuant To Sections 4928.143(E) And (F), Revised Code?

No. Adjustments under R.C. 4928.142(D)(4) refer to enumerated adjustments (1)-(4), that pertain to a first application for an MRO and relate to the generation service price of the MRO that is not subject to competitive bid—the EDUs most recent SSO price. The adjustments there are germane only to an MRO, and would be adjustments to the EDU's most recent SSO price, not the ESP approved SSO that R.C. 4928.143(E) and (F) speak to. The EDU's most recent SSO price, adjusted upward or downward for the

R.C. 4938.142(D)(4) factors is not the equivalent of adjustments referred to in R.C.4928.143(E) and (F), which apply to an ESP approved SSO.

R.C. 4928.143(E) and (F) refer to approved ESP plans, not a first application for an MRO, which is governed by R.C. 4928.142. R.C. 4928.143(E) refers to the prospective effect of approved ESP plan that is longer than three years and refers only to adjustments to the capital structure. R.C. 4928.143(F) "adjustments" refers to provisions of the approved ESP plan alone.

4. Does A Return Become "Excess" As A Result Of "Adjustments" (E.G., Fuel) Or As A Result Of The Establishment Of A Standard Service Offer?

As discussed at length above, for an ESP of less than three years, under R.C. 4928.143(F), the utility's refund exposure is limited to the amount of the ESP adjustments (rate increases). The ESP rate increase includes all terms and conditions of the standard service offer approved by the PUCO, including the riders approved as part of the ESP. There is no claw-back of pre-existing excess profits. For an ESP of more than three years, the test under R.C. 4928.143(E) is both more comprehensive and is prospective. Here, the Commission is to determine whether the "prospective effect of the electric security plan" (not just the rate adjustments) is "substantially likely" to result in excessive profits. Under this more comprehensive test which examines the effect of the entire ESP not just the ESP adjustments, all excess profits are subject to refund. The return becomes excess for an MRO first application under R.C. 4928.142(D), as a result of the limited adjustments (D) (1)-(4) (including e.g., fuel) that may be made to the EDU's most recent SSO price.

5. **How Should The Commission Define What Is Significant? Is There A Difference In Its Meaning In The Various Statutory Sections In Which It Appears (Sections 4928.142(D)(4), 4928.143(E), 4928.143(F), Revised Code)?**

In the Initial Comments, the Customer Parties emphasize that SB 221 provides no statistical definition as to the SEET, and no reference to statistical basis in the application of SEET. The method proposed by OEG witness Mr. King should be adopted. Mr. King recommended that the SEET threshold be set at a simple 200 basis points above the mean return of the comparable group. This is similar to Staff's original position which recommended that the SEET threshold be set at 200-400 basis points above the mean return of the comparable group. Customer Parties contend that 200 basis points provides the utilities with an ample and generous ROE premium. For example, as shown on Appendix A, every 100 basis point premium provides the shareholders of Dayton Power and Light additional earnings of $14.388 million

As long as the Commission retains ultimate authority regarding the ROE premium that should be added to the comparable group ROE, then a reasonable balancing of customer and shareholder interests can be maintained. This is true no matter what future economic conditions may exist. But a rigid statistical standard deviation approach, as proposed by the EDUs and Staff, applied to a utility-conceived comparison group will allow the utilities to dictate the outcome of SEET proceedings and a reasonable customer-shareholder balance is much less likely.

Although the wording "a return on common equity that is significantly in excess of the return on equity" is virtually the same under all three provisions, the SEET test is applied differently depending on what type of SEET analysis is being undertaken. In R.C. 4928.142(D) the analysis applies to a first application for an MRO made on a prospective basis, and applies to the EDU's most recent SSO price, with the enumerated

adjustments that may be made as permitted in subsections (1) through (4). Under R.C. 4928.143(E) the analysis is also made on a prospective basis, but applies to the entirety of the approved ESP plan, not just the ESP adjustments. In R.C. 4928.143(F) the analysis is based on a retroactive or ex post facto examination of the effect of the ESP adjustments on the earnings of the EDU.

6. What Is The Best Way To Establish The Threshold For Significantly Excessive Earnings?

Through the SEET, the General Assembly overwhelmingly determined (93-1 in the House and 32-0 in the Senate) that Ohio consumers cannot be required to fund significantly excessive utility profits. The significantly excessive earnings test is grounded in well-established U.S. Supreme Court constitutional law. The significantly excessive earnings standard is very similar to the "comparable earnings" standard which has guided public utility commissions across the U.S. for generations in setting reasonable returns for public utilities and protecting customers from funding excessive utility profits.

As explained by OCC witness Dr. Woolridge in his testimonies in the FirstEnergy and AEP electric security plans, the use of the statistical standard deviation approach, as advocated by the EDUs and Staff, requires an assumption that the ROEs for the comparable companies are normally distributed.[5] No witness in the ESP proceedings provided any evidence that the ROE range is normally distributed. Dr. Woolridge also warned that the standard deviation of the comparable company ROEs could be greatly inflated by 1) the companies identified as being comparable to the Ohio utilities and 2) outliers. Instead, the Consumer Parties support OEG witness King's methodology which

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[5] Direct Testimonies of Dr. J. Randall Woolridge at 12, 13, Case No. 08-935-EL-SSO at 13, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO.

establishes the SEET threshold at 200 basis points above the mean return of the comparable group. This is the most simple and most fair approach.

7. Taking Into Account Factors Such As Differences In Capital Requirements And Business Risks, Should Significantly Excessive Earnings Thresholds Be Established On A State-Wide Or Company-Specific Basis?

Significantly excessive earning thresholds should be established on a company-specific basis. In OCC's filed testimony in the ESP cases, Dr. Woolridge developed a methodology which involves (1) identify a comparable group of electric utilities by screening the Value Line database; (2) compute the ranges for key business and financial risk financial metrics (beta, asset turnover ratio, and common equity ratio) of the comparable group of electric utilities; (3) screen the entire Value Line database to develop a proxy group of utility and non-utility companies; and (4) compute the return on equity for the overall proxy group of utility and non-utility companies. We have also proposed an approach to make the adjustment for financial risk differences in capital structure. Dr. Woolridge has provided a methodology to make this adjustment. Basically the process involves computing the pre-tax return on capital for the comparable companies, and then making adjustments to reflect the difference in the benchmark ROE based on the capital structure of the Ohio electric utility relative to the average of the comparable public companies. Dr. Woolridge's three-step process to make this adjustment includes:

1. Compute the average pre-tax return on total capital for the comparable group of public companies, using the average ROE, debt/equity percentages, income tax rates, and long-term debt cost rates;

2. Compute the pre-tax ROEs for the Ohio electric utility using (a) the average pre-tax return on total capital for the comparable companies; and (b) the individual debt/equity percentages, income tax rates, and long-term debt cost rates of the Ohio electric utility; and

3. Compute the after-tax benchmark ROEs for the Ohio electric utility using its income tax rates.

Therefore, our recommendation is to make the recommendation for a company-specific basis, and make adjustments for differences in capital structure and financial risk.

8. How Should The Commission Identify And Consider "The Capital Requirements Of Future Committed Investments In This State"?

Although R.C. 4928.143(F) states that consideration shall be given to the capital requirements of future committed investments, in the annual SEET analysis, the statute provides no direction as to how this is to be accomplished. We conclude in general that the capital requirements of future committed investments do not qualify as "adjustments" which could or should influence the finding of significantly excessive earnings. This is based upon our statutory interpretation that in R.C. 4928.143(F) the term "adjustments" refers to the provisions of the ESP itself. Thus, unless the specific capital requirements of future committed investment in this state are part of the provisions of the ESP itself, i.e. through R.C. 4928.143(B)(2)(b)or (B)(2)(c), they should not be considered for purposes of the SEET.

If a utility faces an unprecedented future capital requirement, such as for a new nuclear plant, then that fact may be considered by the Commission in setting the SEET threshold. However, in order for unprecedented capital commitment to be considered in the annual SEET review, there would have to be discrete plans for which the PUCO has determined there is a need. This would require approval by the PUCO of resource planning projections submitted by the EDU, consistent with R.C. 4928.143(B)(2)(b). Additionally consideration of capital requirements of future committed investments should be limited to those requirements that occur during the rate plan term.

Even under such an extraordinary circumstance, Customer Parties believe that a SEET threshold of 200 basis points above the mean return of the comparable group will provide Ohio's EDUs more than adequate returns to attract new capital to maintain current operations. Furthermore, R.C 4928.143(B)(2)(b) permits the EDU to pass on the cost of new generation during construction to Ohio consumers if they commit that capital investment for the benefit of consumers, thus lessening the need for any additional incentive through the SEET process.

9. What Is The Mechanism That An Electric Utility Might Employ To Select Its Proposed Peer Group?

The Customer Parties note that this question implies that an electric utility has the discretion to employ whatever mechanism it believes to be appropriate to select its proposed peer group. As stated in the initial comments, this is tantamount to putting the fox in charge of the hen house, and leaving this critical decision to the utilities can lead to unreasonable results, such as a 55.5% ROE threshold, being funded by customers.

This is not merely an academic financial exercise. It is an issue that is of critical importance to the application of SEET. A clearly defined and transparent methodology in selecting a comparable group of companies and adjusting risk associated with capital structure should be established by the Commission and used by all EDUs subject to the SEET. The business and financial risks of the Ohio EDUs may be different but a common methodology should be used.

There are two aspects to this question. First, how should the companies that face comparable business and financial risk be determined? And second, how should the earnings of comparable companies be adjusted for the financial risk difference associated with the difference in capital structure?

On the important issue of comparable group selection we recommend that the method proposed by OCC witness Dr. Woolridge in the ESP proceedings be adopted. Dr. Woolridge's methodology results in comparison groups that are dominated by electric utilities, thus establishing an appropriate and stable ROE baseline. This helps ensure that the SEET will result in stable and predictable earnings limits for Ohio electric utilities and the protection for customers that is intended in Senate Bill 221. We continue to recommend a uniformly-applied methodology of selecting comparable companies based on OCC witness Dr. J. Randall Woolridge's recommendation for all Ohio EDUs.

SB 221 explicitly states the capital structure of the utility should be considered and accounted for in assessing the SEET. The Customers Parties also believe that the statute requires that leverage (i.e. ratio of common equity) consideration be given primary and explicit consideration in the group selection process.[6]

Here is how Dr. Woolridge's comparable group selection methodology works:

1) Identify a proxy group of electric utilities. The proxy group must have: a) an investment grade bond rating; b) total revenue less than $10 billion; c) percent of regulated electric revenue of at least 75%; and d) a three-year history of paying cash dividends.

2) Identify a list of business and financial risk measures to insure that the comparable private sector companies are similar to the proxy group of electric utilities. These business and financial risk measures are: 1) stock price beta (a measure of stock price volatility); b) asset turnover ratio (measures capital intensity); c) common equity ratio (shareholder equity as percent of total capitalization); and d) no foreign companies.

3) The business and finical risk measures identified above (beta, asset turnover ratio, and common equity ratio) for the proxy group of electric utilities were determined.

4) The beta, asset turnover ratio, and common equity ratios for the proxy group of electric utilities were used to screen the thousands of companies in the Value Line database. The result provides a list of comparable companies, with similar business and financial risk indicators to primarily electric utilities.

[6] See, for example, Woolridge testimony at 1-2 in Case No. 08-935-EL-SSO.

5) The mean (average) ROE for the company comparable group is then calculated to arrive at a benchmark ROE.

6) Finally, the benchmark ROE for the company comparable group is adjusted for the actual capital structure of the Ohio electric utility being examined.

10. How Should The Commission Treat Deferrals To Ensure That Expenses And Revenues Are Appropriately Matched In Each Year And To Facilitate Comparisons With The Reported Earnings Of Other Firms?

The Customer Parties continue to recommend that any deferral of fuel costs or other items should be reflected in the return on equity calculation for SEET in the year when the retail sales occur, not in later years when the deferred revenues are received. This is consistent with the position that stated financial results (which include deferred items) should be used for the calculation of SEET.

Some utilities have argued that deferrals (which increase earnings in the stated financial results) should not be recognized in the SEET process because it could result in an anomaly: a finding of excessive profits and a customer refund at the same time that the utility was deferring recovery of certain of its costs. There is a simple way to address this concern. In any year where there is a deferral and a SEET finding of excess profits, the excess profits should first be used to pay down the deferrals already ordered by the Commission to be collected from customers before any cash refund is awarded.

The earnings for the comparable companies are computed based on GAAP and filed with the SEC and FERC. Therefore, no adjustments need to be made for deferrals. This is an objective approach and does not require adjustments to the utility and/or comparable group earnings and ROE.

11. Are There Any Ways To Apply The SEET Or Other Steps The Commission Can Or Should Take To Recognize Efficient Operations Or Discourage Electric Utilities From Incurring Inefficient Or Wasteful Expenses To "Manage" Their Reported Earnings Based On The Expected Results Of Their Earnings Test?

Utilities and other businesses "manage" their reported earnings for many reasons and in the wake of the accounting scandals which occurred, there has generally been a increased concern with such "managing." Under the SEET process, the components of ROE may be manipulated in a multitude of ways by an EDU. The formula for ROE equals net income/shareholders equity. Net income can be affected not only by inefficient or wasteful expenditures, but also by a host of other devices such as aggressive revenue recognition, changing depreciation, or accounting artifices. Shareholders' equity, the denominator of the equation, can also be controlled by increasing retained earnings, using earnings to buy back shares, and changing dividend distribution policies, etc.

We generally believe that the use of the utilities' per book earnings as reported to the SEC and FERC without any ratemaking adjustments (except for extraordinary revenues or expenses) addresses this concern in part. Also, because of the annual nature of the SEET review process this concern is minimized. For example, if expenses are accelerated into the current year to reduce earnings for SEET purposes, then earnings next year will be similarly increased. However, it would seem prudent for the PUCO to require, as part of the annual SEET review, testimony from the EDU specifically directed to justifying marked changes in net income and shareholders equity. This will provide parties the opportunity to test the EDU's managing of its reported earnings for purposes of affecting SEET.

On the other hand, the Customer Parties do not believe there is a need to take steps to recognize efficient operations. This would imply that the PUCO should offer regulatory

incentives to the EDUs when the utilities already have the considerable benefits under S.B.221. Customer parties do not believe it is appropriate or necessary to add incentives to perform efficiently onto the growing list of benefits to EDUs under S.B. 221. The benefits to utilities are many, and start with the fact that the EDU's view their electric security plan as limitless- including virtually any expenses, limited in fact by only their imagination.

III. CONCLUSION

Governor Strickland in 2007 released primary principles for energy policy in the state and included as one of seven policies "customers deserve equal footing with utilities." He discussed this policy at the Ohio Coal Summit on Sept 6, 2008, shortly following the passage of S.B. 221: "Electricity is vital in the lives of every Ohioan and every Ohio company. Therefore, the needs and preferences of our utilities cannot be the Public Utilities Commission of Ohio's sole concern. Indeed, organizations representing consumer groups should enjoy equal standing in consideration of regulations and rate negotiations."

Equal footing in this process can only be achieved if the SEET review process, one of the primary consumer protection tools found in S.B. 221, is implemented in a manner that will permit it to function effectively. This means interpreting S.B. 221 in a manner that, consistent with the policy of R.C. 4928.02, ensures the availability of reasonably priced electricity for consumers.

Respectfully submitted,

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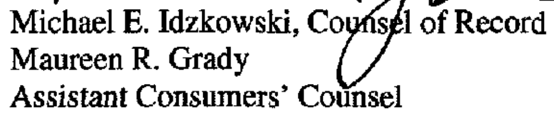
CONSUMERS' COUNSEL



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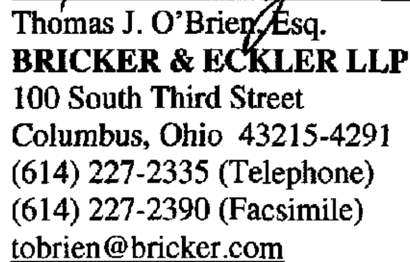

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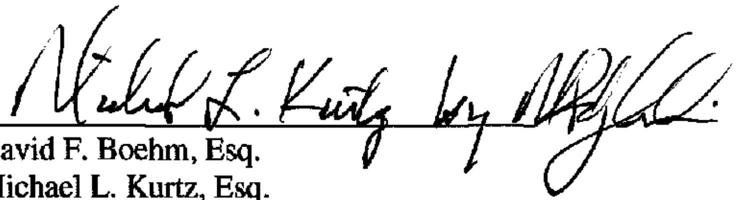

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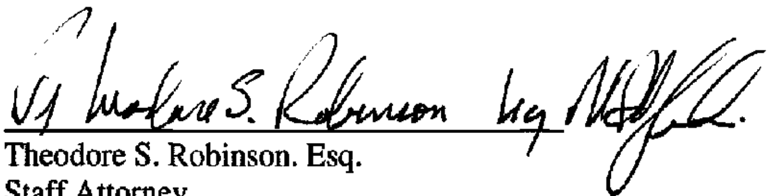

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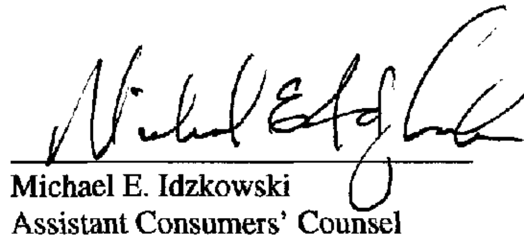
CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Joint Response to Commission Questions by the Office of the Ohio Consumers' Counsel, the Ohio Manufactures' 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 1st day of April, 2010.



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Ohio Utility Companies
Revenue Requirement/Refund for Each 1% Change in Return on Common Equity
Twelve Months Ending December 31, 2009
($000's)

Source: 2009 10-K Financial Statements

		Toledo Edison Company	Ohio Edison Company	Cleveland Electric Illuminating Company (2)	Columbus Southern Power Company	Ohio Power Company	Duke Energy/ CGE (3),(4),(5)	Dayton Power and Light Company (5)
Total Common Equity - December 31, 2008		480,050	1,294,054	1,603,882	1,245,265	2,421,945	2,547,000	1,474,900
Unadjusted Total Common Equity - December 31, 2009		489,878	1,021,110	1,343,987	1,359,835	3,234,695	1,775,000	1,402,600
Adjustments to Total Common Equity				138,013			727,000	
Adjusted Total Common Equity - December 31, 2009		489,878	1,021,110	1,482,000	1,359,835	3,234,695	2,502,000	1,402,600
Average Common Equity - December 31, 2009		484,964	1,157,582	1,542,941	1,302,550	2,828,320	2,524,500	1,438,750
Unadjusted Net Income - Total Company	(1)	23,978	122,434	(10,992)	271,661	308,615	(426,000)	258,900
Adjustments to Net Income				138,013			727,000	
Adjusted Net Income - Total Company	(1)	23,978	122,434	127,021	271,661	308,615	301,000	258,900
% ROE		**4.94%**	**10.58%**	**8.23%**	**20.86%**	**10.91%**	**11.92%**	**17.99%**
Each 1% ROE		**4,850**	**11,576**	**15,429**	**13,026**	**28,283**	**25,245**	**14,388**
Gross-Up Factor	(6)	1.5385	1.5385	1.5385	1.5385	1.5385	1.5385	1.5385
Rev Req/Refund for Each 1% ROE		**7,461**	**17,809**	**23,738**	**20,039**	**43,513**	**38,838**	**22,135**

(1) Net income for the twelve months ended December 31, 2009 excludes reductions in published financial statements for preferred dividends, capital stock expense and net income attributable to noncontrolling interests. The effects of these exclusions are minimal.

(2) Cleveland Electric net income and common equity were adjusted to remove the one-time after tax effect of the $216 million RTC regulatory asset write-off as stipulated in the Amended ESP. The combined income tax rate utilized in the adjustment was 36.105% assuming 35% federal income tax and 1.7% 2009 remaining state franchise tax rates.

(3) The Duke Energy-Ohio 10-K common equity was reduced to remove the acquisition premium from the paid in capital component in accordance with the settlement agreement in Case Nos. 08-920-EL-SSO, 08-921-EL-AAM, 08-922-EL-UNC and 08-923-EL-ATA. The paid in capital component of common equity was reduced from $5.570 billion to $1.447 billion to remove this acquisition premium. The amount of the acquisition premium adjustment is noted on page 253 in the 2006 Form 1 for FERC account 211 which reads "Purchase Accounting Valuations due to Merger w/Duke Energy." The same amount was removed from December 31, 2008 and December 31, 2009 common equity.

(4) Duke Energy-Ohio net income and common equity were not adjusted to remove net income effects of merger with Cinergy, mark to market accounting or nonrecurring gains/losses except for the $727 million goodwill impairment charge in 2009. Although these amounts are required to be removed from Duke Energy-Ohio's net income for the SEET pursuant to the settlement in Case Nos. 08-920-EL-SSO, 08-921-EL-AAM, 08-922-EL-UNC and 08-923-EL-ATA, the information is not publicly available to quantify these adjustments. The effects of the third quarter 2009 $727 million goodwill impairment charge on net income and common equity were removed.

(5) Financial results for Duke Energy Ohio, Inc. were reported rounded to the nearest $ million in the 2009 10-K. Financial results for Dayton Power and Light and Light reported were rounded to the nearest tenth of a $ million.

(6) Federal income tax rate of 35% used in gross-up factor for all companies.