BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM CONTRA OF OHIO POWER COMPANY TO FIRSTENERGY SOLUTIONS CORP.'S MARCH 21, 2012 APPLICATION FOR REHEARING

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1606
Fax: (614) 716-2950
Email: stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur LLP
Huntington Center
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2770
Fax: (614) 227-2100
Email: dconway@porterwright.com

On behalf of Ohio Power Company

MEMORANDUM CONTRA
FIRSTENERGY SOLUTIONS CORP.'S
MARCH 21, 2012 APPLICATION FOR REHEARING

I. BACKGROUND

On September 7, 2011, AEP Ohio, Staff, and numerous other parties filed a Stipulation and Recommendation (Stipulation) in order to resolve the issues raised in ten major proceedings involving Ohio Power Company (OPCo, the Company, or AEP Ohio), including, among other cases, an electric security plan (ESP) proceeding (Case Nos. 11-346-EL-SSO and 11-348-EL-SSO) and the instant proceeding involving appropriate charges for capacity that CRES Providers purchase from AEP Ohio.

On December 14, 2011, the Commission issued an Opinion and Order in the cases that the proposed Stipulation addressed. That Opinion and Order modified in part and adopted the Stipulation, including its provisions regarding capacity pricing.

On January 23, 2012, the Commission clarified in several respects the capacity pricing provisions that would apply during the term of the ESP approved in the December 14, 2011 Opinion and Order. As part of that January 23 Entry, the Commission clarified the following about its modification regarding the Stipulation's customer class re-allocation of RPM-priced capacity set-aside:

> For further clarification purposes, the Commission notes that this modification to the Stipulation goes back to the initial allocation among the customer classes based on the September 7, 2011, data, *regardless of whether any customer class is now oversubscribed.*

(Jan. 23, 2012 Entry at 3-4, emphasis added). Thus, the Commission clarified on January 23, 2012 that only the first 21% of shoppers in each customer class would receive the RPM capacity

price – regardless of whether the customer class was already oversubscribed. This is a clear and direct statement by the Commission that load (above the 21% level) furnished to CRES providers associated with customers that already had received RPM-priced capacity under the Stipulation would be bumped back to the second tier pricing of $255/MW-Day. If FirstEnergy Solutions Corp. (FES) disagreed with that result, it should have filed an application for rehearing in response to the January 23 Entry. It did not, and the capacity pricing required by the January 23 Entry has remained in effect continuously since then.

Subsequently, on February 23, 2012, the Commission issued an Entry on Rehearing rejecting the September 7, 2011 Stipulation and Recommendation. The Entry on Rehearing provided the following directives, after quoting R.C. 4928.143I(2)(b) regarding the requirement to return to the prior SSO rate plan:

> Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP I, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case.

(Feb. 23, 2012 Entry on Rehearing at 12.)

On February 27, 2012, AEP Ohio filed a Motion for Relief and Request for Expedited Ruling (Motion for Relief) in the instant case. In its motion, AEP Ohio urged the Commission to consider expeditiously the implementation of a cost-based capacity rate, at least for a transition period during which it would remain a Fixed Resource Requirement (FRR) entity, in lieu of requiring the exclusive use of Reliability Pricing Model (RPM) auction pricing, and requested that the Commission issue a decision on the merits within 90 days. In addition, the Company

requested that a reasonable interim cost-based capacity rate be established during the pendency of the instant proceeding. AEP Ohio estimated that, if RPM auction pricing were relied upon exclusively to price its capacity, it would experience a massive erosion in revenues. Specifically, the Company projected that, under a capacity pricing regime composed solely of RPM-based pricing, its earnings for 2012 and 2013 would decrease by 27 percent and 67 percent, respectively, resulting in a return on equity of 7.6 percent and 2.4 percent, respectively as well as possible downward adjustments to the Company's credit ratings, which would result in immediate and irreparable harm.[1] (Mot. for Relief at 5.)

Accordingly, in its February 27 Motion for Relief, AEP Ohio proposed using, on an interim basis, the same two-tiered capacity pricing contemplated by the Stipulation, as modified and adopted by the revised Detailed Implementation Plan (DIP) that it submitted on December 29, 2011, or, alternatively, as yet further modified by the Commission's January 23, 2012 Entry. (With regard to the alternative capacity pricing based on the January 23 Entry, OPCo requested that, in the event that alternative were adopted, mercantile load should be excepted from the load eligible for RPM-priced capacity.)

On March 7, 2012, the Commission issued its Entry in the instant proceeding granting AEP Ohio's Motion for Relief. The Commission found support in the record for the conclusion that reverting from the capacity pricing structure established by the January 23 Entry to a state

[1] On February 27, 2012, Fitch Ratings revised its rating outlook for OPCo from Stable to Negative, as a result of the potential impacts on OPCo of the recent adverse regulatory decisions and the uncertainty of future regulatory decisions. *See* http://www.marketwatch.com/story/fitch-affirms-ratings-on-aep-and-subs-ohio-power-outlook-revised-to-negative-2012-02-27. In the press release on the rating action, Fitch indicated, "the Negative Outlook on OPCo reflects the challenging operating environment in Ohio. The most troubling concern in Ohio is the Public Utility Commission of Ohio's (PUCO) decision last week to revoke the stipulation agreement on OPCo's Electric Security Plan (ESP) that it had approved just two months earlier." *Id.* Moody's and S&P have issued similar reports. *See* Moody's, "Ohio's Utility Commission Rescinds Ohio Power's Transition to Market-Based Rates, a Credit Negative for AEP" (Mar. 5, 2012); http://www.reuters.com/article/2012/02/27/idUSWNA105620120227.

compensation mechanism based exclusively on RPM auction pricing could risk an unjust and unreasonable result. Consequently, the Commission's March 7 Entry confirmed that, for the relatively short interim period during which the Commission considers what is a just and reasonable capacity pricing structure for the longer term, AEP Ohio should continue to charge CRES providers for capacity in accordance with the January 23 Entry (including, despite AEP Ohio's request, allowing mercantile load to be eligible for RPM-priced capacity through aggregation programs). In other words, the Commission concluded that for the interim period, capacity will be priced on a status quo basis, using the same regime that the January 23 Entry had previously established.

FES's Petition for Rehearing

On March 21, 2012, FES filed an Application for Rehearing of the March 7, 2012 Entry. FES requests that the Commission grant rehearing and establish an interim state compensation mechanism based on RPM market prices. (FES Appl. for Rehearing at 2.) Alternatively, FES requests that the Commission confirm that, during the implementation of the two-tiered state compensation mechanism set forth in the March 7 Entry, all customers that were shopping as of September 7, 2011, receive capacity at RPM market prices. (*Id.*) Specifically, FES contends that the March 7 Entry is unreasonable and unlawful because it "effectively allows AEP Ohio to avoid the statutory procedures to seek the relief granted by the Entry," "is not based on probative or credible evidence that AEP Ohio will suffer immediate and irreparable financial harm under RPM market-based capacity prices," improperly "authorizes AEP Ohio to recover a capacity rate allegedly based on its full embedded costs," and establishes an interim state compensation mechanism that violates "the state's policy to ensure non-discriminatory pricing and an effective competitive market." (*Id.* at 1.)

II. ARGUMENT

FES's Application for Rehearing should be denied. First, FES's contention that AEP Ohio's Motion for Relief and the March 7 Entry granting that motion are procedurally defective is wholly without merit. Second, FES's arguments regarding the two-tiered capacity pricing regime are nothing more than an improper attempt to re-litigate capacity pricing issues that the Commission has already considered at length and decided. Third, FES's alternative request for rehearing on the basis that the Commission has unlawfully allowed AEP Ohio to charge higher, Tier Two capacity prices to customers who were shopping as of September 7, 2011, is really any untimely application for rehearing of the January 23 Entry. For each of these reasons, the Commission should deny FES's Application for Rehearing.

A. AEP Ohio's Motion For Relief Was Properly Made And Properly Granted.

Contrary to FES's contention, AEP Ohio's February 27, 2012 Motion for Relief and the Commission's March 7, 2012 Entry granting that motion were appropriate. FES argues that the March 7 Entry is procedurally defective because, in granting AEP Ohio's Motion for Relief, it "improperly allowed AEP Ohio to bypass the established appeal procedures and avoid the Commission's February 23, 2012 Entry under a different standard." (FES Appl. for Rehear. at 3.) FES misunderstands AEP Ohio's Motion for Relief to be seeking a revision of the February 23 Entry on Rehearing. (*Id*.) This is simply not the case. AEP Ohio's Motion for Relief does not challenge the February 23 Entry on Rehearing, and AEP Ohio did not ask the Commission to revise that Entry. Rather, AEP Ohio sought temporary interim relief for capacity pricing while this proceeding and its ESP proceeding are being decided. AEP Ohio's actions are perfectly permissible under the Commission's procedural rules. *See* 4901-1-12, Ohio Adm. Code.

Notably, FES has not cited any Commission decision or rule that supports its contention otherwise.

Similarly, the Commission's decision to grant temporary interim relief to AEP Ohio was well-reasoned and appropriate. As, it correctly noted in its March 7 Entry, at 15, the Commission possesses the authority to modify the state compensation mechanism established in its December 8, 2010 Entry in this proceeding. Moreover, the Commission correctly concluded that the temporary interim relief granted was necessary to prevent AEP Ohio from suffering an unjust or unreasonable result.

Despite FES's contention, at pages 6-8, to the contrary, the Commission's March 7 Entry was based on credible and probative evidence that AEP Ohio would suffer immediate and irreparable harm and a massive erosion in revenue if RPM auction pricing were exclusively relied upon to price its capacity. As explained above, AEP Ohio projected that, under a capacity pricing regime composed solely of RPM-based pricing, it would be forced to provide CRES providers with capacity at below-cost rates and its earnings for 2012 and 2013 would decrease by 27 percent and 67 percent, respectively, resulting in a return on equity of 7.6 percent and 2.4 percent, respectively, as well as possible downward adjustments to the Company's credit ratings. (See Mot. for Relief at 5; Mar. 7, 2012 Entry at 5.) Such consequence would clearly be unjust and unreasonable. In addition, switching to RPM-based capacity now, and later implementing a different pricing scheme after this case is decided, would also cause uncertainty and confusion for customers. (Mot. for Relief at 6-8; Mar. 7, 2012 Entry at 5), which would be an additional adverse and inappropriate result.

Moreover, FES's argument on this point is not new. FES has already made, and the Commission has already considered and rejected this argument. The Commission specifically

noted in the March 7 Entry, in response to the identical argument regarding the record support for the interim relief that FES made in response to AEP Ohio's Motion for Relief, that "[a]ll of the testimony and exhibits admitted into the record for purposes of considering the ESP 2 Stipulation are part of the record in this proceeding." (Mar. 7, 2012 Entry at 15.) The Commission explained that the "subsequent rejection of the ESP 2 Stipulation did not remove such evidence from the record, and we may, and do, rely upon such evidence in our decision granting interim relief." (*Id.*)

The Commission noted, in its March 7 Entry, at 16, that when retail customers switch to competitive suppliers, AEP Ohio cannot take full advantage of the opportunity to sell energy to the wholesale market because margins on off-system sales much be shared with other AEP Ohio affiliate companies. Thus, the Commission recognized the simple fact that AEP Ohio's ability to mitigate capacity costs with off-system energy sales is very limited. Recognition of this fact provides yet additional support for the Commission's conclusion that pricing Tier Two capacity provided to CRES providers at $255/MW-Day is more than supported by the evidence in the record. The point is that, even if one were to offset AEP Ohio's capacity costs with some share of margins from off-system energy sales, it would not be significant in comparison to the capacity costs that AEP Ohio incurred ($355/MW-Day) to make its generation assets available. FES's argument, at pages 5-6, that it was unreasonable and unlawful to recognize this fact is neither reasonable nor credible. Accordingly, because the March 7 Entry was based on probative evidence set forth in a properly propounded motion, FES's Application for Rehearing should be denied.

B. FES's Application Improperly Attempts To Re-Litigate Capacity Pricing Arguments That It Has Already Made And The Commission Has Already Rejected.

FES contends that: (1) there is "no basis" to support AEP Ohio's recovery of full embedded costs (FES Appl. for Rehear. at 3-4), (2) the Tier Two ($255/MW-Day) pricing the Commission approved as part of the two-tiered interim capacity pricing structure in its March 7 Entry is "unsupported and unreasonable" (*id.* at 4-6), and (3) that the two-tiered interim capacity pricing structure is "discriminatory" and "anticompetitive" (*id.* at 8-10). Like it's argument that the Motion for Relief is not based on probative evidence, however, FES has already made each of these arguments numerous times in these proceedings. Each time, the Commission has considered and rejected them. The Commission should reject these arguments, now made on rehearing, on the same basis that it overruled them previously.

FES's argument, at pages 3-4, that the March 7 Entry unlawfully authorizes AEP Ohio to recover its full embedded costs has been argued before at length (*see* FES Initial Post-Hearing Br. at 51-54; FES Mem. Contra Mot. for Relief at 12-16), and the Commission has already considered and rejected the argument – twice. (*See* Dec. 14, 2011 Opinion and Order at 51-55; Mar. 7, 2012 Entry.) Similarly, FES's argument, at pages 4-6, that the $255/MW-Day Tier Two pricing is unsupported and unreasonable, also has been raised before. (*See* FES Initial Post-Hearing Br. at 61-73; FES Mem. Contra Mot. for Relief at 16-18.) Again, the Commission has already considered and rejected this argument at least twice. (*See* Dec. 14, 2011 Opinion and Order at 55; Mar. 7, 2012 Entry at 15-17.) FES's arguments that the two-tiered capacity pricing structure is discriminatory and anticompetitive also have been raised, and rejected, before. (*See* FES Initial Post-Hearing Br. at 81-88; Joint Signatories' Reply Post-Hearing Br. at 73-76; Dec. 14, 2011 Opinion and Order at 51-55; Mar. 7, 2012 Entry at 7-8.) Because FES's arguments

regarding the two-tiered capacity pricing structure have already been thoroughly considered and overruled many times before, the Commission should decline to rehash them again on rehearing.

C. FES's Application Is An Untimely Application For Rehearing Of The January 23, 2012 Entry.

FES's Application for Rehearing contains an alternative request for rehearing on the grounds that the Commission's March 7 Entry impermissibly permits AEP Ohio to now charge Tier Two pricing to previously shopping customers that previously received RPM pricing. That request, however, is untimely because the Commission made the decision to allow AEP Ohio to charge Tier Two pricing above the 21% threshold through its January 23 Entry. The Commission's January 23, 2012 Entry, at 3-4, determined that:

> [In] the Opinion and Order, we explicitly modified the Stipulation to ensure "that RPM-priced capacity allocation determined for each customer class is only available for customers in the particular customer class, no RPM-priced capacity can be allocated to a customer in another customer class," (Opinion and Order at 55). Nowhere in the Opinion and Order is this modification limited to unused capacity allotments as of January 2012. For further clarification purposes, the Commission notes that this modification to the Stipulation goes back to the initial allocation among the customer classes based on the September 7, 2011, data, *regardless of whether any customer class is now oversubscribed*.

(Emphasis added.) The Commission's January 23 Entry thus revised the allocation of RPM-priced capacity so that each customer class would receive a full 21% allocation of RPM-priced capacity and confirmed that no RPM-priced capacity allocated to one customer class, *i.e.*, the residential or industrial customer classes, can be allocated to a customer in another class, *i.e.*, the commercial class.

The Entry further clarified that this modification to the Stipulation's approach (which had allowed the shifting of under-utilized RPM capacity from the residential or industrial class to the commercial class) "goes back to the initial allocation among customer classes based on the

September 7, 2011, data." *Id.* This directive was explicitly punctuated by the statement that the RPM set-aside would go back to 21% regardless of whether any customer class was oversubscribed. Consequently, the January 23 Entry limited the commercial class's entitlement to RPM capacity in 2012 under the 21% provision to 21% and directed that the oversubscribed customers above 21% be put back to the second tier of pricing at $255/MW-Day. The reallocation to and grandfathering of commercial customers of RPM capacity in excess of the 21% level allowed by the Stipulation was eliminated. However, that Entry also simultaneously and significantly expanded access to RPM-priced capacity by adding a separate and additional allocation of such capacity for aggregation customers (including commercial and industrial customers in the mercantile category).

While the February 23, 2012 Entry on Rehearing rejected the Stipulation and reversed the December 14, 2011 Opinion and Order, the January 23 Entry's directives regarding the availability and allocation of Tier One (RPM) pricing and Tier Two ($255/MW-Day) pricing will remain in effect on an interim basis. The March 7, 2012 Entry did not revise the capacity pricing regime that the January 23 Entry established. The March 7 Entry merely confirmed that the January 23 Entry regime would be used in order to maintain the status quo with regard to capacity pricing until the Commission issues a decision in this proceeding (which it has committed to do on an expedited basis). Consequently, the existing capacity pricing regime was established by the January 23 Entry.

1. FES should have raised its complaints about the interim capacity pricing structure within 30 days of its adoption; because it failed to do so, its alternative request should be denied.

FES contends, at pages 10-14 of its Application for Rehearing, that the Commission's March 7 Entry unreasonably and unlawfully permits AEP Ohio to charge Tier Two pricing to

customers who were shopping as of September 7, 2011, and who previously received RPM pricing. As discussed above, however, that complaint relates directly to the Commission's January 23 Entry and not to a new matter decided as part of the March 7 Entry. FES never raised any of the objections to the January 23 Entry that it now seeks to advance in response to the March 7 Entry. FES should have raised its objections by seeking rehearing of the January 23 Entry. FES's effort to raise its objections to the capacity pricing structure implemented by the January 23 Entry is now too late. The deadline for seeking rehearing of that Entry expired on February 22, 2012, 30 days after it was issued. FES's Application for Rehearing on this point thus is untimely, and it should be denied on that basis.

2. FES's arguments regarding the interim capacity pricing structure set forth in the January 23, 2012 Entry ignore the fact that the February 23, 2012 Entry on Rehearing rejected both the September 7, 2011 Stipulation and the December 14, 2011 Opinion and Order.

FES's request, at page 14 of is Application for Rehearing, that the Commission "clarify" its March 7 Entry and "confirm that all customers who were shopping as of September 7, 2011, are entitled to receive RPM-based capacity pricing during the pendency of the interim state compensation mechanism[,]" is misdirected. First, as discussed above, the loads of customers in excess of the 21% level for which CRES providers might have been able to obtain RPM pricing, prior to the January 23 Entry, pursuant to the Stipulation and the December 14 Opinion and Order, became ineligible for RPM priced capacity as a result of the January 23 Entry, not due to the March 7 Entry. In addition, the February 23 Entry on Rehearing rejected the Stipulation and reversed the December 14 Opinion and Order. As a result, the February 23 Entry on Rehearing eliminated benefits that CRES providers received pursuant to the specific provisions of the Stipulation and December 14 Opinion and Order were eliminated, just as it eliminated provisions

beneficial to AEP Ohio. FES's argument that it is entitled to receive benefits based on the Stipulation or Opinion and Order ignores the fact that they have been rejected and is meritless.

Nor does FES have any equitable basis for claiming that CRES providers should receive benefits that the Stipulation and the Opinion and Order provided. First, CRES providers' customers will not necessarily be affected by the January 23 Entry. To the extent that the January 23 Entry affected the availability of RPM pricing for commercial customer loads that were shopping as of, and had entered into agreements with CRES providers prior to, September 7, 2011, and those loads were above the 21% level, the customers associated with those loads will continue to obtain the benefits of the shopping arrangements they made with their CRES providers in accordance with the terms and conditions of those agreements. The CRES providers' costs of serving those customers might change during the term of the agreements, but CRES providers are not required to pass through to customers either cost increases or decreases. For example, wholesale energy costs, which are a major component of CRES providers' costs of serving their retail customers, have declined substantially in recent months, materially increasing CRES providers' margins and offsetting any impacts from increases in other wholesale cost components.

Secondly, CRES providers are not treated in an unfair manner either. When the CRES providers entered into their arrangements with customers prior to September 7, 2011, they knew (or should have known) that the costs of the various wholesale components that, in total, comprise retail electric service can change. CRES providers had no entitlement or guarantee to particular pricing for their wholesale components or that the pricing for such components that they obtain from AEP Ohio or other suppliers would remain fixed for any particular time period. Specifically, they had no reasonable basis for assuming that the price for AEP Ohio capacity that

they would purchase to serve the commercial customers' loads, including the loads in excess of the 21% level, would remain available at the RPM price forever.

It is worth reiterating that the difficulty in predicting, and thus relying upon, constant pricing for wholesale components of retail electric service does not necessarily equate to a disadvantage for CRES providers. For example, as noted above, wholesale energy prices, a much larger component of the retail electric service than the cost of capacity, have declined significantly since September 7, 2011, providing additional significant headroom and potential profits for CRES providers in connection with their retail electric service offerings. Notably, FES has not contended that it is unprofitable to continue serving customers whose loads are in excess of the 21% level using Tier Two ($255/MW-Day) capacity pricing, let alone that it is unable to continue serving those customers. CRES providers are not offering to provide their customers with rebates when energy prices decrease, but want to maintain a fixed profit margin at AEP Ohio's expense. The inequity of FES's position is clear. (*See* Mar. 5, 2012 Mot. for Leave to File Reply, Affidavit of William A. Allen.)

It is also worth keeping in mind that, contrary to the implication of FES's arguments, customers of utility services, whether they are wholesale or retail customers, do not have an entitlement to continue receiving any particular rate for their service going forward into the future. While rates may not be changed retroactively, they can and do change prospectively. Notably in that regard, in the instant case, there has been no retroactive change to any prices that FES's members pay for capacity. Rather, changes to capacity prices available to serve load in excess of the 21% level from Tier One to Tier Two prices have occurred only prospectively as a result, first, of the January 23 Entry and, second, as maintained by the March 7 Entry.

3. Maintaining the capacity structure established in the January 23, 2012 Entry preserves the status quo.

FES contends, at page 13, that to maintain the status quo, the Commission must allow all previously shopping customers to continue to receive Tier One pricing. That contention is simply incorrect, as explained above. The status quo has been maintained by retaining the capacity pricing structure that the January 23 Compliance Entry established.

CONCLUSION

For the reasons set forth above, the Commission should deny FES's Application for Rehearing.

Respectfully submitted,

/s/ Steven T. Nourse (by CMM per auth.)
Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1606
Fax: (614) 716-2950
Email: stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur LLP
Huntington Center
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 228-2270
Fax: (614) 227-2100
Email: dconway@porterwright.com

On behalf of Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum Contra of Ohio Power Company to FirstEnergy Solutions Corp.'s March 21, 2012 Application for Rehearing was served this 30th day of March, 2012 by electronic mail, upon the persons listed below.

Christen M. Moore
Christen M. Moore

greta.see@puc.state.oh.us,
jeff.jones@puc.state.oh.us,
Daniel.Shields@puc.state.oh.us,
Tammy.Turkenton@puc.state.oh.us,
Jonathan.Tauber@puc.state.oh.us,
Jodi.Bair@puc.state.oh.us,
Bob.Fortney@puc.state.oh.us,
Doris.McCarter@puc.state.oh.us,
Stephen.Reilly@puc.state.oh.us,
Werner.Margard@puc.state.oh.us,
William.Wright@puc.state.oh.us,
Thomas.Lindgren@puc.state.oh.us,
john.jones@puc.state.oh.us,
dclark1@aep.com,
grady@occ.state.oh.us,
keith.nusbaum@snrdenton.com,
kpkreider@kmklaw.com,
mjsatterwhite@aep.com,
ned.ford@fuse.net,
pfox@hilliardohio.gov,
ricks@ohanet.org,
stnourse@aep.com,
cathy@theoec.org,
dsullivan@nrdc.org,
aehaedt@jonesday.com,
dakutik@jonesday.com,
haydenm@firstenergycorp.com,
dconway@porterwright.com,
jlang@calfee.com,
lmcbride@calfee.com,
talexander@calfee.com,
etter@occ.state.oh.us,
grady@occ.state.oh.us,
small@occ.state.oh.us,
cynthia.a.fonner@constellation.com,
David.fein@constellation.com,
Dorothy.corbett@duke-energy.com,
Amy.spiller@duke-energy.com,
dboehm@bkllawfirm.com,
cmontgomery@bricker.com,
lmcalister@bricker.com,
mwarnock@bricker.com,
gthomas@gtpowergroup.com,
wmassey@cov.com,
henryeckhart@aol.com,
laurac@chappelleconsulting.net,
whitt@whitt-sturtevant.com,
thompson@whitt-sturtevant.com,
sandy.grace@exeloncorp.com,
cmiller@szd.com,
ahaque@szd.com,
gdunn@szd.com,
mhpetricoff@vorys.com,
smhoward@vorys.com,
mjsettineri@vorys.com,
lkalepsclark@vorys.com,
bakahn@vorys.com,
Gary.A.Jeffries@dom.com,
Stephen.chriss@wal-mart.com,
dmeyer@kmklaw.com,
holly@raysmithlaw.com,
barthroyer@aol.com,
philip.sineneng@thompsonhine.com,
carolyn.flahive@thompsonhine.com,
terrance.mebane@thompsonhine.com,
cmooney2@columbus.rr.com,
drinebolt@ohiopartners.org,
trent@theoeg.com,
nolan@theoec.org,
gpoulos@enernoc.com,
emma.hand@snrdenton.com,
doug.bonner@snrdenton.com,
clinton.vince@snrdenton.com,
sam@mwncmh.com,
joliker@mwncmh.com,
fdarr@mwncmh.com,
jestes@skadden.com,
paul.wight@skadden.com,

mkurtz@bkllawfirm.com,
ricks@ohanet.org,
tobrien@bricker.com,
jbentine@cwslaw.com,
myurick@cwslaw.com,
zkravitz@cwslaw.com,
jejadwin@aep.com,
msmalz@ohiopovertylaw.org,
jmaskovyak@ohiopovertylaw.org,
todonnell@bricker.com,
rsugarman@kegler.com
barthroyer@aol.com

dstahl@eimerstahl.com,
aaragona@eimerstahl.com,
ssolberg@eimerstahl.com,
tsantarelli@elpc.org,
callwein@wamenergylaw.com,
malina@wexlerwalker.com,
jkooper@hess.com,
kguerry@hess.com,
afreifeld@viridityenergy.com,
swolfe@viridityenergy.com,
korenergy@insight.rr.com,
sasloan@aep.com,
Dane.Stinson@baileycavalieri.com
Jeanne.Kingery@duke-energy.com

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Summary: Memorandum Memorandum Contra of Ohio Power Company to FirstEnergy Solutions Corp.'s March 21, 2012 Application for Rehearing electronically filed by Ms. Christen M Moore on behalf of Ohio Power Company