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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

PUBLIC VERSION

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

A. INTRODUCTION

In this proceeding, the Public Utilities Commission of Ohio ("Commission") has been asked to take action that is required to return to customers the benefits of voluntary coal contract renegotiations. This action is necessary because the benefits were unfairly and unlawfully denied to customers during 2009 by the accounting decisions of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, American Electric Power or "AEP-Ohio"). The relief requested by Industrial Energy Users-Ohio ("IEU-Ohio") from the Commission is straight-forward. The Commission can provide the needed relief by applying the long-standing regulatory principle that aligns the costs recoverable through rates with the benefits associated with such costs.¹ AEP-Ohio does not claim that there are no benefits in the amounts

¹ See *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters*, PUCO Case Nos. 00-220-GA-GCR, *et al.*, Opinion and Order at 12 (September 25, 2001) (requiring gas cost recovery ("GCR") customers to receive all of the benefits of pipeline capacity release transactions because GCR customers purchased the pipeline capacity, unless otherwise approved by the Commission. The Commission further explained that only the Commission can make an apportionment of benefits decision and chided Dayton Power and Light Company ("DP&L") for taking benefits associated with transactions utilizing ratepayer-funded assets without Commission approval); *In the Matter of the Application of the Cleveland Electric Illuminating Company for an Increase in Rates*, PUCO Case No. 84-188-EL-AIR, Opinion and Order at 21 (March 7, 1985) (mandating that off-system sales revenue be shared with jurisdictional customers because the utility uses plant paid for by jurisdictional customers to make the off-system sales); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*,

demonstrated by IEU-Ohio and others. On the contrary, AEP-Ohio acknowledges that it obtained benefits from the various negotiations, that the negotiations produced higher fuel adjustment clause ("FAC") costs in 2009, and that it peeled off the benefits for its shareholders.

IEU-Ohio, the Office of the Ohio Consumers' Counsel ("OCC"), and Commission Staff ("Staff") all similarly seek an Order from the Commission that restores a proper cost/benefit balance and requires AEP-Ohio to provide customers the value they are due from voluntarily renegotiated coal contracts. The Commission's rules explicitly contemplate the review of the benefits available as a result of, or in connection with, a fuel cost recovery mechanism when considering an electric security plan ("ESP"). Rule 4901:1-39-03(C)(9)(a)(ii), Ohio Administrative Code ("O.A.C."); OCC Initial Brief at 7-10. This same review must also be present when looking at the implementation of an FAC mechanism in the context of the ESP. Further, the Commission accepted the FAC proposed by AEP-Ohio in its ESP Application (with an annual prudence review recommended by Staff), which included the recovery of fuel costs, net of benefits, like the former electric fuel cost ("EFC") mechanism. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 15 (hereinafter "ESP Case").²

PUCO Case Nos. 03-219-GA-GCR, *et al.*, Opinion and Order at 12 (March 2, 2005) (noting the Commission has "long required" local distribution companies ("LDCs") to credit GCR customers with revenue from the third-party use of GCR-financed assets).

² See *ESP Case*, Direct Testimony of Raymond W. Strom at 2 (November 7, 2008) ("The companies proposal includes the recovery of fuel and emission allowance costs, net of benefits, as did the previously existing EFC.")

The Commission should not be distracted by AEP-Ohio's inapplicable and unpersuasive arguments in its Initial Brief. The result uniformly advocated by customers and Staff is consistent with Commission precedent, the Commission's rules, the approved ESP for AEP-Ohio, and common notions of reasonableness and fairness. Finally, the relief requested is particularly appropriate when considered in the historical context provided by IEU-Ohio. See IEU-Ohio Initial Brief at Attachment A.

B. ARGUMENT

- 1. The Commission must direct AEP-Ohio to provide customers the benefits due to them from the voluntary coal contract negotiations, as supported by IEU-Ohio, OCC and Staff.**

a. [REDACTED]

The undisputed record evidence provided by IEU-Ohio and OCC demonstrates that OP's accounting of the voluntary renegotiation of the [REDACTED] contract with [REDACTED] failed to pass onto customers the total benefits associated with the increased costs paid by customers due to the voluntary contract renegotiation. There is no dispute that AEP-Ohio received benefits or value in return for the voluntary contract renegotiations, AEP-Ohio's accounting failed to flow through the full benefits of the voluntarily renegotiated contracts to customers, and customers paid more in fuel costs in 2009 than they would have under the [REDACTED] contract with [REDACTED]. The Commission must adopt the recommendations of IEU-Ohio, OCC, and Staff³ and provide customers with

³ Staff's Initial Brief, while short in length, aptly supports the recommendations of IEU-Ohio and OCC – "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." Staff Initial Brief at 2.

the benefits due to them under the Commission's principle that aligns the costs recoverable through rates with the benefits associated with such costs.

As supported by the testimony of IEU-Ohio witness Hess and OCC witness Duann, the Commission should reduce the OP FAC deferral by the [REDACTED] [REDACTED]. IEU-Ohio Exhibit 1 at 8-9; OCC Exhibit 1 at 10-11. Specifically, the Commission should require OP to reduce its FAC deferral by the [REDACTED] [REDACTED] in benefits that OP [REDACTED] rather than providing to customers as a result of the [REDACTED]. IEU-Ohio Exhibit 1 at 6; OCC Initial Brief at 18.

Additionally, the Commission should direct the auditor in the next FAC Management/Performance ("m/p") audit review proceeding to provide a current valuation of the [REDACTED] Reserve ("Reserve") to be credited against fuel costs. IEU-Ohio Exhibit 1 at 7. The evidence of record, as acknowledged by AEP-Ohio in its Initial Brief, shows there is a wide range of valuations for the Reserve depending on varying assumptions and further review of the value of the Reserve would help ensure that a more accurate value of the benefits owed to customers associated with the Reserve is credited against OP's FAC deferral. IEU-Ohio Initial Brief at 12-14; OCC Initial Brief at 20; AEP-Ohio Initial Brief at 11, 42. In the meantime, the Commission should reduce the OP FAC deferral by [REDACTED] ([REDACTED] [REDACTED]). A reduction of the OP FAC deferral, [REDACTED] of the Reserve booked by AEP-Ohio, would spare customers the deferral carrying costs on the [REDACTED] while the Commission works to ensure a more accurate valuation of the Reserve in the 2010 FAC audit proceeding. IEU-Ohio Exhibit 1 at 7.

Alternatively, the Commission should reprice the replacement coal resulting from the voluntary release of [REDACTED] from the [REDACTED] contract at the [REDACTED] contract price to align the costs and benefits of the [REDACTED] voluntary renegotiation. IEU-Ohio witness Hess explained that the Commission could instead use the [REDACTED] contract ([REDACTED] [REDACTED]) to set the level of costs eligible for recovery through the FAC since this contract would have applied but for the voluntary agreement between American Electric Power Service Corporation ("AEPSC") and [REDACTED]. IEU-Ohio Exhibit 1 at 8. Under this option, the Commission would direct AEP-Ohio to reduce OP's FAC deferral by the difference between the [REDACTED] [REDACTED]. Based on this alternative means of aligning costs and benefits, OP would retain the value of the benefits received from [REDACTED] in exchange for the agreement to prematurely terminate the coal supply contract and this [REDACTED] [REDACTED]. *Id.* Notably, this option was not challenged or addressed by any other party in the hearing or in the Initial Briefs.

Finally, the Commission must reduce OP's FAC deferral by the full value of the [REDACTED] tons due in [REDACTED] under the remaining term of the terminated [REDACTED] contract. As flagged by Energy Ventures Analysis' ("EVA") Audit Report ("Audit Report"), AEPSC agreed to a subsequent buy-out of the balance of [REDACTED] tons of the remaining [REDACTED] tonnage due under the terminated [REDACTED] contract [REDACTED] [REDACTED]. Commission-Ordered Exhibit 1A at 2-21. IEU-Ohio witness Hess and OCC witness Duann presented testimony showing that the Commission must

order OP to flow through the benefits of the [REDACTED] to customers to balance the benefits with the costs in the 2009 FAC collections associated with the additional buy-out. IEU-Ohio Exhibit 1 at 8-9.

b. [REDACTED]

The EVA Audit Report described a two-prong financial package to provide "contract support" to [REDACTED]. Commission-Ordered Exhibit 1A at 2-24. Specifically, AEPSC agreed to [REDACTED] and [REDACTED] agreed to repay AEPSC by deducting [REDACTED] beginning in 2009. Additionally, AEPSC agreed to increase the base price for [REDACTED] of coal by [REDACTED] for [REDACTED]. The contract was also amended to provide AEPSC with the right to extend the contract for two three-year periods at the agreed-upon market price less [REDACTED] ton beginning in [REDACTED]. The [REDACTED] discount to market [REDACTED]

[REDACTED].⁴ In effect, [REDACTED]
[REDACTED].

IEU-Ohio demonstrated that the Commission should require [REDACTED] to refund the [REDACTED] price increase, agreed to under the "contract support", to its FAC customers and account for the [REDACTED]. IEU-Ohio Exhibit 1 at 11-12. The [REDACTED] would then be amortized if and when [REDACTED] actually exercises the options for the respective three-year extensions of the [REDACTED] contract. *Id.* at 11.

⁴ IEU-Ohio Exhibit 1 at JEH-3.

Everyone agrees that customers incurred higher costs in 2009 under the [REDACTED] contract because of the higher prices paid to [REDACTED] to provide [REDACTED] with [REDACTED]. Everyone agrees that [REDACTED] promised to [REDACTED] [REDACTED]. Everyone agrees that AEP-Ohio's accounting results in customers being responsible for the extra costs which AEP-Ohio voluntarily incurred and AEP-Ohio retaining the benefit (discounted coal price) [REDACTED] [REDACTED].

Since it is not presently known whether [REDACTED] will have an FAC after the expiration of the current FAC⁵ there is no certain future path open to the Commission to ensure customers receive the benefits of the discounted coal. IEU-Ohio Initial Brief at 16-17.⁶ Unless AEP-Ohio's cost/benefit mismatch is rectified by the Commission, customers will bear all of the risk associated with the [REDACTED] contract, yet are not guaranteed any of the benefits from this voluntary contract renegotiation. The Commission should adopt IEU-Ohio witness Hess's recommendation, as supported by OCC, to fairly align the costs with the benefits of the [REDACTED] contract support. IEU-Ohio Exhibit 1 at 11-12; OCC Initial Brief at 22-23.

⁵ AEP-Ohio witness Rusk testified there is no guarantee that [REDACTED] will have an FAC in the future to flow these benefits back through to customers during the time period that the option contracts are exercised. Companies Exhibit 6 at 6 (Rusk Rebuttal Testimony).

⁶ AEP-Ohio's Initial Brief contains the same observation that AEP-Ohio is under no obligation to exercise the option contracts and therefore supports IEU-Ohio's requested treatment of the [REDACTED] voluntary contract renegotiation. AEP-Ohio Initial Brief at 35.

C. AEP-OHIO'S ARGUMENTS DEFENDING THE VOLUNTARY CONTRACT RENEGOTIATIONS DO NOT SUPPORT MAINTAINING AEP-OHIO'S ACCOUNTING FOR COSTS AND BENEFITS.

AEP-Ohio's Initial Brief contains many legal and factual assertions that should not be relied upon by the Commission. These arguments, as rebutted by IEU-Ohio, should be rejected by the Commission in their entirety.

1. The relief requested by IEU-Ohio and supported by OCC and Staff does not amount to retroactive ratemaking.

AEP-Ohio claims in its Initial Brief that reconciling FAC costs and benefits as recommended by IEU-Ohio, OCC, and Staff would amount to illegal retroactive ratemaking. AEP-Ohio Initial Brief at 14-16. Specifically, AEP-Ohio asserts the relief requested by IEU-Ohio, OCC, and Staff would violate *Keco Industries, Inc. v. Cincinnati Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957) (hereinafter "*Keco*") and *Lucas Cty. Comm. v. Pub. Util. Comm.*, 80 Ohio St.3d 344 (1980). AEP-Ohio's assertion is without merit.

As the Commission knows, *Keco* involved traditional regulation and did not involve issues related to a self-reconciling automatic adjustment clause such as the FAC which is designed to properly reflect costs and benefits. Neither IEU-Ohio, OCC, nor Staff challenges or seeks refunds of any fixed rates from the ESP. Therefore, the *Keco* and *Lucas Cty. Comm.* decisions do not apply in this case; they are red herrings raised by AEP-Ohio.

The initial FAC rate that emerged from the ESP was based on an estimate or "proxy" and the audit process approved by the Commission specifically allows for a hindsight/retroactive review to determine what reconciliation adjustments, if any, are necessary to match FAC revenues to the net costs subject to recovery through the FAC.

ESP Case, Opinion and Order at 15 (March 18, 2009). The rate under review is the 2009 FAC rate, which the Commission specifically subjected to the annual accounting and prudence review in this case. *Id.* Further, every self-reconciling cost recovery mechanism has a retrospective review aspect as a necessary part of its existence. For fuel cost recovery mechanisms, this review looks at previously executed contracts to ascertain whether they were implemented correctly. It is not retroactive ratemaking when the revenue collected through the FAC is subsequently reconciled against a lower or higher and corrected level of costs that the Commission judges is proper as a result of its review of the accounting, management policies and practices, and prudence of the utility. Scrutiny of the accounting for the voluntary contract renegotiations, as identified by the auditor, and as brought into additional focus by IEU-Ohio, OCC, and Staff, was approved in the ESP and is entirely legal, reasonable, and proper.

Even if the Commission were to find some possible credibility in AEP-Ohio's retroactive ratemaking argument, it could remedy this legal problem by simply repricing the coal from the voluntarily renegotiated [REDACTED] contract, as laid out by IEU-Ohio witness Hess. IEU-Ohio Exhibit 1 at 7-8. This option carries certain administrative conveniences, including solving all of the problems related to a proper allocation of the benefits of the voluntarily renegotiated coal contracts. The Commission could simply [REDACTED] [REDACTED], and permit AEP-Ohio to retain all of the benefits of the contract renegotiations. No party objected to this option during the hearing or in the Initial Briefs.

2. Crediting customers the benefits associated with the voluntary contract renegotiations does not violate any regulatory principles related to a defined FAC audit period.

AEP-Ohio next claims the Commission is limited to solely looking at fuel procurement activities during the 2009 calendar year audit period and cannot look at the implementation of fuel contracts entered into prior to the audit period but which call for deliveries during the audit period. AEP-Ohio Initial Brief at 16-20. AEP-Ohio asserts the matters raised in this case by IEU-Ohio, OCC, and Staff were decided in the ESP case, are *res judicata*, and therefore cannot be relitigated on a retroactive basis. AEP-Ohio's advocacy position is incorrect and should be rejected by the Commission.

Although this proceeding serves to review the reasonableness of 2009 fuel costs, those costs are directly impacted by actions taken by AEP-Ohio both during and prior to the audit period. Ms. Medine (the EVA auditor) acknowledged during her cross-examination that many fuel deliveries reviewed as part of the 2009 audit were the result of the contracts entered into prior to 2009. Tr. Vol. I at 44-46⁷ Moreover, AEP-Ohio witness Nelson agreed that in conducting the audit it was necessary for EVA to determine whether contracts entered into prior to the audit period had any impact on audit period costs:

Q. Well, let me ask this: How would the Commission -- you testify it is fine the Commission reviews the renegotiation but it should also limit its review to the audit period. These negotiations occurred outside of the audit period.

A. Yes. Well, in certain instances there may be some carryover into an audit period and, you know, for the auditor to actually look at these contracts, we don't have an objection to that. She has to determine whether in fact there was any impact on the audit period. And I believe in this instance there isn't any impact on the audit period.

⁷ Ms. Medine testified that an auditor would not typically perform a prudence review of agreements entered into prior to the audit period, but would review agreements with deliveries during the audit period.

Tr. Vol. I at 162-163.

Mr. Nelson further conceded that the Commission had the ability in this proceeding to investigate the totality of actions that impacted 2009 fuel costs:

Q. Well, would you agree -- maybe we can get back to it and maybe we can get to this point another way. Would you agree that this case is in large part about determining the proper amount of AEP's fuel costs that customers should be made to pay?

A. Yes.

Q. And would you agree that an investigation of the factors that contribute to that fuel cost is appropriate in this case?

A. Yes.

Q. And would you agree that AEP's fuel contracts and fuel contract negotiations have set the fuel costs that AEP is seeking to recover in this proceeding?

A. Yes. Contracts that extended into 2009 set the fuel costs that should be reviewed in this proceeding.

Tr. Vol. II at 281.

Further, AEP-Ohio's reliance on *res judicata* is misplaced. AEP-Ohio Initial Brief at 14, 17, 20. The legal principle of *res judicata* encompasses both claim preclusion and issue preclusion. The concept of claim preclusion "holds that a valid, final judgment rendered upon the merits bars all subsequent actions between the same parties or their privies based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action, regardless of whether the cause of action in the two suits is identical or different. That a claim was not actually adjudicated in a previous action does not necessarily render the doctrine inapplicable; *res judicata* applies, not only where a matter was adjudicated in a prior suit, but also where the matter could have been adjudicated in the suit." 63 Ohio Jur. 3d Judgments § 381. Issue preclusion

"holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different, and generally applies when three factors are all satisfied: the fact or issue in question was actually and directly litigated in the prior action; the fact or issue in question was passed upon and determined by a court of competent jurisdiction; the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." 63 Ohio Jur. 3d Judgments § 377.

AEP-Ohio's *res judicata* claim holds no water; neither claim preclusion nor issue preclusion applies in this instance. The costs and benefits at issue are associated with the 2009 fuel costs that AEP-Ohio has injected into the FAC and issue preclusion does not exist; the facts or points associated with the costs and benefits were not reviewed during the ESP period and could not have been reviewed during the ESP period because those costs and benefits were not known at the time. Additionally, claim preclusion does not apply in this instance inasmuch as the facts at play in the 2009 FAC did not arise from the same transaction or occurrence as the ESP and could not have been known during the ESP period.

To accept AEP-Ohio's position would effectively foreclose all parties from protecting their interests as they are affected by AEP-Ohio's implementation of the FAC. AEP-Ohio's position would permit AEP-Ohio to run its FAC mechanism as it sees fit with no oversight or ability to challenge AEP-Ohio's decisions. This is clearly not what the ESP Opinion and Order says or intends and AEP-Ohio's position must be rejected.

3. There is no dispute about the FAC baseline established in the ESP case.

AEP-Ohio further claims that the parties in this case are attempting to illegally re-litigate the FAC baseline established in the ESP case. AEP-Ohio Initial Brief at 20-25. AEP-Ohio's claims are without merit.

The baseline established in the ESP case was established to split the fuel and non-fuel generation costs that were formerly bundled into one charge. The baseline calculation did not do anything to permit AEP-Ohio to give the benefits received from voluntary renegotiations with coal suppliers to shareholders while customers paid the costs associated with the voluntary renegotiations.

There is no link in this case to the baseline issue dreamed up by AEP-Ohio in its Initial Brief. Indeed, of the scant citations to the record in this case in this portion of its Brief, AEP-Ohio's Initial Brief offers no record cites to support the legal theory in its Initial Brief. Neither IEU-Ohio, OCC, nor Staff advanced proposals to modify the FAC baseline; nor did they make any recommendation specifically related to the baseline. The *res judicata* and collateral estoppel claims are non-existent as they relate to AEP-Ohio's baseless claims.

Finally, in this section of its Brief, AEP-Ohio asks the Commission to take administrative notice of the testimony of Staff in the ESP case to the extent necessary to fully consider baseline issues in light of intervenors' ongoing attempts to undermine the Commission's decision on the baseline in the ESP case. AEP-Ohio Initial Brief at 22, FN 2. IEU-Ohio opposes AEP-Ohio's request. As noted above, any baseline issue presented by AEP-Ohio is irrelevant to the current proceeding. Additionally, AEP-Ohio counsel had the opportunity to ask for administrative notice to be taken during the

evidentiary hearing and did not do so. The evidentiary record is closed and AEP-Ohio has not provided good cause or any other persuasive reason why administrative notice should be taken.

4. Customers have a right to the value of the Reserve and do not seek an ownership or property interest in the asset itself.

AEP-Ohio's Initial Brief also claims that OP ratepayers have "no claim" upon the Reserve and cannot be given a property ownership interest in the asset. AEP-Ohio Initial Brief at 40-43. AEP-Ohio misunderstands the claims of IEU-Ohio (and OCC and Staff). Nowhere does IEU-Ohio, OCC, Staff, or the auditor claim that customers should have an ownership right in the Reserve. Customers simply want the benefits which AEP-Ohio has deprived customers to be netted against the costs that AEP-Ohio has billed to and collected from customers. AEP-Ohio's meritless claim should be rejected.

5. The Commission should adopt the ratemaking recommendations of IEU-Ohio regardless of whether AEP-Ohio properly followed generally accepted accounting principles ("GAAP") when accounting for the voluntary contract renegotiations.

AEP-Ohio relies heavily on its assertion that it properly accounted for the voluntary contract renegotiations in accordance with GAAP and therefore the Commission cannot disturb this proper GAAP accounting in conformance with the recommendations of IEU-Ohio, OCC, and Staff. AEP Initial Brief at 10, 31-31, 33, 35. IEU-Ohio is not challenging the appropriateness of the accounting for the voluntary contract renegotiations based on any conflict with GAAP, but rather makes ratemaking recommendations for the Commission's consideration. Tr. Vol. II at 246. AEP-Ohio has not claimed that the relief requested by IEU-Ohio, OCC, and Staff would violate GAAP

because it could not do so. GAAP will accommodate a variety of outcomes. But GAAP compliance is not dispositive of regulatory requirements that attach to ratemaking.⁸

AEP-Ohio's reliance on compliance GAAP accounting to justify the failure to credit to customers the full benefits of the voluntary contract renegotiations should be rejected. As the Commission has previously recognized, ratemaking drives accounting, not vice versa. *Re Promulgation of Rules for Electric Transition Plans*, PUCO Case No. 99-1141-EL-ORD, Second Entry on Rehearing at 17 (January 27, 2000) (2000 WL 286968 at *17); *Re Trading and Usage of Accounting Treatment for Emissions Allowances by Electric Utilities in Ohio*, PUCO Case No. 91-2155-EL-COI, Entry on Rehearing at FN 1 (May 13, 1993) (1993 WL 278658 at *1, FN 1). See also *Re San Diego Gas and Electric Company*, 62 CPUC 2d 391, 1995 WL 696596 (November 8, 1995). The Commission retains complete control over the ratemaking treatment of the benefits of the voluntary contract renegotiations regardless of whether AEP-Ohio accounted for the voluntary contract renegotiations in compliance with GAAP.

Further, AEP-Ohio's claims that it could not have accounted for the benefits identified by IEU-Ohio in the manner suggested by IEU-Ohio witness Hess are not correct. IEU-Ohio witness Hess testified that AEP-Ohio could have requested an application for an accounting modification to account for the [REDACTED] voluntary contract renegotiation in a manner that would have flowed through the benefits to customers. Tr. Vol. II at 247. Additionally, IEU-Ohio witness Hess demonstrated that AEP-Ohio could have equitably matched the benefits with the costs of the [REDACTED] options by [REDACTED] [REDACTED] that could be

⁸ For example, GAAP may allow a utility to treat political contributions as a legitimate expense, but, for ratemaking purposes, political contributions are not allowable expenses.

amortized during the period that the options are actually exercised. IEU-Ohio Exhibit 1 at 11. AEP-Ohio claims these accounting maneuvers suggested by IEU-Ohio would not have been appropriate under GAAP accounting. However, AEP-Ohio witness Dooley admitted on cross-examination that accounting for deferred assets or deferred liabilities pursuant to Commission orders is appropriate under GAAP. Tr. Vol. I at 129. As shown by IEU-Ohio witness Hess, AEP-Ohio could have applied for accounting authority to properly pass on the benefits of the voluntary contract renegotiations to customers that would have been proper under GAAP if approved by the Commission. Indeed, AEP-Ohio has previously shown an ability to request and receive accounting authority to create regulatory assets and regulatory liabilities.⁹ However, AEP-Ohio failed to take the opportunity to more fairly allocate the benefits of the voluntary contract renegotiations and therefore the Commission must direct a reconciliation adjustment to properly match costs and benefits. AEP-Ohio put itself in its current position and this fact must not be allowed to stand in the way of the action the Commission must now take to make sure customers get a lawful and fair outcome.

6. Intervenor's positions properly considered the [REDACTED] in the context of the recommendations made related to the [REDACTED] contracts.

AEP-Ohio claims in its Initial Brief that the positions of IEU-Ohio and OCC unfairly ignore a [REDACTED] that AEP-Ohio did

⁹ For example, AEP-Ohio received accounting authority to create the regulatory asset related to the acquisition of Monongahela Power's Ohio service territory. *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, PUCO Case No. 05-765-EL-UNC, Opinion and Order at 12-13 (November 9, 2005). OP also just requested permission to create a regulatory asset / liability account related to its request for compensation for the early shutdown of a unit at the Sporn Generating Station. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, PUCO Case No. 10-1454-EL-RDR, Application at 4 (October 1, 2010).

not recover through the FAC which began in 2009. AEP-Ohio Initial Brief at 35-40. AEP-Ohio asserts the facts surrounding the [REDACTED] show a one-sided and inequitable argument by IEU-Ohio, OCC, and, by implication, Staff. This is simply not true.

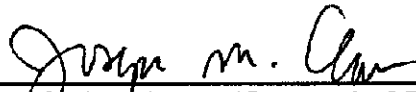
IEU-Ohio witness Hess explicitly stated on cross-examination that IEU-Ohio considered the [REDACTED] and "in that instance felt that the FAC customer had paid its fair share of the costs, the total costs of that contract." Tr. Vol. II at 255. Additionally, the Audit Report contains no recommendation to review the [REDACTED] paid by customers in 2009 in the same manner as it views the equity issues related to the consideration that AEPSC received from [REDACTED] in return for the early termination of the [REDACTED] contract. Further, as to the equity argument, AEP-Ohio's Initial Brief conveniently omits any mention of the fact that customers paid [REDACTED] more in fuel costs during 2009 than they would have under the original [REDACTED] contract as a result of the voluntary contract renegotiations. Commission-Ordered Exhibit 1A at 2-23, FN 9.

Thus, the arguments advanced by IEU-Ohio, OCC, and Staff are not inequitable and properly considered the [REDACTED] in the context of the proper allocation of benefits associated with the additional costs from the voluntary contract renegotiations discussed in the Audit Report.

D. CONCLUSION

IEU-Ohio respectfully requests the Commission adopt the recommendations of IEU-Ohio to more fairly balance the benefits and costs associated with the coal supply contracts in the manner discussed herein and as supported by the record evidence in this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 15th day of October 2010, via electronic transmission.



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