**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of Ohio )

Edison Company, The Cleveland Electric )

Illuminating Company and The Toledo )

Edison Company for Authority to Provide ) Case No. 14-1297-EL-SSO

for a Standard Service Offer Pursuant to )

R.C. 4928.143 in the Form of an Electric )

Security Plan. )

**Industrial Energy Users-Ohio’s Memorandum Contra**

**the Application for Rehearing of the Office of**

**the Ohio Consumers’ Counsel and**

**Northwest Ohio Aggregation Coalition**

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Frank P. Darr (Reg. No. 0025469)

(Counsel of Record)

Matthew R. Pritchard (Reg. No. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

fdarr@mwncmh.com

mpritchard@mwncmh.com

**June 9, 2016 Attorneys for Industrial Energy Users-Ohio**

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The Office of the Ohio Consumers’ Counsel (“OCC”) and the Northwest Ohio Aggregation Coalition (“NOAC”) have sought rehearing of the Public Utilities Commission of Ohio’s (“Commission”) May 25, 2016 Finding and Order approving the electric security plan (“ESP”) compliance tariffs submitted by the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy”).[[1]](#footnote-1)

OCC and NOAC present three assignments of error in their Application for Rehearing. Initially, OCC and NOAC argue that the Commission approved tariff sheets for Rider RRS that are inconsistent with the Commission’s approval of Rider RRS in its March 31, 2016 Opinion and Order. Based on the premise that the approved tariff sheets do not conform to the Commission’s Opinion and Order, OCC and NOAC argue that there has been no finding that the version of Rider RRS reflected in the approved tariff sheets satisfies the requirements of R.C. 4928.143(B)(2)(d). Finally, they argue that the approval of tariff sheets alleged to be inconsistent with the Commission’s Opinion and Order violates R.C. 4928.141(B). As relief, OCC and NOAC request that the Commission reject the entirety of FirstEnergy’s ESP, order FirstEnergy to refile its prior ESP tariffs, and direct FirstEnergy to file an application proposing a new ESP.

As discussed below, OCC and NOAC’s arguments are without merit. The approved Rider RRS tariff sheets are not inconsistent with the Commission’s Opinion and Order. Additionally, the relief OCC and NOAC seek is not an appropriate remedy. The Commission’s Finding and Order was limited to the approval of compliance tariffs. If OCC and NOAC were correct that the Rider RRS tariff sheets were inconsistent with the Commission’s order, the proper remedy would be for the Commission to order FirstEnergy to file a compliant tariff sheet.

Regardless of the merits of OCC and NOAC’s Application for Rehearing, neither OCC nor NOAC suffers any harm from the May 25, 2016 Finding and Order. The Rider RRS rates are effectively set to zero and will remain so unless ordered otherwise by the Commission. On the other hand, the relief that OCC and NOAC seek would work an irreparable hardship on those customers that have sought to enter new contractual relationships with FirstEnergy and competitive retail electric service (“CRES”) providers in reliance on the Opinion and Order and the compliance tariff sheets approved in the Finding and Order. Accordingly, the Commission should deny the Application for Rehearing.

# Background

The Commission issued its Opinion and Order in this matter on March 31, 2016. In the Opinion and Order, the Commission modified and approved an application for an ESP to be effective June 1, 2016 and directed FirstEnergy to file tariff sheets in compliance with the Commission’s decision. Opinion and Order at 121 (March 31, 2016). After the Commission issued its Opinion and Order, the Federal Energy Regulatory Commission (“FERC”) issued a decision suspending the waiver of its affiliate standards as applied to the purchase power agreement (“PPA”) and directed that the PPA be submitted for a review in accordance with 18 C.F.R. § 35.39(b). *Electric Power Supply Association v. FirstEnergy Solutions*, FERC Docket No. EL16-34, Order Granting Complaint at ¶ 53 (Apr. 27, 2016) (“*ESPA*”). FirstEnergy sought rehearing of the Opinion and Order and proposed an alternative to the approved version of Rider RRS. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Application for Rehearing (“FirstEnergy Application for Rehearing”) (May 2, 2016). Other intervenors also sought rehearing and opposed the alternative proposal submitted by FirstEnergy. In response to the applications for rehearing, the Commission granted rehearing for further consideration of the applications for rehearing. Entry on Rehearing (May 11, 2016).

While the matters discussed above were transpiring, FirstEnergy sought an extension of the order to file tariff sheets that complied with the Opinion and Order. FirstEnergy Motion for Extension of Time to File Tariffs (Apr. 29, 2016). On May 10, 2016, the Attorney Examiner directed FirstEnergy to file tariff sheets that complied with the Commission’s Opinion and Order by May 13, 2016. Entry (May 10, 2016).

FirstEnergy made the compliance filing on May 13, 2016. The filing contains tariff sheets for Rider RRS. No rate is stated for Rider RRS for any customer class. Letter from Eileen Mikkelsen to Barcy McNeal on Behalf of the Ohio Edison Company, Attachment 2, Tariff Sheet 127 (May 13, 2016). (Similar filings were made on behalf of the other two electric distribution utilities.) The tariff filing also contained sheets that would implement other terms and conditions such as the expansion of the interruptible load program and the non-market based transmission pilot. *Id*.

On May 20, 2016, the Staff of the Commission filed a letter stating that it had reviewed the tariff sheets filed by FirstEnergy and concluded that the sheets appear to be in compliance with the Commission’s Opinion and Order. Letter from Tamara Turkenton and David Lipthratt to Docketing Division (May 20, 2016).

On May 16, 2016, OCC and NOAC filed an Interlocutory Appeal of the Attorney Examiner’s Entry. OCC and NOAC assert that it was an error to require FirstEnergy to file tariff sheets that otherwise cannot be implemented due to the recent ruling of FERC. Joint Interlocutory Appeal, Request for Certification to Full Commission and Application for Review and Comments on Tariffs by Northwest Ohio Aggregation Coalition and the Office of the Ohio Consumers’ Counsel at 2 (“Interlocutory Appeal”) (May 16, 2016). The Attorney Examiner has not certified the appeal to the Commission or otherwise taken action on the interlocutory appeal.

On May 25, 2016, the Commission issued a Finding and Order regarding FirstEnergy’s compliance tariff filing. In its Finding and Order, the Commission noted that Staff had conducted a review of the compliance tariff filing and determined that the tariffs were in compliance with the Commission’s Opinion and Order. Finding and Order at 3 (May 25, 2016). The Commission also indicated that it had reviewed the compliance tariffs and found that the proposed tariffs were consistent with the Commission’s Opinion and Order. *Id.* at 4. Accordingly, the Commission approved the compliance tariffs. *Id.*

Additionally, the Commission noted that its approval of FirstEnergy’s ESP and grant of rehearing was irrespective of “FERC’s action rescinding the waiver of FirstEnergy Solutions’ affiliate power sales restrictions.” *Id.* In apparent recognition of the lack of injury from the Rider RRS tariff sheets, the Commission noted that FirstEnergy did not include “any proposed charges or credits in their retail rate stability rider (RRS).” *Id.*

# argument

## OCC and NOAC fail to demonstrate that the Rider RRS tariff sheets are inconsistent with the Opinion and Order

OCC and NOAC argue that the Commission should grant rehearing and reverse its May 25, 2016 Finding and Order because the approved Rider RRS tariff sheets are inconsistent with the Commission’s Opinion and Order. Specifically, OCC and NOAC argue that the approved Rider RRS tariff sheets implement the alternative to the approved Rider RRS that FirstEnergy proposed on rehearing. *See* Application for Rehearing by the Office of the Ohio Consumers’ Counsel and Northwest Ohio Aggregation Coalition (“OCC/NOAC Application for Rehearing”) at 6-7 (May 31, 2016). Their claim is incorrect.

Initially, OCC and NOAC advance several claims as to the ultimate fate of a PPA between FirstEnergy and FirstEnergy Solutions Corp. (“FES”) in light of FERC’s decision withdrawing the affiliate waivers. OCC/NOAC Application for Rehearing at 4-5 (May 31, 2016). Parties have already briefed the Commission on the effect of that FERC decision in their May 2, 2016 applications for rehearing, which are currently pending on a grant of rehearing before the Commission. *See, e.g.*, Application for Rehearing by the Office of the Ohio Consumers’ Counsel and Northwest Ohio Aggregation Coalition at 72-77 (May 2, 2016); Entry on Rehearing at 3 (May 11, 2016).

Additionally, OCC and NOAC assert that the approved Rider RRS tariff sheets are inconsistent with the Opinion and Order because they implement FirstEnergy’s proposed alternative to Rider RRS and not the approved Rider RRS. OCC/NOAC Application for Rehearing at 6-7 (May 31, 2016). However, OCC and NOAC fail to point to anything specific in the approved tariff sheets that reflects the approval of the alternate proposal and not the version approved in the Commission’s Opinion and Order. *See* OCC/NOAC Application for Rehearing at 5-6 (May 31, 2016). Accordingly, the claim that the approved tariff sheets implement the pending alternate proposal for Rider RRS is incorrect.

All three of OCC and NOAC’s assignments of error are premised on the fact that the approved Rider RRS tariff sheets are inconsistent with the Commission’s Opinion and Order. Because there has been no demonstration that the approved Rider RRS tariff sheets are inconsistent with the Commission’s Opinion and Order, OCC and NOAC’s Application for Rehearing should be denied.

## OCC and NOAC’s requested relief should be denied because it is beyond the scope of the available relief and incorrectly assumes FirstEnergy has refused to accept the Commission’s modifications to the proposed ESP

Based upon the argument that the Rider RRS tariff sheets reflect FirstEnergy’s alternate proposal, OCC and NOAC assert that FirstEnergy has refused to accept the modifications to the proposed ESP ordered by the Commission. *See, e.g.*, OCC/NOAC Application for Rehearing at 5 (May 31, 2016) (“FirstEnergy’s filing rejected what the PUCO has approved and modified”). Pursuant to R.C. 4928.143(C)(2), OCC and NOAC argue that this refusal should be treated as FirstEnergy’s withdrawal from the modified ESP, requiring the Commission to order FirstEnergy to refile its prior ESP tariffs. The argument is without merit.

The Commission’s Finding and Order only approved compliance tariffs (which the Staff and the Commission have both found to be consistent with the Commission’s Opinion and Order). If OCC and NOAC were correct that the Rider RRS tariff sheets were inconsistent with the Commission’s Opinion and Order, the proper remedy would be to require FirstEnergy to file compliant tariff sheets. Unless FirstEnergy withdraws from the ESP, there is no basis to order FirstEnergy to withdraw its current ESP tariff sheets and to refile its prior ESP tariffs under R.C. 4928.143(C)(2).

## OCC and NOAC do not suffer any harm from a zero-rate Rider RRS, while other customers would suffer harm from the withdrawal of the current ESP tariffs and reversion to the prior ESP tariffs

As filed, the Rider RRS tariff sheets do not state any rate for any customer class, and the rates will remain at zero until the Commission authorizes some other rate. R.C. 4905.22 and 4905.32. If, as OCC and NOAC argue, no Rider RRS rate may ever be approved, then OCC and NOAC will suffer no injury from the Commission’s current authorization of the Rider RRS tariff sheets. Accordingly, OCC and NOAC fail to demonstrate any harm from continuation of the currently authorized Rider RRS tariff sheets.

While OCC and NOAC fail to demonstrate harm from the status quo, many of FirstEnergy’s customers would suffer injury from the relief sought by OCC and NOAC in their Application for Rehearing. The ESP that became effective on June 1, 2016 contains provisions expanding the interruptible program and a transmission pilot that will offer the opportunity for some customers to reduce their total energy bills by managing their demand levels. These programs that have the effect of reducing system demand during peak periods have the potential to benefit all customers, including those served by OCC and NOAC. For example, the benefits of the interruptible program include increased system reliability and stability, the prevention of load shedding (*i.e.,* rolling blackouts) during emergency events, and job retention. See citations to transcript in the Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 108 and n. 521-23 (Feb. 16, 2016) (“FirstEnergy Initial Brief”); Post-Hearing Brief of the Ohio Energy Group at 24-25 (Feb. 16, 2016) (“OEG Initial Brief”); and Initial Brief in Support of ESP IV Stipulation by Nucor Steel Marion, Inc. at 12-15 (“Nucor Initial Brief”). By providing eligible customers a means of reducing their electric generation expenses, continuation of a modified interruptible program also furthers Ohio industrial companies’ effectiveness in the global economy. FirstEnergy Initial Brief at 148. As the record demonstrates, an interruptible rate program advances “numerous benefits, including the promotion of economic development and the retention of manufacturing jobs.” *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.,* Opinion and Order at 40 (Feb. 25, 2015). Thus, although OCC and NOAC cannot demonstrate any prejudice from the Commission’s approval of the Rider RRS tariff sheets, granting the relief OCC and NOAC seek will harm not only large energy users, but all customers of FirstEnergy generally.

# Conclusion

For the foregoing reasons, the Commission should deny OCC and NOAC’s May 31, 2016 Application for Rehearing in this matter.

Respectfully submitted,

*/s/* *Matthew R. Pritchard*

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. No. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

fdarr@mwncmh.com

mpritchard@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

**Certificate of Service**

In accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e‑filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio’s Memorandum Contra the Application for Rehearing of the Office of the Ohio Consumers’ Counsel and Northwest Ohio Aggregation Coalition* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 9th day of June 2016, *via* electronic transmission.

*/s/ Matthew R. Pritchard*

Matthew R. Pritchard

James W. Burk

(Counsel of Record)

Carrie M. Dunn

FIRSTENERGY SERVICE COMPANY

76 South Main Street

Akron, Ohio 44308

burkj@firstenergycorp.com

cdunn@firstenergycorp.com

James F. Lang

N. Trevor Alexander

CALFEE, HALTER & GRISWOLD LLP

The Calfee Building

1405 East Sixth Street

Cleveland, Ohio 44114

jlang@calfee.com

talexander@calfee.com

David A. Kutik

JONES DAY

901 Lakeside Avenue

Cleveland, Ohio 44114

dakutik@jonesday.com

**COUNSEL FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY**

**THE TOLEDO EDISON COMPANY**

Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

mkurtz@BKLlawfirm.com

kboehm@BKLlawfirm.com

jkylercohn@BKLlawfirm.com

**COUNSEL FOR THE OHIO ENERGY GROUP**

Steven T. Nourse

Matthew J. Satterwhite

Yazen Alami

American Electric Power Service Corporation

1 Riverside Plaza 29th Floor

Columbus, Ohio 43215

stnourse@aep.com

mjsatterwhite@aep.com

yalami@aep.com

**COUNSEL FOR OHIO POWER COMPANY**

Bruce J. Weston

Ohio Consumers' Counsel

Larry S. Sauer

(Counsel of Record)

Maureen R. Willis

Kevin F. Moore

Ajay K. Kumar

William J. Michael

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street – Suite 1800

Columbus, Ohio 43215

Larry.sauer@occ.ohio.gov

maureen.willis@occ.ohio.gov

William.Michael@occ.ohio.gov

Kevin.moore@occ.ohio.gov

Ajay.kumar@occ.ohio.gov

**COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Barth E. Royer

Bell & Royer Co., LPA

33 South Grant Avenue

Columbus, Ohio 43215-3927

barthroyer@aol.com

Adrian Thompson

Taft Stettinius & Hollister LLP

200 Public Square, Suite 3500

Cleveland, Ohio 44114

athompson@taftlaw.com

**COUNSEL FOR CLEVELAND MUNICIPAL SCHOOL DISTRICT**

Marilyn L. Widman

Widman & Franklin, LLC

405 Madison Ave., Suite 1550

Toledo, Ohio 43604

Marilyn@wflawfirm.com

**COUNSEL FOR IBEW LOCAL 245**

Richard C. Sahli (0007360)

Richard Sahli Law Office, LLC

981 Pinewood Lane

Columbus, OH 43230-3662

rsahli@columbus.rr.com

Michael Soules

Earthjustice

1625 Massachusetts Ave. NW,

Suite #702

Washington, DC 20036

msoules@earthjustice.org

Shannon Fisk

(Counsel of Record)

Earthjustice

1617 John F. Kennedy Blvd.,

Suite #1675

Philadelphia, PA 19103

sfisk@earthjustice.org

Tony G. Mendoza

Kristin Henry

Sierra Club

85 Second Street, Second Floor

San Francisco, CA 94105-3459

tony.mendoza@sierraclub.org

kristin.henry@sierraclub.org

**COUNSEL FOR THE SIERRA CLUB**

Jennifer L. Spinosi (0089162)

(Counsel of Record)

Direct Energy

21 East State Street, 19th Floor

Columbus, Ohio 43215

jennifer.spinosi@directenergy.com

Scott R. Dismukes, Esq.

Eckert Seamans Cherin & Mellott, LLC

U.S. Steel Tower

600 Grant Street, 44th Floor

Pittsburgh, PA 15219

sdismukes@eckertseamans.com

Daniel Clearfield, Esq.

Sarah Stoner, Esq.

Eckert Seamans Cherin & Mellott, LLC

213 Market Street, 8th Floor

Harrisburg, PA 17101

dclearfield@eckertseamans.com

sstoner@eckertseamans.com

**COUNSEL FOR DIRECT ENERGY SERVICES, LLC, DIRECT ENERGY BUSINESS, LLC AND DIRECT ENERGY BUSINESS MARKETING, LLC**

Colleen L. Mooney

(Counsel of Record)

Ohio Partners for Affordable Energy

231 West Lima Street

Findlay, Ohio 45839-1793

cmooney@ohiopartners.org

**COUNSEL FOR OHIO PARTNERS FOR AFFORDABLE ENERGY**

Joseph E. Oliker

(Counsel of Record)

IGS Energy

6100 Emerald Parkway

Dublin, Ohio 43016

joliker@igsenergy.com

**COUNSEL FOR IGS ENERGY**

Celia M. Kilgard

Devin D. Parram

Taft Stettinius & Hollister LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215

ckilgard@taftlaw.com

dparram@taftlaw.com

**COUNSEL FOR THE KROGER CO.**

Richard L. Sites

Ohio Hospital Association

155 East Broad Street, 15th

Columbus, Ohio 43215

ricks@ohanet.org

Dane Stinson

Dylan F. Borchers

Bricker & Eckler LLP

100 S. Third Street

Columbus, OH 43215

dstinson@bricker.com

dborchers@bricker.com

**COUNSEL FOR THE OHIO HOSPITAL ASSOCIATION**

Michael K. Lavanga

Garrett A. Stone

Stone Mattheis Xenopoulos & Brew, P.C.

1025 Thomas Jefferson Street, N.W.

8th Floor, West Tower

Washington, D.C. 20007-5201

mkl@smxblaw.com

gas@smxblaw.com

**COUNSEL FOR NUCOR STEEL MARION, INC.**

Barbara A. Langhenry

Harold A. Madorsky

Kate E. Ryan (Counsel of Record)

City of Cleveland

601 Lakeside Avenue – Room 106

Cleveland, Ohio 44114

blanghenry@city.cleveland.oh.us

hmadorsky@city.cleveland.oh.us

kryan@city.cleveland.oh.us

**COUNSEL FOR THE CITY OF CLEVELAND**

Kimberly W. Bojko

Danielle M. Ghiloni

Carpenter Lipps & Leland LLP

280 Plaza, Suite 1300

280 North High Street

Columbus, Ohio 43215

Bojko@carpenterlipps.com

ghiloni@carpenterlipps.com

**COUNSEL FOR OMAEG**

Lisa M. Hawrot

Spilman Thomas & Battle, PLLC

Century Centre Building

1233 Main Street, Suite 4000

Wheeling, West Virginia 26003

lhawrot@spilmanlaw.com

Derrick Price Williamson

Spilman Thomas & Battle, PLLC

1100 Bent Creek Blvd., Suite 101

Mechanicsburg, Pennsylvania 17050

dwilliamson@spilmanlaw.com

Carrie M. Harris

Spilman Thomas & Battle, PLLC

310 First Street, Suite 1100

Roanoke, Virginia 24002-0090

charris@spilmanlaw.com

**COUNSEL FOR WAL-MART STORES EAST, LP AND SAM’S EAST, INC.**

Joseph P. Meissner

Attorney at Law

1223 W. 6th Street – 4th Floor

Cleveland, Ohio 44113

meissnerjoseph@yahoo.com

**COUNSEL FOR CITIZENS COALITION, CONSUMER PROTECTION ASSOCIATION, CLEVELAND HOUSING NETWORK, AND THE COUNCIL FOR ECONOMIC OPPORTUNITIES IN GREATER CLEVELAND**

Thomas R. Hays

8355 Island Lane

Maineville, Ohio 45039

trhayslaw@gmail.com

**COUNSEL FOR LUCAS COUNTY**

**BOARD OF COMMISSIONERS**

Leslie Kovacik

Counsel for the City of Toledo

420 Madison Avenue

Toledo, Ohio 43604

lesliekovacik@toledo.oh.gov

**COUNSEL FOR THE CITY OF TOLEDO**

Glenn S. Krassen

(Counsel of Record)

Bricker & Eckler LLP
1001 Lakeside Ave., Suite 1350

Cleveland, Ohio 44114

gkrassen@bricker.com

Dane Stinson

Dylan Borchers

Bricker & Eckler LLP

100 South Third Street

Columbus, Ohio 43215

dstinson@bricker.com

dborchers@bricker.com

**COUNSEL FOR NORTHEAST OHIO PUBLIC ENERGY COUNCIL; OHIO SCHOOLS COUNCIL; AND, POWER4SCHOOLS**

Michael J. Settineri (0073369)

Gretchen L. Petrucci (0046608)

Vorys, Sater, Seymour and Pease LLP

52 E. Gay Street

Columbus, Ohio 43215

mjsettineri@vorys.com

glpetrucci@vorys.com

**COUNSEL FOR DYNEGY INC.**

Matthew R. Cox

Matthew Cox Law, Ltd.

88 East Broad Street, Suite 1560

Columbus, Ohio 43215

matt@matthewcoxlaw.com

**COUNSEL FOR THE COUNCIL OF SMALLER ENTERPRISES**

Madeline Fleisher

Staff Attorney

Environmental Law & Policy Center

21 W. Broad St., Suite 500

Columbus, OH 43215

mfleisher@elpc.org

**Counsel for the Environmental Law & Policy Center**

Trent Dougherty

1145 Chesapeake Avenue, Suite I

Columbus, OH 43212

tdougherty@theOEC.org

John Finnigan

128 Winding Brook Lane

Terrace Park, Ohio 45174

jfinnigan@edf.org

**COUNSEL FOR THE OHIO ENVIRONMENTAL COUNCIL AND ENVIRONMENTAL DEFENSE FUND**

Michael J. Settineri

Gretchen L. Petrucci

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

Columbus, Ohio 43216-1008

mjsettineri@vorys.com

glpetrucci@vorys.com

Cynthia Brady

Exelon Business Services

4300 Winfield Rd.

Warrenville, Illinois 60555

Cynthia.brady@exeloncorp.com

David I. Fein

Exelon Corporation

10 South Dearborn Street – 47th Fl.

Chicago, Illinois 60603

David.fein@exeloncorp.com

Lael E. Campbell

Constellation NewEnergy, Inc. and Exelon Corporation

101 Constitution Ave., NW

Washington, DC 20001

Lael.campbell@exeloncorp.com

**COUNSEL FOR EXELON GENERATION COMPANY, LLC AND CONSTELLATION NEWENERGY, INC.; PJM POWER PROVIDERS GROUP; THE ELECTRIC POWER SUPPLY ASSOCIATION; AND, RETAIL ENERGY SUPPLY ASSOCIATION**

Glen Thomas

1060 First Avenue, Suite 400

King of Prussia, Pennsylvania 19406

gthomas@gtpowergroup.com

Laura Chappelle

201 North Washington Square - #910

Lansing, Michigan 48933

laurac@chappeleconsulting.net

**ON BEHALF OF PJM POWER PROVIDERS GROUP**

Christopher J. Allwein

Kegler Brown Hill and Ritter LPA

65 East State Street – 1800

Columbus, Ohio 43215

callwein@keglerbrown.com

**COUNSEL FOR HARDIN WIND LLC, CHAMPAIGN WIND LLC AND BUCKEYE WIND LLC**

Todd M. Williams

Shindler, Neff, Holmes, Worline & Muhler, LLP

300 Madison Avenue

1200 Edison Plaza

Toledo, Ohio 43604

twilliams@snhslaw.com

Jeffrey W. Mayes

Monitoring Analytics, LLC

2621 Van Buren Avenue, Suite 160

Valley Forge Corporate Center

Eagleville, Pennsylvania 19403

Jeffrey.mayes@monitoringanalytics.com

**COUNSEL FOR INDEPENDENT MARKET MONITOR FOR PJM**

Sharon Theodore

Electric Power Supply Association

1401 New York Ave. NW 11th fl.

Washington, DC 20001

stheodore@epsa.org

**ON BEHALF OF THE ELECTRIC POWER SUPPLY ASSOCIATION**

Kevin R. Schmidt

Energy Professionals of Ohio

88 East Broad Street, Suite 1770

Columbus, Ohio 43215

Schmidt@sppgrp.com

**COUNSEL FOR THE ENERGY PROFESSIONALS OF OHIO**

Christopher L. Miller

Gregory H. Dunn

Jeremy M. Grayem

Ice Miller LLP

250 West Street

Columbus, Ohio 43215

Christopher.miller@icemiller.com

Gregory.dunn@icemiller.com

Jeremy.grayem@icemiller.com

**COUNSEL FOR THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO**

Craig I. Smith

Material Sciences Corporation

15700 Van Aken Blvd. – Suite 26

Shaker Heights, Ohio 44120

wttpmlc@aol.com

**COUNSEL FOR Material Sciences Corporation**

Joel E. Sechler

Carpenter Lipps & Leland

280 N. High Street, Suite 1300

Columbus, Ohio 43215

sechler@carpenterlipps.com

Gregory J. Poulos

EnerNOC, Inc.

471 E. Broad Street – Suite 1520

Columbus, Ohio 43054

gpoulos@enernoc.com

**COUNSEL FOR ENERNOC, INC.**

David J. Folk

Assistant Director of Law

City of Akron

161 S. High Street - Suite 202

Akron, OH 44308

dfolk@Akronohio.Gov

**COUNSEL FOR THE CITY OF AKRON**

Daniel W. Wolff

Richard LehFeldt

Crowell & Moring LLP

1001 Pennsylvania Ave., N.W.

Washington, DC 20004

dwolff@crowell.com

rlehfeldt@crowell.com

**COUNSEL FOR CPV SHORE, LLC**

Thomas McNamee

Thomas Lindgren

Attorney General's Office

Public Utilities Commission of Ohio

30 E. Broad Street, 16th Floor

Columbus, Ohio 43215-3793

thomas.mcnamee@ohioattorneygeneral.gov

thomas.lindgren@ohioattorneygeneral.gov

**COUNSEL FOR THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO**

Gregory Price

Mandy Willey Chiles

Attorney Examiner

Public Utilities Commission of Ohio

180 E. Broad Street

Columbus, Ohio 43215

Gregory.price@puc.state.oh.us

Mandy.chiles@puc.state.oh.us

**ATTORNEY EXAMINERS**

1. OCC and NOAC’s Application for Rehearing repeats the arguments they previously advanced in an interlocutory appeal filed with the Commission on May 16, 2016, in this proceeding. OCC and NOAC’s interlocutory appeal has not been certified or otherwise ruled upon by the Commission. However, subsequent to advancing arguments in the interlocutory appeal that are similar to those raised in their Application for Rehearing, the Commission issued a decision accepting the compliance tariff sheets. [↑](#footnote-ref-1)