

# McDermott Will & Emery

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<b>To:</b>	<b>Company:</b>	<b>Facsimile No:</b>	<b>Telephone No:</b>
	Public Utilities Commission Ohio	614-466-0313	614-466-4095
<b>From:</b>	Douglas M. Mancino	<b>Direct Phone:</b>	+1 310 551 9323
<b>E-Mail:</b>	dmancino@mwe.com	<b>Direct Fax:</b>	+1 310 277 4730
<b>Sent By:</b>	Michele Johnson	<b>Direct Phone:</b>	202-756-8237
<b>Client/Matter/Tkpr:</b>	009900-0011-9340	<b>Original to Follow by Mail:</b>	Yes
		<b>Number of Pages, Including Cover:</b>	23
<b>Re:</b>	Case Nos. 08-920-EL-SSO, 08-921-EL-AAM, 08-922-EL-UNC & 08-923-EL-ATA [Duke]		

## Message:

Attached, are the below listed documents in the above-referenced cases:

1. Cover Letter
2. Motion to Leave to File Out of Time
3. Motion to Intervene and Memorandum in Support of the Commercial Group
4. Motion for Pro Hac Vice for Grace Wung

FAX

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Main Facsimile: +1 202 756 8087 Facsimile Operator: +1 202 756 8090

U.S. practice conducted through McDermott Will & Emery LLP.  
600 Thirteenth Street, N.W. Washington, D.C. 20005-3086

Telephone: +1 202 756 8000

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# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Munich  
New York Orange County Rome San Diego Silicon Valley Washington, D.C.

Strategic alliance with MWL China Law Office (Shanghai)

Douglas M. Mancino  
Attorney at Law  
dmancino@mwe.com  
+1 310 551 8323

September 9, 2008

VIA FEDERAL EXPRESS AND FACSIMILE

Public Utilities Commission of Ohio  
Docketing Division  
180 East Broad Street  
Columbus, OH 43215-3793

Re: Case Nos. 08-920-EL-SSO; 08-921-EL-AAM; 08-922-EL-UNC; 08-923-EL-ATA

Dear Sir or Madam:

Pursuant to the order issued by the Attorney Examiner on September 5, 2008, enclosed for filing please find an original and 20 copies of the Motion to Leave to File Out of Time, Motion to Intervene and Memorandum In Support of the Commercial Group and the Motion for Pro Hac Vice for Grace Wung in the above-referenced cases.

Also enclosed is one extra copy of each document to be dated-stamped and returned to me in the enclosed, self-addressed Federal Express envelope. Please do not hesitate to contact me at the number above if you have any questions.

Thank you for your assistance in this matter

Sincerely,



Douglas M. Mancino

DMM/maj  
Enclosures

**BEFORE****THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy ) Case No. 08-920-EL-SSO  
Ohio for Approval of an Electric Security Plan )

In the Matter of the Application of Duke Energy )  
Ohio for Approval to Amend Accounting ) Case No. 08-921-EL-AAM  
Methods )

In the Matter of the Application of Duke Energy )  
Ohio for Approval of a Certificate of Public ) Case No. 08-922-EL-UNC  
Convenience and Necessity to Establish an )  
Unavoidable Capacity Charge(s) )

In the Matter of the Application of Duke Energy ) Case No. 08-923-EL-ATA  
Ohio for Approval to Amend its Tariff )

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**MOTION FOR LEAVE TO FILE OUT OF TIME,  
MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT OF  
THE "COMMERCIAL GROUP"**

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Douglas M. Mancino (0005355)  
McDermott Will & Emery LLP  
2049 Century Park East  
Suite 3800  
Los Angeles, CA 90067-3218  
Telephone: (310) 551-9323  
Fax: (310) 277-4730  
dmancino@mwe.com

Grace C. Wung  
McDermott Will & Emery, LLP  
600 Thirteenth Street, N.W.  
Washington, DC 20005  
Telephone: (202) 756-8160  
Fax: (202) 756-8087  
gwung@mwe.com

Attorneys for the Wal-Mart Stores East LP,  
Sam's Club East, and Macy's Inc.  
(collectively, the "Commercial Group")

**BEFORE****THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan	) )	Case No. 08-920-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Approval to Amend Accounting Methods	) ) )	Case No. 08-921-EL-AAM
In the Matter of the Application of Duke Energy Ohio for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge(s)	) ) ) )	Case No. 08-922-EL-UNC
In the Matter of the Application of Duke Energy Ohio for Approval to Amend its Tariff	) )	Case No. 08-923-EL-ATA

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**MOTION FOR LEAVE TO FILE OUT OF TIME AND  
MOTION TO INTERVENE OF THE "COMMERCIAL GROUP"**

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Now comes Wal-Mart Stores East, LP ("Wal-Mart") and Sam's East, Inc. ("Sam's East"), and Macy's Inc. ("Macy's") (collectively, the "Commercial Group") and hereby respectfully moves the Public Utilities Commission of Ohio ("Commission"), pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code, for leave to intervene in the above-captioned matters with the full powers and rights granted by the Commission, specifically by statute or by the provisions of the Ohio Administrative Code, to intervening parties. Further, pursuant to the attorney examiner's September 5, 2008 order extending the procedural schedule and directing parties that submitting filings via the Commission's e-filing system to refile pursuant to Rule 4901-1-02, Ohio Administrative Code, the Commercial Group respectfully

requests that the Commission accept this Motion for Leave to File Out of Time and Motion to Intervene of the Commercial Group.<sup>1</sup>

On May 1, 2008, Governor Ted Strickland signed into law Amended Substitute Senate Bill ("SB 221"). SB 221 modified, among other things, Chapter 4928 of the Revised Code. Section 4928.141, Revised Code, requires each electric distribution utility ("EDU") to establish a standard service offer ("SSO") in accordance with Sections 4928.142 or 4928.143, Revised Code.<sup>2</sup>

On Thursday, July 31, 2008, Duke Energy Ohio ("DE-Ohio") filed an Application for approval of an SSO under Section 4928.143, Revised Code.

As demonstrated further in the Memorandum in Support attached hereto and incorporated herein, the Commercial Group has a direct, real and substantial interest in the issues and matters involved in the above-captioned proceedings, and is so situated that the disposition of these proceedings may, as a practical matter, impair or impede its ability to protect that interest. The Commercial Group believes that its participation will not unduly prolong or delay these proceedings and that it will significantly contribute to the full development and equitable resolution of the factual and other issues in these proceedings. Further, the Commercial Group will accept the record as it stands. The interests of the Commercial Group will not be adequately represented by other parties to the proceedings and, as such, the Commercial Group is entitled to intervene with the full powers and rights granted by the Commission, specifically by statute and

<sup>1</sup> The Commercial Group notes that on September 4, 2008, it submitted a Motion to Intervene and Memorandum in Support of the "Commercial Group" via the Commission's e-filing system. However, the Commercial Group's e-filing was submitted shortly after the 5:30 pm cut off. Therefore, in this instant filing, the Commercial Group respectfully requests that its Motion to Intervene be accepted out of time. Additionally, in its e-filed intervention, the Commercial Group noted that as of date of its e-filing Wal-Mart and Sam's East were the only entities in the Commercial Group, but that additional commercial customers were anticipated to join the group. In this instant motion, the Commercial Group now includes Wal-Mart, Sam's East, and Macy's, but still anticipates that additional commercial customers may join the commercial group before the end of this week. The Commercial Group will make the appropriate filings to reflect additional commercial customers that join the group.

<sup>2</sup> Section 4928.142, Revised Code, governs market rate option ("MRO") plans while Section 4928.143, Revised Code, controls electric security plans ("ESP").

by the provisions of the Ohio Administrative Code, to intervening parties. Further, at this juncture, given the extension in the procedural schedule granted by the attorney examiner on September 5, 2008, the scope of the issues to be addressed in DE-Ohio's application, the substantial interest of the Commercial Group in these proceedings and the consolidation of such interests through group representation, as well as the reasons provided in the Memorandum in Support, extraordinary circumstances exist that warrant granting the Commercial Group's intervention.

By separate motion, a request for admission *Pro Hac Vice* for Grace C. Wung, of the firm of McDermott Will & Emery, LLP, has been filed in the above captioned proceeding. The Commercial Group asks that if approved, she be added to the official service list. Additional contact information for the additional counsel and representatives are provided in the attached Memorandum in Support.

Respectfully submitted,



Douglas M. Mancino (0005355)  
McDermott Will & Emery LLP  
2049 Century Park East  
Suite 3800  
Los Angeles, CA 90067-3218  
Telephone: (310) 551-9323  
Fax: (310) 277-4730  
dmancino@mwe.com

Grace C. Wung  
McDermott Will & Emery, LLP  
600 Thirteenth Street, N.W.  
Washington, DC 20005  
Telephone: (202) 756-8160  
Fax: (202) 756-8087  
gwung@mwe.com

**Attorneys for the Wal-Mart Stores East LP,  
Sam's Club East, and Macy's Inc.  
(collectively, the "Commercial Group")**

**BEFORE****THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy	)	Case No. 08-920-EL-SSO
Ohio for Approval of an Electric Security Plan	)	
 In the Matter of the Application of Duke Energy	 )	
Ohio for Approval to Amend Accounting	)	Case No. 08-921-EL-AAM
Methods	)	
 In the Matter of the Application of Duke Energy	 )	
Ohio for Approval of a Certificate of Public	)	Case No. 08-922-EL-UNC
Convenience and Necessity to Establish an	)	
 Unavoidable Capacity Charge(s)	 )	
In the Matter of the Application of Duke Energy	)	Case No. 08-923-EL-ATA
Ohio for Approval to Amend its Tariff	)	

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**MEMORANDUM IN SUPPORT OF THE "COMMERCIAL GROUP'S" MOTION FOR  
LEAVE TO FILE OUT OF TIME AND MOTION TO INTERVENE**

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Section 4903.221, Revised Code and Rule 4901-1-11 of the Ohio Administrative Code, establish the standard for intervention in the above-styled proceeding as a full party of record. In examining whether a party should be permitted to intervene in a proceeding, the Public Utilities Commission of Ohio ("Commission") considers, among other factors, the direct interests of the party, whether the intervention by the prospective party will unduly prolong or delay the proceedings, whether the party will significantly contribute to the full development and equitable resolution of the factual issues, and in the case of untimely motions to intervene, the extraordinary circumstances that warrant late intervention.<sup>3</sup> A review of these factors in light of following facts supports granting the Commercial Group's intervention.

In support of this Motion to Intervene, the Commercial Group states that each entity in the Commercial Group is an ultimate customer of DE-Ohio. Further, the entities that comprise

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<sup>3</sup> See also R.C. 4903.221(B) upon which the above rule is authorized.

the Commercial Group each purchase substantial amounts of electric and related services from DE-Ohio, which is a public utility subject to the jurisdiction of the Commission.

Wal-Mart, Sam's East, and Macy's, are each served by DE-Ohio and may be affected by DE-Ohio's proposed ESP. The Commercial Group has a real and substantial interest inasmuch as these proceedings may directly or indirectly impact the provision of electric service to the Commercial Group. Specifically, the Commercial Group's direct interest in these proceedings is the result of the effect that these proceedings shall have upon the price, adequacy, and reliability of the electric supply and related services within Ohio, including the areas presently served by DE-Ohio.

Additionally, as the Commercial Group consists of more than one commercial customer served by DE-Ohio, the collective representation of the Commercial Group's interest will significantly contribute to the full and expeditious development of an equitable resolution of the factual issues in this proceeding. The Commercial Group has also formed to consolidate their substantially similar interests, and to consolidate their examination of witnesses and presentation of testimony. The instant motion is being filed no later than five days after the specific deadline set forth in this proceeding and therefore no harm or prejudice will occur if the Commercial Group's intervention is granted at this time. Extraordinary circumstances exist to grant the Commercial Group's motion to intervene, because additional time was needed to form the Commercial Group.<sup>4</sup> Further, in light of the extension in the procedural schedule issued on September 5, 2008 (and directing parties who e-filed in this proceeding to refile before September 12, 2008), good cause exists to warrant the Commercial Group's intervention at this time.

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<sup>4</sup> See *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, 2004 Ohio PUC LEXIS 358 (June 1, 2004) at paragraphs 7 -8 (where the Commission granted the a late-filed motion to intervene nearly one month after the intervention deadline recognizing that the intervenor had numerous members that required additional time to determine whether the proposal could have a disruptive impact on their interests).



WHEREFORE, for the foregoing reasons, the Commercial Group respectfully requests that the Commission grant this motion for leave to intervene and that they be made a full party of record. For purposes of receiving service in the proceeding, in addition to the undersigned, the Commercial Group requests that the following persons be place on the official service list:

Grace C. Wung  
McDermott Will & Emery LLP  
600 Thirteenth Street, N.W.  
Washington, DC 20005  
Tel: (202) 756-8160  
Fax: (202) 756-8087  
gwung@mwe.com

Tim Leigh  
Macy's Inc.  
5985 State Bridge Road  
Duluth, GA 30097  
Tel: (678) 474-3214  
Fax: (474)-3313  
Tim.leigh@macys.com

Steve W. Chriss  
Manager, State Rate Proceedings  
Wal-Mart Stores, Inc.  
2001 SE 10th Street  
Bentonville, AR 72716-0550  
Tel: (479) 204-1594  
Fax: (479) 273-6851  
Stephen.chriss@wal-mart.com

Respectfully submitted,



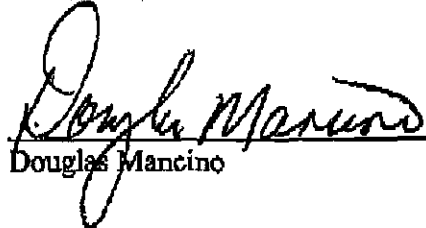
Douglas M. Mancino (0005355)  
McDermott Will & Emery LLP  
2049 Century Park East  
Suite 3800  
Los Angeles, CA 90067-3218  
Telephone: (310) 551-9323  
Fax: (310) 277-4730  
dmancino@mwe.com

Grace C. Wung  
McDermott Will & Emery, LLP  
600 Thirteenth Street, N.W.  
Washington, DC 20005  
Telephone: (202) 756-8160  
Fax: (202) 756-8087  
gwung@mwe.com

Attorneys for the Wal-Mart Stores East LP,  
Sam's Club East, and Macy's Inc.  
(collectively, the "Commercial Group")

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Intervene and Memorandum in Support of the "Commercial Group" was served upon the following parties of record this 9th day of September, 2008, via first class mail, postage prepaid.

  
\_\_\_\_\_  
Douglas Mancino

**FirstEnergy List: 08-920-EL-SSO**

Harvey L. Wagner 76 S. Main Street Akron, OH 44308	Arthur Korkosz, Senior Attorney James Burk, Esq. Mark A. Hayden Ebony L. Miller, Esq. First Energy Service Company 76 South Main Street Akron, OH 44308-1890
Howard Petricoff Stephen M. Howard M. Petricoff Vorys, Sater, Seymour and Pease LLP 52 East Gay Street Columbus, OH 43215	David Boehm, Esq. Boehm, Kurtz & Lowry 36 East Seventh Street, Suite 1510 Cincinnati, OH 45202-4454
Laura McBride James Lang Trevor Alexander Calfee Halter & Griswold LLP 800 Superior Avenue Cleveland, OH 44114	Jacqueline Roberts, Esq. Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, OH 43215
David A. Muntean Sean W. Vollman Max Rothal, Director of Law 161 South High Street, Suite 202 Akron, OH 44308	Andrew J. Campbell, Esq. Mark A. Whitt, Esq. Jones Day 325 John H. McConnell Blvd. Suite 600 Columbus, OH 43215-2673
Kevin Schmidt 33 North High Street Columbus, OH 43215	Sheilah McAdams 204 W. Wayne Street Maumee, OH 43537
Gary Reese Director of Environmental Service Memorial Hospital of Union County Marysville, OH 43040	Steven Beeler Assistant Director of City of Cleveland Department of Law 601 Lakeside Avenue, Room 106 Cleveland, OH 44114

Nolan Moser The Ohio Environmental Council 1207 Grandview Avenue, Suite 201 Columbus, OH 43212	Gregory H. Dunn, Esq. Andre T. Porter, Esq. Christopher L. Miller, Esq. Schottenstein Zox & Dunn Co., LPA 250 West Street Columbus, OH 43215
Cynthia A. Fonner Constellation Energy Group, Inc. 550 W. Washington Street, Suite 300 Chicago, IL 60661	Brett E. Breitschwerdt Thomas O'Brien Sally Bloofield Bricker & Eckler LLP 100 South Third Street Columbus, OH 43215
Lisa McAlister Daniel J. Neilsen, Esq. Samuel C. Randazzo, General Counsel Joseph M. Clark McNees, Wallace & Nurick 21 East State Street, 17th Floor Columbus, OH 43215-4228	Langdon D. Bell Barth E. Royer Bell & Royer Co., LPA 33 South Grant Avenue Columbus, OH 43215
Robert J. Triozzi Cleveland City Hall 601 Lakeside Avenue Room 206 Cleveland, OH 44114-1077	Sheilah McAdams 400 Conant Street Maumee, OH 43537
Brian J. Ballenger Law Director Ballenger & Moore Co., L.P.A. 3401 Woodville Road, Suite C Toledo, OH 43619	Paul Goldberg 5330 Seaman Road Oregon, OH 43616
James E. Moan 4930 Holland-Sylvania Road Sylvania, OH 43560	John Orr VP Regulatory Affairs Contellation Energy Commodities Group, Inc. 111 Market Place, 5th Floor Baltimore, MD 21202
Eric Stephens 5400 Franz Road Suite 250 Dublin, OH 43016	Gary A. Jeffries 501 Martindale Street Suite 400 Pittsburgh, PA 15212-5817

Wind on the Wires 1619 Dayton Avenue Suite 203 Saint Paul, MN 55104	F. Mitchell Dutton 700 Universe Boulevard Ctr/JB Juno Beach, FL 33408
Bobby Singh 300 West Wilson Bridge Road Suite 350 Worthington, OH 43085	Mark S. Yurick, Esq. John Bentine, Esq. Matthew S. White, Esq. Chester Wilcox & Saxbe LLP 65 East State Street Suite 1000 Columbus, OH 43215
Denis George 1014 Vine Street, G-07 Cincinnati, OH 45202-1100	Thomas Hays, Solicitor 3315 Centennial Road, Suite A-2 Sylvania, OH 43560
Lance Keiffer 711 Adams, 2nd Floor Toledo, OH 43624	Craig G. Goodman National Energy Marketers Association 3333 K Street, NW, Suite 110 Washington, DC 20007
Henry Eckhart, Esq. 50 West Broad Street, Suite 2117 Columbus, OH 43215-3301	Glenn Krassen, Esq. Bricker & Eckler LLP 1375 East Ninth Street, Suite 1500 Cleveland, OH 44114-1718
Garrett A. Stone, Esq. Michael K. Lavanga, Esq. Brickfield, Burchette, Ritts & Stone, P.C. 1025 Thomas Jefferson Street, NW 8th Floor, West Tower Washington, DC 20007	Jeffrey Small Michael E. Idzkowski Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, OH 43215-3485
Dale Arnold Director, Energy Services Ohio Farm Bureau Federation, Inc. P.O. Box 182383 Columbus, OH 43218	Larry Gearhardt Ohio Farm Bureau Federation, Inc. 280 N. High Street P.O. Box 479 Columbus, OH 43216
Richard L. Sites 155 E. Broad Street 15th Floor Columbus, OH 43215-3620	David C. Rinebolt Ohio Partners for Affordable Energy 231 W. Lima Street Findlay, OH 45839-1793

Brandi Whetstone 131 N. High Street, Suite 605 Columbus, OH 43215	Paul Skaff 353 Elm Street Perrysburg, OH 43551
City of Cleveland 1300 Lakeside Avenue Cleveland, OH 44114	City of Northwood Brian Ballenger 6000 Wales Road Northwood, OH 43619
City of Toledo Suite 2250 One Government Center Toledo, OH 43604	Northeast Ohio Public Energy Council One Cleveland Center, Suite 1500 1375 E. Ninth Street Cleveland, OH 44114
Northwest Ohio Aggregation Coalition One Government Center, Suite 2250 Toledo, OH 43604	Nucor Steel Marion, Inc. 912 Cheney Avenue Marion, OH 43302
Eric L. Burkland Ohio Manufacturers Association 33 N. High Street Columbus, OH 43215	Rebecca Standfield Natural Resources Defense Council 101 N Wacker Drive, Suite 609 Chicago, IL 60606
Selwyn J. R. Dias 88 E. Broad Street Suite 800 Columbus, OH 43215	Marvin Resnik American Electric Power Serv. Corporation 1 Riverside Plaza, 29th Floor Columbus, OH 43215
Daniel Conway Porter Wright Morris & Arthur LLP 41 South High Street Columbus, OH 43215	Steven T. Nourse Senior Counsel 1 Riverside Plaza Columbus, OH 43215
Michael R. Smalz Ohio State Legal Service Association 555 Buttles Avenue Columbus, OH 43215	Michael E. Idzkowski Ohio Consumer Counsel 10 West Broad Street, Suite 1800 Columbus, OH 43215-3485
Anita Schafer Paralegal Cinergy Corp. 139 E. Fourth Street Cincinnati, OH 45201-0960	Paul Smith Duke Energy Ohio 139 E. Fourth Street Cincinnati, OH 45202

Douglas E. Hart Attorney at Law 441 Vine Street, Suite 4192 Cincinnati, OH 45202	Teresa Orahood Bricker & Eckler LLP 100 South Third Street Columbus, OH 43215-4291
Elizabeth H. Watts 139 East Fourth Street 25 Atrium II Cincinnati, OH 45202	Paul Colbert Attorney at Law Cincinnati Gas & Electric Company 139 East Fourth Street 2500 Atrium II BL Cincinnati, OH 45201-0960
Michael E. Idzkowski Ohio Consumer Counsel 10 West Broad Street Suite 1800 Columbus, OH 43215-3485	Noel M. Morgan Legal Aid Society of Southwest Ohio 215 E. Ninth Street Cincinnati, OH 45202
Mr. Jeff Ventre City of Cincinnati 3300 Colerain Avenue Suite 250 Cincinnati, OH 45225	Village of Terrace Park 428 Elm Avenue Terrace Park, OH 45174
Robert P. Malloy Wood & Lamping LLP 600 Vine Street, Suite 2500 Cincinnati, OH 45202	Ann Hotz Office of Consumers' Counsel 10 W Broad Street, Suite 1800 Columbus, OH 43215
People Working Cooperatively, Inc. Jock J. Pitts 4612 Paddock Road Cincinnati, OH 45229	Mary Christensen Christensen & Christensen 100 E. Campus View Blvd., #360 Columbus, OH 43235-4647
American Wind Energy Association 1101 14th Street, NW 12th Floor Washington, DC 20005	Carl W. Boyd Two Gateway Center, 9th Floor Pittsburgh, PA 15222