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

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**BEFORE
PUBLIC UTILITIES COMMISSION OF OHIO**

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INTRODUCTION

The fundamental issue in this case is what, if anything, is to be done as regards the 2008 buyout agreement. Under this agreement AEP received a certain cash payment, received certain coal reserves of uncertain value, and committed to making specified cash payments for amounts of coal to be delivered across then future periods including the audit period in this case. The question is then presented, what is the real price of the coal delivered under this agreement during the audit period? AEP's answer, the cost is merely the current cash contract price paid, is clearly wrong. AEP's position ignores the rest of the deal and the rest of the deal cannot be ignored. This is analogous to the situation when one buys a new car, trading in an old one and making an additional payment. Certainly the real price of the new car is the sum of the cash paid and the value of the old car. AEP's reasoning would say no, the price is just the cash paid.

We cannot pick and choose which parts of an agreement to recognize. The real price of the coal used during the audit period is the result of the rather complex calculus

weighing the *entire* transaction. The record is not sufficient to do this complete analysis now. That is the reason that the Staff recommends the Commission direct the next auditor to analyze the entirety of the agreement and make that determination for the next case.

AEP 2008 Buyout Arguments

AEP objects to this rather simple recommendation. It raises a number of objections all of which are entirely off point. These arguments will be addressed individually below.

AEP claims that determining the real cost of coal during the audit period violates the Constitutional restriction against making statutes retroactive. While this argument is creative, it has nothing to do with the situation before the Commission. The Staff's recommendation does not make any statute retroactive. It is simply implementing the statute to determine current cost currently. That current costs are impacted by things occurring in the past is not surprising. Indeed the great preponderance of the AEP coal contracts were entered into prior to the audit period. All of their costs are determined, in part, by things occurring in the past. While this is true, it has nothing to do with making a statute retroactive. To the contrary, the goal is to make the statutory scheme (implemented through the ESP order) effective currently not in the past. AEP's argument has no application in this case.

AEP has a fixation on prudence reviews. It spends a large portion of its brief explaining why a prudence review is unneeded or illegal. Staff would suggest that all of this discussion is irrelevant. In Staff's view, prudence is not involved. This shows in two

ways. First, if prudence were at issue in this case, there would be some evidence of imprudence and Staff can identify none. Without a prima facie showing of imprudence, there is really nothing to talk about. Second, if there were a claim of imprudence the recommendation would be different. In an imprudence situation, the prudent price of the item in question (in this case coal) would be of interest. The recommendation would be to investigate what the prudent price of coal would have been. That is not the recommendation here. Rather the Staff recommends that the next auditor assess the real, effective, current price under the agreement. The point of the Staff recommendation is not to set the agreement aside but rather to implement all of it, not just the portion that AEP has selected through its accounting treatment. Staff makes no argument that AEP acted imprudently in this transaction. AEP's arguments in this regard are moot.

AEP continues its parade of irrelevant arguments by claiming that determining the current economic cost of coal for recovery through the FAC somehow violates the *Keco Industries v. Cincinnati and Suburban Bell Tel. Co.* (1957) 166 Ohio St. 254 decision. This case has no relevance. That case stands for the uncontroversial idea that there can be no retro-active ratemaking. None is suggested in this case. Staff does not claim that any prior period rate was incorrect in any way. Rather the point of the exercise in this case is to determine what the current rate should be. This is not an effort to do something today to make up for yesterday's error. Rather this is an effort to establish what the real price of coal during the current period is. The company wants to recognize only one part of the transaction. The Staff, properly, advocates recognizing all three parts.

AEP argues that *Lucas Cty. Comm. V. Pub. Util. Comm.* (1997) 80 Ohio St.3d 344 is relevant in this matter. It is not. In *Lucas*, the Court agreed that the Commission can not order adjustments to a prior rate when the pilot program, under which that rate had been charged, had expired. Again, the Staff recommendation has nothing to do with any prior rate. Staff does not recommend that any prior rate be changed in any way. Staff does not suggest that any prior rate was wrong in any way. This case is not about prior rates. It is focused entirely on current rates. To determine current rates, the transactions that occasion them must be examined. Staff recommends that all of the transaction be examined. AEP only wants to look at a part.

AEP argues that determining the real cost of coal during the audit period would abrogate the Commission's earlier order approving the AEP RSP. Again AEP misses the point. This case has nothing to do with the AEP RSP. There is no effort to restructure or alter the old RSP in any way.

The company argues that it has properly accounted for the 2008 buyout and the Commission cannot revisit the issue. This shows a misunderstanding at two levels. The Commission controls accounting for regulatory purposes. R.C. 4905.13. It is not hostage to any accounting choice that AEP might have made. Further, the Commission has not visited this issue previously. Again, the point of the Staff recommendation is not to alter the 2008 buyout, it is to implement it, to determine the real cost of coal for the audit period.

The company points out that the ratepayers do not own the coal reserves and the value of the coal reserves is unknown. In this, finally, the company is correct. The

company does own the coal reserves, but this is neither here nor there. Staff does not claim any ownership in this asset, merely that it is part of the compensation which, in toto, makes up the real cost of coal during the audit period. That the value of the reserves is unknown is part of the problem that Staff believes needs to be addressed and forms the basis of the Staff recommendation that the next auditor should investigate that value.

AEP Miscellaneous Arguments

The company takes issue with the arguments of other parties regarding two other transactions a delivery shortfall agreement and a contract support agreement. The delivery shortfall agreement appears to be tied to the coal cost in a prior period. Although a payment was received during the audit period in this case, it does not appear to be related to coal used during the current period. The contract support agreement includes an option allowing AEP to obtain coal at a fixed price after 2013. This would also appear to have an effect, if at all, in periods other than the current audit. Staff has no objection to these matters being examined by the next auditor but otherwise takes no position.

In an interesting twist, AEP points out several transactions which, it claims, had the effect of raising fuel costs outside the audit period while lowering the costs during the audit period. In effect, these would be the inverse of what the 2008 buyout appears to have been. AEP's argument is simple, if you can reach out of period to drive the recoverable cost down, you can reach out to drive the recoverable cost up. AEP reaches the correct result for the wrong reason. The point of the audit is to determine the real, economic cost of coal during the audit period. If the cash cost during the period does not

reflect all of the economic value, it must be adjusted to reflect all parts of the transactions in question. It does not matter whether the end result is higher or lower, what matters is that the recoverable cost be accurate and complete. To the extent that AEP has identified such transactions, *the next auditor should examine these as well to determine if there was an effect and, if so, the amount.*

CONCLUSION

To sum this up, the Staff recommends that the Commission direct the next auditor to review those matters where out-of-period aspects of a transaction had an effect on the current audit period coal price, determine values for those effects, if found, and recommend a way to address the matter.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Post-Hearing Brief, submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, hand-delivered, or delivered via electronic mail, upon the following parties of record, this October 15, 2010.


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