**BEFORE THE**
**PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**OHIO POWER COMPANY'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS – OHIO**

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## MEMORANDUM CONTRA

In its May 11, 2012 Application for Rehearing, Industrial Energy Users-Ohio ("IEU") asks the Commission to reverse the conclusion in its April 11, 2012 Entry on Rehearing (at ¶ 18) that Ohio retail customers should be credited for only that portion of the value of Ohio Power's 2008 BuyOut Agreement (the "2008 Settlement Agreement") that is allocable to Ohio's retail jurisdictional customers and not the full amount of the value, including that properly allocable to wholesale and non-Ohio retail jurisdictions. The Commission should deny IEU's application because it raises no new issue for review and has no merit. The result IEU seeks is contrary to well-established Commission and Ohio Supreme Court precedent and would violate federal law. While Ohio Power believes the Commission erred in requiring any additional portion of the value obtained from the 2008 Settlement Agreement to be credited against 2009 fuel costs, the Commission should not compound its error by confiscating non-jurisdictional asset value, as IEU suggests.

### A. IEU's application for rehearing should be denied because the Commission has fully considered this issue and IEU raises no new arguments.

The 2008 Settlement Agreement resulted in total proceeds of $71.6 million ($30 million in cash and a coal reserve valued at $41.6 million). (Co. Ex. 1 at 3.) The Company recorded the 2008 Settlement Agreement as a gain of $58.3 million in 2008 and a gain of $13.3 million total in 2009 and 2010. The Company applied the Ohio retail share of the $13.3 million gain recorded in 2009 and 2010 to reduce fuel costs in 2009 and 2010. (Co. Ex. 1 at 4.)

In its January 23, 2012 Opinion and Order, the Commission ordered, among other things, that all the remaining value from the 2008 Settlement Agreement should be credited against Ohio Power's Fuel Adjustment Clause ("FAC") under-recovery for 2009. Ohio Power sought rehearing of this order on numerous grounds. *See* Ohio Power Application for Rehearing (Feb. 23, 2012), Secs. I-VIII. While Ohio Power argued that no additional portion of the 2008 Settlement Agreement asset value (the cash or the coal reserve) should be credited to Ohio retail customers, it argued in the alternative that, if any such additional credit was ordered, it necessarily had to be limited to that portion of the remaining value allocable to Ohio retail jurisdictional customers. (OPCo's App. for Rehearing at 12-14.) IEU fully responded to this alternative argument in its March 5, 2012 Memo Contra at 12-14, raising exactly the same the issues it now raises again in its latest application for rehearing. The Commission nevertheless found Ohio Power's position well-taken and in its Entry on Rehearing (at ¶18) clarified that "the 2009 FAC under-recovery need only be credited for the share of the settlement agreement allocable to Ohio's retail jurisdictional customers."

The Commission should summarily reject IEU's latest application for rehearing because each of the arguments advanced in it were raised in its March 5, 2012 Memo Contra and have already been found to be unmeritorious by the Commission in its April 11, 2012 Entry on Rehearing. IEU improperly seeks "rehearing" on an issue already fully briefed and clarified on rehearing.

### B. The Commission properly found in its April 11, 2012 Entry on Rehearing that the record fully supports Ohio Power's jurisdictional claim.

IEU again argues that Ohio Power should be precluded from raising the jurisdictional issue in its own application for rehearing because it did not offer evidence on this issue in the original hearing and did not brief the jurisdictional issue in its initial brief or reply brief. (IEU AFR at 9.) IEU made this same non-substantive argument in its March 5, 2012 Memo Contra at 13. The Commission properly rejected this argument as there was substantial evidence in the record that FAC-related expenses and revenues must be allocated to Ohio retail and non-Ohio retail jurisdictional buckets and cannot be indiscriminately lumped together.

Contrary to IEU's claim, there was specific testimony on the fact that proceeds of the 2008 Settlement Agreement would be subject to jurisdictional allocation, as discussed below. And, AEP Ohio raised the jurisdictional argument in its Initial Brief at 11 by responding to OCC witness Duann's opinion that retail customers should be credited with both the cash gains and the value of the coal reserves from the 2008 Agreement. In response, AEP Ohio argued: "But even if such a remedy would be appropriate (which it is not), there is no basis to conclude that Ohio retail customers would get 100% of the cash payments or coal reserve value."

Company witness Dooley testified that only a "portion" of the $13 million gain from the 2008 Settlement Agreement that was posted to 2009 and 2010 was credited to Ohio retail customers. (Co. Ex. 1 at 4). As Mr. Dooley clearly explained on the record:

> They received a portion of the total value that was received. Some $13.3 million was deferred as part of this settlement when we recorded it, and in 2009 and 2010 portions of that were amortized to fuel inventory. The Ohio retail FAC portion would have gotten a portion of that.

(Tr. I at 122.)

Further, the Financial Auditor also testified that he fully understood that expenses reflected in the AEP Ohio accounting ledgers were allocated as between retail and non-retail expenses before being included in the FAC. (T. I at 15-16.) Specifically, the Auditor explained regarding fuel costs allocated to the FAC from the general ledger:

> If amounts are allocated from the general ledger, then only a portion of those would be included in the FAC, so for the allocated amounts, the general ledger would essentially include 100 percent and then the FAC would only include the allocated portion of those.

(Tr. I at 16.) It is the Financial Auditor's function to confirm that the Company properly calculated and accounted for the FAC and the Financial Auditor found no issues or problems in the jurisdictional allocation.

Moreover, Company witness Nelson offered the following testimony when asked whether the "full amount" of the 2008 Settlement Agreement would affect the retail deferred fuel balance.

> All of the amounts that have been discussed in the Audit Report and in the Companies' testimony associated with the 2008 Settlement Agreement are total OPCo amounts. OPCo's total generation output greatly exceeds its retail sales. Therefore, had a fuel clause existed in 2008, the impact on the retail fuel deferral would have been only a portion of the total OPCo amounts that were discussed in the Audit Report.

(Co. Ex. 3 at 8.)

In sum, retail customers do not pay for 100% of AEP Ohio's fuel costs – only the retail jurisdictional allocation. The Financial Auditor reviewed the Company's implementation of this concept when it calculated the FAC. And the record was very clear as to the fact that the FAC involves only the retail share of the Company's fuel costs and the portion of value already flowed through to FAC customers was done based on the retail jurisdictional allocation. Nothing in the substantive discussion found in the Opinion and Order indicated any reason to do otherwise, except the ordering language was worded broadly so as to present the possibility of an erroneous interpretation. As the Commission noted in its Entry on Rehearing at ¶ 18, the specific jurisdictional issue related to the amount to be credited did not arise until the Commission issued its FAC Opinion and Order and stated that "all of the realized value from the settlement agreement" should be credited against 2009 fuel costs. The Company cannot be faulted for not anticipating that the Commission might inadvertently use language in its order that literally read would result in violating the distinctions between Ohio retail jurisdiction and wholesale and non-Ohio retail jurisdictions. In any case, the Commission properly clarified on rehearing that it did not intend to confiscate any non-Ohio retail share of the asset value.

### C. The Commission's clarification that only that portion of the asset value arising from the 2008 Settlement Agreement properly allocable to Ohio retail jurisdiction customers are to be credited against the 2009 FAC under-recovery is consistent with Ohio law, the Commission's prior orders, and the record in this case.

#### 1. IEU's jurisdictional argument

IEU again argues, as it did in its March 5, 2012 Memo Contra, that the "jurisdictional argument is only conceptually relevant, if at all, in a traditional cost of service ratemaking context," and has no application to the pricing of "default generation supply service." (IEU AFR at 8.) IEU cites absolutely no authority or precedent for its claim. The lack of authority for its claim is not surprising, however, because the claim simply cannot be squared with the most fundamental principle governing state regulation of electric service – that the General Assembly's authority to regulate the provision of electric service, and therefore the Commission's own authority to regulate, is limited to regulating the provision of retail electric service in Ohio.

The General Assembly has no authority under Ohio law to regulate the provision of retail electric service in other states and no authority to regulate the provision of the wholesale sale of electric service. These jurisdictional barriers apply regardless of whether the Commission is limited to setting rates using traditional cost of service ratemaking or authorized to approve rates for "default generation service" using the alternative electric security plan ("ESP") method described in R.C. 4928.143. R.C. 4928.143 is one means by which an Ohio electric distribution utility may satisfy its obligation to provide default generation service under R.C. 4928.141. The statutory default generation service obligation is to provide "a standard service offer of all competitive *retail electric services* necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." R.C. 4928.141(A). For purposes of R.C. Chpt. 4928, "retail electric service" is defined as:

> any service involved in supplying or arranging for the supply of electricity to *ultimate consumers in this state*, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components" : generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

R.C. 4928.01(A)(27) (Emphasis added.) Similarly, the Commission's jurisdiction over the FAC, a component of the ESP, is limited to regulating the "cost of fuel used to generate electricity supplied under the [SSO]." R.C. 4928.143(B)(2)(a).

There is no language in R.C. 4928.143, or any other provision of R.C. Ch. 4928, that can be read to suggest that the jurisdictional barriers between Ohio retail electric service and wholesale service and retail service provided in other states were removed as part of the electric utility restructuring process in Ohio. While the pricing for default generation service post-restructuring is no longer based on traditional cost of service ratemaking, the pricing for default generation service must still respect traditional jurisdictional barriers.

Thus, the clarification made in the Entry of Rehearing (at ¶ 18) is not only consistent with Ohio law; it was required to be made by Ohio law. Ohio Power's total generation output greatly exceeds its retail sales in Ohio. (Co. Ex. 3 at 8.) The Commission's authority to regulate its generation output, or the revenue and expenses associated with that output, however, is limited by Ohio law to regulating only that used to satisfy the Company's obligation to provide retail electric service in Ohio. *See Ohio Edison v. Pub. Util. Comm.*, 63 Ohio St.3d 555, 556, 589 N.E.2d 1292 (1992).

### 2. IEU's "selective advancement" argument.

Contrary to IEU's claim that Ohio Power "selectively advances" the need for jurisdictional allocation, (IEU AFR at 11), both AEP Ohio and the Commission have been consistent in recognizing the need to respect jurisdictional lines. Neither the Company nor the Commission changed their position after the enactment of S.B. 221. AEP Ohio's position and the Commission's finding in *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.142(F), Revised Code, and Rule 4901:1-35-10, Ohio Adm.Code*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011), attests to the consistency of the their position on the jurisdictional issue. In that case, AEP Ohio argued, and the Commission agreed, that the revenue associated with the off system sale of generation had to be excluded from the SEET analysis, as required by R.C. 4928.143(F), because such off system sales are not within the purview of an electric security plan covering the provision of retail electric service in Ohio. *Id.* Opinion and Order at 27-30.

Ironically, it is IEU, not AEP Ohio, that has flip-flopped on the jurisdictional issue. In Case No. 10-1261, IEU vigorously argued that the SEET analysis required by R.C. 4928.143(F) could be performed only if the electric utility performed a complete jurisdictionalized earnings allocation study. IEU made this argument even though the SEET analysis is a requirement appended to the ESP pricing of default generation service and had no counterpart in the traditional cost of service ratemaking context. Likewise, it is IEU that advocates an inconsistent position in this case. IEU wants the Commission to order a claw back of the full amount of all the asset value from the 2008 Settlement Agreement for the benefit of Ohio retail customers in 2009 but it is not suggesting that any of the increased fuel costs Ohio Power absorbed in 2008 from transactions necessary to manage the volatility of fuel costs in that period be carried forward into the 2009 FAC under-recovery.

### 3. The ESP argument.

IEU also repeats its argument that limiting the credit against the 2009 FAC under-recovery to only that portion of the 2008 Settlement Agreement asset value allocable to Ohio's retail jurisdictional customers is inconsistent with Ohio Power's 2009-2011 ESP because the Commission's ESP Entry on Rehearing required Ohio Power to continue to allocate its lowest cost fuel to its standard service offer customers. (IEU AFR at 8) (citing *ESP I,* Case No. 08-917-El-SSO, Entry on Rehearing at 4 (July 23, 2009). *See also* IEU Memo Contra at 12-13. Similarly, IEU states (at 5) that ratepayers would have received lower priced coal through at least 2012, had the contract not been bought out. The argument is based on an entirely faulty premise – that the Supplier Contract that was in fact terminated by the 2008 Settlement Agreement was still an available coal source in 2009. This argument also conflicts with the M/P Auditor's findings that the 2008 Settlement Agreement payments were to be commended as a prudent decision. Moreover, this argument does not reflect a proper understanding of the FAC or fuel cost accounting. Being a low-cost generation resource is not driven by a particular contract but is determined based on the average dispatch cost associated with a unit for a particular period of time.

To the extent that the 2009-2011 ESP Entry required Ohio Power to allocate its lowest cost fuel to SSO customers, it was referring to "the cost of fuel used to generate the electricity supplied under the SSO." *Id.* Case No. 08-917-EL-SSO, Entry on Rehearing at 4. By the time electricity was being supplied under the SSO governed by Ohio Power's ESP, the Supplier Contract, upon which IEU relies to make its argument, was no longer in existence and was not an available coal source for Ohio Power. Ohio Power fully complied with any obligation to allocate the lowest cost fuel actually *available to it in 2009* to its SSO customers; and there is nothing in the record to suggest that it was not in full compliance with this obligation.

IEU's argument is circular and illogical. It argues that Ohio retail customers should be credited with the full amount Ohio Power gained by terminating the Supply Contract in 2008 because the fuel it could have procured under that contract, had it not been terminated, would have been less costly than the fuel Ohio Power actually used to generate the electricity supplied under the SSO. It makes this argument, notwithstanding the fact no party or witness challenged the prudence of the termination of the Supply Contract as part of the 2008 Settlement Agreement and the fact the termination of the Supply Contract was not found to be imprudent by the Financial Auditor or by the Commission. In making this argument, IEU also ignores the record evidence that the Supply Contract was not sustainable and that the likely result, absent the 2008 Settlement Agreement, was that the coal supplier would have defaulted and Ohio Power would have had to procure replacement coal at the higher market prices. (Co. Ex. 2 at 13.)

**4. The "equities."**

Finally, IEU's claim that limiting the credit to only the asset value allocable to Ohio retail jurisdictional customers is "inequitable" completely ignores the record. (IEU AFR at 8-9.) The following key record facts easily discredit IEU's equitable argument: 1) during the period from 2001 through 2008 when no FAC was in effect, Ohio Power's shareholders bore the total risk for increased fuel cost, and coal prices during that time reached all-time high prices (Tr. I at 61); 2) Ohio Power incurred increased fuel costs resulting from other agreements entered into during the pre-FAC period (Co. Ex. 1 at 4-5; Co. Ex. 2 at 16-20; Co. Ex. 3 at 6) but is not recovering these higher fuel costs in whole or in part from Ohio retail customers, and under the Commission's clarified Entry still is not able to off-set these higher fuel costs with any of the asset value from the 2008 Settlement Agreement allocable to Ohio retail customers; 3) Ohio retail customers already benefited from the 2008 Settlement Agreement by enjoying the pre-ordained, stabilized generation rates guaranteed by the rate stabilization plan in effect in 2008, when fuel costs were so volatile; and 4) the costs Ohio Power incurred for fuel in 2009 were found to be prudently incurred by both the Financial Auditor and the Commission.

**D. The result IEU seeks is prohibited by federal law.**

To the extent that IEU is seeking to have the Commission order Ohio Power to credit Ohio retail customers with the share of the settlement agreement asset value allocable to the generation output for wholesale sales, the result is prohibited by federal law. Under well-established federal statutory and constitutional law, there is a "bright-line" between wholesale power transactions and retail transactions. *Mississippi Power & Light Co. v. Mississippi* (1988), 487 U.S. 354, 374, 108 S.Ct. 2428, 101 L.Ed. 322; *Nantahala Power & Light Co. v. Thornburg* (1986), 476 U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943. It is this federally-created "bright-line" that gives rise to the need to allocate total company revenues and expenses between an electric utility's wholesale business and retail business. See *Ohio Edison v. Pub. Util. Comm.*, 63 Ohio St3d at 556. The result IEU seeks would unlawfully cross the line to the extent Ohio retail customers are credited with asset value properly attributable to Ohio Power's wholesale generation output.

Similarly, federal constitutional law prohibits a State from attempting to seize exclusively for its citizens economic benefits that should be shared with retail customers in other states. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 102 S.Ct. 1096, 71 L.Ed2d 188 (1982) (federal Commerce Clause prohibits one state from hording the benefit of low cost power

## CERTIFICATE OF SERVICE

I hereby certify that a copy of AEP Ohio's Memorandum Contra Application for Rehearing was served on the persons stated below via electronic mail this 21st day of May 2012.

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