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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus)
Southern Power Company for Approval of)
an Electric Security Plan; an Amendment to) Case No. 08-917-EL-SSO
its Corporate Separation Plan; and the Sale or)
Transfer of Certain Generating Assets.)

In the Matter of the Application of Ohio)
Power Company for Approval of its Electric) Case No. 08-918-EL-SSO
Security Plan; and an Amendment to its)
Corporate Separation Plan.)

COLUMBUS SOUTHERN POWER COMPANY'S
AND OHIO POWER COMPANY'S
COMBINED REPLY TO IEU'S OBJECTIONS AND MEMO IN OPPOSITION
TO OCC'S/OPAE'S MOTION TO REJECT TARIFFS

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BACKGROUND

On May 18, 2011, Industrial Energy Users- Ohio (IEU) filed objections to the May 11, 2011 compliance tariffs filed by Columbus Southern Power Company (CSP) and Ohio Power Company (OPCo) (collectively, "AEP Ohio"). On May 19, 2011, the Office of the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) filed a motion to reject AEP Ohio's May 11 compliance tariffs. While AEP Ohio itself also asked, through its May 11 motions, that the same tariffs be rejected or held in abeyance, AEP Ohio disagrees with the arguments advanced by IEU and OCC/OPAE claiming that the May 11 compliance tariffs do not properly implement the Commission's May 4, 2011 Entry (Entry) in these cases. The record needs to be set straight before the Commission addresses the compliance tariff filing. As set forth below, AEP Ohio's May 11 compliance tariffs do properly implement the Commission's Entry and reflect the only reasonable interpretation of the remand Entry in light of the Supreme Court's April 19, 2011 Decision in Case No. 2009-2022 (Decision). Further, the OCC/OPAE motion advances an unsupported and implausible claim that AEP Ohio intentionally violated the requirements of the Entry. The arguments made by IEU and OCC/OPAE should be disregarded and/or rejected.

ARGUMENT

IEU claims (at 2) that "the Companies failed to comply with the Commission's directive to remove the revenue effect of the POLR charges from their rates" and refers to the Companies' May 11 compliance tariff filing as a "decision to ignore the Commission's May 4, 2011 Entry." Similarly, OCC/OPAE (at 3) advance an interpretation of the Entry as requiring tariffs that "completely remove the POLR

charges, including the 2008 'POLR' rates." AEP Ohio's compliance tariffs represent a good faith attempt to comply with the Entry and, AEP Ohio submits, reflect the only reasonable interpretation of the remand Entry in light of the Court's Decision.

IEU and OCC/OPAE also contrast the POLR reduction with the environmental carrying costs elimination, suggesting that AEP Ohio was not taking consistent action to implement the Entry. However, the base generation rate also existed prior to the ESP decision – the ESP Order merely permitted an increase based on recovery of carrying costs for pre-ESP environmental investments. Under IEU's and OCC/OPAE's logic, the entire base generation rate should be eliminated since the ESP Order established a new, higher base generation rate. Even though AEP Ohio's compliance tariffs do precisely the same thing for both the environmental and POLR charges (back out the increases awarded in the ESP Order), IEU and OCC/OPAE accept the base rate reduction as adequately removing the environmental charge while inconsistently attacking the pre-ESP POLR charge.

The Companies' May 11 compliance tariffs would completely remove the environmental carrying cost because it was a new rate adjustment authorized by the ESP Order. Similarly, the POLR charge increase was removed by AEP Ohio's compliance tariffs, to precisely the same extent as it was increased by in the ESP Order. Going farther than removing the POLR increase, as IEU suggests, would exceed the scope of the Court's remand. The Court's reversal, in combination with the Commission's Entry, would have the same effect as a stay of execution over the ESP Order's POLR decision. Indeed, the OCC's May 18 memorandum in opposition to AEP Ohio's motion to reject tariffs extensively portrays and defends the May 4 Entry as a stay order reversing the ESP

Order's POLR charge increase. The effect of a stay order is to achieve the *status quo ante* – which is precisely what AEP Ohio's compliance tariffs do for both the environmental and POLR charges.

As a related matter, OCC/OPAE itself argues (at 3) that the POLR charge increase was “an add-on” to the prior POLR rate. OCC/OPAE go on to correctly explain (at 3-4) that CSP and OPCo both had pre-existing POLR charges that were increased as a result of implementing the ESP Order. These points bolster AEP Ohio's position, not OCC/OPAE's. The *status quo* before the ESP Order was that AEP Ohio had smaller POLR charges that were strictly nonbypassable. The *status quo* before the ESP Order was not that AEP Ohio had POLR charges of \$0.00 like the result that IEU and OCC/OPAE presently seek to achieve. The ESP Order did not remove the old charge and implement a new charge – it authorized an increase and that is what the ESP compliance tariffs achieved in 2009 - in addition to changing the terms and conditions in accordance with the ESP Order. (See Exhibit DMR-5.) Consequently, it makes no sense to conclude that the Court's reversal of the ESP Order's decision to increase pre-existing POLR charges should be interpreted to not only reverse the POLR increases awarded but to also to eliminate the pre-existing POLR charges established in the *2005 Rate Stabilization Order* (Case No. 04-169-EL-UNC).

AEP Ohio has interpreted the Commission's order in the context in which it was made and IEU asks the Commission to interpret the Entry out of context.¹ AEP Ohio

¹ There have been many pages of arguments submitted by the parties on remand thus far. AEP Ohio believes that it has made its key positions clear through respectful advocacy. Yet, in a misguided attempt to portray AEP Ohio as violating the Entry, IEU (at 5) and OCC/OPAE (at 6) both prominently cite a single reference by AEP Ohio portraying the May 4 Entry as presuming that “the entire amounts of these charges approved as part of

reasonably interpreted the unelaborated phrase in Paragraph 4 of the Entry requiring AEP Ohio to “remove the POLR charges” as taking away the same thing the ESP Order had awarded AEP Ohio – nothing more and nothing less. After all, the Commission’s Entry was issued in response to the Court’s Decision reversing a remanding the Commission’s decision in the ESP Order to grant AEP Ohio an increase in the existing POLR charge; it did not establish a new POLR charge that now needs to be completely eliminated. AEP Ohio had POLR charges prior to the ESP Order.

In fact, OCC/OPAE specifically point out (at 5) that AEP Ohio’s original POLR charges related to Regional Transmission Organization costs, and CWIP related to environmental capital investments. The fact that the pre-ESP POLR charges were based on specific investments and not the Black-Scholes option model supports AEP Ohio’s position, not that of IEU and OCC/OPAE. Being based on undisputed RTO costs and capital environmental investments, recovery of these actual costs do not relate to the issues/concerns expressed in the Court’s Decision as the basis for reversing the ESP Order’s POLR increase. The Court’s concerns related to the Commission’s characterization of the POLR charge increase as being cost-based when the Court did not perceive the record as supporting that conclusion. Neither the Court’s Decision nor the Commission’s ESP Order has any application to these undisputed environmental and

the Companies’ ESPs should be eliminated.” First, this reference does refer to the charge approved by the ESP Order (which is the POLR increase), so the entirety is still the total increase not the resulting total charge. Second, while AEP Ohio does not claim to perfectly articulate and communicate its arguments and positions at all times, it does believe that it has made its position perfectly clear in this case that only the POLR increase should be at issue on remand. It is disingenuous and wasteful for IEU and OCC/OPAE to attempt such fanfare over one potentially ambiguous statement.

RTO costs. Thus, it would be wrong to apply the Court's Decision to eliminate a charge associated with those prior investments.

IEU's complaint (at 3) concerning the impact of going back to the prior nonbypassable POLR charge is without merit. AEP Ohio was very clear up front that the impact of backing out the POLR charge increase would be to return to the prior charge and that is what naturally happens if the ESP Order's POLR increase is eliminated. The IEU would apparently have the Commission discard the 90% POLR revenue requirement award (from page 40 of the ESP Opinion and Order) while retaining the 10% provision contained in the same paragraph (whereby a customer can bypass the POLR charge if they agree to pay a market rate if they return to the SSO). But the two corollary provisions of adopting 90% of the requested POLR charge increase while simultaneously providing for the waiver to manage the other 10% of the risk were part-and-parcel of the same decision addressing the POLR charge modifications. IEU cannot have it both ways – either both of these intertwined aspects of the ESP Order should remain or both should be removed.

IEU argues (at page 4, note 8) that the POLR charge should completely disappear and only be reinstated if AEP Ohio starts over and demonstrates the entire charge is justified – because AEP Ohio has the burden to presently establish the lawfulness of its prior POLR charge in order to have the right to continue collecting it. Similarly, OCC/OPAE argue that the original POLR charge cannot continue because “the Companies have not identified these costs as qualifying under a specific enumerated provision of R.C. 4928.143(B)(2)” as required by the Court's Decision. This position transparently attempts to extrapolate the Court's Decision and cross-apply the holding for

the environmental charge to the POLR charge. That is improper for two distinct reasons. First, it exceeds the scope of the remand proceeding that only reversed and remanded two specific charges within the ESP rate plan. Second, it amounts to an untimely challenge of the Commission's prior Rate Stabilization Plan Order (Case Nos. 04-169-EL-UNC) where the Commission adopted AEP Ohio's original POLR charges.

Regarding the second point, it is even more egregious when advanced by OCC – since OCC unsuccessfully challenged the original 2005 POLR charge through rehearing and appeal. See *Consumers' Counsel v. Pub. Util. Comm.*, Sup. Ct. Case No. 2005-767 (OCC's Notice of Appeal is attached as Exhibit A, with assignment of error #5 setting forth three distinct challenges to the original POLR charge). Presently, OCC again seeks to challenge and eliminate the original POLR charge. These arguments expose OCC's long-held goal of eliminating AEP Ohio's POLR charges – regardless of whether they are based on specific investments or modeled costs associated with shopping risk. In its motion, OCC/OPAE maintain (at 4) that setting the POLR charges at the prior levels “assumes that the [pre-ESP] POLR charges relate to the actual responsibilities of the Companies to be the provider of last resort. They do not.” This is wrong. The Commission determined in the *RSP Order* that the costs did relate to AEP Ohio's POLR obligation and there is no question that the actual investments were made due to regulatory requirements. Thus, OCC's present effort to again undermine the RSP's original POLR charge is a transparent attempt to improperly collaterally attack the original POLR charge – especially given OCC's prior attempt to do so through rehearing and appeal were unsuccessful. In any case, the present attack is improper and amounts to

an untimely and unlawful attempt to challenge the POLR charge established by the Commission back in 2005.

OCC/OPAE's attempt to invoke R.C. 4905.54 and 4905.61 is without merit and amounts to bluster. As a related matter, IEU states (at 5) that the Entry is "unambiguous" and then it advances the baseless claim that the Companies have sought to delay and possibly flout the implementation [of] a decision of the Supreme Court by the Commission." There is no basis to claim that AEP Ohio has sought to delay or flout either the Court's or the Commission's decisions. On the contrary, AEP Ohio has attempted to comply in good faith with the Entry and complied in a timely manner by filing the required tariffs by May 11. In this regard, AEP Ohio already filed an application for rehearing noting that the abbreviated Entry was not supported by any explanation or rationale.

As demonstrated above, AEP Ohio's interpretation is plausible and was made in good faith. Conversely, it is implausible to support the interpretation advanced by OCC/OPAE and IEU as being unambiguous and clearly intended by the Commission. As set forth above, AEP Ohio submits that the IEU/OCC/OPAE interpretation is the one that is misguided and illogical. In the unlikely event that those parties have correctly discerned the Entry and AEP Ohio has somehow misapprehended the Entry, it would be unfair and unreasonable to conclude that AEP Ohio did so intentionally or with intent to subvert the Entry.

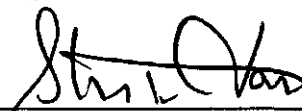
Finally, OCC/OPAE is also wrong about suggesting (at 6) that the rate reductions it anticipated from the May 4 Entry cannot be implemented in a timely manner. To the extent that the Commission finds that AEP Ohio's filed tariffs did not reflect the Entry's

intent and to the extent that the Commission proceeds to order that tariffs be immediately implemented to not only eliminate the ESP Order's POLR charge increase but also require that the prior POLR charge established in 2005 be eliminated, AEP Ohio will stand ready to quickly implement such an order (even though it would strongly disagree with such an interpretation of the Entry and submits that it would impermissibly exceed the scope of the Court's remand decision).

CONCLUSION

AEP Ohio's compliance filing was made in good faith and based on the most obvious meaning of the May 4 Entry in the context in which it was issued. In the unlikely event that the Commission meant to order what IEU and OCC interpret the May 4 Entry to do (*i.e.*, eliminate not only the ESP Order's increase but to also wipe out the prior POLR charge authorized under the 2005 RSP Order), preparing those tariffs is a simple matter and AEP Ohio will be ready to quickly file such tariffs if the Commission so orders. For the reasons stated above, however, AEP Ohio submits that such an interpretation of the May 4 Entry goes beyond the scope of the Court's remand and should not be the result.

Respectfully Submitted,



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FILE

11

IN THE SUPREME COURT OF OHIO
On Appeal from the Public Utilities Commission of Ohio

Office of the Ohio Consumers' Counsel,

Appellant,

v.

The Public Utilities Commission
of Ohio,

Appellee.

Case No.

05-0767

Appeal from the Public
Utilities Commission of Ohio

Public Utilities
Commission of Ohio
Case No. 04-169-EL-UNC

NOTICE OF APPEAL
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SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT
OFFICE OF THE OHIO CONSUMERS' COUNSEL

Appellant, the Office of the Ohio Consumers' Counsel, pursuant to R.C. 4903.11 and 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee," "PUCO" or "Commission") of this appeal to the Supreme Court of Ohio from Appellee's Opinion and Order entered in its Journal on January 26, 2005 and Entry on Rehearing entered in its Journal on March 23, 2005 in PUCO Case No. 04-169-EL-UNC.

Pursuant to R.C. Chapter 4911, Appellant is the statutory representative of the residential customers of the following electric distribution companies: Ohio Power Company and Columbus Southern Power Company, collectively referred to as "Companies." Appellant was and is a party of record in PUCO Case No. 04-169-EL-UNC. On February 25, 2005, Appellant timely filed an Application for Rehearing from the January 26, 2005 Opinion and Order pursuant to R.C. 4903.10. Appellant's Application for Rehearing was denied with respect to the issues raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on March 23, 2005 in the case below.

Appellant complains and alleges that Appellee's January 26, 2005 Opinion and Order and March 23, 2005 Entry on Rehearing in PUCO Case No. 04-169-EL-UNC are unlawful, unjust and unreasonable, and the Commission erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

1. The Commission acted unlawfully and unreasonably in failing to dismiss the Companies' Application in PUCO Case No. 04-169-EL-UNC for a so-called Post-Market Development Period Rate Stabilization Plan ("RSP"). As set forth in OCC's Motion to Dismiss in Case No. 04-169-EL-UNC filed at the PUCO on May 24, 2004 and OCC's Application for Rehearing, there is no basis in Ohio law for the Companies' RSP. The Companies' RSP violates R.C. 4909.15, 4909.18, 4928.02, 4928.14, 4928.15, 4928.17, 4928.34, 4928.38 and 4928.40.
2. The Commission's Opinion and Order violates R.C. 4928.14(A), which requires that a market-based standard service offer be available to customers at the end of the Market Development Period ("MDP"), and R.C. 4928.14(B), which requires that an option to purchase competitive retail electric service at a price determined through a competitive bidding process ("CBP") also be available to customers at the end of the MDP.
3. Neither R.C. 4928.14(A) and (B) nor the evidentiary record supports the Commission's finding that increasing generation rates by 7 percent annually for the years 2006, 2007 and 2008 for Ohio Power Company and 3 percent annually for the years 2006, 2007 and 2008 for Columbus Southern Power Company results in market-based standard service offers pursuant to R.C. 4928.14.
4. The Commission acted unlawfully in violation of R.C. 4928.14(A) and (B) and unreasonably without regard to the evidence of record in approving the Companies' request for the opportunity to seek additional 4 percent generation rate increases (above the 7 percent and 3 percent annual increases referenced above) during the years 2006, 2007 and 2008.
5. The Commission acted unlawfully and unreasonably in approving a Provider of Last Resort ("POLR") charge for the Companies when there is no basis in Ohio law for such a charge and when the amount of revenues to be recovered by the charge is the same amount requested by the Companies in deferrals for regional transmission organization ("RTO") administrative charges incurred during the MDP and for carrying charges on construction work in progress and in-service generation plant expenditures incurred during the MDP. Such deferrals during the MDP violate R.C. 4928.34(A)(6); therefore, the creation of a charge to recover amounts equal to such deferrals, regardless of the name given to the charge, violates R.C. 4928.34(A)(6).

- A. The establishment of a POLR charge set at an amount that includes transmission costs incurred during the MDP is unlawful, because there is no provision in Ohio law for POLR charges and because the deferral of expenses incurred during the MDP for recovery after the MDP violates the rate cap provisions of R.C. 4928.34(A)(6).
 - B. The establishment of a POLR charge including an amount for various carrying costs associated with generation plant during the MDP is unlawful, because R.C. 4928.14(A) and (B) do not allow for POLR charges associated with generation service.
 - C. The establishment of a POLR charge violates the distribution rate freeze agreed to in the Stipulation and Recommendation approved by the Commission in its September 28, 2000 Opinion and Order in the Companies' electric transition plan ("ETP") cases, PUCO Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP. The approval of this provision of the Companies' RSP conflicts with the Commission's previous Opinion and Order approving the Stipulation and Recommendation in the ETP cases and the doctrine of collateral estoppel, which bars relitigation of the ETP.
6. The Commission acted unreasonably and unlawfully by adding two new exceptions to the Companies' distribution rate freezes. The two new exceptions (for security costs and operating and maintenance expenses associated with new requirements imposed on the Companies by federal or state legislative regulatory bodies after January 31, 2004) were not included in the list of exceptions to the distribution rate freeze in the ETP Stipulation and Recommendation, which the Commission approved in PUCO Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP in its Opinion and Order dated September 28, 2000. The approval of this provision of the Companies' RSP conflicts with the Commission's previous Opinion and Order approving the Stipulation and Recommendation in the ETP cases and the doctrine of collateral estoppel, which bars relitigation of the ETP cases.
7. The Commission acted unreasonably and unlawfully in violation of R.C. 4928.34(A)(6), the ETP Stipulation and Recommendation and the doctrine of collateral estoppel in granting deferrals of certain costs (RSP filing costs, ETP filing costs, customer choice education costs and customer choice implementation costs) incurred during the MDP and during the period of the Commission-approved ETP Stipulation's distribution rate freezes for recovery after the MDP and distribution rate freezes approved by the Commission in PUCO Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Opinion and Order (September 28, 2000).

8. The Commission violated R.C. 4928.17(A) and R.C. 4928.02 in allowing the Companies to avoid the corporate separation requirements of Ohio law.
9. The Commission acted unreasonably and unlawfully in failing to enforce the Commission-approved ETP Stipulation with respect to the unused Columbus Southern Power Company shopping incentives, which were to be credited to regulatory transition cost recovery for all customers. PUCO Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Opinion and Order (September 28, 2000). To the extent that the Commission redirected the use of the unused shopping incentives to another public benefit, the Commission acted unreasonably in allowing the Companies to retain a portion of these funds and failing to designate the redirection of the entire amount of the unused Columbus Southern Power Company shopping incentives.

WHEREFORE, Appellant respectfully submits that the Appellee's January 26, 2005 Opinion and Order and March 23, 2005 Entry on Rehearing are unlawful, unjust and unreasonable and should be reversed. This case should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

By:




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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of record to the proceedings before the Public Utilities Commission and pursuant to R.C. 4903.13 by hand-delivery or regular U.S. Mail this 29th day of April 2005.


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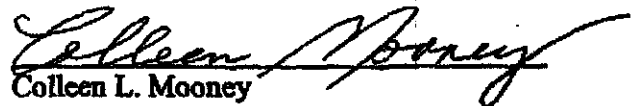
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CERTIFICATE OF FILING

I hereby certify that this Notice of Appeal has been filed with the Docketing Division of the Public Utilities Commission of Ohio in accordance with Rules 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.


Colleen L. Mooney
Counsel for Appellant, Office of the Ohio
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In The Supreme Court of Ohio
Case Information Statement

Case Name: Office of the Ohio Consumers' Counsel, Appellant, v. Public Utilities Commission of Ohio, Appellee

Case No.: PUCO Case No. 04-169-EL-UNC

05-0767

I. Has this case previously been decided or remanded by this Court? No

If so, please provide the Case Name: _____

Case No.: _____

Any Citation: _____

II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? No

If so, please provide the Case Name and Citation: n/a

Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes

If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:

U.S. Constitution: Article _____, Section _____

Ohio Revised Code: R.C. 4928.14(A) and (B), 4928.15, 4928.17, 4928.02, 4928.34(A)(6), 4928.40, 4928.02, 4909.18 and 4909.19, 4905.33, 4905.34, 4905.35, 4903.09, 4903.13

Ohio Constitution: Article _____, Section _____

Court Rule: _____

United States Code: Title _____, Section _____

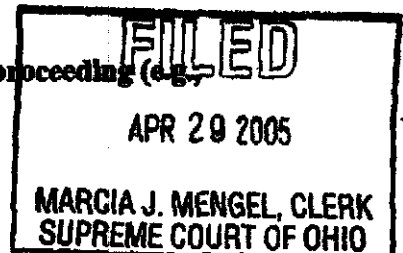
Ohio Admin. Code: _____

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UILM, search and seizure, etc.):

1) Statutory interpretation (R.C. Chapters 4903, 4905, 4909 and 4928)

2) Administrative law

3) Regulatory law, authority of the Public Utilities Commission of Ohio



IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes

If so, please identify the Case Name: Industrial Energy Users-Ohio v. Pub. Util. Comm., Case No. GEN-2005-656, Court where Currently Pending: Ohio Supreme Court, Issue: PUCO's Opinion and Order was unreasonable and unlawful with respect to law and evidence;

Case Name: Office of the Ohio Consumers' Counsel v. Pub. Util. Comm., Case No. GEN-2004-1993, Court where Currently Pending: Ohio Supreme Court, Issue: Whether the PUCO violated the Ohio Revised Code in approving a Rate Stabilization Plan for FirstEnergy Corp.;

Case Name: City of Maumee, City of Northwood, City of Oregon, City of Perrysburg, City of Sylvania, City of Toledo, Village of Holland, Board of County Commissioners of Lucas County v. Pub. Util. Comm., Case No. GEN-2005-118, Court where Currently Pending: Ohio Supreme Court, Issue: Whether the PUCO violated the provisions of Ohio law in approving a Rate Stabilization Plan for FirstEnergy Corp.;

Case Name: Office of Ohio Consumers' Counsel v. Pub. Util. Comm., Case No. GEN-2005-518, Court where Currently Pending: Ohio Supreme Court, Issue: Whether the PUCO violated the Ohio Revised Code in approving a Rate Stabilization Plan for Cincinnati Gas & Electric Company;

Case Name: Monongahela Power Company v. Pub. Util. Comm., Case No. GEN-2005-392, Court where Currently Pending: Ohio Supreme Court, Issue: the PUCO's authority to set post-market development period generation rates.

Contact information for appellant or counsel:

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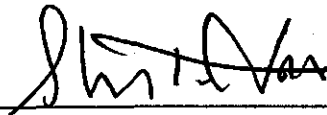
Counsel for: The Office of the Ohio Consumers' Counsel

Signature:

Colleen L. Mooney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Combined Memorandum in Opposition and Reply Comments has been served upon the below-named counsel and Attorney Examiners via electronic mail this 20th day of May, 2011.



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