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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company.	)))	Case No. 09-872-EL-FAC Case No. 09-873-EL-FAC

PUBLIC VERSION

POST-HEARING REPLY BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

In its Initial Merit Brief ("Brief") in this case, Columbus Southern Power Company and Ohio Power Company ("CSP" and "OP" or "OPCo", respectively, and "AEP Ohio," "AEP" or "Companies," collectively) seeks to justify, through an assortment of legal and equitable arguments, its attempt to recover from AEP Ohio customers more fuel cost than the law allows. AEP Ohio is attempting to recover an excessive fuel cost by passing on to its customers all of AEP Ohio's costs under [redacted] while [redacted] those [redacted].

AEP Ohio's arguments ignore the controlling statutes, R.C. 4928.143(B)(2)(a) and R.C. 4928.02(A), and go against basic regulatory principles of equity and reasonableness. Some of AEP Ohio's arguments seek to distract the Commission from the matter before it – determining AEP Ohio's actual, prudently incurred fuel cost for 2009 – by fervently referencing the audit period of January 1, 2009 through December 31, 2009, as if AEP Ohio's actions only during 2009 determined AEP Ohio's 2009 fuel cost.

Common sense, however, as well as R.C. 4928.143(B)(2)(a) and R.C. 4928.02(A), requires that the Commission also review AEP Ohio's fuel-related activities prior to 2009, i.e., AEP Ohio's coal procurement contract negotiations and renegotiations in 2007 and 2008, to determine the actual fuel cost incurred by AEP Ohio for 2009. This was the approach suggested by the Management/Performance auditor,[1] advocated by the Industrial Energy Users ("IEU"), as well as the Ohio Consumers' Counsel ("OCC"), and recognized as appropriate by the Staff of the Public Utilities Commission of Ohio ("Staff" and "PUCO," respectively).[2]

As Staff succinctly opined in its Post-Hearing Brief ("Staff's Brief"), "It is staff's belief that, while the Companies are entitled to recover the costs of fuel, they are only entitled to recover the true cost incurred. That is, any proceeds received offsetting the cost of fuel should be credited against under-recoveries, regardless of the period in which the proceeds are recognized."[3] This approach is the only way to ensure that AEP Ohio's customers pay electric rates that are reasonable, as required under the law.[4]

II. ARGUMENT

A. Under R.C. 4928.143(B)(2)(a), Ohio Adm. Code 4901:1-35-03(C)9)(a)(ii), And R.C. 4928.02(A) The Commission Must Review The Effects Of AEP Ohio's [redacted] Prior To The 2009 Audit Period And Must Not Limit Its Review To AEP Ohio's [redacted] During 2009.

[1] [redacted]

[2] Id.

[3] Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Staff's Brief") at 2.

[4] R.C. 4928.143(A).

In its Brief, AEP Ohio contends that the audit period of 2009 limits the Commission's review of AEP Ohio's fuel cost to AEP Ohio's [redacted].[5] Under AEP Ohio's argument, *any* [redacted] existing prior to January 1, 2009, cannot be considered by the Commission. Even the Companies' 1992 contract, if it had not been [redacted], could not be reviewed by the Commission under AEP Ohio's theory. Under AEP Ohio's argument, the Commission can review only spot market purchases or new fuel contracts entered into during 2009. In addition, the Commission would have no jurisdiction over the ongoing matter of the [redacted] acquired by AEP Ohio in the [redacted]. This limited review would provide a partial and inaccurate picture of AEP Ohio's fuel cost in 2009, in violation of R.C. 4928.143(B)(2)(a), R.C. 4928.02(A) and common sense.

R.C. 4928.143(B)(2)(a) requires that the Commission review and authorize the recovery of the prudently incurred "cost of fuel used to generate the electricity supplied under the offer."[6] Much of the fuel AEP Ohio used to generate the electricity supplied under the offer was purchased under contracts entered into by AEP Ohio prior to the period of January 1, 2009 to December 31, 2009. As discussed in OCC's Post-Hearing Brief, the [redacted], in particular, should be reviewed to determine AEP Ohio's actual fuel cost for the 2009 period. These contracts not only set the price of coal per ton delivered in 2009 and

[5] AEP Brief at 16.

[6] R.C. 4928.143(B)(2)(a).

beyond, but also acquired for AEP Ohio [redacted]

In its review, the Commission must assess any [redacted] AEP Ohio as a result of these contracts. Otherwise, customers will be required to pay a 2009 fuel cost that has little relation to the actual cost of fuel incurred by the utility during the 2009 audit period. To assist the Commission's review, Ohio Adm. Code 4901:1-35-03(C)(9)(a)(ii) provides that an application by an electric utility seeking to recover its fuel costs must include "any benefits available to the electric utility as a result of or in connection with such costs including but not limited to profits from emission allowance sales and profits from resold coal contracts."[7] Thus, in authorizing AEP Ohio's recovery of its cost of fuel, the Commission must properly account for AEP Ohio's customers all of the [redacted] AEP Ohio [redacted]

R.C. 4928.02(A), which provides that consumers shall be ensured of reasonably priced electric service,[8] also requires the Commission to look at AEP Ohio's [redacted] entered into prior to the 2009 audit period. Reasonably priced electric service does not result when an electric utility is allowed to recover from customers more than its actual fuel cost incurred in the generation of electricity.[9] The Commission's determination and authorization of AEP Ohio's fuel cost must follow a thorough analysis of these matters so that customers are made to bear only AEP Ohio's actual fuel cost incurred in the generation of electricity. The Commission must not allow

[7] Ohio Adm. Code 4901:1-35-03(C)(9)(a)(ii).

[8] R.C. 4928.02(A).

[9] R.C. 4928.02(A).

AEP Ohio, through its [redacted],[10] to realize an unreasonable and inequitable share of the [redacted] and receive little or no benefit.

Further, both R.C. 4928.143(B)(2)(a) and R.C. 4928.02(A) obligate the Commission to ensure that AEP Ohio does not benefit, at the expense of its customers, from AEP Ohio's inaction regarding the [redacted]. AEP Ohio has credited to the customers of Ohio Power only a very small part of the [redacted] regarding the 1992 coal procurement contract, instead seeking to keep for itself the majority of the [redacted] This violates the basic regulatory principle of matching costs and proceeds.[11] In providing for reasonable electric rates, R.C. 4928.02 requires that AEP Ohio's customers receive all of the [redacted] from the [redacted] including the [redacted][12]

1. The underlying ESP decision and the January 7, 2010 Entry in this case do not limit the Commission's review of AEP Ohio's [redacted] to only those entered into during the 2009 FAC period.

Contrary to the Commission's statutory authority under R.C.4928.143(B)(2)(a), AEP Ohio claims that the Commission cannot review AEP [redacted] that fixed the [redacted] AEP Ohio purchased in 2009 and used in that year to

[10] [redacted]

[11] See *In the Matter of the Application of Piedmont Gas Company for a Revision to its Gas Cost Recovery Rate*, PUCO Case No. 06-210-GA-GCR, Entry (March 15, 2006) at paragraph 4.

[12] Id. at 12.

generate electricity. To support this position, AEP Ohio contends that, under the PUCO's decision on AEP Ohio's electric security plan ("ESP"), (1) the FAC mechanism excludes both the pre-ESP period and post-ESP period,[13] and (2) the scope of the audit is limited to reviewing "fuel procurement activities that occur during each annual audit period that occurs during the ESP term."[14] AEP Ohio further contends that the Commission's January 7, 2010 Entry in the instant case limits the Commission's review to the FAC period.

In an attempt to bolster its argument, AEP Ohio points to the "prospective operation"[15] of the FAC mechanism and the one-year nature of the FAC period, while ignoring the express language in the ESP decision and testimony presented in the ESP hearing. In its ESP decision, the Commission states that the FAC mechanism is to include an "annual *review* * * * to review the appropriateness of the accounting of the FAC costs and the prudency of decisions made"[16] (emphasis added). The FAC mechanism is established under R.C. 4928.143(B)(2)(a) "to recover prudently incurred costs associated with fuel used to generate the electricity [AEP Ohio] supplied under the offer; * * *."[17] The decision does not strictly limit the Commission's FAC review authority to annual January through December periods. As cited in AEP Ohio's Brief,[18] Staff testified that the Commission would review "the prudence of *decisions made*

[13] AEP Brief at 16.

[14] AEP Brief at 18.

[15] AEP Brief at 5.

[16] Opinion and Order at 15.

[17] Opinion and Order at 14.

[18] AEP Brief at 17.

relative to the components of the FAC" (emphasis added), not the prudence of decisions made *within an FAC period.*

AEP states that the Commission's prudence review must be limited to 2009 fuel procurement activities.[19] But AEP Ohio's fuel procurement activities that greatly affected AEP Ohio's coal deliveries in 2009 and contributed to the large FAC under-recovery of AEP Ohio did not occur in 2009, but rather, in [redacted].[20] These activities must be included in the Commission's review under R.C. 4928.143(B)(2)(a).

It should be noted that the concept of looking beyond the current audit period is not foreign to the PUCO. Several past cases demonstrate the Commission's willingness to look outside the audit period in order to establish a more complete and accurate picture of the individual case at hand. For example, in a gas-cost-recovery case, the Commission recognized that "although the GCR auditors included recommendations regarding [the company], such findings are beyond the GCR audit period and provided only to put the Commission on notice about potential concerns."[21] In that case, the Commission required gas cost recovery customers to receive all the benefits of pipeline capacity release transactions because customers purchased the pipeline capacity. Similarly, in the past the Commission has stated that its policy regarding the review of information -- both

[19] AEP Brief at 16.

[20] Tr. Vol. I at 31 (Medine).

[21] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Vectren Energy Delivery of Ohio and Related Matters*, Case No. 00-220-GA-GCR, Opinion and Order on September 25, 2001.

inside and outside a given audit period -- must be to look at each set of circumstances on a case by case basis.[22]

Moreover, as a regulatory agency, the PUCO is entrusted with a public duty that all necessary data is taken into account in order to make the most informed and educated decisions in cases before it. The Commission has previously acknowledged this duty, stating that it is "imbued with a sense of public responsibility [and] the Commission may find it necessary to review a company decision or action which occurred outside the scope of a current audit period."[23] As such, it is well within the Commission's discretion to allow review of information that may have originated outside the present audit period.

Further, AEP Ohio's claim presents a glaring inconsistency -- if it is unlawful for the Commission to consider AEP Ohio's [redacted] established [redacted] FAC period, it is unlawful for the Commission to allow AEP Ohio to pass through the fuel cost increases in 2009 that were established under the same contracts.

Finally, it should be noted that AEP Ohio is alone in its interpretation of the application of Commission review. OCC, IEU and Staff agree that AEP Ohio is entitled to recover its true, i.e., actual fuel cost. Therefore, any proceeds received offsetting the cost of fuel should be credited against under-recoveries, regardless of the period in which the proceeds are recognized.[24]

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[22] *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Cleveland Electric Illuminating Company and Related Matters*, Case No. 86-08-EL-EFC, Opinion and Order on February 17, 1987

[23] *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC, Entry on November 10, 1986.

[24] Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Staff's Brief") at 2.

2. Because AEP Ohio's [redacted] relate to the 2009 fuel cost, OCC and IEU are not attempting to "claw back" revenue received by AEP Ohio "under a prior rate plan."

AEP Ohio argues that OCC and IEU's positions regarding the matching of costs and benefits under AEP Ohio's fuel contracts constitute an attempt by an "opportunistic"[25] OCC to "claw back"[26] what AEP Ohio alternately refers to as "prudently-incurred costs"[27] and "revenue collected under a prior rate plan."[28] AEP Ohio states, "Just because there are long-term impacts of prior fuel-related actions of the Companies, that does not mean that the prior rate plan should be abrogated."[29]

Citing what it believes to be a "regulatory compact"[30] AEP Ohio further argues that Title 49 does not allow the Commission "to order refunds based on expired programs"[31] or "address continuing costs or a decision from a prior review period."[32] AEP Ohio argues, "The Commission should not reach back into a prior rate plan and review contracts entered into when fuel was unregulated and when there was no prudence review of fuel procurement activity – doing so is the same as revisiting a procurement contract that had already been deemed prudent."[33] Specific to the [redacted] AEP Ohio argues that the Commission should not "reach back into [redacted]

[25] AEP Brief at 14.

[26] AEP Brief at 16.

[27] AEP Brief at 25.

[28] AEP Brief at 16.

[29] AEP Brief at 19.

[30] AEP Brief at 9.

[31] AEP Brief at 16.

[32] AEP Brief at 19.

[33] AEP Brief at 20.

[redacted] by flowing it back through the now-established FAC."[34] Thus, AEP Ohio wants [redacted] to flow through to the FAC, but not the [redacted].

AEP Ohio's arguments are particularly troublesome because the revenue [redacted] and alleges to have "collected under a prior rate plan" is actually the [redacted] AEP Ohio gained through contracts related to 2009 FAC costs. These [redacted], while entered into during a period [redacted], relate to 2009 fuel costs that are regulated under the ESP, and have not been found to be prudent, despite AEP Ohio's assertion of that.[35] There is no attempt to "claw back" proper revenues acquired "under a prior rate plan,"[36] and to claim otherwise is misleading.

Specific to the [redacted] AEP Ohio argues that the Commission should not "reach back into 2008 . . . and capture the [redacted] by flowing it back through the now-established FAC."[37] Thus, AEP Ohio wants the price of coal established in its [redacted] to flow through to the FAC, but not the [redacted] under the same agreement. How is this reasonable?

Curiously, AEP Ohio has, in fact, passed through to customers some of the [redacted]

[34] AEP Brief at 28.

[35] AEP Brief at 14.

[36] AEP Brief at 20.

[37] AEP Brief at 28.

[redacted].[38] So AEP Ohio apparently agrees that their [redacted] are, at least in part, tied to its customers' 2009 fuel cost. Unfortunately, AEP Ohio cannot make the complete connection and pass through the [redacted]. Further, if it is unlawful, as AEP Ohio contends,[39] for the Commission to order a [redacted], then AEP Ohio unlawfully shared [redacted] with its customers.

The matter in this proceeding is not the fuel cost or earnings of AEP Ohio in 2008. The matter is a true and fair accounting of AEP Ohio's fuel cost of 2009 that has been recovered through the FAC from AEP Ohio's customers. The fact that AEP Ohio has [redacted], and thus, has [redacted][40] has no bearing on the proper accounting of the 2009 fuel cost. This is not a "claw back" of 2008 revenue under a prior rate plan. Rather, it is the legal way to determine the true fuel cost of 2009.

3. The FAC Baseline Is Irrelevant To The Matter of Requiring AEP Ohio To Recover Only Its Actual Fuel Cost and Does Not Constitute *Res Judicata.*

In an attempt to further support its position that the Commission cannot review or refund the [redacted] related to its 2009 fuel cost, AEP Ohio claims in its Brief that the FAC baseline "put the pre-ESP period fuel

[38] AEP Brief at 8.

[39] AEP Brief at 16.

[40] AEP Brief at 30-31.

costs behind everyone"[41] and "in the past."[42] AEP Ohio states, "In short, establishment of the FAC baseline and other matters involving operation of the FAC mechanism during the ESP were hotly contested issues that the Commission fully adjudicated and decided in the *ESP Cases*."[43] AEP Ohio further argues that "the FAC baseline is *res judicata* and cannot be re-litigated or re-applied on a retroactive basis."[44] AEP Ohio concludes:

> As such, the Commission is precluded from revisiting these issues during the term of the ESP – including in this 2009 FAC Audit proceeding.
>
> As discussed above, the decision in the ESP Cases left no room for re-examination of fuel costs outside the ESP term or limiting recovery of fuel costs within the term based on activity that occurred during the time when AEP Ohio was not operating under a FAC; rather, there was a clear and definitive separation of the ESP period from both the pre-ESP period and the post-ESP period * * *.[45]

This argument by AEP Ohio is entirely unfounded and irrelevant. There is nothing in the record in this proceeding to support it, and little, if any, mention of the FAC baseline. Recognizing this, AEP Ohio inappropriately requests in its Brief that "the Commission take administrative notice of the ESP testimony in this regard and fully consider that issue * * *."[46] The FAC baseline discussion in the ESP Opinion and Order relates to "methodologies to obtain a proxy for 2008 fuel costs."[47] The brief section of Commission's Opinion and Order related to the FAC baseline determines AEP Ohio's 2009 fuel cost, and does not address the review of AEP Ohio's 2009 fuel cost under R.C.

[41] AEP Brief at 20.

[42] AEP Brief at 6.

[43] Id.

[44] AEP Brief at 20.

[45] AEP Brief at 20 - 21.

[46] AEP Brief at 22, footnote 2.

[47] Opinion and Order at 19.

4928.143(B)(2)(a) in any manner. As such, the FAC baseline is irrelevant and not controlling.

Further, the doctrine of *res judicata* in Ohio encompasses the two related concepts: claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel. * * *."[48] The Ohio Supreme Court has held:

> "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action," whereas issue preclusion, or collateral estoppel, "precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action."[49]

Here, the doctrine of *res judicata* does not apply. The issues of AEP Ohio's 2009 fuel cost and the [redacted] related to its 2009 fuel were not considered or addressed in the ESP case. AEP Ohio's 2009 fuel cost was neither (1) an action based upon a claim arising our of a transaction that was the subject matter of AEP Ohio's ESP proceeding nor (2) an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action. Therefore, the doctrine of *res judicata* does not bar the consideration of AEP Ohio's [redacted] in this proceeding.

[48] *State ex rel. Nickoli v. Erie Metroparks* (2009), 124 Ohio St.3d 449, 453, 923 N.E.2d 588, 592, citing *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007 Ohio 1102, P 6, 862 N.E.2d 803.

[49] Id. citing *Ft. Frye Teachers Assn. OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395.

B. Requiring AEP Ohio To Recover Only Its Actual Fuel Cost Does Not Constitute Selective Or Retroactive Ratemaking.

In its Brief, AEP Ohio alleges that in seeking to allow AEP Ohio to recover only its actual fuel cost, OCC and IEU are taking an "opportunistic" position that constitutes "selective and unlawful retroactive ratemaking."[50] Noting that SB 221 did not become effective until July 31, 2008, and AEP Ohio's FAC mechanism became effective in January 2009, AEP Ohio claims that OCC and IEU are seeking to retroactively apply the FAC and unlawfully reach back to encompass transactions that occurred in 2008, before the application of the law, and "selectively leverage [redacted]" from those transactions.[51]

AEP Ohio implores the Commission to "decline intervenors' [so-called] misguided invitation to retroactively modify the RSP and ESP agreements previously approved and implemented."[52] AEP Ohio states, "As such, any ongoing effect of the [redacted] in the current 2009 review period cannot be retroactively modified or disallowed in this proceeding."[53] AEP Ohio's argument regarding retroactive or selective ratemaking is unfounded in law or fact.

First, R.C. 4928.143(B)(2)(a) provides for an electric distribution utility's recovery of its prudently incurred cost of fuel "used to generate the electricity supplied under the offer * * *."[54] Under the statute, this fuel cost is expressly related to the electricity supplied under the offer, i.e., the ESP, and not electricity supplied under a

[50] AEP Brief at 14.

[51] AEP Brief at 14 - 15.

[52] AEP Brief at 2.

[53] AEP Brief at 25.

[54] R.C. 4928.143(B)(2)(a).

previous offer, i.e., the RSP in effect prior to 2009. In any FAC audit, the auditor should look at each coal contract that provided deliveries during the audit period. In this case, that would include the [redacted]. Absent the [redacted], the auditor would have reviewed the [redacted] contract that would have provided coal in the 2009 audit period.[55]

Second, there is nothing in the record, whatsoever, to indicate that OCC or IEU are seeking to apply the law to transactions or contracts related to fuel used or fuel costs incurred prior to the 2009 FAC period. OCC and IEU are not seeking to affect past rates in effect under the RSP, but only the FAC recovery under the new law in effect starting 2009. Thus, OCC and IEU are not advocating the retroactive application of a law, but rather the prospective application of the law to AEP Ohio's 2009 fuel cost it seeks to recover in the instant proceeding.

Third, the body of case law that has developed regarding retroactive ratemaking generally concerns Ohio's so-called "filed rate doctrine" codified in R.C. 4905.22 and 4905.32. Under those sections of the Revised Code, a utility may not charge or collect a rate other than as specified by the Commission according to Commission-approved schedules. Specific to the issue of retroactive ratemaking, the Ohio Supreme Court has held, "It is axiomatic that before there can be retroactive ratemaking, there must, at the very least, be ratemaking."[56] And the Ohio Supreme Court has historically advised in cases involving fuel cost adjustment procedures that "a distinction must be recognized between the statutory rate-making process involved in establishing fixed rate schedules, and the statutory procedure governing variable rate schedules under the fuel cost

[55] Tr. Vol. I at 46 (Medine).

[56] *River Gas Co. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 509, 512, 433 N.E.2d 568, 571.

adjustment procedure."[57] The function of the Commission is to determine whether rates as proposed are just and reasonable.[58] In contrast, a fuel cost adjustment is a statutory plan that authorizes variable fuel costs and passes those costs to customers. Rates are thereby varied and independent from the formal rate-making process.[59]

Similar to fuel adjustment procedures prior to S.B. 221, R.C. 4928.143(B)(2)(a) provides the Commission the authority to approve fuel costs as part of the ESP. Accordingly, the Commission's review of fuel procurement [redacted], which OCC and IEU have requested in the instant proceeding, does not constitute retroactive ratemaking.

C. The Management/Performance Auditor Report And The Auditor's Testimony Do Not Support AEP Ohio's Attempt To Recover More Than Its Actual Fuel Cost.

The scope of the [redacted], as discussed by the auditor at hearing, is that the Commission should consider whether proceeds [redacted] should be credited against OPCo's FAC under-recovery.[60] Despite the obvious title, [redacted]" AEP Ohio claims that Auditor "was not making a recommendation[,][61] but merely felt that the issue should be raised for the Commission's consideration[.]" AEP Ohio argues that "while the EVA [auditor] may have had good intentions in raising this 'equity' issue, it would be inappropriate for the Commission to entertain the notion because it creates a host of legal

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[57] *Office of Consumers' Counsel v. PUCO* (1979), 57 Ohio St.2d 78, 82, 38 N.E.2d 1343, 1346, 11 Ohio Op. 3d 245.

[58] Id.

[59] Id.

[60] Tr. Vol. I at 38 (Medine).

[61] AEP Brief at 8.

issues and undermines the regulatory compact created by AEP Ohio's current and prior rate plans."[62] AEP Ohio concludes, "Regarding [redacted], it is fair to say that the Commission has fulfilled the Auditor's request to consider the equity issue raised."[63]

Contrary to AEP Ohio's contention, the matter of [redacted] is not closed. It appears from the auditor's testimony that the auditor included the recommendation in the audit report because something about the [redacted] just did not feel right. Most likely, it did not feel right because it was not right. As AEP Ohio notes, "EVA did not reach any findings of imprudence for AEP Ohio,"[64] but the auditor also did not find AEP Ohio's [redacted] to be "prudent." In fact, the auditor did not conduct a prudence review with respect to any of the [redacted].[65] The audit report states, "Equity suggests that the PUCO consider whether some of the [redacted] should be credited against the under-recovery."[66] At hearing, the auditor affirmed her concern regarding the equity of (1) AEP Ohio's [redacted][67] (2) the [redacted] by AEP Ohio,[68] and

[62] AEP Brief at 9.

[63] AEP Brief at 51.

[64] AEP Brief at 26.

[65] Tr. Vol. I at 78 (Medine).

[66] [redacted]

[67] Tr. Vol. I at 30-31 (Medine).

[68] Tr. Vol. I at 31 (Medine).

(3) AEP Ohio's acquisition of the [redacted][69]

The auditor testified that [redacted] was a "very large [redacted]," and a "very profitable company."[70] The auditor testified that the AEP Ohio [redacted]"[71] In the auditor's opinion, the [redacted] was "a relatively weak claim"[72] and [redacted] would not have [redacted] to AEP Ohio at [redacted].[73] Despite this weak claim, AEP Ohio agreed to [redacted] for the period of 2009, 2010, and 2011.[74] The auditor testified that the [redacted] was one factor behind the large OPCo FAC under-recovery.[75] The auditor further testified that under the [redacted], most of the [redacted] did not flow through to customers and certainly did not offset the [redacted] during the ESP period.[76]

The undisputed facts are, AEP Ohio [redacted] that did not start until the FAC

[69] Tr. Vol. I at 30 (Medine).

[70] Tr. Vol. I at 91 (Medine).

[71] Id.

[72] Tr. Vol. I at 90 (Medine).

[73] Tr. Vol. I at 34 (Medine).

[74] Tr. Vol. I at 27-29 (Medine).

[75] Tr. Vol. I at 31 (Medine).

[76] Tr. Vol. I at 33-34 (Medine).

period started, and which would be entirely paid for by customers. To the auditor, these facts sufficiently warranted the Commission's review to the extent that the auditor made presented the matter as [redacted]." To AEP Ohio, it is inappropriate for review.[77] To customers, it appears (to borrow a term from AEP Ohio) "opportunistic."

D. The Pre-ESP Period Coal Market and Regulatory Conditions Do Not Support AEP Ohio's [redacted] Or Justify AEP Ohio's Present Attempt To Recover More Than Its Actual Fuel Cost.

In an apparent attempt to garner the Commission's sympathy or indulgence, AEP Ohio commits significant portions of its Brief to discussions of the pre-ESP period coal market and regulatory conditions. AEP Ohio's cites "[v]olatile coal prices reaching all-time highs during 2007-2008,"[78] coal prices that tripled between mid-2007 and mid 2008,[79] "extraordinary circumstances in the coal market in the period just prior to the beginning of the ESP term"[80] and "unprecedented volatility in coal markets."[81]

AEP Ohio refers, perhaps nostalgically, to "a period when fuel costs were unregulated and annual prudence reviews were not conducted[,]"[82] and states: "Thus, the Companies were 'on their own' with respect to recovery of fuel costs during the RSP period of 2006 through 2008."[83] "The Companies lived by the Rate Stabilization Plan (RSP), in effect from 2006 through 2008, and never sought to recover these

[77] AEP Brief at 9.

[78] AEP Brief at 2 at 3.

[79] AEP Brief at 3.

[80] AEP Brief at 14.

[81] AEP Brief at 3.

[82] AEP Brief at 2.

[83] AEP Brief at 3.

extraordinarily high fuel costs."[84] "During the period from 2001 through 2008 when no FAC was in effect, the Companies' shareholders bore the total risk of increased fuel costs."[85] "During this extraordinary historical period of coal procurement when fuel costs were not regulated, the Companies entered into several transactions to manage coal prices while maintaining a reliable supply."[86] "Material and volatile coal prices created ideal circumstances for having a FAC, but after AEP Ohio weathered this storm without one, intervenors now seek to 'cherry pick' only certain upside results achieved by AEP Ohio under its prior rate plan."[87]

The above-cited assertions by AEP Ohio have little relevance to this case and little resemblance to the record in this proceeding. AEP Ohio cites a market in which coal prices tripled and the Companies were "on their own," but with an existing, [redacted] AEP Ohio was well insulated from rising coal prices. The audit report found that "AEP Ohio's coal costs compare favorably with the coal purchase expenses of nearby utilities as shown in [redacted]."[88] [redacted] of the audit report shows that AEP Ohio [redacted], and that the contracts establish per ton coal prices between [redacted] than the cost (approximately [redacted] per ton) that AEP Ohio enjoyed under its [redacted], but much less than three times the price. AEP Ohio's competitors, without the benefit of [redacted]

[84] AEP Brief at 2.

[85] AEP Brief at 3.

[86] AEP Brief at 3-4.

[87] AEP Brief at 3.

[88] [redacted]

and relying more on the spot market, may have experienced sharply rising costs, but according to the audit report and the evidence at hearing, [redacted].

When AEP Ohio [redacted], AEP Ohio did not bear any additional risk because AEP Ohio pushed the [redacted] onto customers through the new FAC, which coincided with the [redacted]. In the deal, AEP Ohio [redacted] AEP Ohio claims that it entered into [redacted] transactions to "manage coal prices." AEP Ohio managed these transactions well for itself, which is not the same thing as managing them well for customers.

E. AEP Ohio Is Attempting To Use The FAC To Its Advantage By Acquiring The [redacted] While Pushing All Of The Costs Under The [redacted] To Customers During The FAC Period.

1. AEP Ohio's exclusive claim to the [redacted] fails because customers are paying for the [redacted], not AEP Ohio.

AEP Ohio opposes the fair treatment of the [redacted] proposed by OCC in this proceeding. AEP Ohio states that it would be "unfair and punitive to require OPCo to [redacted] as OCC suggests."[89] AEP further claims that the [redacted] "is an OPCo [redacted] for which ratepayers have no claim and its current [redacted] is unknown."[90]

[89] AEP Brief at 11.

[90] AEP Brief at 40-41.

To support its position, AEP Ohio cites a 1988 case involving the Conesville Coal Preparation Plant[91] for the proposition that "customers pay for electricity, not utility assets."[92] AEP Ohio argues, "In any case, the Commission's holding that customers do not enter into an installment sale for utility assets when they pay rates for service applies here with additional force, given that OPCo customers did not even pay a separate fuel rate for generation service during the pre-ESP period."[93]

AEP Ohio's argument is based on the inaccurate premise that because AEP Ohio's [redacted] occurred in 2008, the [redacted] had nothing to do with AEP Ohio's 2009 fuel cost or its customers paying that cost. The undisputed fact is that AEP Ohio [redacted] as part of the [redacted] effective January 1, 2009. There is nothing in the record (no accounting entry, company memorandum, purchase contract, or other evidence in the form of a document, an exhibit or testimony) to indicate that AEP Ohio [redacted] it in a transaction unrelated to AEP Ohio's 2009 fuel cost. Similarly, there is nothing in the record establishing that the [redacted] was related to AEP Ohio's pre-ESP period rates or fuel cost. Assuming AEP Ohio did not [redacted], the truth is that AEP Ohio's customers are paying for the [redacted] through a [redacted] applicable to the FAC periods of 2009, 2010, and 2011.

[91] *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of Columbus Southern Power Company and Related Matters*, PUCO Case. No. 88-102-EL-EFC, Opinion (Oct. 23, 1988).

[92] AEP Brief at 41.

[93] Id.

Regarding the [redacted], AEP Ohio further contends that [redacted] [94] Apparently abandoning its earlier position taken in testimony that the [redacted] [95] it is clear that although the [redacted] may be undetermined, the [redacted]. Together, [redacted] [96]

More importantly, a lawful and reasonable result in this case can be reached even if the [redacted] is still to be ascertained. As presented in the testimony of OCC witness, Dr. Duann, the absence of a market-determined value of [redacted] does not pose any legal or financial impediments of implementing a lawful and reasonable reduction of the fuel cost deferral balance.[97] To this issue, the auditor testified that "the [redacted] should be considered [by the Commission] to be applied to the under-recovery."

Further, AEP Ohio's [redacted] presents the question: If the [redacted] can be shared, why not the [redacted]? Perhaps AEP Ohio, in no apparent hurry to do anything with the [redacted], entertains the belief that if [redacted] after the FAC period, it can simply [redacted].

[94] AEP Brief at 40.

[95] [redacted]

[96] Tr. Vol. I at 37 (Medine).

[97] OCC Exhibit 1A (Pre-filed Testimony of Duann) at 17-21.

2. AEP Ohio's [redacted] is a further instance of AEP Ohio's [redacted] of the FAC process.

Similar to AEP Ohio's [redacted] related to AEP Ohio's 2009 FAC, AEP's [redacted] is an example of AEP's manipulation of the FAC process for its own self interest. Through the so-called [redacted], AEP essentially [redacted] which AEP views as fully recoverable from its customers through the FAC, in exchange for [redacted] to AEP Ohio's customers.

AEP Ohio has provided no reason why it would not take advantage of the [redacted] and provided no evidence in this proceeding that AEP Ohio will not [redacted]. Clearly, Ohio Power will still use coal for electricity generation in 2013 and beyond.

AEP Ohio's argument that Ohio Power "[redacted] * * * that it [redacted]"[98] is irrelevant. This [redacted] is being paid for by customers through [redacted]. Consequently, the [redacted] should be properly accounted for in determining the true and actual 2009 fuel cost of AEP Ohio.

F. Immediate Credits To The FAC Under-Recovery Are In The Best Interest Of AEP Ohio's Customers.

OCC, IEU and Staff agree that while AEP Ohio is entitled to recover its prudently incurred cost of fuel, AEP Ohio is only entitled to recover its true, or actual, cost

[98] AEP Brief at 35.

incurred. That is, any [redacted] the cost of fuel should be credited against under-recoveries, regardless of the period in which the [redacted].

OCC, IEU and Staff are not in agreement as to when AEP Ohio's customers should receive their rightful share of the [redacted] that affected AEP Ohio's 2009 cost of fuel. OCC and IEU agree that the Commission should credit against the Ohio Power FAC under-recovery the [redacted] Regarding the [redacted], IEU states, "The Commission should direct the auditor in the next FAC m/p audit review proceeding to provide a current [redacted] to be credited against fuel costs."[99] IEU further recommends, "In the meantime, the Commission should use the [redacted] to make an initial downward adjustment to the OP FAC under-recovery. * * * Any greater value attributed to the [redacted] could also be credited to OP's under-recovery once the Commission settles on a more accurate valuation of the [redacted] in the 2010 FAC audit."[100] In its Post-Hearing Brief, Staff states, "[I]t is clear from the record in this case that the value of such credits cannot be determined at this time. Consequently, Staff recommends that the Commission direct that EVA, which will also conduct the audit for the second year of [the] FAC mechanism, evaluate [redacted] by the Companies and not credited either to the FAC or to deferred under-recoveries, and make recommendations in the next audit proceeding as to the [redacted] to be credited."[101]

[99] Initial Brief of Industrial Energy Users-Ohio ("IEU Brief") at 12.

[100] IEU Brief at 13.

[101] Staff's Post-Hearing Brief at 3.

OCC advocates that customers should receive the maximum credit against the Ohio Power FAC under-recovery as soon as possible. The [redacted] AEP Ohio are well established and they should be applied immediately to the fuel cost deferral balance to alleviate the unreasonable burden on the customers of the Ohio Power FAC under-recovery. Specifically, there is no dispute that [redacted] has not been passed through to Ohio Power's customers. There is also independent evidence establishing that the [redacted] Yet, none of this [redacted] has been passed through to the customers of Ohio Power. OCC recommends that the Commission immediately credit [redacted] to the FAC deferral balance, subject to a true-up when AEP Ohio [redacted] As the second [redacted] shows, the [redacted][102] depending on market conditions at the time of the [redacted]

Any delay in applying these credits will unnecessarily increase the burden to the customers of Ohio Power. As indicated by OCC witness Dr. Duann, the extremely large fuel cost deferral balance is an issue that Commission should address as soon as possible[103] because the carrying charge associated with this amount of fuel cost deferral can exceed [redacted] million every three months.[104] Furthermore, OCC has proposed a workable true-up mechanism that will ensure that the true [redacted] is

[102] Tr. Vol. I at 37 (Medine).

[103] OCC Exhibit 1A (Pre-filed Testimony of Duann) at 16.

[104] Id.

fully passed through to the customers of Ohio Power, and at the same time, protect the financial position of Ohio Power.[105]

III. CONCLUSION

As demonstrated above and in OCC's initial Post-Hearing Brief, Ohio law mandates that Ohio's electric utility customers shall receive electric service at a reasonable price and pay only the actual fuel cost incurred by AEP Ohio. The Commission must not allow AEP Ohio, through its [redacted], to unlawfully and unreasonably [redacted] while allowing its customers little or no benefit.

Therefore, the Commission should thoroughly review the effects of AEP Ohio's [redacted], which established AEP Ohio's 2009 fuel costs. In addition, the Commission should order an immediate credit to the FAC deferral balance in the full amount of the [redacted] for future coal delivery.

[105] OCC Exhibit 1A (Pre-filed Testimony of Duann) at 15-22.

Respectfully submitted,

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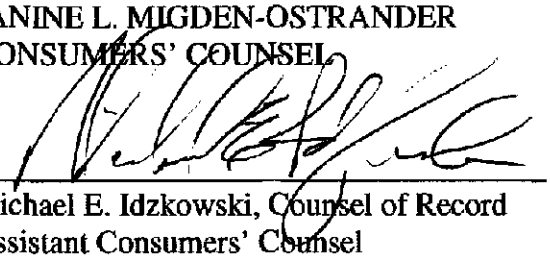

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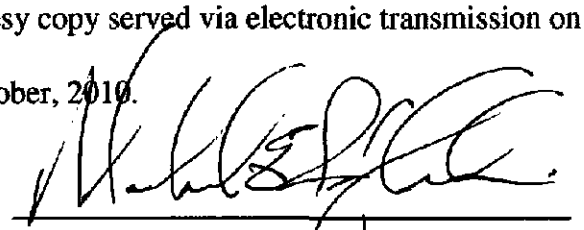
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Reply Brief of the Office of the Ohio Consumers' Counsel, Public Version, was served via regular U.S. Mail Service, postage prepaid, with a courtesy copy served via electronic transmission on the parties listed below this 15th day of October, 2010.



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