BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals	))))	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	))))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders	))))	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders	))))	Case No. 10-344-EL-ATA
In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	))))	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	)))))	Case No. 11-4921-EL-RDR

SUPPLEMENTAL JOINT MOTION FOR PROTECTIVE ORDERS AND MEMORANDUM IN SUPPORT OF SIGNATORY PARTIES TO THE SEPTEMBER 7, 2011 STIPULATION FILING AS JOINT MOVANTS

Pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code (O.A.C.) and the Attorney Examiner's Entry of October 7, 2011, the undersigned signatory parties (Joint Movants) to the September 7, 2011 Stipulation ("Stipulation") hereby file a Supplemental Joint Motion in further support of their September 30, 2011 Joint Motion for Protective Orders. In the time since Joint Movants' September 30 motion was filed, they have participated in the *in camera* review described in the Attorney Examiner's October 7 Entry. During that *in camera* review, Joint Movants identified certain documents for which a protective order is no longer being sought, as well as other documents which Joint Movants continue to assert should be protected from public disclosure pursuant to applicable exemptions contained in Ohio's Public Records Act. Consistent with the Attorney Examiner's October 7 Entry, then, Joint Movants hereby file this Supplemental Motion, "more specifically detailing arguments as to why a certain document or documents should be subject to a protective order." October 7 Entry, at ¶ 6.

The reasons supporting this Supplemental Motion are more fully explained in the attached Memorandum in Support and accompanying Affidavit of Julia A. Sloat, AEP's Vice President—Regulatory Case Management.

Respectfully submitted jointly,

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MEMORANDUM IN SUPPORT

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Attorney Examiner's October 7 Entry afforded the Joint Movants and other interested parties an opportunity to review, *in camera*, the documents that have been deemed responsive to a public-records request to the Public Utilities Commission of Ohio ("Commission"). Representatives of the Joint Movants conducted that review on October 13 and 14 at the offices of the Ohio Attorney General, consistent with the procedure outlined in the Attorney Examiner's Entry. The *in camera* review concerned approximately 220[1] documents (mostly e-mail communications and attachments) obtained from the files of Commission Staff that were generated, transmitted, and/or received during the negotiations leading up to the Stipulation. The Attorney Examiner stated that, after the *in camera* review, the parties could file "a subsequent motion more specifically detailing arguments as to why a certain document or documents should be subject to a protective order." October 7 Entry, at ¶ 6.

As described in greater detail below, Joint Movants identified thirty-seven (37) documents during the *in camera* review for which a protective order is no longer being sought (so long as these documents are released without any referenced attachments or metadata, in the same condition that each specific document was presented during the *in camera* review). These 37 documents are specifically identified below and in the supporting Affidavit of Julia A. Sloat by the "Section Number" (slip-sheet number) utilized by the Attorney General's Office to separate the documents from one another

[1] No image was provided at the *in camera* review for any document bearing Section Number (slip-sheet number) 149. The documents on the laptop provided skipped from Section Number 148 to 150. Joint Movants request the opportunity to review the document assigned Section Number 149, or confirmation that no such document exists.

during the *in camera* review. Without conceding that these documents are, in fact, "records" of the type actually subject to disclosure under Ohio's Public Records Act, Joint Movants do not object to the release of these 37 documents, and no longer seek a protective order with respect to them, because they do not contain any confidential draft stipulations, draft term sheets, or related communications that convey compromise settlement offers, proposals, or counterproposals exchanged by the parties during the prehearing process culminating in the Stipulation. Nor do they reveal any of Joint Movants' trade secrets, the release of which is prohibited by state law.

With respect to the remaining 183 documents identified below and in the attached Affidavit, however (hereinafter referred to as "Settlement Communications"), Joint Movants respectfully renew their request that the Commission issue protective orders maintaining their confidentiality, and that the Commission decline their public release. Unlike the 37 documents described above, these Settlement Communications *do* contain confidential draft stipulations, draft term sheets, and related communications that convey compromise settlement offers, proposals, or counterproposals exchanged by the parties and shared with Staff (pursuant to express agreements of confidentiality) during the process culminating in the Stipulation. As Joint Movants explained in their September 30 Motion, and as further detailed herein, these 183 Settlement Communications do not constitute "records" subject to disclosure under the Public Records Act because they do not document the organization, functions, policies, decisions, procedures, operations, or other activities *of the Commission*, as they must do in order to qualify as "records" that are subject to the requirements of the Act. Moreover, because R.C. 4901.16 expressly prohibits Commission Staff from divulging "any information *** in respect to the

transaction, property, or business of any public utility," the Settlement Communications are thus exempt from public disclosure under the Act, which specifically exempts "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). Third, the Settlement Communications contain trade secrets that are exempt from disclosure pursuant to R.C. 149.43(A)(1)(v) and 1333.61 (Ohio's Trade Secrets Act). Finally, as explained below and in the supporting Affidavit of Ms. Sloat, the fact that a Stipulation has been filed and awaits approval by the Commission in no way impairs the confidential, trade-secret status of the *pre*-Stipulation Settlement Communications that the Joint Movants seek here to protect from disclosure.

II. LAW AND ARGUMENT

A. Confidential Settlement Communications That Parties Share With Commission Staff During Negotiations Are Not "Records" Under R.C. 149.011(G) Because They Do Not Document The Organization, Functions, Policies, Decisions, Procedures, Operations, Or Other Activities *Of The Commission*, As The Statutory Definition Of "Records" Requires.

The Settlement Communications that the Joint Movants still seek to protect here are not required to be released under the Public Records Act because, as a threshold matter, they do not meet the definition of a "record" in the Act. Although the scope of the Public Records Act is undeniably broad (and properly so, in order to illuminate the workings of government), Ohio's General Assembly circumscribed the scope of public records requests by determining that a "record" subject to disclosure under the Act must "document the organization, functions, policies, decisions, procedures, operations, or other activities *of the office*." R.C. 149.011(G) (emphasis added). By its own terms, this definition of "record" does *not* embrace the confidential Settlement Communications of

parties who appear *before the office* and which do *not* document the organization, functions, policies, decisions, procedures, operations, or other activities *of the office*. Id.

As the Supreme Court has recognized in caselaw interpreting the definition of "record" in R.C. 149.011(G), not every document in the possession of a State agency or its employees documents the functions, policies or decisions of the agency, and it would be "absurd" to conclude otherwise. *State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St.3d 61, 1998-Ohio-180 (letters sent to judge regarding upcoming sentencing decisions, even though she kept them in her files and "glanced" at them, were not "records" subject to disclosure under the Act because they were not actually used or relied upon by the judge in rendering her sentencing decisions); see also *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, ¶ 15 ("the dispositive fact is that 'R.C. 149.011(G) *** requires more than mere receipt and possession of a document in order for it to be a record for purposes of R.C. 149.43.'") (quoting *Whitmore* at 64, 697 N.E.2d 640.) On this question regarding the interpretation and scope of R.C. 149.011(G)'s definition of "record," the Ohio Supreme Court has cited analogous federal authority for the idea that the mere possession of a document by an agency does not make that document an "agency record" that is subject to disclosure under the Freedom of Information Act. In *Ronan*, for example, the Ohio Supreme Court quoted the D.C. Circuit's decision in *Tax Analysts v. United States Dept. of Justice* (C.A.D.C.1988), 845 F.2d 1060, for the proposition that "'agency possession and power to disseminate a document are still insufficient by themselves to make it an "agency record." *** Agencies must use or rely on the document to perform agency business, and

integrate it into their files, before it may be deemed an "agency record."'" *Ronan*, 2010-Ohio-5680 at ¶ 13, quoting *Tax Analysts*, 845 F.2d at 1068.

As Joint Movants explained in their September 30 motion for protective orders, and as the *in camera* review process confirmed with respect to the Settlement Communications identified in the accompanying Affidavit of Ms. Sloat, the Settlement Communications do *not* document the organization, functions, policies, decisions, procedures, operations, or other activities *of the Commission*. A proposed term sheet or draft stipulation – intended to move the parties toward the resolution of a dispute pending *before the office*, does not document any function, policy, decision, procedure, operation, or other activity *of the office* (the Commission). The "function" of the Commission is not to negotiate settlement terms and circulate (confidential) proposals, but rather to (publicly) rule on the Stipulation that may (or may not) ultimately be proposed by the negotiating parties. Settlement terms offered in a term sheet or draft stipulation do not reflect any "policy" or "decision" of the Commission *until the Stipulation is approved* – what comes before that time reflects only the (confidential) desires, concessions, and concerns of the negotiating parties.

To better understand Joint Movants' position that the Settlement Communications identified in Ms. Sloat's Affidavit do not constitute "records" under R.C. 149.011(G), it is helpful to examine some specific examples of confidential Settlement Communications that in no way document any function, policy, decision, procedure, operation, or other activity *of the office* (the Commission). Among the core Settlement Communications that Joint Movants still seek to protect, for example, are the draft term sheets and proposed stipulations that AEP circulated to the parties, which were then

redlined by the parties (with AEP's originally proposed text still visible) and re-circulated as the negotiations progressed.[2] These term sheets (by AEP), proposed stipulations (by AEP) and redlines (by the parties) do not document any function, policy, decision, procedure, operation, or other activity *of the office* (the Commission). These proposed term sheets, draft stipulations, and suggested redlines reveal only the parties' (supposedly confidential) efforts to negotiate a resolution to the pending proceedings. They reveal nothing about the Commission's "functions," "policies," or "decisions" and thus are not "records" under R.C. 149.011(G) that are subject to disclosure under the Public Records Act.

The same goes for the communications in which AEP transmitted various data or assumptions in support of its proposed term sheets and draft stipulations.[3] The same is also true for the communications in which various parties agreed on (or rejected) certain counterproposals that were intended to be made to AEP.[4] And the same is true for the many e-mail communications in which various parties (including Staff) proposed specific revisions to AEP's term sheets or proposed stipulations – in some instances incorporating actual text from AEP's proposals within the body of the communication in redline form, in other cases simply proposing revisions in a narrative form.[5] Here again, these and other similar communications identified in Ms. Sloat's Affidavit reflect the (confidential) wishes, proposals, and counteroffers of the parties – not the functions,

[2] See, *e.g.*, Section Numbers 55-1, 55-2, 56 through 70, 85, 91, 112, 147-1, 163, 164, 171, 178, 181, 183, 188, 190, 191, & 212.

[3] See, *e.g.*, Section Numbers 1, 2, 87, 90, 116-118, 172, 173, 175, & 182.

[4] See, *e.g.*, Section Numbers 122, 124, 125, 127-136, 139, & 143.

[5] See, *e.g.*, Section Numbers 3, 5, 8, 11, 27, 38, 50, 84, 86, 97, 100-115, 192-196, 199, 202, 204, & 206.

policies, or decisions of the Commission. As such, they are not "records" under R.C. 149.011(G) that must be disclosed in response to a public records request, even if they happen to be maintained in the files of Commission Staff. They are akin to the letters sent to Judge Whitmore in the *Beacon Journal* case by associates of the defendant whose sentencing was imminent; that is, communications which may be shared with (and later reviewed and even "kept" by) a public office, but which reflect nothing about the actual functions, policies, or decisions to be made by that office. For the foregoing reasons, the Settlement Communications identified by Section Number in Paragraphs 18 and 19 of Ms. Sloat's Affidavit do not qualify as "records" under R.C. 149.011(G) and thus need not be disclosed *on that basis alone*, regardless of whether or not they qualify for any specific statutory exemption from disclosure, such as the exemptions discussed immediately below.

B. Confidential Settlement Communications That Parties Share With Commission Staff During Negotiations Are Exempt From Disclosure Under R.C. 149.43(A)(1)(v) and R.C. 4901.16, Which Prohibits Staff From Divulging "Any Information" Respecting The "Transaction, Property, Or Business Of Any Public Utility."

Even if the Settlement Communications at issue here met the definition of "record" in R.C. 149.011(G), which they do not for the reasons just described, Ohio's Public Records Act does not require public offices to disclose "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). In this case, a provision of state law in Title 49, Ohio Revised Code expressly prohibits Commission Staff from divulging "any information" that relates to "the transaction, property or business of any public utility," such as the Settlement Communications at issue here. Specifically, R.C. 4901.16 states:

> Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, **no employee or agent** referred to in section 4905.13 of the Revised Code **shall divulge any information** acquired by him **in respect to the transaction, property, or business of any public utility**, while acting or claiming to act as such employee or agent. **Whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the commission**.

(Emphasis added). As the Ohio Supreme Court has noted, "[R.C. 4901.16] prevents employees or agents of the PUCO who examine the accounts, records, or memoranda kept by public utilities pursuant to R.C. 4905.13 from divulging information regarding the 'transaction, property or business' of the public utility other than in reports to the PUCO or testimony in court or commission proceedings. *** [**It] imposes a duty of confidentiality on PUCO employees and agents** *** [.]" *Vectren Energy Delivery of Ohio, Inc. v. Pub. Utilities Comm.*, 113 Ohio St.3d 180, 2007-Ohio-1386, ¶ 52 (emphasis added). The "duty of confidentiality" imposed by R.C. 4901.16 and expressly recognized by the Ohio Supreme Court in *Vectren Energy* would be rendered utterly meaningless if it could be defeated by any public records request.

The obvious purpose of R.C. 4901.16 is to prevent the Commission Staff from disclosing confidential information that, if released, could cause a substantial financial impact on the utility and to the industry. Compromise offers made during negotiations in a pending case squarely fall within the scope of the statute. As described in the attached Affidavit of AEP's Vice President – Regulatory Management, Julia Sloat, the release of settlement offers or negotiated positions could have a severe impact on stock prices and the financial standing of all utilities and companies involved in a negotiation. See generally Sloat Affidavit, ¶¶ 11, 12.

State law flatly prohibits the disclosure of "any information" acquired by Staff in respect to the transaction, property, or business of the AEP Ohio Companies while acting as a party to the Commission proceeding, and does so under penalty of discharge. The statutory exemptions in R.C. 4901.16 permitting disclosure (in a Staff report to the Commission, or in Staff hearing testimony) are inapplicable here. A settlement communication concerning the very structure of the Joint Movants' operations going forward and the resulting standard service offer clearly concerns "the transaction, property, or business" of the utilities. The state law prohibition on disclosure in R.C. 4901.16 thus applies here and results in a corresponding exemption from disclosure under R.C. 149.43(A)(1)(v).

Notably, the Ohio Administrative Code *also* contemplates the protection of utility information from disclosure by Commission Staff in its involvement in Commission proceedings prior to public hearings and Commission decisions. The very rule pursuant to which this motion for a protective order is being sought carves out information provided to the Commission staff from the need for a protective order. Under Ohio Administrative Code 4901-1-24(G), parties need <u>not</u> file requests for protective orders for confidential information that is submitted to Commission Staff, because unlike information filed with the docketing division, such information does <u>not</u> become part of the "public record" in a proceeding. This administrative rule complements the prohibition against disclosure in R.C. 4901.16 and reinforces the conclusion that the Settlement Communications identified in Ms. Sloat's Affidavit which contain "any information *** in respect to the transaction, property, or business of any public utility" are properly exempt from public disclosure pursuant to R.C. 149.43(A)(1)(v) and R.C. 4901.16.

C. Confidential Settlement Communications That Parties Share With Commission Staff During Negotiations Are Exempt from Disclosure Under R.C. 149.43(A)(1)(v) and R.C. 1333.61(D), To The Extent That They Reveal Trade Secrets Of The Negotiating Parties.

R.C. 4901.16, discussed above, is not the only state law that constitutes a valid exemption from the requirements of the Public Records Act for the Settlement Communications at issue here. The Settlement Communications identified in Paragraphs 18 and 19 of Ms. Sloat's Affidavit also constitute trade secrets that are exempt from disclosure under R.C. 149.43(A)(1)(v) and R.C. 1333.61(D).

1. Ohio law exempts from disclosure under the Public Records Act any business information that derives potential economic value from not being generally known by others, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ohio's version of the Uniform Trade Secrets Act defines a "trade secret" as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or **any business information or plans, financial information**, or listing of names, addresses, or telephone numbers, **that satisfies both of the following**:
>
> **(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.**
>
> **(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy**.

R.C. 1333.61(D) (emphasis added). As the Ohio Supreme Court has previously confirmed, trade secrets that are submitted to public offices for regulatory purposes are exempt from public disclosure pursuant to the Public Records Act. *State ex rel. Lucas*

County Bd. of Commrs. v. Ohio Environmental Protection Agency, 88 Ohio St.3d 166, 2000-Ohio-282. In the *Lucas County* decision, the Supreme Court noted that "The Ohio Uniform Trade Secrets Act, R.C. 1333.61 through 1333.69, is a state law exempting trade secrets from disclosure under R.C. 149.43." Id., 88 Ohio St.3d at 172. The Court also confirmed its prior holding that "[w]here documents already in the public domain are combined to form a larger document, a trade secret may exist if the unified result would afford a party a competitive advantage." Id. at 174 (citing *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 528, 687 N.E.2d 661). Applying these principles to redacted portions of a document containing various data fields that a landfill operator had submitted to Ohio EPA, which compiled information about the landfill's treatment of waste from various waste generators, the Supreme Court concluded that the redacted information was properly withheld from a public records request as the landfill operator's trade secrets. Id. at 175.

2. Many of the confidential settlement communications that were the subject of the Attorney Examiner's *in camera* review satisfy the multifactor test that Ohio courts apply to determine whether business information constitutes a "trade secret" under R.C. 1333.61.

As the federal courts have observed, Ohio courts apply six factors to determine whether particular information qualifies as a "trade secret" pursuant to R.C. 1333.61(D):

> When determining if a trade secret exists, courts look to (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e. by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time

> and expense it would take for others to acquire and duplicate the information.

Kendall Holdings, Ltd. v. Eden Cryogenics LLC (S.D. Ohio 2008), 630 F. Supp.2d 853, 861, citing *Penetone Corp. v. Palchem, Inc.* (N.D. Ohio 1985), 627 F.Supp. 997, 1005. As detailed in the attached Affidavit of Ms. Sloat, the Settlement Communications which the Joint Movants seek here to protect against public disclosure satisfy each of these six trade-secret factors.

First, as Ms. Sloat explains in Paragraph 12 of her Affidavit, the information and business plans contained in the Settlement Communications are generally not known outside of AEP's business. Although the Settlement Communications were exchanged with Commission Staff and with counsel for other parties to these proceedings, they were exchanged with the express understanding that they would remain confidential, that they would not be disseminated publicly, and that they would not be used for any other purpose other than the effort to obtain a negotiated resolution of these proceedings that would be submitted to the Commission for its review and approval. As Ms. Sloat states in her Affidavit, the Stipulation itself is a publicly available document. But the term sheets, offers, counterproposals, and other Settlement Communications leading up to that Stipulation are *not* publicly available, are not generally known outside of AEP's business, and are known only to the other parties pursuant to agreements of confidentiality and limitations on use.

Second, as Ms. Sloat explains in Paragraph 13 of her Affidavit, the financial information and business plans contained within the Settlement Communications are known only to a select number of upper-management employees and counsel for AEP. As a whole, Ms. Sloat notes, AEP and its subsidiaries employ nearly 19,000 people. Yet

only a very limited number of executive committee members and regulatory personnel have reviewed and/or approved the financial information and business plans contained within the draft stipulations, draft term sheets, and related communications that were exchanged by the parties and Staff in these proceedings before the Stipulation was filed. Ms. Sloat goes on to explain that the involvement of very few employees in negotiation-related activities demonstrates the Companies' committed attempt to avoid the inherent risk of publicizing insider or market-moving information. The confidential nature of how company officials handle the various stages of settlement development is similar to how company officials handle developing earnings-related information throughout a reporting period, or strategic decisions that a company may consider throughout time. As Ms. Sloat goes on to note, access to explored or developing strategies does not diminish the confidential nature of the information because the pursuit of those strategies may be considered again or come to fruition at a later date, and the risk of its misuse continues to exist as long as the materials can be accessed.

Third, as Ms. Sloat explains in Paragraph 14 of her Affidavit, the parties here took conscious precautions to safeguard the confidentiality of the information contained in the Settlement Communications sought by the public record request. As a threshold matter, employees of AEP, Columbus Southern Power Company, and Ohio Power Company (as well as the companies' contractors) are required to sign confidentiality agreements and maintain the confidentiality of all records so designated by the companies. AEP's Term Sheets, Ms. Sloat further notes, were conspicuously marked with a bold-print header at the top of the page stating "**Confidential—For Settlement Discussions Only."** They were electronically mailed to the parties and Commission Staff with "CONFIDENTIAL

SETTLEMENT OFFER" appearing in the subject line of the e-mails, and with the legend "CONFIDENTIAL" included within the file names of the attachments. The e-mails transmitting the term sheets from AEP included the legal department's conspicuous footer, warning all recipients that the message was for "the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message." When the parties and Staff met in person to discuss their confidential Settlement Communications, they were asked to confirm that their discussions were confidential. Any extra, unneeded hard copies of the Settlement Communications were shredded or provided to in-house counsel as the negotiations progressed. To the best of Ms. Sloat's knowledge, none of the Settlement Communications has yet been publicly disclosed by AEP, Columbus Southern Power Company, Ohio Power Company, or any other parties, reflecting the parties' strenuous precautions to guard the secrecy of the information contained within them.

Fourth, Ms. Sloat describes in Paragraph 15 of her Affidavit how the financial information contained within the Settlement Communications has significant value to AEP, Columbus Southern Power Company, and Ohio Power Company. The scenarios explored throughout the Settlement discussions resulted in varying business risk profiles, competitive positioning, and financial outcomes for the companies, which, if considered in isolation, could have caused investors to transact in the company's securities in ways and degrees that would have likely differed from that which the filed Stipulation precipitated. Even if some fragments of the Settlement Communications consist of

information already in the public domain, the comprehensive financial information and business plans reflected in the draft stipulations, draft term sheets, settlement offers, and related communications are not readily ascertainable from any public sources. This corresponds with the Ohio Supreme Court's conclusion in the *Lucas County* case, *supra*, that "[w]here documents already in the public domain are combined to form a larger document, a trade secret may exist if the unified result would afford a party a competitive advantage." 88 Ohio St.3d at 174.

Fifth, Ms. Sloat testifies at Paragraph 16 of her Affidavit that AEP expended significant time, money, and effort in developing the draft stipulations, draft term sheets, settlement offers, and related communications that were exchanged during the negotiations leading up to the Stipulation. Thus, the information, process and strategic products of this effort are considered proprietary and, therefore, confidential. They also include what could be viewed as material, market-moving information, even if considered in retrospect. As Ms. Sloat explains, the information contained within the company's confidential Settlement Communications is of the same importance as the research in which the company engages to develop new operational or environmental technologies. The fruits of the company's efforts throughout the entire process are owned by the company and any of its partners exclusively.

Finally, Ms. Sloat notes in Paragraph 17 of her Affidavit that if the Settlement Communications are *not* publicly disclosed (as they should not be), and if the parties and Staff abide by the promises of confidentiality that they made in exchanging them during settlement negotiations, then it would be next to impossible for others to acquire and duplicate the financial information and business plans contained within the Settlement

Communications. The significant time spent and expense incurred by the company to arrive at and respond to the multiple settlement scenario discussions results in valuable outputs that, while not directly embedded in the filed Stipulation, are considered proprietary and not shared with others. For the foregoing reasons, therefore, the information contained within the Settlement Communications listed in Ms. Sloat's Affidavit qualifies as trade secrets and is exempt from disclosure under R.C. 149.43(A)(1)(v) and R.C. 1333.61(D).[6]

3. Other states agree that trade secrets submitted to public agencies during confidential negotiations are exempt from disclosure under public records acts, and that the release of such materials would impair agency functions.

Courts in other jurisdictions recognize the importance of shielding from disclosure trade secrets provided by utilities to public agencies regarding sensitive settlement negotiations. The trade secrets exemption in Illinois' Freedom of Information Act, for instance, has been interpreted to exempt from disclosure "information that * * * would * * * make it more difficult for the agency to induce people to submit similar information in the future." *Bluestar Energy Serv., Inc. v. Illinois Commerce Comm.* (2007), 374 Ill.App.3d 990, 995, 871 N.E.2d 880, citing 5 Ill.Comp.Stat. 140/7(1)(g). In *Bluestar*, the court held that a settlement agreement between an electric utility and a trade

[6] As Ms. Sloat describes in her Affidavit, several of the documents presented at the *in camera* review constitute "core" Settlement Communications, such as the term sheets and draft stipulations that AEP circulated to the parties, which were then redlined by the parties (with AEP's originally proposed text still visible) and re-circulated as the negotiations progressed. Sloat Aff. at Paragraph 18. Other Settlement Communications are embedded within (sometimes lengthy) e-mails that the parties circulated to one another and Staff during their negotiations. Id. at Paragraph 19. Some portions of this latter category of documents might safely be produced subject to appropriate redactions. On October 14, however, counsel for Joint Movants requested additional time in the *in camera* review schedule to propose and facilitate appropriate redactions, but counsel was notified by counsel for the Commission that no additional time would be allowed in the *in camera* review schedule. Accordingly, at this stage, in order to preserve their trade secrets, Joint Movants must request that no portion of the Settlement Communications identified in Paragraphs 18 or 19 of Ms. Sloat's Affidavit be disclosed.

group that was shared with a public agency was a trade secret exempt from a public records request because its disclosure would chill utilities from sharing similar information in the future. *Id*. at 996. The court so held despite the fact that Illinois' trade secret exemption says nothing about such a consideration being a factor. See Ill.Comp.Stat. 140/7(1)(g) (shielding "[t]rade secrets and commercial or financial information obtained from a person or business * * * furnished under a claim that they are proprietary, privileged or confidential, [where] disclosure * * * would cause competitive harm to the person or business * * *."). Public records law, the court stated, "should not be used to subvert the [agency]'s ability to regulate the public utilities sector, by deterring public utilities from candidly disclosing information pertinent to [its] regulatory function." *Bluestar*, Ill.App.3d. at 995.[7] The *Bluestar* court also noted that the settlement agreement – like the Settlement Communications at issue here – had been shared pursuant to agreements of confidentiality that would be meaningless if disclosure was required. Id. Thus, even though Illinois' public records act – like Ohio's – embodies a presumption of openness, and even though statutory exceptions to disclosure in Illinois – as in Ohio – are narrowly construed, the Appellate Court of Illinois agreed that the

[7] Recognizing the importance of fostering openness between government and industry, Hawaii expressly exempts from disclosure under its public records law "[g]overnment records that, by their nature, must be confidential in order for the government to avoid frustration of a legitimate government function." Hawaii.Rev.Stat. 92F-13(3). Applying this statute, the Supreme Court of Hawaii has held that an individual was not entitled to disclosure of development *proposals* submitted to a public development organization within the State of Hawaii Department of Planning and Economic Development. *Kaapu v. Aloha Tower Devel. Corp.* (1993), 74 Haw. 365, 846 P.2d 882. As the Supreme Court noted in *Kaapu*, public disclosure of the development proposals, "involving proprietary and other confidential information, such as trade secrets and confidential commercial and financial data – prior to final negotiation of a long-term lease could foreseeably give an unfair competitive advantage to other developers in the event negotiations were to break down. Concern over this risk could cause developers to offer up deliberately vague plans or decline to submit development proposals altogether. The likely result would be fewer submissions and an increase in the cost of government procurements." Id., 846 P.2d at 892. The same logic applies here – forced public disclosure of the settlement *proposals* embodied in the Settlement Communications will surely impair future settlement efforts by utilities before the Commission.

public utility settlement documents at issue were trade secrets properly exempt from disclosure. Id. at 994.

Similarly, in *Glens Falls Newspapers, Inc. v. Counties of Warren and Washington Indus. Dev. Agency* (1999), 684 N.Y.S.2d 321, 323, 257 A.D.2d 948, the court held that a confidential settlement agreement entered into between an electric utility and a state agency was protected under an exemption in New York public-records law for records "that are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." N.Y.Public Officers Law 87(2)(d). "Public disclosure of the details of the settlement agreement with [the agency] would be an obvious advantage to [the utility]'s competitors by jeopardizing [its] ability to negotiate effectively with other producers in order to obtain the lowest rates for its customers," stated the court. *Id.*

Ohio's definition of "trade secret," while worded differently from the New York and Illinois statutes, closely mirrors them in substance; each protects business and financial information that is closely guarded by the holder and potentially valuable to its competitors. See R.C. 1333.61(D). Protecting the Joint Movants' confidential settlement negotiations with Commission Staff as trade secrets is neither inconsistent with 1333.61(D) nor with R.C. 149.43's "fundamental policy of promot[ing] open government." *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St.3d 396, 398, 732 N.E.2d 373.

D. The Fact That A Stipulation Has Been Filed In No Way Impairs The Nature Of The Pre-Stipulation Confidential Settlement Communications As Being Exempt From Disclosure Under R.C. 4901.16 Or R.C. 1333.61.

Joint Movants anticipate that parties opposing the Commission's entry of the requested protective orders will point to the filed Stipulation as evidence that protection from public disclosure is no longer needed. If the filed Stipulation is a public document, they may argue, then why should the underlying negotiations leading to the Stipulation be non-public? Ms. Sloat responds to this contention in her Affidavit. As she describes, the pre-Stipulation Settlement Communications still contain potentially market-sensitive information and, therefore, could be used to unfairly and inappropriately influence the security prices of the investor-owned utilities who were involved in the settlement discussions. Sloat Aff. at ¶ 11. Thus, even a "look back" at the discussions that pre-dated the Stipulation could lead to irrational and inefficient security price fluctuations benefiting a select group of parties. Id. Volatility in securities prices within the utilities sector is generally viewed as a negative, which could place downward pressure on the valuation that Wall Street assigns to a traded security and, therefore, upward pressure on capital costs to the utility, which could eventually lead to higher prices to customers. Id. Accordingly, the fact that the Stipulation has been filed in no way undercuts Joint Movants' request for protective orders associated with the pre-Stipulation Settlement Communications.

III. CONCLUSION

For the foregoing reasons, the Joint Movants respectfully withdraw their joint requests for protective orders with respect to the 37 documents identified at Paragraph 20 of Ms. Sloat's Affidavit. However, for all of the reasons described above and in Joint

Movants' September 30 motion, Joint Movants respectfully urge the Commission to grant their request for protective orders with respect to the remaining Settlement Communications listed in Paragraphs 18 and 19 of Ms. Sloat's Affidavit.

A hasty decision by the Commission to release the Settlement Communications at issue here would have dire practical consequences in pending and future matters before the Commission. Ultimately, the Joint Movants seek a protective order to protect the very basis of confidential settlement discussions in proceedings before the Commission. The expectation of confidential settlement discussions is implicit in the legal system. The Ohio Revised Code and Ohio Administrative Code ensure that these Settlement Communications are protected when shared with Commission Staff. A Commission decision granting Joint Movants' request for protective orders would simply confirm the existing rule of law. An adverse ruling in this proceeding, however, could impair settlement discussions for years to come before the Commission.

Respectfully submitted jointly,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Supplemental Joint Motion for Protective Orders and Memorandum in Support of Signatory Parties to the September 7, 2011 Stipulation* has been served upon the below-named counsel and Attorney Examiners via electronic mail this 19th day of October, 2011.

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals	))))	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan	)))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders	))))	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders	))))	Case No. 10-344-EL-ATA
In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company	))))	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	)))))	Case No. 11-4921-EL-RDR

AFFIDAVIT OF JULIA A. SLOAT IN SUPPORT OF JOINT MOVANTS' SUPPLEMENTAL MOTION FOR PROTECTIVE ORDER

STATE OF OHIO)
)ss:
COUNTY OF FRANKLIN)

Julia A. Sloat, being first duly sworn, states as follows:

1. I am over eighteen years of age and am competent to testify regarding the matters set forth herein.

2. I submit this Affidavit in support of Joint Movants' October 19, 2011 Supplemental Motion for Protective Order in the above-captioned cases.

3. I am currently employed at American Electric Power Service Corporation("AEPSC") as Vice President – Regulatory Case Management. I have been responsible for Regulatory Case Management activities since September 2009. I joined AEP's credit risk management department in 1999 and moved to the company's investor relations department the following year. In 2003, I was named Managing Director - Investor Relations and was named Vice President - Investor Relations in 2004. In 2007, I was named Vice President – Investor Relations and Strategic Initiatives. In January 2008, I was appointed to the position of Treasurer of American Electric Power. In addition to my AEP career, I worked for Tween Brands, Inc. as Vice President – Corporate Finance and Investor Relations where I was responsible for all financial planning and analysis, store finance, treasury, risk management and investor relations functions. I worked for Bank One as a buy-side equity analyst covering the electric utility sector and a bank debt facility underwriter for large corporate markets. Prior to that, I worked for M&T Mortgage Corp., a subsidiary of M&T Bank Corp.

4. I earned a bachelor's degree in business administration with a double major in finance and economics from The Ohio State University (Ohio State). In 1999, I received a master's degree in business administration from Ohio State. I have previously served as the first and second vice president of the National Investor Relations Institute, Central Ohio Chapter Board of Directors. I currently serve as a board member for The Girl Scouts of Ohio's Heartland Council.

5. Investor Relations at AEP is a strategic management responsibility that combines finance, communications, marketing, and securities compliance issues to enable the most effective communication between the company, the financial community, and other constituencies, which contributes to the fair valuation of the company's securities. This department at AEP handles inquiries from shareholders, investors, ratings agencies and others who are interested in a company's stock and bond instruments or financial condition. The function reports to AEP's Chief Financial Officer and is responsible for closely monitoring and providing assistance in the development of the company's position in proceedings before multiple state and federal regulatory commissions.

6. I have reviewed a detailed spreadsheet log of the approximately 220 confidential settlement communications that the Public Utilities Commission of Ohio ("Commission") assembled as being potentially responsive to a public-records request. The spreadsheet of settlement communications that I reviewed was prepared by an employee of AEP's Regulatory Services Department with the assistance of legal counsel during an *in camera* review process implemented by the Commission's Attorney Examiner, Jeffrey Jones, and conducted at the offices of the Ohio Attorney General, under the supervision of an Assistant Attorney General.

7. I am personally aware of some of the confidential settlement communications that were logged during the *in camera* review, particularly those that originated from the office of Steven Nourse, Senior Counsel for AEP.

8. I assisted Mr. Nourse, other AEP counsel, and other senior management in the review of certain of the related communications ("Settlement Communications") that were exchanged by the parties during the process culminating in the Stipulation and Recommendation filed in the above-captioned cases on September 7, 2011.

9. The Stipulation, if approved, gives AEP the authority to merge its two operating companies (Columbus Southern Power Company and Ohio Power Company) into a single company. It also calls for the Company to corporately separate its Ohio generation assets and complete the transition to a competitive generation market by mid-2015. The Stipulation also supports economic development opportunities and asset investment in Ohio.

10. The Settlement Communications originating from AEP and other parties, and shared with Commission Staff during the negotiations leading up the Stipulation, were transmitted confidentially with the understanding that they would remain confidential and would not be used for any other purpose.

11. The public release of confidential settlement offers or negotiated positions such as those contained within the Settlement Communications requested in the public records request could have a significant and severe impact on stock prices and the financial standing of all investor-owned utilities and public companies involved in the negotiations leading up to the Stipulation. It is important to note that the "public release" in this context is not truly "public" in a securities market sense. In this particular circumstance, the information is released only to the limited, select audience member(s) requesting this information. Thus,

the party(ies) gaining access to such information would be in possession of what could be described as insider information, which places them in a position not only to unfairly purchase or sell the involved companies' securities or derivative securities for personal gain but also to possibly utilize that information inappropriately or unfairly until the Commission issues an order in these proceedings.

12. The financial information and business plans contained within the Settlement Communications are generally not known outside of AEP's business. Although the Settlement Communications at issue here were exchanged with Commission Staff and with counsel for other parties to these proceedings, including a limited number of other investor-owned utilities, they were exchanged with the express understanding that they would remain confidential, that they would not be disseminated publicly, and that they would not be used for any other purpose other than the effort to obtain a negotiated resolution of these proceedings that would be submitted to the Commission for its review and approval. The Stipulation itself is a publicly available document. But the term sheets, offers, counterproposals, and other Settlement Communications leading up to that Stipulation are *not* publicly available, are not generally known outside of AEP's business, and are known only to the other parties pursuant to agreements of confidentiality and limitations on use. Despite the fact that such materials were created in the past, they still contain material or potentially market-sensitive information and, therefore, could be used to unfairly and inappropriately influence the security prices of the investor-owned utilities who were involved in the settlement discussions. Therefore, even a "look back" at the discussions that pre-dated the Stipulation could lead to irrational and inefficient security price fluctuations benefiting a select group of parties. Increased volatility in a security's price within the

utilities sector is generally viewed as a negative, which could place downward pressure on the valuation that Wall Street assigns to a traded security and, therefore, upward pressure on capital costs to the utility, which could eventually lead to higher prices to customers.

13. The financial information and business plans contained within the Settlement Communications at issue here are known only to a select number of upper-management employees and counsel for AEP. As a whole, AEP and its subsidiaries employ nearly 19,000 people. Yet, only limited executive committee members and a limited number of Ohio and AEPSC Regulatory personnel reviewed and/or approved of the financial information and business plans contained within the draft stipulations, draft term sheets, and related communications that were exchanged by the parties and Staff in these proceedings before the September 7, 2011 Stipulation was filed. The involvement of very few employees in negotiation-related activities demonstrates the Companies' committed attempt to avoid the inherent risk of publicizing insider or market-moving information, which is in direct conflict with the spirit of the public records request made to the Commission. The confidential nature of how company officials handle the various stages of settlement development is similar to how company officials handle developing earnings-related information throughout a reporting period, or strategic decisions that a company may consider throughout time. Access to explored or developing strategies does not diminish the confidential nature of the information because the pursuit of those strategies may be considered again or come to fruition at a later date and the risk of its misuse continues to exist as long as the materials can be accessed.

14. The parties here took conscious precautions to safeguard the confidentiality of the information contained in the Settlement Communications sought by the public record

request. As a threshold matter, employees of AEPSC, Columbus Southern Power Company, and Ohio Power Company (as well as the Companies' contractors) are required to sign confidentiality agreements and maintain the confidentiality of all records so designated by the Companies. AEP's Term Sheets, moreover, were conspicuously marked with a bold-print header at the top of the page stating "**Confidential—For Settlement Discussions Only.**" They were electronically mailed to the parties and Commission Staff with the legend "CONFIDENTIAL SETTLEMENT OFFER" appearing in the subject line of the e-mails, and with the legend "CONFIDENTIAL" included within the file names of the attachments. The e-mails transmitting the term sheets from AEP included the legal department's conspicuous footer, warning all recipients that the message was for "the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message." When the parties and Staff met in person to discuss their confidential Settlement Communications, they were asked for their oral confirmation of the confidential nature of their discussions. Extra, unneeded hard copies of the Settlement Communications were shredded or provided to in-house counsel as the negotiations progressed. To the best of my knowledge, none of the Settlement Communications has yet been publicly disclosed by AEP, Columbus Southern Power Company, Ohio Power Company, or any other parties, reflecting the parties' precautions to guard the secrecy of the information contained within them.

15. The financial information contained within the Settlement Communications is of significant value to AEP, Columbus Southern Power Company, and Ohio Power Company. The scenarios explored throughout the Settlement discussions resulted in varying business

risk profiles, competitive positioning, and financial outcomes for the Companies, which, if considered in isolation, could have caused investors to transact in the Companies' securities in ways and degrees that would have likely differed from that which the filed Stipulation precipitated. Even if some fragments of the Settlement Communications consist of information already in the public domain, the comprehensive financial information and business plans reflected in the draft stipulations, draft term sheets, settlement offers, and related communications are not readily ascertainable from any public sources.

16. AEP expended significant time, money, and effort in developing the draft stipulations, draft term sheets, settlement offers, and related communications that were exchanged during the negotiations leading up to the Stipulation. Thus, the information, process and strategic products of this effort are considered proprietary and, therefore, confidential. They also include what could be viewed as material, market-moving information, even if considered in retrospect. It is no different than the research in which a company engages to develop new operational or environmental technologies. The fruits of a company's efforts throughout the entire process are owned by the company and any of its partners exclusively.

17. If the Settlement Communications are not publicly disclosed, and if the parties and Staff abide by the promises of confidentiality they made in exchanging them, it would be next to impossible for others to acquire and duplicate the financial information and business plans contained within the Settlement Communications. The time spent and expense incurred by the Companies to arrive at and respond to the multiple Settlement scenario discussions results in valuable outputs which, while not directly embedded in the filed Stipulation, are considered proprietary. Thus, these outputs could be misused and/or their

value eroded by sharing such information with entities that are not parties to the Stipulation and not bound by confidentiality agreements. As a consequence, the market value of the investor-owned utilities and public companies that are Stipulation signatories could be impacted if this information was to be shared.

18. Based on my review of the spreadsheet log of Settlement Communications that were subject to the Attorney Examiner's *in camera* review procedure and as compared to the corresponding documents in AEP's possession, the following Settlement Communications (which I identify by the Attorney General's "Section Number" cover sheet identification) are confidential AEP term sheets (or other parties' redline markups of AEP's term sheets) that contain or reflect AEP's highly sensitive financial and business information: **Section Numbers 55-1, 55-2, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 85, 87, 90, 91, 104, 112, 116, 117, 118, 147-1, 155, 156, 163, 164, 167, 171, 172, 173, 175, 178, 181, 182, 183, 188, 190, 191, 202, & 212.**

19. Based on my review of the spreadsheet log of Settlement Communications that were subject to the Attorney Examiner's *in camera* review and as compared to the corresponding documents in AEP's possession, the following documents contain the parties' confidential Settlement Communications and/or references to AEP's highly sensitive financial and business information that should be redacted before any public disclosure: **Section Numbers 1, 2, 3, 5, 8, 11, 12, 17, 18, 20, 22, 24, 27, 30, 33, 34, 38, 39, 40, 41, 42, 43, 47, 48, 49, 50, 51, 54, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 88, 89, 92, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 119, 120, 121, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147-2, 148, 149 (no image provided; would request**

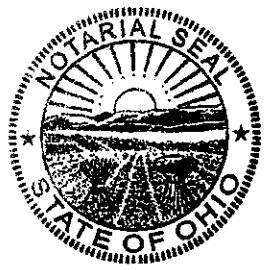
opportunity to review/redact), 150, 151, 152, 153, 154, 157, 158, 159, 161, 162, 166, 168, 169, 170, 174, 176, 177, 180, 184, 185, 186, 187, 189, 192, 193, 194, 195, 196, 199, 203, 204, 205, 206, 207, 208, 210, 211, 213, 214, 215, 216, 217, 218.

20. Based on my review of the spreadsheet log of Settlement Communications that were subject to the Attorney Examiner's *in camera* review and as compared to the corresponding documents in AEP's possession, the following thirty-seven (37) documents could be disclosed to the public (without attachments, as they were produced during the *in camera* review) without disseminating any trade secrets of AEP, Columbus Southern Power Company, or Ohio Power Company: **Section Numbers 4, 6, 7, 9, 10, 13, 14, 15, 16, 19, 21, 23, 25, 26, 28, 29, 31, 32, 35, 36, 37, 44, 45, 46, 52, 53, 93, 94, 126, 160, 165, 179, 197, 198, 200, 201, & 209.**

FURTHER AFFIANT SAYETH NAUGHT.

Sworn to before me and subscribed in my presence this 19 day of October, 2011.

Notary Public



Cheryl L. Strawser
Notary Public, State of Ohio
My Commission Expires 10-01-2016

Case No(s). 10-2376-EL-UNC, 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

Summary: Motion Supplemental Joint Motion for Protective Orders and Memorandum in Support of Signatory Parties to the September 7, 2011 Stipulation Filing as Joint Movants electronically filed by Mr. Matthew J Satterwhite on behalf of American Electric Power Service Corporation