

**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 )	Case No 10-2376-EL-UNC
and Related Approvals )	

In the Matter of the Application of )	
Columbus Southern Power Company and )	
Ohio Power Company for Authority to )	Case No 11-346-EL-SSO
Establish a Standard Service Offer )	Case No 11-348-EL-SSO
Pursuant to §4928.143, Ohio Rev. Code, )	
in the Form of an Electric Security Plan )	

In the Matter of the Application of )	
Columbus Southern Power Company and )	Case No 11-349-EL -AAM
Ohio Power Company for Approval of )	Case No 11-350-EL-AAM
Certain Accounting Authority )	

In the Matter of the Application of )	
Columbus Southern Power Company )	
to Amend its Emergency Curtailment )	Case No 10-343-EL-ATA
Service Riders )	

In the Matter of the Application of )	
Ohio Power Company )	
to Amend its Emergency Curtailment )	Case No 10-344-EL-ATA
Service Riders )	

In the Matter of the Commission Review of )	
the Capacity Charges of Ohio Power )	
Company and Columbus Southern Power )	Case No 10-2929-EL-UNC
Company )	

In the Matter of the Application of )	
Columbus Southern Power Company )	
for Approval of a Mechanism to Recover )	Case No. 11-4920-EL-RDR
Deferred Fuel Costs Ordered Under )	
Ohio Revised Code 4928.144 )	

In the Matter of the Application of )	
Ohio Power Company for Approval )	
of a Mechanism to Recover )	
Deferred Fuel Costs Ordered Under )	Case No 11-4921-EL-RDR
Ohio Revised Code 4928.144 )	

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**JOINT MEMORANDUM CONTRA TO FIRSTENERGY SOLUTIONS CORP.'S  
MOTION TO STRIKE REBUTTAL TESTIMONY OF JOSEPH HAMROCK AND PETER  
BAKER AND REQUEST FOR EXPEDITED RULING AS JOINED BY THE  
INDUSTRIAL ENERGY USERS OF OHIO BY THE STAFF OF THE PUBLIC UTILITIES  
COMMISSION OF OHIO, COLUMBUS SOUTHERN POWER COMPANY AND OHIO  
POWER COMPANY**

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**MEMORANDUM IN SUPPORT**

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## MEMORANDUM CONTRA

### **I. INTRODUCTION**

On October 25, 2011, FirstEnergy Solutions (FES) filed a motion seeking to strike the rebuttal testimony of Staff witness Baker and AEP witness Hamrock.<sup>1</sup> The Staff of the Public Utilities Commission of Ohio (Staff), Columbus Southern Power Company and Ohio Power Company (collectively “AEP Ohio” or “Companies”) reply with this Joint Memorandum Contra the Motion. The motion to strike the rebuttal testimony of these two witnesses should be denied.

The rebuttal testimony sought to be stricken responds to the inappropriate characterization of a single way to approve the Distribution Investment Rider (DIR), an element of the Stipulation at issue in this hearing, and provides a response to the assertions made in the testimony of the Non-Signatory Party witnesses direct testimony that this element of the Stipulation could not be approved by the Commission due to the lack of certain elements found in the particular statutory provision the Non-Signatory Parties assert controls the decision

The Commission has broad discretion in the order of its proceedings. The rebuttal testimony offered by Staff witness Baker and AEP witness Hamrock relate directly to the testimony offered by other witnesses and provides the Commission a factual basis to carry out its duty to evaluate the Stipulation and Recommendation offered for its consideration in these dockets. Denial of the motion is appropriate based on prior Commission findings and alternatively on the discretion of the Commission and the Attorney Examiners overseeing a proceeding before the Commission.

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<sup>1</sup> IEU-Ohio filed a memorandum on October 26, 2011, amounting to a single paragraph expressing its intention to support the motion filed by FES and its reasons for the support.

## **II. LAW AND ARGUMENT**

### **A. The Rebuttal Testimony is Justified**

The areas covered by AEP witness Hamrock and Staff witness Baker are in direct response to issues raised by the Non-signatory parties in the direct case. OCC witness Duann and IEU witness Bowser raise R.C. 4928.143(B)(2)(h) as the standard for approval of the DIR and assert that the Signatory Parties did not apply the mechanism to this statutory provision. Witnesses for the Non-Signatory Parties raised these points as a reason to deny the Stipulation in direct testimony at the evidentiary hearing. It is appropriate on rebuttal for the Signatory parties to respond to the positions taken of the Non-Signatory Parties' expert witnesses.

Proceedings to consider partial stipulations are typically unique cases, especially when they involve an application, supporting testimony for that application, a subsequent stipulation and subsequent testimony in support of that Stipulation. In these cases, the hearing becomes focused on the three-part test for approving a partial stipulation. The testimony filed in support of the initial application by AEP witness Thomas Kirkpatrick included a broader discussion of the DIR mechanism including discussion of reliability, customer expectations, and system needs. This testimony was filed in the public docket for all of the Signatory parties to rely upon in signing and supporting the Stipulation. The signature of the Signatory Parties on the Stipulation indicates their agreement with the settlement document as a whole and can be considered by the Commission. In this case the reasonableness of the elements and mechanisms within the Stipulation are supported by all Signatory Parties. To the extent testimony in this area was offered in a previous stage of this proceeding is not grounds for declaring it is not

proper rebuttal testimony. In a previous decision where testimony was filed and then subsequently a stipulation was reached and the previous testimony was not sponsored on the record, the Commission found the fact that a portion of the rebuttal testimony includes identical and similar portions of prefiled direct testimony is not dispositive of whether the rebuttal testimony is proper. *In the Matter of the Regulation of the Electric Fuel Component contained within the Rate Schedules of the Ohio Edison Company and Related Matters*, 83-34-EL-EFC (January 31, 1984 Opinion at 13-14.) 1984 Ohio PUC LEXIS 60. The Commission judged the rebuttal testimony on whether it was responding to OCC's witnesses in that case (*Id*). The testimony of Staff witness Baker and AEP witness Hamrock responds to the testimony of Non-Signatory Parties that asserted a lack support for the distribution investment rider under a particular statute highlighted by their testimony in opposition.

The next phase of the proceeding moved to the evidentiary hearing for the signed Stipulation. The Signatory parties seek Commission approval of the terms of the Stipulation under the three-part test traditionally applied by the Commission when considering partial stipulations

While there must be evidence of record supporting a partial settlement, each issue is not litigated to the same degree as with full blown case. This settlement involves the collective interests of more than 20 parties to the case. The transfer of the case from an application supported by the Companies to a Stipulation supported by more than 20 parties should not be overlooked in the making of evidentiary rulings. The efficiency and efficacy of the three-part test would be eviscerated if each and every issue were fully litigated as if no settlement had occurred. Indeed, AEP Ohio submits that the context of

settlement is to promote reasonable compromise and efficiency, while also reducing (but not eliminating) the litigation burdens for all involved. The purpose of the Commission proceeding is to develop a record adequate for Commission review.

The Non-Signatory Parties have asserted a single statutory justification for the distribution investment rider and claimed that the Signatory Parties fail to satisfy the standard of the statute. The Commission has options for its approval of the mechanism and it is appropriate for the Signatory Parties to respond with rebuttal testimony in opposition to that assertion as well as reply to the assertion that the record does not contain what is needed for an ultimate Commission determination. The Signatory Parties cannot anticipate every argument that will be made by the Non-Signatory Parties in a proceeding and such a standard is not required. *Martin v Weaver* (6<sup>th</sup> Cir. 1981), certiorari denied, 102 S Ct. 2038 (trial court abused discretion in refusing to admit crucial testimony offered by plaintiff to rebut affirmative defense; while such evidence might have been included in plaintiff's case-in-chief, "the plaintiff has no duty to anticipate or to negate a defense theory in plaintiff's case-in-chief.").

In the recent Commission *ESP Remand Decision* (Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Opinion and Order on Remand at page 8, October 3, 2011), the Commission denied a request to strike the rebuttal testimony of AEP witness Dr. LaCasse, finding that the "Monte Carlo" model at issue in Dr. LaCasse's rebuttal testimony was in response to the testimony of IEU-Ohio's witness Dr. Lesser's statements in cross-examination during his expert testimony. The Commission also found that the moving parties in that case did not demonstrate how the admission of the testimony into the record caused them prejudice finding that those parties were afforded

the opportunity to cross-examine Dr. LaCasse regarding the Monte Carlo results. A Monte Carlo model could have been included as part of the Companies initial case but was not. It was offered in response to statements by an opposing witness.

Likewise, the rebuttal testimony of AEP witness Hamrock and Staff witness Baker is provided in response to assertions by Non-Signatory witnesses that the Stipulation case does not consider certain points and the assertion that the Commission is limited to a single statutory basis. It is fair and reasonable to permit a response to the particular attaches that do arise and were addressed through opposing testimony. If the Non-Signatory parties believed these were purely legal arguments they did not need to include them in the evidentiary record as part of their expert witness testimony. But since they did include these points the door is opened for rebuttal on these points. The Non-Signatory Parties will have the right to cross examine those witnesses on those points just as the parties did in the *ESP Remand Decision*

FES' reliance upon *In re Ameritech Ohio's Economic Costs*, Case No. 96-922-TP-UNC, 2001 Ohio PUC LEXIS 1146 (Ohio PUC 2001) (Entry) cited on page 6 and page 8 of FES' memorandum in support is misplaced. In that case Examiner Nodes denied the rebuttal testimony of the Intervenor, not the Company, and found that the Intervenor had already had the opportunity to review the Company's case, do discovery, and address the arguments made in the Company's initial filing over a three month period before filing its initial testimony. (*Id.* at ¶¶ 8-9 ) Examiner Nodes found the rebuttal amounted to a restatement of the initial filing versus a response to the cross-examination of witnesses at hearing. In this case the Signatory Parties filing testimony did not have the three month opportunity to review, conduct discovery, and tailor its initial testimony

in response to the testimony filed by the Non-Signatory Parties. Rather, Signatory Parties filed supporting testimony less than one week after filing the Stipulation. As such, on rebuttal the positions raised in the testimony of the experts offered by the Non-Signatory Parties are being rebutted. The *In re Ameritech Ohio's Economic Costs* authority cannot be relied upon in this case.

Similar to the *In re Ameritech Ohio's Economic Costs* decision, in the *Bell Atlantic and GTE*<sup>2</sup> case relied upon by FES, the Examiner denied a motion to certify an interlocutory appeal to the Commission based on the striking of rebuttal testimony that included a delay in the proceeding to prepare the initial testimony. In that case the Staff had issued a Preliminary Staff Proposal and the Examiner delayed the proceedings “to allow the parties, in their prefiled direct testimony, an opportunity to address issues raised in the Preliminary Staff Proposal.” (*Id.* at ¶ 4.) Again this proceeding included a process to allow the consideration of the opposing case into the direct testimony. In this case the Non-Signatory Parties filed after the Signatory Parties, leaving this rebuttal testimony as its first opportunity to rebut the statements made and the assertions that this mechanism is only justified under a specific statutory provision.

**B. FES Motion to Strike Impairs the Commission's Ability to Carry Out Its Review**

FES necessarily reads R.C. 4928.143(B)(2)(h) as imposing an affirmative burden of proof on the Signatory Parties to present affirmative evidence in support of the DIR (evidence going to reliability, alignment of expectations, etc.). FES argues that since the company did not fully address this affirmative evidence in its case-in-chief, it is barred from doing so in rebuttal. But the statute is permissive to the extent it even applies to the

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<sup>2</sup> Case No 98-1398-TP-AMI at ¶ 4 (July 16, 1999) relied upon by FES on pages 6, 7 and 8 of its memorandum in support.



approval of the DIR in this case. It says that companies "may" provide for a DIR in their application, and if they do, it then becomes the Commission's duty to examine the factors listed at the end of subsection (h):

As part of its determination as to whether to allow in an electric distribution utility's [ESP] inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system. (Emphasis added)

The statute thus imposes an investigatory duty on the Commission that arises based on the contents of the company's application, and the Commission has the discretion under its rules to undertake that examination in whatever way it deems fit, including by taking the testimony of Witnesses Hamrock and Baker if it wishes. See OAC 4901-1-27 (giving the hearing officer the power to "regulate the course of the hearing and the conduct of the participants \*\*\* without limitation")(Emphasis added). See also OAC 4901-1-38 ("The commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case.") The burden of proof in R.C. 4928.143(C)(1) does not jettison the Commission's inherent power to regulate the course of the hearing "without limitation" in order to conduct the examination that the General Assembly made a duty of the Commission in R.C. 4928.143(B)(2)(h) or any other statutory provision.

**C. The Attorney Examiners and Commission have discretion over its proceedings.**

Ultimately, the Attorney Examiner has discretion in the development of the record and develops a record for ultimate Commission consideration. The Commission is not bound by strict rules of evidence as an administrative agency and is able to weigh information in its record accordingly. In a previous dispute based on a challenge to an Attorney Examiner's rulings the Commission found, "[t]he examiner correctly noted that administrative tribunals are accorded wide latitude in the admission or exclusion of evidence and the weight to be accorded admitted evidence. The discretionary powers accorded the examiner are in contra-distinction to courts of law where lay jurors are properly constrained in the evidence to be considered. The examiner, as a fact-finder, is accorded deference and respect in her rulings; and her motion rulings were reasonable and lawful." *In the Matter of the Complaint of Brothers Century 21, Inc., Complainant, v. The East Ohio Gas Company*, 84-866-GA-CSS, (July 22, 1986 Opinion and Order at 8-9), 1986 Ohio PUC LEXIS 760. Likewise, in a previous rebuttal dispute seeking to strike testimony, the parties had continued the issue into the briefing stage. The Commission found that it "\*\*\* will give the testimony that is the subject of the motions to strike whatever weight is appropriate in the context of this proceeding." *In the Matter of the Complaint of Allnet Communications Services, Inc., Complainant, v. The Ohio Bell Telephone Company*, Case No 86-771-TP-CSS, Opinion and Order April 15, 1993 at 8-9) 1993 Ohio PUC LEXIS 293. The rebuttal testimony offered is appropriate in response to the testimony provided by the Non-Signatory Parties expert testimony and the Commission can weigh the evidence as it deems it appropriate.

Non-signatory parties may raise a myriad of issues understood by the Signatory parties and considered in the process to reach the Stipulation. To the extent there are issues raised in the evidentiary testimony offered by Non-Signatory parties, rebuttal is the appropriate place to respond to that testimony and ensure the Commission is provided with a full record. Attempts to limit the information available for Commission review of the evidentiary record, especially information provided in response to expert testimony, should be avoided and the Commission be allowed to consider the full record to assist it in making its ultimate decision. *Bowman v General Motors Corp.* (D.C. Pa. 1977), 427 F.Supp. 234, 240 ("[w]here the evidence is real rebuttal evidence, the fact that it might have been offered in chief does not preclude its admission in rebuttal.") Wright & Gold, *Federal Practice & Procedure* (1993), Section 6164, note that "exclusion of rebuttal evidence that could have been offered during plaintiff's or the prosecution's case-in-chief has been held an abuse of discretion where its probative value outweighs the interests of preventing unfair surprise and saving time." *Id.*, citing *Weiss v Chrysler Motors Corp.* (2<sup>nd</sup> Cir. 1975), 515 F.2d 449, 457-458 (discretion to exclude rebuttal evidence that could have been presented in chief "should be tempered greatly" where the proffered rebuttal evidence has high value)

To the extent that the Commission does not deem the pertinent testimony to be appropriately filed under the normal rebuttal standard discussed above, AEP Ohio submits that more flexibility than normal should be afforded in the context of a partial Stipulation. AEP Ohio fully supported all of its proposals more fully in the context of its application and supporting testimony in Case Nos. 11-346-EL-SSO et al. But given the scope and breadth of the Stipulation and the unknown basis for the non-signatory parties'

opposition (at the time supporting testimony was filed), it was not known that this particular challenge would be raised.

The case in point illustrates this principle perfectly well. FES is the moving party for challenging the rebuttal nature of the testimony involving the DIR. Who would guess that FES, a CRES provider that intervened in this case based on competitive issues involving generation supply, would be primarily concerned with issues relating to non-competitive distribution service such as the DIR? AEP Ohio submits that FES does not have standing to even raise this issue. Suffice it to say that AEP Ohio did not expect FES to raise such issues in this case. In any case, AEP Ohio submits that a measure of flexibility should be afforded to the supporting parties in order to ensure that the Commission understands and can fully evaluate the Stipulation.

## CONCLUSION

For all the foregoing reasons the Staff and the Companies respectfully request that the Commission deny the motion to strike the rebuttal testimony of Staff witness Baker and AEP witness Hamrock.

Respectfully Submitted,  <u>//ss//Werner Margard</u> Werner Margard John Jones Assistant Attorneys General Public Utilities Section 180 E Broad St, 6 <sup>th</sup> Fl. Columbus, OH 43215 614-466-4395 <u>Werner.margard@puc.state.oh.us</u> <u>John.jones@puc.state.oh.us</u>  <i>Counsel for Staff of the Public Utilities Commission of Ohio</i>	Respectfully Submitted,  <u>//ss//Matthew J. Satterwhite</u> Steven T. Nourse Matthew J. Satterwhite American Electric Power Corporation 1 Riverside Plaza, 29th Floor Columbus, Ohio 43215-2373 614-716-1608 <u>stnourse@aep.com</u> <u>mjsatterwhite@aep.com</u>  Daniel R. Conway L. Bradfield Hughes Porter Wright Morris & Arthur Huntington Center 41 S. High Street, 30th Floor Columbus, Ohio 43215  <i>Counsel for Columbus Southern Power Company and Ohio Power Company</i>
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum Contra has been served upon the below-named counsel and Attorney Examiners via electronic mail this 26th day of October, 2011.

//ss// Matthew J. Satterwhite

Matthew J. Satterwhite

Samuel C. Randazzo  
Joseph E. Olikar  
Frank P. Darr  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[joliker@mwncmh.com](mailto:joliker@mwncmh.com)  
[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)

Dorothy K. Corbett  
Associate General Counsel  
139 East Fourth Street  
1303-Main  
Cincinnati, OH 45202  
[Dorothy.Corbett@duke-energy.com](mailto:Dorothy.Corbett@duke-energy.com)

Philip B. Sineneng  
Carolyn Flahive  
Terrance A. Mebane  
Thompson Hine LLP  
41 South High Street  
Suite 1700  
Columbus, OH 43215  
[Philip.Sineneng@ThompsonHine.com](mailto:Philip.Sineneng@ThompsonHine.com)  
[Carolyn.flahive@thompsonhine.com](mailto:Carolyn.flahive@thompsonhine.com)  
[Terrance.mebane@thompsonhine.com](mailto:Terrance.mebane@thompsonhine.com)

David F. Boehm  
Michael L. Kurtz  
Kurt J. Boehm  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)  
[kboehm@BKLawfirm.com](mailto:kboehm@BKLawfirm.com)

Richard L. Sites  
General Counsel & Senior Director  
of Health Policy  
Ohio Hospital Association  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215-3620  
[ricks@ohanet.org](mailto:ricks@ohanet.org)

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291  
[tobrien@bricker.com](mailto:tobrien@bricker.com)

David C. Rinebolt  
Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, OH 45839-1793  
[drinebolt@aol.com](mailto:drinebolt@aol.com)  
[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)

Steve W. Chriss  
Manager, State Rate Proceedings  
Wal-Mart Stores, Inc.  
2001 SE 10<sup>th</sup> Atrreet  
Bentonville, AR 72716-0550  
[Stephen.chriss@wal-mart.com](mailto:Stephen.chriss@wal-mart.com)

Terrence O'Donnell  
Christopher Montgomery  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291  
[todonnell@bricker.com](mailto:todonnell@bricker.com)  
[cmontgomery@bricker.com](mailto:cmontgomery@bricker.com)

Lisa G. McAlister  
Matthew W. Warnock  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291  
[lmcalister@bricker.com](mailto:lmcalister@bricker.com)  
[mwarnock@bricker.com](mailto:mwarnock@bricker.com)

John W. Bentine  
Mark S. Yurick  
Zachary Kravitz  
Chester Willcox & Saxbe, LLP  
65 East State Street, Suite 1000  
Columbus Ohio 43215  
[jbentine@cwslaw.com](mailto:jbentine@cwslaw.com)  
[myurick@cwslaw.com](mailto:myurick@cwslaw.com)  
[zkravitz@cwslaw.com](mailto:zkravitz@cwslaw.com)  
Mark A. Hayden  
Kathy J. Kolich  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)

James F. Lang  
Laura C. McBride  
N. Trevor Alexandor  
Calfee, Halter & Griswold LLP  
1400 KeyBank Center  
800 Superior Ave.  
Cleveland, OH 44114  
[jlang@calfee.com](mailto:jlang@calfee.com)  
[lmcbride@calfee.com](mailto:lmcbride@calfee.com)  
[talexander@calfee.com](mailto:talexander@calfee.com)

Michael R. Smalz  
Joseph V. Maskovyak  
Ohio Poverty Law Center  
555 Buttles Avenue  
Columbus, OH 43215  
[msmalz@ohiopoveritylaw.org](mailto:msmalz@ohiopoveritylaw.org)  
[jmaskovyak@ohiopoveritylaw.org](mailto:jmaskovyak@ohiopoveritylaw.org)

Jay E. Jadwin  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
[jejadwin@aep.com](mailto:jejadwin@aep.com)

M. Howard Petricoff  
Stephen M. Howard  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[smhoward@vorys.com](mailto:smhoward@vorys.com)

William L. Massey  
Covington & Burling, LLP  
1201 Pennsylvania Ave. NW  
Washington, DC 20004  
[wmassey@cov.com](mailto:wmassey@cov.com)

Pamela A. Fox  
Law Director, the City of Hilliard, Ohio  
[pfox@hilliardohio.gov](mailto:pfox@hilliardohio.gov)

Christopher L. Miller  
Gregory H. Dunn  
Asim Z. Haque  
Schottenstein Zox & Dunn Co., LPA  
250 West Street  
Columbus, OH 43215  
[cmiller@szd.com](mailto:cmiller@szd.com)  
[gdunn@szd.com](mailto:gdunn@szd.com)  
[ahaque@szd.com](mailto:ahaque@szd.com)

Kenneth P. Kreider  
David A. Meyer  
Keating Muething & Klekamp PLL  
One East Fourth Street  
Suite 1400  
Cincinnati, OH 45202  
[kpkreider@kmklaw.com](mailto:kpkreider@kmklaw.com)  
[dameyer@kmklaw.com](mailto:dameyer@kmklaw.com)

Michael J. Settineri  
Benita Kahn  
Lija Kaleps-clark  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008  
[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  
[lkalepsclark@vorys.com](mailto:lkalepsclark@vorys.com)

Henry W. Eckhart  
2100 Chambers Road, Suite 106  
Columbus, OH 43212  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)

Jesse A. Rodriguez  
Exelon Generation Company, LLC  
300 Exelon Way  
Kennett Square, PA 19348  
[jesse.rodriguez@exeloncorp.com](mailto:jesse.rodriguez@exeloncorp.com)

Sandy I-ru Grace  
Exelon Business Services Company  
101 Constitution Avenue NW  
Suite 400 East  
Washington, DC 20001  
[sandy.grace@exeloncorp.com](mailto:sandy.grace@exeloncorp.com)

Barth E. Royer  
Bell & Royer Co., LPA  
33 South Grant Avenue  
Columbus, OH 43215-3927  
[BarthRoyer@aol.com](mailto:BarthRoyer@aol.com)



Tara C. Santarelli  
Environmental Law & Policy Center  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212  
[tsantarelli@elpc.org](mailto:tsantarelli@elpc.org)

Holly Rachel Smith  
Holly Rachel Smith, PLLC  
3803 Rectortown Road  
Marshall, VA 20115  
[holly@raysmithlaw.com](mailto:holly@raysmithlaw.com)

Shannon Fisk  
2 North Riverside Plaza, Ste. 2250  
Chicago, IL 60606  
[sfisk@nrhc.org](mailto:sfisk@nrhc.org)

Jay L. Kooper  
Katherine Guerri  
Krystyn Noeth  
Hess Corporation  
One Hess Plaza  
Woodbridge, NJ 07095  
[jkooper@hess.com](mailto:jkooper@hess.com)  
[kguerri@hess.com](mailto:kguerri@hess.com)

David A. Kutik  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114  
[dakutik@jonesday.com](mailto:dakutik@jonesday.com)

Allison E. Haedt  
Jones Day  
P.O. Box 165017  
Columbus, OH 43216-5017  
E-mail: [aehaedt@jonesday.com](mailto:aehaedt@jonesday.com)

Trent A. Dougherty  
Nolan Moser  
William i Reisinger  
Ohio Environmental Council  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212  
[camille@theoec.org](mailto:camille@theoec.org)  
[nolan@theoec.org](mailto:nolan@theoec.org)  
[trent@theoec.org](mailto:trent@theoec.org)  
[will@theoec.org](mailto:will@theoec.org)

Emma F. Hand  
Douglas G. Bonner  
Keith Nusbaum  
Clinton A. Vince  
Daniel D. Barnowski  
SNR Denton US LLP  
1301 K Street, Suite 600, East Tower  
Washington, DC 20005-3364  
[emma.hand@snrdenton.com](mailto:emma.hand@snrdenton.com)  
[doug.bonner@snrdenton.com](mailto:doug.bonner@snrdenton.com)  
[keith.nusbaum@snrdenton.com](mailto:keith.nusbaum@snrdenton.com)  
[cvince@sonnenschein.com](mailto:cvince@sonnenschein.com)  
[dbarnowski@sonnenschein.com](mailto:dbarnowski@sonnenschein.com)

Gregory J. Poulos  
EnerNOC, Inc.  
101 Federal Street, Suite 1100  
Boston, MA 02110  
E-mail: [gpoulos@enernoc.com](mailto:gpoulos@enernoc.com)

Grant Gaber  
Jones Day  
P.O. Box 165017  
Columbus, OH 43215  
[gwgaber@jonesday.com](mailto:gwgaber@jonesday.com)

Gary A. Jeffries  
Dominion Resources Services, Inc.  
501 Martindale Street, Suite 400  
Pittsburgh, PA 15212-5817  
[Gary.A.Jeffries@dom.com](mailto:Gary.A.Jeffries@dom.com)

Paul F. Wight  
John N. Estes, III  
Skadden, Arps, Slate, Maegher & Flom  
1440 New York Ave., NW  
Washington, DC 20005  
[John.estes@skadden.com](mailto:John.estes@skadden.com)  
[Paul.wight@skadden.com](mailto:Paul.wight@skadden.com)

David I. Fein  
Cynthia Fonner Brady  
Constellation Energy Resources  
550 W. Washington St.  
Chicago, IL 60661  
[Cynthia.brady@constellation.com](mailto:Cynthia.brady@constellation.com)  
[David.fein@constellation.com](mailto:David.fein@constellation.com)

Allen Freifeld  
Samuel A. Wolfe  
Viridity Energy, Inc.  
100 West Elm St., Ste 410  
Coshohocken, PA 19428  
[afreifeld@viridityenergy.com](mailto:afreifeld@viridityenergy.com)  
[swolfe@viridityenergy.com](mailto:swolfe@viridityenergy.com)

Robert Korandovich  
KOREnergy  
P.O. Box 148  
Sunbury, OH 43074  
[korenergy@insight.rr.com](mailto:korenergy@insight.rr.com)

Constance Whyte Reinhard  
Assistant General Counsel  
Exelon Business Services Company  
10 S. Dearborn Street  
Chicago, IL 60603  
[Constance.reinhard@exeloncorp.com](mailto:Constance.reinhard@exeloncorp.com)

William Wright  
Werner Margard  
Thomas Lindgren  
Stephen A. Reilley  
Assistant Attorneys General  
Public Utilities Section  
180 E. Broad St., 6<sup>th</sup> Fl.  
Columbus, OH 43215  
[William.wright@puc.state.oh.us](mailto:William.wright@puc.state.oh.us)  
[Stephen.reilly@puc.state.oh.us](mailto:Stephen.reilly@puc.state.oh.us)  
[Werner.margard@puc.state.oh.us](mailto:Werner.margard@puc.state.oh.us)  
[Thomas.lindgren@puc.state.oh.us](mailto:Thomas.lindgren@puc.state.oh.us)

Bruce Weston  
Consumers' Counsel  
Terry L. Etter  
Maureen R. Grady  
Jeffrey Small  
Office of the Ohio Consumers' Counsel  
10 West Broad St., Ste. 1800  
Columbus, OH 43215  
[grady@occ.state.oh.us](mailto:grady@occ.state.oh.us)  
[etter@occ.state.oh.us](mailto:etter@occ.state.oh.us)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)

J. Kennedy & Associates  
570 Colonial Park Dr., Ste. 305  
Roswell, GA 30075

John Mascio  
325 North 4<sup>th</sup> St., Lower Level  
Steubenville, OH 43952

[gthomas@gtpowergroup.com](mailto:gthomas@gtpowergroup.com)  
[laurac@chappelleconsulting.net](mailto:laurac@chappelleconsulting.net)  
[malina@wexlerwalker.com](mailto:malina@wexlerwalker.com)  
[ned.ford@fuse.net](mailto:ned.ford@fuse.net)  
[callwein@williamsandmoser.com](mailto:callwein@williamsandmoser.com)

Mark A. Whitt (0067996)  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
(614)365-4100  
[whitt@carpenterlipps.com](mailto:whitt@carpenterlipps.com)

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Summary: Memorandum Joint Memorandum Contra electronically filed by Mr. Matthew J Satterwhite on behalf of Staff of the Public Utilities Commission of Ohio and American Electric Power Service Corporation