

**Emma F. Hand**  
**Partner**  
emma.hand@snrdenton.com  
**D +1 202 408 7094**  
**T +1 202 408 6400**  
**F +1 202 408 6399**  
snrdenton.com

**FILE**

December 1, 2011

**BY FACSIMILE & FEDERAL EXPRESS**

Public Utilities Commission of Ohio  
Docketing Division  
180 East Broad Street  
Columbus, Ohio 43215-3793  
Fax: (614).466.0313

Case No. 10-2376-EL-UNC  
Case No. 11-346-EL-SSO  
Case No. 11-348-EL-SSO  
Case No. 11-349-EL-AAM  
Case No. 11-350-EL-AAM  
Case No. 10-343-EL-ATA  
Case No. 10-344-EL-ATA  
Case No. 10-2929-EL-UNC  
Case No. 11-4920-EL-RDR  
Case No. 11-4921-EL-RDR

Re: *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case Nos. 11-346-EL-SSO, 11-348-EL-SSO; et al*

**Dear Sir or Madam:**

Enclosed please find an original and twenty copies of the *Reply of Ormet Primary Aluminum Corporation to the Joint of the Undersigned Parties in Opposition to Ormet Primary Aluminum Corporation's Motion to Strike* in the referenced proceeding. The document was originally filed by fax on December 1, 2011.

Two additional copies of each document are enclosed to be date-stamped and returned to me in the enclosed, self-addressed Federal Express envelope.

Thank you for your assistance in this matter. If you have any questions please contact me at the telephone number above.

Sincerely,

Sincerely,

*Erin L. Clark*

**Emma F. Hand**  
Partner

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**In the Matter of the Application of  
Ohio Power Company for Approval of  
a Mechanism to Recover Deferred  
Fuel Costs Ordered Under Section  
4928.144, Ohio Revised Code.**

**Case No. 11-4921-EL-RDR**

**(Consolidated)**

**REPLY OF ORMET PRIMARY ALUMINUM CORPORATION  
TO THE JOINT MEMORANDUM OF THE  
UNDERSIGNED SIGNATORY PARTIES IN OPPOSITION TO ORMET PRIMARY  
ALUMINUM CORPORATION'S MOTION TO STRIKE**

In their November 18, 2011 *Joint Reply Brief of the Undersigned Signatory Parties* ("Signatory Parties' Reply Brief") the Signatory Parties utterly fail to address bedrock precedent of this Commission founded in Ohio statutes and upheld in clear jurisprudence by the Ohio Supreme Court by flagrantly discriminating against Ormet without explaining why their proposed rate differential is based on a difference in service furnished to a consumer. This glaring deficiency is dispositive of their position. The Signatory Parties attempt to sidestep this fundamental failure by inappropriately inserting irrelevant and unsupported arguments for the first time into this proceeding in post-hearing briefs thus violating a second essential requirement of Commission and Ohio precedent, that the Commission's decision be based on the evidence in the record. The Commission should strike these arguments.

Instead of forthrightly addressing the critical failure of proof, in their *Joint Memorandum of the Undersigned Signatory Parties in Opposition to Ormet Primary Aluminum Corporation's Motion to Strike* ("Memorandum Contra") the Signatory Parties concoct a novel regulatory concept, for which they can cite no precedent.<sup>1</sup> Under their theory, they could discriminate against Ormet by simply showing anything unique about Ormet, even if the characteristic they identify has no nexus whatsoever to the proposed rate differential. Compounding their invention

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<sup>1</sup> Memorandum Contra at p. 3.

of this extraordinary new standard is the fact that it is presented in post-hearing briefs using irrelevant and non-record evidence.

To allow the Signatory Parties to use this tactic would be an obvious violation of Ormet's due process rights. Their only justification for their non-record, irrelevant post-hoc rationalization of their discrimination is to criticize Ormet's very valid and appropriate motion to strike as a polemical feint.<sup>2</sup> Ormet's motion is a serious, legitimate approach well accepted in Commission precedent to deal with precisely the type of non-record, irrelevant "evidence" that the Signatory Parties are attempting to insert into the record in their post-hearing brief.

Ohio law forbids AEP Ohio from charging different rates to customers for whom it does "a like and contemporaneous service under substantially the same circumstances and conditions."<sup>3</sup> A "*reasonable* differential or inequality of rates" can only be justified "where such differential is based upon some actual and measurable differences in the furnishing of services to the consumer."<sup>4</sup> The Commission is limited to discerning the reasonableness of such a justification "from the evidence" before it.<sup>5</sup> The rule does not center around whether the customer has unique characteristics, but rather around whether unique characteristics *of the service being provided to the customer* justify a rate differential.

Neither Ormet's kilowatt hour tax status nor its history of power arrangements are relevant to the resolution of this issue. In fact, no evidence in the record supports any argument regarding Ormet's kilowatt hour tax status. The Signatory Parties have not demonstrated any nexus between Ormet's history of power agreements or its kilowatt hour tax status and the 250

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<sup>2</sup> Memorandum Contra at p. 2.

<sup>3</sup> 49 Ohio Rev. Code § 4905.33; *Constellation NewEnergy, Inc. v. Pub. Utils. Comm'n of Ohio*, 820 N.E.2d 885, 888 (Ohio 2004).

<sup>4</sup> *Mahoning Cnty. Townships v. Pub. Utils. Comm'n of Ohio*, 388 N.E.2d 739, 742 (Ohio 1979) (emphasis added).

<sup>5</sup> See *Office of Consumers' Counsel v. Public Utils. Comm'n of Ohio*, 592 N.E.2d 1370, 1373 (Ohio 1992) (quoting *Duff v. Pub. Utils. Comm'n of Ohio*, 384 N.E. 2d 264, 273 (Ohio 1978).

MW monthly peak load limitation designed to exclude Ormet from the Load Factor Provision (“LFP”) proposed in the Stipulation. Therefore, those discussions should be stricken.

The Commission must use the appropriate legal standard to make its determination of whether evidence is relevant to the case. In asking the Commission not to strike their arguments on the basis of relevance, the Signatory Parties would have the Commission abandon the legal standard for determining discrimination and rule that any difference between customers is sufficient to determine that they are not “similarly situated” regardless of whether there is any nexus between the difference and the rate differential the utility seeks to impose. Under such a loosely applied standard for differential rate treatment, each and every customer of a utility could be considered inherently unique. Taken to its logical conclusion, such an interpretation would allow a utility to justify a discriminatory rate against any specific customer simply by seizing upon any unique characteristic of that customer, regardless of whether that characteristic has any reasonable nexus to the proposed rate differential - discrimination could be allowed for almost any reason. Accordingly, Ohio law requires that there be a reasonable nexus between the rate differential and the services furnished to the customer.

The Signatory Parties state in their Reply Brief that “[t]he fact that Ormet has operated under a series of unique arrangements over the last half century is not the reason that Ormet is effectively excluded from the LFP, although it does reinforce the point that it is not unduly discriminatory to treat Ormet as unique in this proceeding.”<sup>6</sup> This sentence makes it clear that the Signatory Parties do not believe it is necessary to find a nexus between the setting of a rate differential and the “differences” that justify the differential -- any “difference” will do to support discrimination.

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<sup>6</sup> Signatory Parties’ Reply Brief at pp. 23-24.

Under the interpretation they advocate, a different rate could be set for any customer a utility could demonstrate was different from other customers in any way. Rate differentials could be imposed upon any “undesirable” characteristic not shared by all customers equally, such as any customers who receive local tax benefits or grants or have had reasonable arrangements in the past, without regard to whether those customers cause costs that differ from costs caused by other customers. The Signatory Parties admit that Ormet’s history of power arrangements is not the reason for the rate differential.<sup>7</sup> Therefore, they should not be permitted to insert Ormet’s history of power arrangements into this proceeding at this late date.

Similarly, the Signatory Parties do not even attempt to show in their Memorandum Contra how the kilowatt hour tax is relevant to the issue of whether there is an actual and measurable difference in service furnished to Ormet. Rather, they try to change the legal standard to be applied by the Commission in evaluating discrimination to include the historical treatment of the customer to be discriminated against and any other utility-related laws that may distinguish a customer -- regardless of whether either of these factors are in any way related to the specific rate differential sought to be imposed. Because neither Ormet’s history of power arrangements nor its kilowatt hour tax status have any relation to the rate differential sought for Ormet by the Signatory Parties, the Signatory Parties’ discussions of these issues should be stricken.

The Signatory Parties’ kilowatt hour tax discussion is also completely unsupported by the record in this case, particularly their discussion of how the kilowatt hour tax applies to Ormet. The Signatory Parties cite only to the statute granting the exemption itself. They offer no record evidence to support any of their assertions in that discussion regarding Ormet’s eligibility for the exemption, the dollar amounts that Ormet does or does not pay under the tax, or the impact they

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<sup>7</sup> *Id.*

allege it has on local governments. To introduce such a discussion for the first time in briefing, when affected parties such as Ormet are unable to probe any of the Signatory Parties' assertions or offer any countervailing evidence of their own regarding the impact that the kilowatt hour tax exemption may or may not have on the electric service to be provided to Ormet by AEP Ohio under the proposed Stipulation would be a serious denial of due process and should not be permitted.

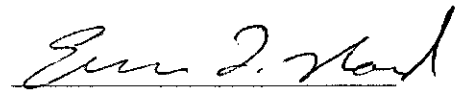
Finally, Ormet did not use its Motion to Strike as an improper vehicle for arguing the merits of this case. The Commission regularly strikes evidence that is not a part of the record when a party seeks to introduce it in post-hearing briefing as the Signatory Parties have here. *Re United Telephone Co. of Ohio*, No. 07-760, 2008 WL 449797, \*15 (Ohio P.U.C. Feb. 13, 2008) (striking section of post-hearing brief referencing facts not in record); *see OhioTelnet.Com, Inc. v. Ameritech Ohio*, No. 01-2444, 2002 WL 31319425, \*1 (Ohio P.U.C. Aug. 8, 2002) (same). The Commission also routinely strikes irrelevant evidence pursuant to its statutory authority. *See, e.g., In re Application of Columbus Southern Power Co.*, No. 08-917, 2011 WL 3202942, \*3 (Ohio P.U.C. July 19, 2011) (granting AEP Ohio's motion to strike based on relevance); *City of Reynoldsburg v. Pub. Utils. Comm'n of Ohio*, No. 08-846, 2011 WL 1428237, \*21 (Ohio P.U.C. April 5, 2011); *see also* Ohio Rev. Code § 4901-1-27. Therefore, argument that a passage is unsupported in the record or is irrelevant to the issues in the case is appropriate for a motion to strike. Further, the Signatory Parties included evidence in their Reply Brief that Ormet had moved to strike from their Initial Brief. Therefore, moving to strike the same information from the Reply Brief is appropriate, consistent, and necessary to protect Ormet's rights.

## CONCLUSION

WHEREFORE, for the reasons stated above, Ormet respectfully moves the Commission to strike the following sections of the Signatory Parties' Reply Brief: (1) from the last sentence

on page 21 beginning with “And, as discussed in detail in the Signatory Parties’ Joint Brief, . . .” through the end of the first full paragraph on page 22, ending with “. . . to be treated differently under the Stipulation in this proceeding.” and (2) the last full sentence on page 24, starting with “And Ormet’s load factor and peak demand. . .” and ending “. . . have not enjoyed.”

Respectfully submitted,



**Emma F. Hand (PHV - 1353-2011)**  
**Douglas G. Bonner (PHV - 1363-2011)**  
**SNR Denton US LLP**  
**1301 K Street, NW**  
**Suite 600, East Tower**  
**Washington, DC 20005**  
**Tel: 202-408-6400**  
**Fax: 202-408-6399**  
**emma.hand@snrdenton.com**  
**doug.bonner@snrdenton.com**

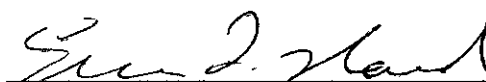
***Attorneys for Ormet Primary Aluminum  
Corporation***

**December 1, 2011**



### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Reply of Ormet Primary Aluminum Corporation to the Joint Memorandum of the Undersigned Parties in Opposition to Ormet Primary Aluminum Corporation's Motion to Strike* was served by U.S. Mail and email upon counsel identified below for all parties of record this 1st day of December, 2011.



Emma F. Hand

### **SERVICE LIST**

Steven T. Nourse  
Matthew J. Satterwhite  
American Electric Power Corp.  
1 Riverside Plaza, 29th Floor  
Columbus, Ohio 43215  
stnourse@aep.com  
mjsatterwhite@aep.com

Daniel R. Conway  
Porter Wright Morris & Arthur  
41 South High Street  
Columbus, Ohio 43215  
dconway@porterwright.com

Dorothy K. Corbett  
Duke Energy Retail Sales  
139 East Fourth Street  
1303-Main  
Cincinnati, Ohio 45202  
Dorothy.Corbett@duke-energy.com

David F. Boehm  
Kurt Boehm  
Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street. Suite 1510  
Cincinnati, Ohio 45202  
dboehm@bkllawfirm.com  
mkurtz@bkllawfirm.com

Samuel C. Randazzo  
Joseph E. Olikier  
Frank P. Darr  
Vicki L. Leach-Payne  
Joseph M. Clark  
McNees Wallace & Nurick  
21 East State Street, 17th Floor  
Columbus, Ohio 43215  
sam@mwncmh.com  
joliker@mwncmh.com  
fdarr@mwncmh.com

Richard L. Sites  
Ohio Hospital Association  
155 East Broad Street, 15th Floor  
Columbus, Ohio 43215-3620  
ricks@ohanet.org

Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, Ohio 45840  
cmooney2@columbus.rr.com

John W. Bentine  
Mark S. Yurick  
Zachary D. Kravitz  
Matthew S. White  
Chester Willcox & Saxbe, LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215  
jbentine@cwsllaw.com  
myurick@cwsllaw.com  
zkravitz@cwsllaw.com

Terry L. Etter  
Maureen R. Grady  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
etter@occ.state.oh.us  
grady@occ.state.oh.us

Thomas J. O'Brien  
Teresa Orahood  
Bricker & Eckler  
100 South Third Street  
Columbus, Ohio 43215-4291  
tobrien@bricker.com  
torahood@bricker.com

Jay E. Jadwin  
American Electric Power Service Corporation  
1 Riverside Plaza, 29th Floor  
Columbus, Ohio 43215  
jejadwin@aep.com

Michael R. Smalz  
Ohio Poverty Law Center  
555 Buttles Avenue  
Columbus, Ohio 43215  
msmalz@ohiopoveritylaw.org  
jmaskovyak@ohiopoveritylaw.org

Terrence O'Donnell  
Christopher Montgomery  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
todonnell@bricker.com  
cmontgomery@bricker.com  
Jesse A. Rodriguez  
Exelon Generation Company, LLC  
300 Exelon Way  
Kennett Square, Pennsylvania 19348  
jesse.rodriguez@exeloncorp.com

Glen Thomas  
1060 First Avenue, Ste. 400  
King of Prussia, Pennsylvania 19406  
gthomas@gtpowergroup.com

Henry W. Eckhart  
2100 Chambers Road, Suite 106  
Columbus, Ohio 43212  
henryeckhart@aol.com

Christopher L. Miller  
Gregory H. Dunn  
Asim Z. Haque  
Stephen J. Smith  
C. Todd Jones  
Schottenstein Zox & Dunn Co., LPA  
250 West Street  
Columbus, Ohio 43215  
cmiller@szd.com  
gdunn@szd.com  
ahaque@szd.com  
sjsmith@szd.com

Lisa G. McAlister  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
lmcaster@bricker.com  
mwarnock@bricker.com

William L. Massey  
Covington & Burling, LLP  
1201 Pennsylvania Ave., NW  
Washington, DC 20004  
wmassey@cov.com

Laura Chappelle  
4218 Jacob Meadows  
Okemos, Michigan 48864  
laurac@chappelleconsulting.net

Pamela A. Fox  
Law Director  
The City of Hilliard, Ohio  
pfox@hilliardohio.gov

United Way of Jefferson County  
501 Washington Street  
P.O. Box 1463  
Steubenville, OH 43952

Sandy I-ru Grace  
Marianne M. Alvarez  
Exelon Business Services Company  
101 Constitution Avenue N.W., Suite 400 East  
Washington, DC 20001  
sandy.grace@exeloncorp.com

Gary A. Jeffries  
Dominion Resources Services, Inc.  
501 Martindale Street, Suite 400  
Pittsburgh, PA 15212-5817  
gary.a.jeffries@dom.com

Kenneth P. Kreider  
David A. Meyer  
Keating Muething & Klekamp PLL  
One East Fourth Street, Suite 1400  
Cincinnati, Ohio 45202  
kpkreider@kkmklaw.com

Steve W. Chriss  
Wal-Mart Stores, Inc.  
2001 SE 10th Street  
Bentonville, Arkansas 72716  
stephen.chriss@wal-mart.com

Holly Rachel Smith  
Holly Rachel Smith, PLLC  
Hitt Business Center  
3803 Rectortown Road  
Marshall, Virginia 20115  
holly@raysmithlaw.com

Barth E. Royer  
Bell & Royer Co., LPA  
33 South Grant Avenue  
Columbus, Ohio 43215-3927  
barthroyer@aol.com

John H. Jones  
Vern Margard  
Public Utilities Section  
Ohio Attorney General Mike DeWine  
180 East Broad Street, 6th Floor  
Columbus, Ohio 43215  
john.jones@puc.state.oh.us  
werner.margard@puc.state.oh.us

Greg Poulos  
EnerNOC, Inc.  
101 Federal St.  
Boston, Massachusetts 02110  
gpoulos@enernoc.com

Carolyn S. Flahive  
Terrance A. Mebane  
Thompson Hine LLP  
41 S. High Street, Suite 1700  
Columbus, Ohio 43215  
Carolyn.Flahive@ThompsonHine.com  
Terrance.Mebane@ThompsonHine.com

Leo Antons  
1237 Cisler Dr.  
Marietta, OH 45750  
leoantons@suddenlink.net

E. Camille Yancey  
Nolan Moser  
Trent A. Dougherty  
Ohio Environmental Council  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212-3449  
camille@theoec.org  
nolan@theoec.org  
trent@theoec.org

Mark A. Hayden  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
haydenm@firstenergycorp.com

David A. Kutik  
Jones Day  
901 Lakeside Avenue  
Cleveland, OH 44114  
dakutik@jonesday.com

Christopher J. Allwein  
1373 Grandview Ave.  
Suite 212  
Columbus, OH 43212  
wein@williamsandmoser.com

Tara C. Santarelli  
Environmental Law & Policy Center  
1207 Grandview Ave., Suite 201  
Columbus, Ohio 43212  
tsantarelli@elpc.org

James F. Lang  
Laura C. McBride  
N. Trevor Alexander  
Calfee, Halter & Griswold LLP  
1400 KeyBank Center  
800 Superior Ave.  
Cleveland, OH 44114  
jlang@calfee.com  
lmcbride@calfee.com  
talexander@calfee.com

Allison E. Haedt  
Grant W. Garber  
Jones Day  
P.O. Box 165017  
325 John H. McConnell Boulevard  
Suite 600  
Columbus, Ohio 43216-5017

J. Kennedy And Associates  
570 Colonial Park Drive  
Suite 305  
Roswell, GA 30075

Jennifer Duffer  
Armstrong & Okey, Inc.  
222 East Town Street  
2nd Floor  
Columbus, OH 43215  
jduffer@ameritech.net

Lija K. Kaieps-Clark  
M. Howard Petricoff  
Vorys, Sater, Seymour and Pease  
52 E. Gay St.  
PO Box 1008  
Columbus, OH 43216  
lkalepsclark@vorys.com  
mhpetricoff@vssp.com

Bill Dingus  
Lawrence Economic Development Corporation  
P.O. Box 488  
South Point, OH 45680-0488

Constellation NewEnergy Inc  
Cynthia Fonner Brady  
550 W Washington Street  
Suite 300  
Chicago, IL 60661  
Cynthia.Brady@constellation.com

Denis George  
Kroger Company  
1014 Vine Street-G07  
Cincinnati, OH 45202-1100

Shannon Fisk  
2 North Riverside Plaza Suite 2250  
Chicago, IL 60606  
sfisk@nrdc.org

Canton Chamber Of Commerce  
229 Wells Ave N.W.  
Canton, OH 44703-1044

Amy Spiller  
Duke Energy Ohio  
139 E. Fourth Street, 1303-Main  
P.O. Box 961  
Cincinnati, OH 45201-0960  
Amy.Spiller@Duke-Energy.com

FirstEnergy Solutions Corp  
Louis M. D'Alessandris  
341 White Pond Drive  
Akron, OH 44320  
ldaleessandris@firstenergy.com

Ohio Partners For Affordable Energy  
David C. Rinebolt  
231 West Lima St.  
P.O. Box 1793  
Findlay, OH 45839-1793  
drinelbolt@aol.com

Steve Howard  
52 East Gay St.  
P.O. Box 1008  
Columbus, OH 43215  
smhoward@vorys.com

AEP Retail Energy Partners LLC  
Anne M. Vogel  
1 Riverside Plaza, 29th Floor  
Columbus, OH 43215  
amvogel@aep.com

Shawnee State University  
940 Second Street  
Portsmouth, OH 45662

Mark A. Whitt  
Carpenter, Lipps & Leleand LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus OH 43215

Jeffrey Small  
Jody M. Kyler  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
small@occ.state.oh.us  
kyler@occ.state.oh.us

Jacqueline Lake Roberts  
EnerNOC, Inc.  
13212 Haves Corner Road SW  
Pataskala OH 43062

The Sierra Club  
50 West Broad Street #2117  
Columbus, OH 43215

Meigs County Commissioners  
Michael Davenport, President  
100 East Second Street  
Pomeroy, OH 45769

Tuscarawas County  
330 University Drive NE  
New Philadelphia, OH 44663

Paul F. Wight  
Skadden, Arps, Slate, Meagher & Flom LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005

Deb J. Bingham  
Patti Mallarnee  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485

Philip B. Sineneng  
Thompson Hine LLP  
41 S. High Street, Suite 1700  
Columbus, Ohio 43215  
Philip.Sineneng@ThompsonHine.com