BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4921-EL-RDR

OHIO POWER COMPANY MEMORANDUM CONTRA APPLICATIONS FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE INDUSTRIAL USERS-OHIO

Filed: September 10, 2012

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I. Introduction

Pursuant to Section 4903.10, Ohio Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Ohio Power Company ("AEP Ohio" or the "Company") respectfully files this Memorandum Contra to the Applications for Rehearing of the Commission's August 1, 2012 Finding and Order, filed by the Office of the Ohio Consumers' Counsel ("OCC") and the Industrial Energy Users-Ohio ("IEU") (collectively "Opposing Parties") each filed on August 31, 2012.

The applications for rehearing filed by the Opposing Parties seek to raise arguments previously decided by the Commission that are not properly part of the present proceeding. The present docket is meant to implement the Commission's previous approve of a phase-in plan and apply the factual findings made by the Commission concerning deferrals ordered related to fuel costs incurred by the Company since 2009.

The Opposing Parties attempt to require the Commission to reopen past decisions are improper and the Commission should find accordingly in its entry on rehearing to make it clear that such arguments are not relevant to this proceeding and likewise are not valid for an appeal of the limited purpose of this case. Opposing Parties are simply looking for any and all forums to reprise the same arguments previously raised in other proceedings before the Commission and also now before the Court. The Commission should not entertain these attempts and should deny the Opposing Parties' applications for rehearing.

II. Law and Argument

A. The Office of the Ohio Consumers Counsel Application for Rehearing

OCC filed a ten-page brief that included five grounds for rehearing. Their arguments include inappropriate requests that are beyond the record in this case and highlight the Commission's need to enforce its initial order on these matters in the ESP I decision and not reopen adjudicated matters or partake in the requested retroactive ratemaking suggested by OCC and IEU alike. Those grounds for rehearing should be denied.

1. The Commission appropriately denied the request to reduce the deferral balance to account for the flow-through effects of the remand of the ESP 1 Order because it was not an issue in this case and also because it would have violated the well established prohibition against retroactive ratemaking. (Relating to OCC Rehearing Ground 1).

OCC again argues incorrectly that the Commission is acting unlawfully and unreasonably by refusing to violate the *Keco* doctrine prohibiting retroactive ratemaking. The argument raised by OCC is the same argument the Commission previously rejected in the ESP Remand proceeding in its order on October 3, 2011 ("*Remand Order*"). The

argument raised is not appropriate in the context of this case that merely applies the finding of the previous ESP, to populate the ordered deferral into a mechanism for recovery.

The Commission made it clear in its Finding and Order in this case that it already dealt with this issue in the *Remand Order* and incorporated its rejection of this argument by reference at page five of its order. In the *Remand Order*, the Commission specifically stated:

> The Commission finds that the proposed adjustment to the FAC deferral balance, as recommended by OCC, OPAE, and IEU-Ohio, would be tantamount to unlawful retroactive ratemaking. In the ESP Order, we authorized AEP-Ohio to defer any FAC amount over the allowable total bill increase percentage levels pursuant to Section 4928.144, Revised Code, and directed that any deferred FAC expense balance remaining at the end of 2011 is to be recovered via an unavoidable surcharge from 2012 to 2018. [FN39 ESP Order at 22-23.] The Commission agrees with AEP-Ohio that an adjustment to the FAC deferral balance, which we previously authorized to be collected as a means to recover the Companies' actual fuel expenses incurred plus carrying costs, would be contrary to the Court's prohibition against retroactive ratemaking and refunds, [FN 40 *In re Application of Columbus S. Power Co* (2011), 128 Ohio St.3d 512, 516 (stating that "the law does not allow refunds in appeals from Commission orders"); *Ohio Consumers' Counsel v. Pub. Util Comm.* (2009), 121 Ohio St.3d 362, 367 (noting that "any refund order would be contrary to our precedent declining to engage in retroactive ratemaking"); *Lucas County Com'rs v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 348 (determining that "utility ratemaking by the Public Utilities Commission is prospective only").] Although OCC, OPAE, and IEU-Ohio characterize their proposed adjustment as a prospective offset to amounts deferred for future collection, they essentially ask the Commission to provide customers with a refund to account for the Companies' past POLR and environmental carrying charges, which were collected from April 2009 through May 2011. Consistent with the Court's precedent, *we cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified.* The Commission likewise disagrees with IEU-Ohio's contention that there are other areas in which we should similarly address the purported flow-through effects of the Court's remand.

Emphasis added. Remand Order at 34-35. As noted by the Commission, this same argument was raised and denied in that previous order and the Commission properly referred to that finding in this case. The Commission properly denied OCC's argument that the past case law would allow the Commission to change its prior deferral of Company fuel expenses. The Commission should make it clear on rehearing that those issues are not part of this proceeding and any attempts to raise the issue in this proceeding are misplaced and improper.

2. The Commission's Finding and Order did not violate R.C. 4903.09 requirement to support its findings concerning such findings on its denial of the request to make the order subject to refund, collection of the deferrals from customers, and its decision on interest. (Relating to OCC Rehearing Grounds 2, 4 and 5).

R.C. 4903.09 requires the Commission to issue orders with findings of fact and written opinions setting forth the reasons prompting decisions arrived at, based upon such findings of fact. It should also be pointed out that this proceeding did not involve or require an evidentiary hearing. The Commission allowed parties to file comments for the Commission's consideration of this application of factual matters previously adjudicated. This proceeding did not carry with it the duty to make the number of factual findings by the Commission because factual matters were not at issue. OCC mistakes the Commission's process for suggestions with an adjudicatory matter. The Commission was applying factual matters made in a previous case of which OCC has and is still seeking appeal.

The purpose of R.C. 4903.09 is to ensure the Commission decisions are based in the evidentiary record and its conclusions are understandable. However, the requirement

does not serve to require the Commission to make findings on suggestions by parties in their comments or to explain the basis of its jurisdiction or effectiveness of its orders as defined by statute and case law in each and every case. Each of the matters raised by OCC also has specific reasons why the Commission Finding and Order does not violate R.C. 4903.09.

a. Commission decisions are effective upon issuance by the Commission and therefore a Finding and Order that denies a party's request to make a decision subject to refund that undermines this legal standard does not violate the R.C. 4903.09 standard for the Commission to explain its decisions.

OCC incorrectly assert that the Commission's Finding and Order is unlawful and unreasonable because it did not issue a written decision denying OCC's suggestion to make the decision subject to refund. First, the suggestion to implement the outcome of the case subject to refund was only a suggestion made by OCC and not binding on the Commission. Second, Commission orders are presumed valid upon execution by the Commission and there is no expectation that any order would be undermined or subject to refund unless clearly stated by the Commission in its Order.

OCC's admission that this part of its comments was a mere "suggestion" shows that it did not involve a controversy in need of an adjudicatory finding or explanation under R.C. 4903.09. Parties may make suggestions to the Commission on how they would implement the outcome of a decision if they were the Commission, but such "suggestions" or preferences are not matters the Commission is required to address in its decisions under R.C. 4903.09.

Orders of the Commission are considered effective immediately and there is no expectation that any decision would be subject to refund absent extraordinary

circumstances as enumerated by the Commission. Under R.C. 4903.15, an order of the Commission is effective immediately unless otherwise specified in that order. Likewise, under R.C. 4905.32 a utility is required to collect rates approved by the Commission. Under the Ohio Revised Code there is a presumption that Commission orders are valid and are only subject to change by the Commission on rehearing or on appeal exclusively by the Supreme Court of Ohio. There should be no expectation of any order being filed subject to refund. The fact that the Commission issued its order and ordered the filing of tariffs was an adequate response to OCC's suggestion that the Commission depart from its practice and statutory history of having the decision effective immediately.

A practice of holding a case subject to refund, absent truly extraordinary circumstances, would undermine the well established *Keco* doctrine. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 141 N.E.2d 465. The key principles in the *Keco* decision formed the so-called "filed rate doctrine" in Ohio and established that: (1) any rates set by the Commission are lawful until such time as they are set aside by the Supreme Court; (2) a utility has no option but to collect the rates set by the Commission, unless a stay order is obtained; (3) there is no automatic stay of any order and it is necessary for an aggrieved party to affirmatively obtain a stay and post a bond; and (4) no action for unjust enrichment lies to recover the rates that were subsequently determined to be unlawful because the comprehensive regulatory scheme in Title 49 abrogates any common law action in this regard. *Id.* There is no basis for the Commission to expect its decisions would need to be issued subject to refund. The Court held in Keco that the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection and any rate set by the Commission is lawful and that

the provision of a method to suspend rates abrogates the common-law remedy of restitution. *Keco* at 259, 469. R.C. 4903.16 provides a statutory remedy to stay Commission orders for extraordinary reasons.

Finally, the Commission determines how it will implement its orders. An argument that the order "could be" applied in a certain manner is not a matter in the case in need of a factual finding under R.C. 4903.09. It is up to the Commission, not OCC, to determine how to apply its decision and there is both a statutory and judicial presumption that those decisions are valid and not in need of being issued subject to refund. The expectation that the Commission would need to address "suggestions" for the Commission to issue an exception to the norm is not properly applying the standard found in R.C. 4903.09. Rejecting OCC's recommendation does not constitute a violation of R.C. 4903.09. The Commission should not entertain requests to second guess its decisions as an adjudicatory body beyond the rehearing process. The request for the Commission to make a decision, but to hold that in abeyance is improper in this case and the Commission should find accordingly.

b. The Commission relied upon a specific citation in the Company's reply comments for the deferrals related to CSP.

OCC incorrectly asserts that the record is without support for the recovery of a deferral balance from Columbus Southern Power and Ohio Power Company customers. OCC argue that the reference the Commission makes to the reply comments of the Company is not accurate and therefore the Commission finding again violates R.C. 4903.09. The Company's reply comments clearly state that there was an under recovery

of fuel costs in the Columbus Southern Power Company at page five (see excerpt attached). This ground for rehearing is without merit.

c. There are no current over-collections of fuel charges from CSP customers to apply interest, as pointed out by the Commission, making OCC's request moot.

OCC incorrectly asserts that the Commission failed to address OCC's request for interest to be applied to over-collection of fuel deferral from CSP customers. The only error, as shown in (b) above and on the attached document, is on behalf of OCC for incorrectly assuming the Commission was not relying upon comments in the Company's reply comments establishing the under recovery of fuel deferrals from CSP customers. Specifically, as shown on the attached portion of AEP Ohio's reply comments:

> 8. The overcollection of CSP's fuel costs should be returned with interest.
>
> Commenting Party/Parties that support this position: OCC (19-20)
>
> Company position: The Phase-In Plan relates to deferrals caused by under-recovery of fuel expenses triggered by application of the annual rate caps imposed by the Commission in the ESP I decision. OCC is mistaken and the fact is that CSP actually had an under-recovery of $15 million at the end of 2011 which is part of the PIRR balance being held up currently without collection.

See AEP Ohio's Reply Comments filed in this docket on April 17, 2012 (relevant portion attached). This text was included in the reply comments under the title of "Overview of Major Comments and Company Responses." The text clearly highlights OCC's argument and directly responds to it accordingly.

The Commission Finding and Order cites to specific comments provided by the Company making indicating an under recovery of fuel costs making OCC's argument moot.

3. The Commission's Finding and Order was reasonable and lawful where it upheld its prior adjudicated finding from ESP I by declining to reduce the deferrals for accumulated deferred income taxes. (Relating to OCC Rehearing Ground 3).

OCC incorrectly applies precedent to assert that the Commission should modify its previously adjudicated finding in favor of OCC's position in this case. OCC argues that the Commission erred by not changing its previous factual finding on accumulated deferred income taxes, because in OCC's opinion it should be like other cases that used different carrying charges, regardless of the facts already determined in this case. OCC's statement that the Commission changed course in this proceeding with a single sentence, on pages eight to nine of its application for rehearing, by declining to change its existing finding on the matter from the *ESP I* decision, highlights the extent to which OCC misapplies the concept of precedent and prior findings. The prior order that was appealed to the Supreme Court of Ohio and deemed a final order was not disturbed. That is an appropriate outcome, regardless of OCC's attempt to reinvent previously denied adjudicated matters no longer subject to reconsideration.

OCC cannot use the outcome of other cases with different factual scenarios to require the Commission to retroactively change its position on a previously declared factual determination. The assertion that the Commission refuses to change an established factual finding from another proceeding, just because OCC raises its argument again in this later case, is without merit and should be summarily denied.

The Commission correctly pointed out in its Finding and Order that the issue was already considered and addressed in the *ESP I* proceeding. The parties should not be allowed to create another appellate vehicle of that issue in the present proceeding for a matter that is part of an existing final nonappealable order. A Commission finding that factual determinations from prior final nonappealable orders are subject to future review undermines the very definition of a final nonappealable order. While the Commission may adjust its policy of what elements are appropriate in carrying charges from case to case, the request by OCC is to change the actual determination already made by the Commission on this matter. That is not a change in policy when faced with a new set of facts; that is a request to change the facts of a final nonappealable order already made by the Commission.

OCC cannot raise matters already decided in previous final appealable orders. In *Office of the Consumers' Counsel v. Pub. Util. Comm.* (1984), 16 Ohio St.3d 9, OCC challenged the Commission's decision to limit the refund of over recovered system loss costs to the specific audit period under review. The Court held that OCC was barred from raising this argument because the Commission previously had reviewed the electric utility's fuel procurement practices, including the computation of system loss costs, during the period of time for which OCC sought a refund and found them proper. The Court stated: "The inevitable conclusion from these facts is that OCC is barred by the doctrines of *res judicata* and collateral estoppel from attempting to relitigate the issue of the RFC rate which was previously determined to be proper. * * * * This question was directly at issue in the prior proceeding and was passed upon by the commission. OCC cannot now attempt to reopen the question." *Id.* at 10.

The Commission already made its decision on the argument raised again by OCC. The Commission again denied the analysis presented on the issue. The Commission should make it clear that this matter is not even an issue in this proceeding and therefore not even eligible for an appeal again.

B. Industrial Energy User-Ohio Application for Rehearing

IEU misunderstands the scope of this proceeding, which leads it to assert a number of misplaced rehearing arguments. The root of IEU's misunderstanding of the scope of this case can be found in its first sentence in its Argument section of its application. IEU states, "In this proceeding, the Commission is tasked with setting an appropriate rate for the PIRR." That is not the scope of this proceeding. This proceeding is simply the implementation of the phase-in plan, already established in the previous *ESP I* proceeding. IEU's misunderstanding of this proceeding causes it to raise a number of arguments already considered in previous Commission orders and already part of an order considered by the Supreme Court of Ohio. These arguments are not appropriate for this proceeding.

1. The Commission should deny IEU's attempt to raise matters previously adjudicated by the Commission dealing with the carrying charges on deferred balances adjusted for accumulated deferred income taxes. (Relating to IEU Rehearing Ground 1).

IEU makes the same argument raised by OCC and arguments previously made in this and other records, that the Commission has a duty to reconsider its previous factual determination on the accumulated deferred income tax and other matters in this case. Just as indicated above, IEU is estopped from rearguing this point in this proceeding at this time by the doctrine of *res judicata (*see discussion in II(A)(3) above*)*. This matter

was raised, considered, and part of the order appealed to the Supreme Court of Ohio. IEU is using the Commission order to take a second bite at the final and unappealable apple in this case. The Commission should deny IEU's attempt to relitigate this already determined argument in this case as an improper argument.

The argument raised by IEU highlights the precedential concern with the Commission action of reconsidering final adjudicated matters. As shown by the argument raised by IEU, all factual determinations made by the Commission would now be subject to reconsideration. This case involves the application of prior factual findings to carry out the delay in collection of expenses previously approved. These arguments represent a slippery slope. Unless OCC and IEU's arguments are denied and the Commission recognizes the finality of past adjudicatory findings, then nothing stops parties in the future from filing motions on its own accord to ask the Commission to reconsider prior factual determinations, even after such matters have been through a full appellate process through the Supreme Court of Ohio. A party need only plead that the Commission may reconsider the facts at this point in time and file motions repeatedly seeking the Commission to again retroactively change past factual decisions. Such a practice eviscerates finality. IEU raises a matter previously established by the Commission finalized by the passing of the appeal. The proper response by the Commission to prevent the opinion of the floodgates of reconsideration of past factual determinations is to deny IEU's attempt to reargue this final adjudicated fact and clarify that final adjudicated matters are not subject to reconsideration.

IEU fails to raise new positions not already considered by the Commission in this proceeding or in the prior proceedings where IEU makes the same arguments. The

Company incorporates its positions in this docket, in particular the April 17, 2012 Reply Comments, responding to these same arguments and pointing out their non-application to this case. The Commission should deny these arguments as a ground for rehearing.

2. There is no statutory right to a hearing in this proceeding where the recovery of the deferred fuel expenses was authorized by the Commission in the *ESP I* Order as required by an exercise of R.C. 4928.144. (Relating to IEU Rehearing Ground).

IEU incorrectly argues the Commission initiated an increase in rates arbitrarily and capriciously amounting to a violation of due process. IEU's argument ignores the extensive history of these expenses and the proceedings establishing them and delaying the collection pursuant to the Commission's authority under R.C. 4928.144. This case did not involve the increase of a rate, this case merely formalized the collection of a charge established in the *ESP I* proceeding and delayed for the public good.

As indicated in the Finding and Order, the Commission established the recovery of these deferred expenses in the *ESP I* Order on a phased-in collection schedule under R.C. 4928.144. The unavoidable surcharge was actually created with the approval of *ESP I* as required when the Commission exercises its rights under R.C. 4928.144. The statute states:

> The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order *shall authorize the collection of those*

> *deferrals through a nonbypassable surcharge on any such rate or price so established* for the electric distribution utility by the commission.

Emphasis added. The statute makes it clear that the order shall authorize the collection of the nonbypassable surcharge on the rate or price established at that time the Commission is exercising the phase-in rights. The statute recognizes the rate or price is already being established by the Commission and it is only the collection that is being phased in over time.

The Commission's recitation of the history of this case reinforces that the Commission applied R.C. 4928.144, approving the charge as a part of the *ESP I* case, and delaying only the full recovery of the charges. In the Finding and Order the Commission noted that "[t]he Commission authorized AEP-Ohio to establish a regulatory asset to recover and defer fuel expenses, with carrying costs at the pre-tax WACC rate of 11.15 percent, and recovery through a nonbypassable surcharge to commence on January 1, 2012, and continue through December 31, 2018." (Finding and Order at ¶ 35.) The Commission reiterated in this order that the right to rate recovery was established in the *ESP I* proceeding, where the underlying facts and rights to due process were considered in establishing the standard service offer. The Commission went on to point out that it stated, "[a]s required by the statute, the Commission ordered that any deferred FAC expense balance remaining at the end of 2011 would be recovered through the unavoidable surcharge, thereby approving recovery of the regulatory asset." (*Id.*) It is inappropriate for IEU to claim that the consideration of the underlying charge is now the matter at issue when it was established in *ESP I.*

The present proceeding merely effectuated the establishment of the rate established and delayed in the ESP I decision, not requiring a hearing. The Supreme

Court of Ohio has repeatedly held that there is no constitutional right to a hearing in rate-related matters if no statutory right to a hearing exists. *See Consumers' Counsel v. Pub. Util. Comm.* (2006) 111 Ohio St.3d 300, 856 N.E.2d 213; *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 248–249, 638 N.E.2d 550; *Armco, Inc. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 401, 409, 23 O.O.3d 361, 433 N.E.2d 923; *Cleveland v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 446, 453, 21 O.O.3d 279, 424 N.E.2d 561. The case law cited by IEU discuss general due process rights in a number of different circumstances but in no way provides any authority for why a hearing is required in this situation. There is no statutory right to a hearing for the application of the Commission's phase-in of this previously approved matter. No hearing is required.

The due process sought by IEU was already provided as part of the *ESP I* proceeding and the subsequent appellate and additional Commission proceedings. IEU specifically challenged many of these same issues previously in the *ESP I* proceeding and even participated in an appeal of the *ESP I* Order to the Supreme Court of Ohio. In fact, as admitted on page 17 of its application for rehearing in this case, IEU is again challenging many of the same arguments in a second appeal to the Court. One thing the Commission can be sure of is that IEU has had no shortage of due process related to its arguments with the phase in recovery of the deferred fuel expenses established by the *ESP I* Order and phased-in by the Commission.

The Commission should recognize the layers of arguments previously argued by IEU in other proceedings and not allow this docket to be another venue to rehash the same challenges to the Commission's rulings. The Commission should deny IEU's ground for rehearing.

3. **IEU's rehearing request should be denied that admittedly raises arguments currently on appeal in other cases that are not properly raised in the present proceeding, dealing with the deferral balance and purported flow-through effects of the remand of the ESP I order. (Relating to IEU Rehearing Ground 3).**

IEU reiterates its belief that the fuel deferral balance should be adjusted for impacts from the *ESP I* appeal and what it terms flow-through effects. The Company responded to this same argument above in response to OCC's first ground for rehearing and will incorporate its discussion to IEU's argument.

IEU also makes a straight forward admission that it has already appealed the *Remand Order* on this basis and asserts that it will not repeat those arguments in its application for rehearing. (IEU Application for Rehearing at 17.) This statement is an admission by IEU that the matters are considered in that docket and should not be considered again in this docket. In fact, if IEU believes its appeal in Supreme Court Case No. 2012-0187 is valid then it would be barred from asserting the Commission could change the matter in this case because it would mean the Commission has lost jurisdiction of this matter that is now on appeal to the Supreme Court.[1] It should not disturb the matter previously determined and cannot disturb the matter under review by the Court. IEU should not be permitted to file inconsistent arguments. Hence, the Commission should deny this ground for rehearing as improper both legally and jurisdictionally.

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[1] The Company's position is that the argument that IEU has taken on appeal is also without merit.

III. Conclusion

The applications for rehearing filed by OCC and IEU are without merit and should be denied. The arguments raised by the Opposing Parties highlight the importance of the Commission treatment of past adjudicatory matters as final. The attempt by the Opposing Parties to reopen past proceedings and take a fresh look at all matters determined by the Commission should be denied to prevent a dangerous precedent. The Commission should deny the Opposing Parties applications for rehearing and find the arguments beyond the scope of this proceeding.

Respectfully Submitted,

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ATTACHMENT

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OHIO POWER COMPANY'S REPLY COMMENTS

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Notwithstanding its present legal right to implement the PIRR and commence recovery of the fuel expenses deferred by virtue of the *ESP I* rate caps, the Company has once again proposed a compromise as part of an integrated package of terms and conditions being proposed in the modified ESP II filing. Specifically, without waiving its lawful rights and remedies related to the PIRR implementation, AEP Ohio proposed in the modified ESP filing to delay the commencement of PIRR recovery until June 2013 (with the end of the recovery period remaining as December 31, 2018), while continuing to accrue during the continuing deferral period a weighted average cost of capital carrying charge as authorized in the *ESP I* decision. In this regard, the Company requested in its modified ESP II filing that the Commission consider the delayed PIRR as part of the modified ESP and suspend the procedural schedule currently established in Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR.

However, because the modified ESP II proposal is being actively considered in separate proceedings during the comment cycle in this PIRR docket, AEP Ohio is advancing its litigation position regarding the PIRR through these reply comments. To be clear, AEP Ohio reserves its right to pursue its existing legal rights under the final and non-appealable *ESP I* decision without any compromise or modification, in the event that the pending ESP II proposal is modified or rejected by the Commission.

OVERVIEW OF MAJOR COMMENT AND COMPANY RESPONSES[2]

1. **A debt rate should apply instead of the WACC during the seven-year recovery period.**

Commenting Party/Parties that support this position: Staff (4-7), Ormet (5-7), OCC (18-19), IEU (10-11)

[2] Some of the comments are summarily addressed in this overview section while others are addressed in greater detail below as indicated.

Company position: The Commission approved use of the WACC for the Phase-In Plan as part of the *ESP I* decision and, because the decision is final and non-appealable, the Commission cannot modify it as advocated by commenters. *See* Sections I and II below.

2. **The deferred fuel balance at the end of 2011 should be reduced for Accumulated Deferred Income Taxes (ADIT) in the calculation of carrying costs for the PIRR.**

Commenting Party/Parties that support this position: Staff (7-11), Ormet (7-8), IEU (11-12), OEG (1-5)

Company position: The Commission approved the Phase-In Plan on a gross-of-tax basis as part of the *ESP I* decision and, because the decision is final and non-appealable, the Commission cannot modify it as advocated by commenters. *See* Sections I and III below.

3. **AEP Ohio should be required to calculate the deferred fuel balance "going forward" using annual compounding and not monthly compounding.**

Commenting Party/Parties that support this position: Staff (11-12)

Company position: The Commission has routinely approved carrying charges calculated on a monthly basis for AEP Ohio's riders, including the recently-approved Distribution Asset Recovery Rider (DARR) approved in Case Nos. 11-351-EL-AIR et al. The DARR also involves a significant regulatory asset that is being amortized over a number of years. One would normally expect monthly compounding to be more accurately reflect the Company's carrying costs on a contemporaneous basis and Staff's recommendation in this regard appears to be result-oriented and not based on regulatory principle or established practice.

4. **The Company should be required to make annual informational filings regarding the collection balance associated with the PIRR.**

Commenting Party/Parties that support this position: Staff (12)

Company position: The Company does not oppose the proposal for annual informational reporting. The PIRR application already stated (Par. 5) that The Companies plan to make annual filings by December 1 of each year (beginning with 2012) during the planned collection period, if necessary, to adjust the rate to recover the actual balance over the remaining term of the recovery period.

5. **The regulatory asset balance should be reduced to reflect the revenues collected in conjunction with the Provider of Last Resort charges in effect from 2009 through 2011.**

Commenting Party/Parties that support this position: OCC (6-7, 13-15), IEU (13-14)

Company position: The Commission should reject this argument, consistent with its rulings in the ESP Remand proceeding. *See* Section IV below.

6. **The PIRR rates should be established subject to refund, in order to capture developments in the pending FAC proceedings that relate to 2009-2011.**

Commenting Party/Parties that support this position: OCC (8-12), IEU 12-13)

Company position: The Commission should reject this argument as inappropriate, especially since the underlying regulatory asset will be modified, as necessary, to reflect decisions in the 2009-2011 FAC cases. *See* Section V below.

7. **The PIRR recovery period should end prior to 2018.**

Commenting Party/Parties that support this position: OCC (15-18)

Company position: The Phase-In Plan approved in the ESP I decision was a ten-year plan, with a three-year deferral period and a seven-year recovery period which was to begin in the first billing cycle of 2012 and end in the last billing cycle of 2018. *See* Section I below.

8. **The overcollection of CSP's fuel costs should be returned with interest.**

Commenting Party/Parties that support this position: OCC (19-20)

Company position: The Phase-In Plan relates to deferrals caused by under-recovery of fuel expenses triggered by application of the annual rate caps imposed by the Commission in the ESP I decision. OCC is mistaken and the fact is that CSP actually had an under-recovery of $15 million at the end of 2011 which is part of the PIRR balance being held up currently without collection.

ADDITIONAL REPLY COMMENTS

Absent the Company's consent, the Commission lacks authority or discretion to delay recovery of the cost deferrals, modify the carrying charges previously approved or otherwise apply a net-of-tax recovery approach in violation of §4928.144, Ohio Rev. Code, and the final, non-appealable *ESP I* decision. While AEP Ohio is proposing a modification of the amortization/recovery period in its March 30, 2012 modified ESP proposal, the Company is only willing to implement that modified PIRR based on adoption of the total package of terms and conditions reflected in that filing. If the Commission decides the issues in this docket separate and apart from the modified ESP proceeding, it must follow the applicable statute, §4928.144,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum Contra has been served, via electronic service, to the counsel identified below this 10th day of September 2012.

/s/ Matthew J. Satterwhite
Matthew J. Satterwhite

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Summary: Memorandum OPC Memorandum Contra Applications for Rehearing of the OCC and IEU-Ohio electronically filed by Mr. Matthew J Satterwhite on behalf of American Electric Power Service Corporation