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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA OHIO POWER COMPANY'S APPLICATION FOR REHEARING

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Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

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Attorneys for Industrial Energy Users-Ohio

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I. INTRODUCTION

On January 23, 2012, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order directing the Ohio Power Company ("OP")[1] to credit against its deferral balance the benefits it received from a settlement agreement (the "Buy-Out") with one of its coal suppliers. The Commission has taken a critical first step in properly assigning the benefits of the contract decisions OP made to customers who have already incurred the costs of those decisions.

On February 22, 2012, OP filed an Application for Rehearing of the Commission's Opinion and Order, alleging ten assignments of error. While assignments of error 1 and 2 present new arguments, neither warrants rehearing. The balance of the assignments of error have already been considered and rejected. Thus, the Commission should deny OP's Application for Rehearing.

[1] The Commission issued its order following an audit of Columbus Southern Power Company's ("CSP") and OP's fuel adjustment clause ("FAC") for 2009. Since the audit was performed, CSP and OP have merged. OP, the post-merger company, has filed its Application for Rehearing on behalf of both OP and CSP.

II. BACKGROUND

On March 18, 2009, the Commission issued an Opinion and Order approving an electric security plan ("ESP") for the Companies.[2] In *ESP I*, the Commission authorized OP to establish a FAC to recover its cost of fuel[3] subject to annual audit and reconciliation. In approving a FAC in *ESP I*, the Commission relied upon the testimony of OP witness Nelson.[4] As witness Nelson explained, the lowest cost resources are assigned to internal load and "the highest cost resources to OSS on an hour-by-hour basis."[5]

Energy Ventures Analysis ("EVA") performed a management performance and financial audit of the FAC for the term of January 1, 2009 to December 31, 2009. In the audit report, EVA reviewed several fuel procurement contracts, which became the focus of attention in this proceeding.

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[2] *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*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order (March 18, 2009) (hereinafter "*ESP I*").

[3] Prior to *ESP I*, OP recovered its fuel costs through a bundled generation rate. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 15-19 (Jan. 26, 2005) (establishing annual generation rate increases of 3% and 7% for CSP and OP, respectively). The Commission's Opinion and Order in OP's and CSP's rate stabilization proceeding ("RSP") proceeding also allowed CSP and OP to request an additional 4% generation rate increase for certain additional generation costs. *Id.* at 20. CSP and OP subsequently asked for and were granted a portion of the additional 4% increase on top of the annual 3% and 7% increases. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Additional Generation Service Rate Increase Pursuant to Their Post-Market Development Period Rate Stabilization Plan*, Case No. 07-1132-EL-UNC, Opinion and Order at 3, 11 (Jan. 30, 2008).

[4] *ESP I*, Opinion and Order at 14.

[5] *ESP I*, Cos. Ex. 7 at 12 (Direct Testimony of Philip Nelson). To the extent that the Commission grants OP's request to take Administrative Notice of the Testimony of Staff witness Strom in *ESP I*, the Commission should also take Administrative Notice of the Testimony submitted by OP witness Nelson in *ESP I*.

The main dispute in this proceeding stems from the renegotiation of a long-term contract between OP and one of its coal suppliers that would have provided coal at a price below market during 2009 and through the ESP period (the "Coal Contract"). OP had the unilateral right to renew the Coal Contract for an additional five-year period at the same contract price, which would have allowed OP to obtain coal at a price below market well into OP's next ESP.

In 2008, OP voluntarily agreed to terminate the Coal Contract in return for $30 million, paid in installments,[6] and a coal reserve in West Virginia (the "Coal Reserve").[7] The Companies booked the value of the Coal Reserve at approximately $41 million.[8] OP kept most of the benefits for shareholders, passing along a fraction of the $30 million cash payment.

As a result of the renegotiation, however, OP had to replace the coal that would have been provided pursuant to the Coal Contract with significantly more expensive coal.[9] The cost of the higher priced replacement coal was recovered from customers

[6] Only a portion of the $30 million has been flowed back to ratepayers. Opinion and Order at 12; *see also* Tr. Vol. I at 121-123.

[7] Opinion and Order at 12.

[8] *Id.*

[9] OP argues—without citation—that "[t]here is no basis for the Commission's statement that, as a result of the 2008 Settlement Agreement, OPCo paid significantly more for coal beginning in 2009, the start of the ESP period . . . . The evidence confirms that the probable result, absent the 2008 Settlement Agreement, was that the supplier for the underlying coal contract would have defaulted. . ." OP Application for Rehearing at 11 (Feb. 22, 2012). The record demonstrates otherwise. EVA witness Medine specifically stated that she did not believe that the supplier would have defaulted on the contract; thus, customers would have received the lower priced coal during the *ESP I* period. Tr. Vol. I at 91-92; *see also* Tr. Vol. I at 26-27. Moreover, OP did not present any witness that participated in the decision to enter into the Buy-Out or that had personally evaluated the probability that the supplier would default on its obligation. Tr. Vol. I at 141-143; Tr. Vol. I at 160-162; Tr. Vol. II at 282-285. Finally, OP witness Rusk stated that the OP individuals that evaluated the supplier's legal claim thought it was weak. Tr. Vol. I at 141-142.

through the FAC in 2009. It is now 2012, OP still has a FAC, and OP is still paying more for coal than it would have under the Coal Contract.

To restore balance to the equation, the Commission directed OP to provide to customers all of the benefits that were obtained through the Buy-Out. The Commission's Opinion and Order held that "to determine the real economic cost of coal during the audit period, the Commission must consider both the revenues and the benefits received by the Companies pursuant to the Settlement Agreement and not rely solely on the price paid for coal during 2009."[10] Thus, the Commission directed OP to credit to the deferral balance the $30 million 2008 lump sum payment not already credited to OP ratepayers as well as the $41 million value that OP booked for the Coal Reserve. The Commission also directed that an independent auditor examine the value of the Coal Reserve to determine the additional value that must flow to ratepayers.

OP has now filed for rehearing. OP claims that customers have no right to the benefits obtained in the Buy-Out based on the following arguments: crediting the deferral balance would constitute retroactive ratemaking, disturb prior decisions that are *res judicata*, modify the FAC baseline, order a credit without a finding of imprudence, and provide ratepayers an ownership interest in the Coal Reserve (Assignments of Error 3-6, and 8). In the alternative, OP claims that the credit should be reduced to the Ohio retail jurisdictional amount (Assignment of Error 1), and the credit should be further reduced to account for other fuel increases that OP incurred in 2008 without guaranteed cost recovery (Assignment of Error 7, discussed below). Finally, OP argues that the

[10] *Id.* at 13.

only way to determine the proper value of the Coal Reserve is to sell it and that such sale should not occur until after all appeals are exhausted (Assignment of Error 2).

Two other renegotiated contracts also are in dispute in this proceeding. First, OP agreed to a temporary price adder with one of its suppliers for coal delivered in 2008 and 2009 (the "Production Bonus Agreement"). Pursuant to the Production Bonus Agreement, OP paid an additional $28 million for coal in 2008, which was not recovered through the FAC.[11] The Production Bonus Agreement had a significantly higher impact on FAC costs in 2009.[12] Without mentioning the higher costs that were passed onto customers through the FAC, OP requests that the $28 million be applied as a reduction to the Commission ordered credit.

Second, in a separate contract renegotiation with a different supplier, OP agreed to increase the base price for coal during 2009 ("Contract Support Agreement") with the option to acquire coal at a discount off the market price for two three-year terms beginning in 2013. The Commission determined that any effect of the Contract Support Agreement on the Companies' fuel costs would apply outside the current audit period and the agreement would be better examined by a future audit.[13] At this time, it is unclear whether OP will have a FAC during the first or second option. OP does not address this factual scenario; rather, OP claims that, based on the same reasoning set

[11] While OP previously requested that this amount be deemed confidential it has selectively made the number public information. OP, however, has not waived confidentiality of the significantly higher amount that ratepayers were forced to pay in 2009 as a result of the Production Bonus Agreement.

[12] The auditor determined that the Production Bonus Agreement was one of two contracts that contributed to over half of the $297.6 million under-recovery in 2009. Opinion and Order at 4.

[13] *Id.* at 14.

forth in Assignments of Error 3-8,[14] the Commission must determine that the Contract Support Agreement cannot be reviewed in a future audit.

II. ARGUMENT

A. The Commission's Alignment of Costs and Benefits did Not Constitute Retroactive Ratemaking in Violation of *Keco Industries.*

In Assignment of Error 3, OP claims that crediting FAC costs with benefits from the Buy-Out constitutes illegal retroactive ratemaking. OP already argued this issue at length in its Initial Brief (p. 14-16) and the Commission addressed and rejected OP's arguments in the Opinion and Order. As the Commission correctly concluded, the relief ordered by the Commission does not constitute retroactive ratemaking.

The Commission did not order a refund of a previously approved rate as OP purports. Rather, the Commission directed OP to prospectively adjust the self-reconciling FAC to reflect OP's real economic cost of fuel for 2009. OP's real fuel cost is the price it pays for fuel minus any benefits OP received.[15] Accordingly, the Commission correctly directed OP to offset FAC costs for any benefits that OP received through the Buy-Out.

Supreme Court precedent further undercuts OP's claim that the Commission engaged in retroactive ratemaking. The Supreme Court has specifically held that an adjustment to a self-reconciling mechanism does not constitute retroactive ratemaking. *See River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St. 2d 509, 512-13 (1982); *see also*

[14] OP Application for Rehearing at 34.

[15] This approach is consistent with the Commission's rules regarding an application to establish a FAC: "The electric utility shall include in the application any benefits available to the electric utility as a result of or in connection with such costs including but not limited to profits from emission allowance sales and profits from resold coal contracts." Rule 4901:1-35-03(C)(9)(a), Ohio Administrative Code ("OAC").

Ohio Power Company v. Pub. Util. Comm., 54 Ohio St. 2d 342, 344 (1978) ("We perceive that the requirement of fairness which compels adjustment in rates to compensate utilities for escalating fuel costs also compels retrospective reconciliation to exclude charges identifiably resulting from unreasonable computations or inclusions"). Moreover, every self-reconciling cost recovery mechanism requires retrospective review. Otherwise, as the Commission correctly identifies, an audit would be pointless if the Commission had no ability to reconcile the FAC in light of the auditor's recommendations.

B. Crediting Customers the Benefits Associated with the Buy-Out Does Not Violate Regulatory Principles Related to a Defined FAC Audit Period.

In Assignment of Error 4, OP wrongly claims that any transactions occurring prior to 2009 are *res judicata* and cannot be considered in the FAC audit. The Opinion and Order properly determined that this argument is without merit and the Commission should not revisit this issue. Regardless, OP's claim that *res judicata*, which requires a demonstration of claim preclusion and issue preclusion, is without merit.

Claim preclusion bars relitigation of a suit that has already been finally determined, and issue preclusion bars relitigation of an issue or fact that has already been determined in an earlier case. The dispute in this proceeding is focused on OP's 2009 fuel costs: that issue was not litigated in *ESP I*—nor could it have been—because 2009 fuel costs were not yet known.[16] Thus, *res judicata* does not apply to a determination regarding OP's 2009 fuel costs.

[16] *ESP I*, Opinion and Order at 19.

Witness testimony further undercuts OP's *res judicata* claim. OP witness Nelson and EVA witness Medine stated that in order to determine whether OP's fuel costs were appropriate, it was necessary to review contract negotiations outside of the FAC period that impact the FAC period.[17] Since the Buy-Out had a direct impact on 2009 fuel costs, the Commission correctly required this transaction to be accounted for in determining OP's real economic cost of fuel during the FAC period.

C. The Commission Did Not Modify the FAC Baseline.

In Assignment of Error 5, OP claims that the Commission's determination improperly modifies the FAC baseline established in *ESP I*. That is simply not true. The FAC baseline was established to unbundle fuel and non-fuel generation costs. OP's 2008 fuel costs were not known at the time, so the Commission used 2007 costs with 3% and 7% increases for CSP and OP, respectively, as a proxy to establish the FAC baseline.[18] The Opinion and Order does not modify the FAC baseline established in *ESP I*. Indeed the FAC baseline—which was established based on 2007 fuel costs—is not at issue in this proceeding.[19] OP's 2009 real economic cost of fuel, rather, is the relevant issue in this proceeding, and *ESP I* provided that the real cost of fuel would be determined through an audit of the FAC.[20]

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[17] Tr. Vol. I at 44-46; Tr. Vol. I at 162-163; Tr. Vol. II at 281.

[18] *ESP I*, Opinion and Order at 19.

[19] OP's request at page 26 of its Application for Rehearing to take administrative notice of testimony submitted in *ESP I* should also be rejected. OP's counsel had the opportunity to seek administrative notice during the hearing and did not do so.

[20] *ESP I*, Opinion and Order at 14-15.

D. The Prudence of Buy-Out is Not at Issue in This Proceeding.

In Assignment of Error 6, OP takes the incorrect position that the Commission cannot direct OP to flow through any of the benefits associated with the Buy-Out without first finding the Buy-Out to be imprudent or OP's accounting in violation of generally accepted accounting principles ("GAAP"). OP's claim is nonsensical and its logic could not be implemented. Under OP's twisted logic, customers would have to demonstrate that OP had acted imprudently in every transaction that reduced overall fuel costs in order for OP to reflect that reduction in the FAC. The Commission's rules, however, are clear that a utility's FAC must include "any benefits available to the electric utility as a result of or in connection with such costs including but not limited to profits from emission allowance sales. . . ."[21] Thus, OP must automatically account for reductions in its fuel costs without customers pursuing litigation.

Likewise, the fact that OP accounted for the benefits of the Buy-Out in a manner consistent with GAAP is irrelevant. Accounting does not drive regulation.[22] Regulation exists to protect customers from utility's self-serving accounting practices. Thus, the Commission properly directed OP to credit the deferral balance for the benefits obtained in the Buy-Out.

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[21] Rule 4901:1-35-03(C)(9)(a), OAC.

[22] *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*, Case No. 99-1141-EL-ORD, Second Entry on Rehearing at 27 (January 27, 2000); *In the Matter of the Commission Investigation Into the Trading and Uses of, and the Accounting Treatment for, Emissions Allowances by Ohio's Electric Utilities*, 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) (Nov. 8, 1995).

E. The Commission Should Not Reduce the Credit to Customers for the Production Bonus Agreement.

In Assignment of Error 7, OP claims that the Commission has applied a one-sided and inequitable treatment to a $28 million Production Bonus Agreement that it entered into with one of its suppliers in 2008. OP claims that the Commission is "cherry picking" benefits for customers without considering that OP had increased fuel costs in 2008 for which it was not guaranteed cost recovery.

But OP completely ignored the fact that it had previously obtained annual generation increases during its RSP,[23] which were intended to allow OP to recover projected increases to OP's generation costs.[24] Embedded in OP's generation costs were its fuel costs. Moreover, the impact of the Production Bonus Agreement did not cease at the end of 2008. Indeed, the impact of the Production Bonus Agreement continued into 2009 and accounted for a large amount of the fuel increases that were collected through the FAC.[25] As Industrial Energy Users-Ohio's ("IEU-Ohio") witness

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[23] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 15-19 (Jan. 26, 2005) (establishing annual generation rate increases of 3% and 7% for CSP and OP, respectively). The Commission's Opinion and Order in OP's and CSP's RSP proceeding also allowed CSP and OP to request an additional 4% generation rate increase for certain additional generation costs. *Id.* at 20. CSP and OP subsequently asked for and were granted a portion of the additional 4% increase on top of the annual 3% and 7% increases. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Additional Generation Service Rate Increase Pursuant to Their Post-Market Development Period Rate Stabilization Plan*, Case No. 07-1132-EL-UNC, Opinion and Order at 3, 11 (Jan. 30, 2008).

[24] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 18 (Jan. 26, 2005).

[25] Opinion and Order at 4.

Hess testified, the "customer had paid its fair share of the costs, the total costs of that contract."[26]

F. The Commission Properly Determined that the Contract Support Agreement Should be Examined in a Later Audit.

In Assignment of Error 9, OP claims that, for the same reasons set forth in Assignments of Error 3-8, the Commission cannot review the Contract Support Agreement in a later audit. The Commission properly held that the Contract Support Agreement needed additional review to allow the Commission to properly align the costs and benefits of the agreement.[27] The Commission held that the effects of the Contract Support Agreement would "apply in time periods outside of the current audit."[28] The Commission's statement was partially correct. The benefits OP might receive under the Contract Support Agreement will not occur until at least 2013; however, customers paid a higher price for coal in 2009 as a result of the agreement. Therefore, since it is unclear whether customers will receive the benefits under the option, the Commission correctly held that it would be proper to review the Contract Support Agreement during a future FAC audit.

G. Ratepayers Do Not Seek a Property Interest in the Coal Reserve.

In Assignment of Error 8, OP again incorrectly asserts that customers are seeking an ownership interest in the Coal Reserve.[29] All that the Commission has done

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[26] Tr. Vol. II at 255. It is also important to note that the auditor did not recommend that the $28 million Production Bonus Agreement offset the benefits from the Buy-Out to be credited against the deferral balance.

[27] *See* Opinion and Order at 14.

[28] *Id.*

[29] OP Initial Brief at 40-43; OP Application for Rehearing at 32-34.

is correctly align the costs and benefits of OP's fuel contracts. Thus, the Commission should again reject OP's claim that customers are seeking an interest in OP's assets, as OP's claim is factually incorrect.

H. OP Has Failed to Demonstrate that Customers are Only Entitled to a Jurisdictional Portion of the Benefits Obtained in the Buy-Out.

In Assignment of Error 1, OP claims that the Commission must clarify that customers are only entitled to the Ohio retail jurisdictional portion of the benefits obtained from the Buy-Out. OP's argument is without merit for several reasons.

First, OP's jurisdictional argument is only conceptually relevant, if at all, in a traditional cost of service ratemaking context which does not exist here. Here, the Commission is dealing with pricing for default generation supply service which is, as a matter of law, not based on a jurisdictionalized cost of service methodology. Accordingly, OP's Assignment of Error 1 is not advanced by OP to align the ratemaking treatment between cost-based-ratemaking jurisdictions. Rather, it is advanced to allow OP or OP's only shareholder, American Electric Power, to ultimately retain a portion of the benefits that OP failed to net against the higher costs that OP wrongly placed on the backs of Ohio consumers. It is also important to note that the subject of this proceeding is fuel costs recoverable from consumers for the year 2009. It is now 2012. The practical effect of OP's claim is also designed to further extend OP's day of being accountable for imposing excessive costs on Ohio consumers.

Second, OP has failed to provide any proof that Ohio consumers should be deprived of the full amount of the benefits received by OP in exchange for the higher costs of fuel paid by Ohio consumers. In this context, it is important to note that OP's voluntary termination of the Coal Contract also eliminated an option to further extend the Coal Contract for five years.

OP only offers unsupported conclusions in support of Assignment of Error 1, and OP failed to raise this issue in either its Initial Brief or Reply Brief.[30] Furthermore, OP fails to demonstrate that a jurisdictional apportionment is appropriate since OP has also claimed that its internal load, including the default supply provided to Ohio consumers, is supplied from its lowest-cost generation resources.[31] Since the Buy-Out involved a below-market Coal Contract, logic suggests that the generation resources that would have, but for OP's voluntary termination, used that coal would have supplied the needs of Ohio consumers.

The Commission should also reject OP's jurisdictional claim because it is a claim that OP selectively advances when it operates to tilt the playing field against Ohio consumers. OP has demonstrated that it will either support or oppose a jurisdictional allocation depending on its impact on earnings. OP's position in the application of the Significantly Excessive Earnings Test ("SEET") illustrates this point:

> AEP-Ohio removed off-system sales (OSS) net margins from CSP's total company dollar return on equity for 2009 because OSS margins result from wholesale transactions subject to FERC jurisdiction and not retail transactions. AEP-Ohio admits, however, that there are other non-jurisdictional activities that the Companies did not attempt to fully

[30] Section 4903.10(B), Revised Code, states that: if the Commission grants rehearing it **shall** not, upon such rehearing, take any evidence that could have been offered in the original hearing. Clearly, OP could have and should have offered evidence to support its jurisdictional claim during the litigation phase of this proceeding but it elected to not do so and it also failed to mention this topic during the briefing phase. OP's belated interest in a jurisdictional analysis operates to preclude OP from introducing this subject at the rehearing phase.

[31] *ESP I*, Cos. Ex. 7 at 12 (Direct Testimony of Philip Nelson).

jurisdictionalize for 2009 earnings purposes although the Companies claim the right to do so, if necessary. The importance of AEP-Ohio's selective application between SEET and jurisdictional rate plan transactions was discussed by Staff witness Cahaan. Mr. Cahaan testified that if the OSS were excluded from the net income (numerator) then there should have been an adjustment made to the common stock equity (denominator).[32]

Rather than accepting OP's self-serving, unsupported conclusions, the Commission should find that OP's Assignment of Error 1 is without merit. Otherwise, the Commission should direct that the auditor consider and address OP's jurisdictional claim and OP's effort to retain a portion of the benefits that should have been applied to reduce Ohio consumers' costs in 2009 and thereafter.[33] In the meantime, the Commission should not disturb its holding that OP must reduce the phase-in deferral balance by the amount of all the benefits that OP received in the Buy-Out, as though the benefits were received at the commencement of the phase-in deferral accounting, so as to properly reduce the amount of the carrying charge that OP was permitted to add to the proper amount of the rate increase eligible for deferral.[34]

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[32] *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 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order at 11-12 (Jan. 11, 2011).

[33] As indicated above, the voluntary termination of the Coal Contract also eliminated an option to extend the Coal Contract. The Commission should also instruct the auditor to consider the Ohio consumer impact of OP's failure to exercise the five-year renewal option in the Coal Contract.

[34] Over the objections of parties representing consumers, the Commission authorized a carrying charge rate including a return on common equity which resulted in a relatively large carrying charge rate. The inclusion of a return on common equity in the carrying charge rate indicates that OP's shareholder assumed some risk related to the ultimate recovery of the phase-in deferral balance. Reducing the beginning balance of the phase-in deferral amount by the full amount of the benefits discussed above is necessary to properly state the amount of the *ESP 1* rate increase that was eligible for deferral and to also avoid rates that provide OP with unjust compensation through the return on equity component included in the carrying charge rate.

I. The Commission Should Hire an Independent Auditor to Establish an Amount to Immediately Reduce the Deferral Balance.

In Assignment of Error 2, OP claims that the only way to determine the proper value of the Coal Reserve is to sell it and that such sale should not occur until after all appeals are exhausted. OP requests a stay of the Commission's order that an auditor value to Coal Reserve without satisfying the necessary requirements.[35]

The Commission correctly ordered that an appraisal of the Coal Reserve be undertaken so that it can determine the amount to credit against the deferral balance. Customers are currently feeling the impact of the phase-in recovery rider ("PIRR"),[36] and an appraisal is the fastest way to determine the amount that should offset the deferral balance. If customers are forced to wait until OP sells the asset, customers may either have to wait several years to see a reduction in their bills or OP may sell the asset in a fire sale. Both results are unacceptable. The Commission should issue a request for proposal to hire an independent auditor without delay.[37]

J. The Commission Should Reject OP's Request to Avoid Updating its Fuel Procurement Policy Manual.

The Commission correctly adopted the auditor's recommendation to require OP to "finalize its update to its policies and procedures manual."[38] The auditor specifically

[35] To obtain a stay of a Commission order, the party requesting the stay must demonstrate probable success on the merits, irreparable harm in the absence of the stay, no harm will occur to other parties in the event the stay is granted, and the stay must be in the public interest. *In the Matter of the Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Company and The Cleveland Electric Illuminating Company*, Case No. 09-423-EL-CSS, Entry (Jul. 8, 2009).

[36] Because OP has begun collecting charges under the PIRR without Commission approval, the PIRR is illegal. IEU-Ohio has opposed the PIRR in a separate filing. *See* Objection to Ohio Power Company's Compliance Tariffs and Request to Set a Reconciliation Date at 3-5 (Mar. 2, 2012).

[37] *See* IEU-Ohio Application for Rehearing at 11-12.

[38] M/P Audit Recommendation 5. Commission-Ordered Exhibit 1A at 1-7.

recommended OP include 8 items in the manual, as updated.[39] In its Application for Rehearing OP seeks to avoid updating its manual to include specific procedures.[40] OP claims that "policies, not procedures, result in the most efficient procurement of fuel at the lowest reasonable price."[41] However, as this proceeding has highlighted, the price OP's customers had to pay for fuel increased dramatically as a result of the Buy-Out, the Production Bonus Agreement, and from the Delivery Shortfall Agreement. Additional safeguards are obviously necessary to protect customers.

Currently, OP's manual does not contain specific fuel procurement procedures; rather, it focuses on broader policies.[42] General fuel procurement policies are difficult to audit under a prudence review due to the subjective nature of implementing broad policies. Again, OP's subjective implementation of its policies fail to provide customers with sufficient protection.

The specific procedures the auditor recommended, such as "[s]pecific obligations to use competitive solicitations" and "[p]rocedures that will insure that the procurements for each utility are not compromised by procurements for the other affiliate utilities," will help to ensure that Ohio customers pay for their fair share of OP's fuel costs, and only their fair share. Thus, the Commission should reject OP's assignment of error and uphold its decision that requires OP to update its policies and procedures manual in accordance with the auditor's 8 specific recommendations.

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[39] Commission-Ordered Exhibit 1A at 2-11.

[40] OP Application for Rehearing at 35.

[41] *Id.*

[42] Commission-Ordered Ex. 1A at 2-10.

IV. CONCLUSION

For the reasons stated herein, IEU-Ohio respectfully requests that the Commission deny the Application for Rehearing submitted by OP.

Respectfully Submitted,

Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Ohio Power Company's Application for Rehearing* was served upon the following parties of record this 5th day of March, 2012, via electronic transmission, hand-delivery or first class mail, postage prepaid.

Joseph E. Oliker

Steven T. Nourse
Matthew J. Satterwhite
Anne M. Vogel
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Selwyn J. R. Dias
Columbus Southern Power Company
Ohio Power Company
850 Tech Center Dr.
Gahanna, OH 43230

Daniel R. Conway
Porter Wright Morris & Arthur
Huntington Center
41 S. High Street
Columbus, OH 43215

ON BEHALF OF COLUMBUS SOUTHERN POWER AND OHIO POWER COMPANY

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

ON BEHALF OF OHIO ENERGY GROUP

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213

ON BEHALF OF THE KROGER CO.

Bruce J. Weston
Interim Consumers' Counsel
Maureen R. Grady
Terry L. Etter
Melissa Yost
Kyle L. Verrett
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Richard L. Sites
Ohio Hospital Association
155 E. Broad Street, 15th Floor
Columbus, OH 43215-3620

Thomas O'Brien
Matthew Warnock
Bricker & Eckler
100 South Third Street
Columbus, OH 43215

ON BEHALF OF THE OHIO HOSPITAL ASSOCIATION

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839

ON BEHALF OF OHIO PARTNERS FOR AFFORDABLE ENERGY

Keith C. Nusbaum
Sonnenschein, Nath & Rosenthal
1221 Avenue of the Americas
New York, NY 10020-1089

Clinton A. Vince
Emma F. Hand
Ethan Rii
Presley Reed
Sonnenschein, Nath & Rosenthal
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005

ON BEHALF OF ORMET PRIMARY ALUMINUM CORPORATION

Matthew Warnock
Bricker & Eckler
100 South Third Street
Columbus, OH 43215

Kevin Schmidt
The Ohio Manufacturers' Association
33 North High Street
Columbus, OH 43215

ON BEHALF OF THE OHIO MANUFACTURERS' ASSOCIATION

Michael Smalz
Joseph Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215

ON BEHALF OF OHIO POVERTY LAW CENTER AND APPALACHIAN PEACE & JUSTICE NETWORK

William Wright
Thomas McNamee
Werner Margard
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See
Sarah Parrot
Jeff Jones
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

ATTORNEY EXAMINER